Canada Law Journal.

VOL. XXI. FEBRUARY 15, 1885. No. 4.

DIARY FOR FEBRUARY.

15. Sun.....*Quinquagesima Sunday.*
16. Mon. .....Maritime Court Act came into force, 1878.
17. Tues.....Supreme Court Session begins.
18. Wed .....Ash Wednesday. Wm. Osgoode, first C.J. of U. C., died 1824.
19. Thur.....Divisional Court Sittings, Chan. Div., H.C.J., begin.
22. Sun.....*Quadragesima Sunday.*
27. Fri.....Sir John Colborne, administrator, 1838.

TORONTO, FEBRUARY 15, 1885.

HON. MR. JUSTICE SMITH, of Manitoba, unhappily did not live long to enjoy the honours of his position. But as we learn from our Manitoba cotemporary it was long enough to win the respect and admiration of the Bar, both for his legal ability and for his kind and courteous bearing. He is succeeded by Mr. A. C. Killam, Q.C., of Winnipeg. Mr. Killam is said to be a good lawyer and likely to be a useful addition to the Bench.

A RECENT suggestion of Sir Edmund Beckett, addressed by him to the *Times*, has attracted some attention recently in England. It is that a short Act should be passed for describing Acts of Parliament in future by the year A.D., instead of the year reckoned from the accession of the sovereign, which, in the case of our present Queen, necessitates adding 37 to the latter date, in order to discover the year A.D., with the additional inconvenience that Acts of Victoria are described as passed in two consecutive years, *e.g.*, 30-31 Vict. cap. A correspondent on the subject adds:—

"It is true that 'short titles' have done much to obviate the necessity of numerical reference altogether, *e.g.*, Public Health Act, 1875, instead of 38 and 39 Vict. cap. 55; but inasmuch as a short title to an Act, though of recent years the rule is not universal and requires a special clause in the Act itself declaring that the Act may be so cited, it would obviously be more simple and conducive to memory to describe an Act numerically as Vict. 1875 cap. 55, than by the old-fashioned title of 38 and 39 Vict., etc., which was itself substituted by Lord Brougham's Act of 1850 for the long-winded titles now happily superseded (in most cases) by short descriptive titles."

We certainly cordially concur in these propositions. The present system has, it appears to us, nothing but custom to recommend it, and it is curious that it should have lasted so long unchallenged.

IT will not, we think, be out of place for us to refer to the appointment to the Senate of Canada of James Robert Gowan, until lately the County Judge of the County of Simcoe. The appointment has been accepted by parties of all shades of politics as creditable to the Government of the day and an honour deservedly bestowed upon an old and faithful servant of our country. With no political influence to wield, with no political ambition to gratify, with no selfish purposes to serve, with means sufficient to make him thoroughly independent of any temptation to office, he is just the sort of man one likes to see in the halls of the Legislature. His recommendation for the position was the record of a long and useful public life, with abilities and experience far above the average. He will bring to the discharge of his legislative duties a calm, highly-trained judicial intellect, a mind well stored, not only with

legal lore, but with a large fund of general information which cannot but make him a most useful member of the Upper House.

We look upon this appointment as the establishing of a happy precedent. A retired judge, whether of the County Bench or Superior Court, in many instances will preserve sufficient mental vigour and physical strength to discharge the duties of a legislator—especially in the less partizan atmosphere of the Upper Chamber of our Dominion Parliament. The appointment of Judge Gowan opens up a new and useful field for men of this class in which the ripened experience and trained abilities of some of our ablest judicial minds may find congenial occupation, and at the same time afford an honourable and fitting termination of advantage to the step to many eminent careers.

EXAMINATIONS FOR DISCOVERY.

At the trial of a recent case, *Clark* v. *Loughead*, before Ferguson, J., in the Chancery Division, that learned judge took occasion to make the following remarks on the above subject:—

"There was a law before the time of these present special examinations, whereby discovery could be had for the purpose of guiding people in framing their suits and defences in order to get the proper matters before the Court for trial; then the case was tried upon the evidence.

Now we have discovery extended to such an extent that the examination in most cases makes the brief for counsel, and trials are extended to an enormous length, without getting any nearer the truth by preliminary examination.

I think that is the result of my observation, and I know it is the opinion of a great many others. Now I have on an average 200 to 300 cases to try every year—over 200. Here is a case involving $110, to get the money out of property, the balance of which is not very large over the mortgage that is upon it, and if it requires two days, or two and a-half, to try this case, how can the work ever be done? I shall have to consume 800 or 900 days in every year in order to do the work.

These examinations certainly do not aid, to the extent that is supposed, in getting at the truth. After all that may be said about what a witness has said before another tribunal, or another man taking the examination, and how he or she may recollect what was said then, without an opportunity of observing the circumstances under which certain answers were made to certain questions put, there is not the light afforded that many seem to suppose.

The great bulk of the matter on which the determination must take place is what proceeds from the witnesses, in presence of the judge who is to try the case. This is running out so far that it is impossible to try a docket of many cases at all; one docket might take a whole year; one counsel has as good a right to avail himself of it as another. It is the law that it may be done, but it will come to a deadlock in doing the business of this country. I am not alone in these views."

The original of the modern practice is to be found in the written interrogatories, which formerly constituted a part of a bill of complaint in Chancery. These interrogatories were often very voluminous, and had to be exceedingly minute, so as to compel an explicit answer to the matter, as to which discovery was sought, and prevent the possibility of evasive answers being given. The answers to these interrogatories were framed by counsel, and although sworn to by the defendant, it is to be feared were often expressed in a way that the defendant would not have expressed himself if orally interrogated. In order to get over the manifold inconveniences, expense, delay and trouble, involved

in the delivery of written interrogatories, at an early period in the history of Equity practice in this Province, the order for production of documents, and the right to make an oral examination of the opposite party after answer, or after the time for answering had elapsed, was substituted for the written interrogatories. It was hoped by subjecting the party to an oral examination the discovery of matters within his knowledge might be more readily obtained. The affidavit of documents, and the oral examination together are, we are sure, an improvement on the original method, but the modern practice is undoubtedly liable to abuse, and no doubt is often abused. At the same time it is somewhat difficult to suggest an effective remedy. The officer before whom the examination is conducted is generally loath to interfere with the course of such examinations; his pecuniary interest, moreover, is in favour of their being spun out as much as possible, not that we imagine that mere pecuniary interest would induce any Special Examiner to depart from his duty. At the same time, in doubtful points it would with some men have a certain weight. Then again the solicitors who are paid for their services by the hour, have a direct pecuniary interest in prolonging such examinations.

High-minded practitioners are, doubtless, not deterred by any pecuniary loss from making such examinations as short as possible, and from protesting against their being protracted to an unnecessary length. There are, however, men who have not such a nice sense of duty, and even men who have, may be deterred from objecting to prolixity, by reflecting that though the examination be shortened, there would be no saving of time, and possibly a loss of time by the wrangling to be gone through in order to maintain the ground. The only remedy we can think of for the evil, is to pay Special Examiners by salary, and give them greater power than they at present possess of cutting short examinations, taking good care that those only are appointed Special Examiners who are competent to exercise discretionary powers. When you have made it the interest of the examiner to make such examinations as short as possible, a long way will have been gained towards making them really more effective, and at the same time save them from being made oppressive, or needlessly costly.

ADMISSION OF ENGLISH BARRISTERS TO PRACTICE AT THE BAR OF ONTARIO.

CONSIDERABLE interest, and, we may say, in a sense no way offensive to Mr. De Souza, some amusement, has been created by the claim made by that gentleman, before the Common Pleas Divisional Court, to a right of audience in our Courts, by virtue of his having been duly called to the Bar in England, where he has won distinction of an academical nature, by gaining one of the Lincoln's Inn Scholarships, and from which he carries with him flattering testimonials of ability. His argument is certainly an ingenious one, and we shall not be surprised if he is successful in upholding it. We are able to present it to our readers in a concise form, in Mr. De Souza's own words:—

"The right of English Barristers depends upon R. S. O. c. 139, which in section 1 expressly declares the qualifications of those who are to practise at the Bar. There are five classes whose right is absolute and beyond the refusal of the Benchers; in four cases it is absolute upon certain conditions being performed, while in the other (that of English Barristers) there is no condition whatever. In section 1, sub-sections 1, 2, various periods of pupilage are prescribed, among them that of *membership* of the Law Society. In sub-sections 4, 5, as well as in 1 and 2, examination is imposed and the Law

Society is required to inspect testimonials. But in sub-section 3 nothing more is said than, 'any person who *has been called* in England.' He is not required to join the society, nor to be certified by them, nor to present to them his testimonials, nor to undergo any examination, nor to obey any rules of the Law Society.

That these distinctions are not unmeaning may be found from considering the history of the statutes on this subject.

By stat. 37 Geo. III., whereby the Law Society was founded, 'none are to practise but such as are of the Society;' but it expressly provides that English Barristers shall have this privilege, upon producing testimonials *to the judges*, not to the Law Society; and they were not required to join the Law Society except by a *condition subsequent*, taking effect one month *after* they had already, by reception in the King's Bench by the judges, acquired full and *independent standing*.

Here then commences this distinction; it is as old as the Law Society itself. Membership of the Law Society was not originally necessary to English Barristers.

Stat. 2 Geo. IV., c. 5, then requires English Barristers to join the Law Society, but does not make their right of audience any the less absolute, or within the refusal of the Law Society.

C. S. U. C. c. 34 names and specifies four classes who alone shall have audience; but various conditions are presented in every case except in the case of English Barristers. The provision of the stat. 2 Geo. IV., requiring English Barristers to join the Law Society is not retained. We have seen that before stat. 2 Geo. IV., membership of the Law Society was not prescribed to English Barristers except by the doubtful operation of a *condition subsequent*. The privilege and exemption of English Barristers is placed in even a stronger light by the course that Barristers from certain colonies (see C. S. U. C. c. 34) who, under the stat. 37 Geo. III., were in the same category with English Barristers are now, by C. S. U. C. 35 (section 1, sub-section 4), disjoined and their right is made to depend upon the existence of mutuality or reciprocity while that of English Barristers remains as unqualified and as absolute as ever. *Expressio unius, alterius exclusio.* 'The several inditing and penning of the different branches,' says Lord Coke, 'doth argue that the maker did intend a difference in the purview and remedies.'

By R. S. O. c. 138 the same distinction is preserved. It says in section 1: 'Subject to rules *under a certain* statute the *following and no other*.' What then is the scope of these *rules* here mentioned? By the statute in question, the Law Society, at section 38, has a power to '*make rules* on *special cases* respecting the admission of *students*.' This is a power to increase, not to diminish; to admit a student in, say, *two* years, not to impose upon him an additional period of *ten*; nor yet to say that certain persons shall not be admitted whose right, depending on a special statute, cannot be of the class called *special cases*."

Whether Mr. De Souza ultimately succeeds in establishing his right to practise at our Bar or not, we certainly think he will have no reason to complain of any ungenerous treatment at the hands of the profession, many of whom have already shown themselves even eager to extend to him any friendly offices in their power. We feel that in placing any obstacles in the way of English Barristers practising in our Courts, the Law Society is "cruel only to be kind," in view of the competition already existing; but if Mr. De Souza should succeed in showing that no such obstacles at present really exist, he will be welcomed to the Bar ungrudgingly, with what we hope we are justified in calling true Canadian hospitality.

OSGOODE HALL LIBRARY.

THE management of Osgoode Hall Library is of so great importance to a large portion of the members of the profession, that we think no excuse is called for if we from time to time recur to it. To our mind, the great evil of the present library is that it is a thoroughfare to all the Courts. A library should not, if it can possibly be avoided, be used as a thorough-

fare. We would suggest to the authorities that it might be a great gain if the new hall were made use of as a library. It would hold a very large portion of the books, if not all, which are at all in active use. At the same time it would be quiet and undisturbed by reason of its not being a thoroughfare. The present library could then be used, partly still as a library, but mainly as a room for seeing clients, a waiting room for witnesses, etc. At all events, the use of the hall as a library would, it is thought, be so great a gain, that the fact of its being at present used as a lecture and examination room is a small objection to the scheme.

But if the present library must continue to be the only library, we would urge replacing in the alcoves the tables which used formerly to be there. At present any one intent on searching up the law governing some point which necessitates reference to a number of authorities, and much thought and reflection, may often look in vain for a quiet table on which to place his books, and at which to pursue his researches. The tables now in the library are few, and generally crowded. It is certainly not conducive to profitable study to have some one touching your respective elbows on each side. It might also be well to replace the tables in the two rooms, which were formerly the Benchers' rooms, at each end of the library. At present, these rooms are well nigh worthless as places for reading. Many of the profession share these views. The above suggestions may possibly not be the best that can be made, but we offer them in the hope that whatever is best in the premises may be done.

SELECTIONS.

THE TEMPLE CHURCH.

AFTER a few years' absence from London it is hardly safe to assume the present existence of any old landmark, but we hope the much decorated barber's shop in Fleet street, just within Temple Bar, has escaped the fate of its better known neighbour, the old Bar itself, and still remains with its bold inscription informing the passer-by that here once stood the palace of Henry VIII. A second Elia would find matter for an essay in such an instance of the irony of history, but the mantle of Elia, alas! has not fallen upon any successor, and our purpose is not to moralize, but to turn once more, as in the happy days of yore, down the archway under the shop, and descending the flight of steps to enter the ancient and solemn portal of the Temple church. What an airy architecture have we here! How original and striking the effect of the old octagon chapel—of which the first stone was laid by an eastern patriarch in the early crusading days—opening into the younger but still ancient oblong, forming now the principal building. Around us lie the Crusaders themselves, with legs crossed, and their great guards by their sides, while over our heads the quaint gargoyles show the exuberant wit of monastic fancy. How some old fellow must have chuckled to himself when he knocked off this poor sinner's head, with the devil actually eating his ear! Truly Rabelais was not without predecessors who writ their mocking tales in stone.

But we pass through the barrier and enter the main building. Our lady companions are ushered to their separate seats at the side, and we bachelors for the nonce must take our places in the middle pews, for the separation of the sexes still remains a custom of this church, handed down from the old monastic times. A chorister boy is busy arranging music books. A distant strain of rehearsal reaches us from the outer buildings, and we may therefore safely conclude that we have a quarter of an hour to spare before service commences. We notice the clean spring of the arches from the darkly

glistening, many columned pillars, the rich, soft colours of the roof, the purple windows, the quiet, unobtrusive completeness of the whole building, and we admit that the Honourable Societies of the Inner and Middle Temple have indeed known how to build to God a church worthy of their old and noble guild. We recall, too, the many famons divines that have preached here, from the sad and serious Hooker, the stately periods of whose "Ecclesiastical Polity" still delight the student of Elizabethan literature, down to the present distinguished master, C. J. Vaughan, whose sermons are a model of cultured power.

Even this afternoon we notice in the congregation many a famous man. Yonder, pathetic in his blindness, sits the beloved Sir John Karslake, and next to him is Sir Thomas Chambers, recorder of the city, whilst just behind them, also amongst the Benchers of the Middle Temple, we espy the ruddy countenance of the Prince of Wales. Over against them, on the Inner Temple side, sits old Lord Chelmsford, erst chancellor, close to his successor on the woolsack Cairns, and further on, Selborne, who in his turn has ousted Cairns, is cheek by jowl with the last of the chief barons, Sir Fitzroy Kelly. The Temple congregation is probably the most intellectual and distinguished in London, and it is no ordinary ordeal a preacher here has before him.

Now let us see what music we are to have, and whilst we are examining our anthem and church books we do not fail to note the winged Pegasus stamped thereon, the emblem of the Inner Temple. We are just deep in the learned examination of cathedral music, which precedes the chorals, when the melodious thunder of the organ awakes our attention. Nor must we omit to notice this famous instrument, peculiar in having six black keys to each octave, to wit, a B minor distinct from the D sharp, built by Smith, the father of English organ building, *in tempore* Charles II. The construction thereof was a subject of competition between the aforesaid Smith and the then equally renowned Renatus Harris. Both rivals erected an organ in the church, and the *cognoscenti* of the day were at a loss to decide which to select, till ultimately the choice was left to Chief Justice Jeffreys of bloody Assize infamy, who pitched upon the one which, greatly augmented and improved, now delights us with its soft fullness of tune. For many a year has Hopkins, the present organist, to whom the English Church is indebted for some of its most beautiful services and anthems, presided at its keys, and long may he remain an institution of the Temple!

And now the choir and clergy enter, and even-song commences. We will not dilate upon the well-matched voices of the boys, the harmony of the chorus, and the sweetness of the solos, but the most unmusical hearer cannot but be struck by the exceptional effect of the hymn singing in which the voices of the whole congregation join. Each person has the tune before him, and the majority of the worshippers being sufficiently skilled in music to take their parts, the result is a grand volume of harmonious sound. The preacher this afternoon is the reader, Ainger, a quiet scholar, whose thoughtful cogent discourses have in large part remained in our memory (a memory not too prone to retain sermons) even after the lapse of years. The pulpit candles throw into strong relief his pale and wasted face, whilst the rest of the church is gradually shrouded in gloom, through which his well modulated voice sounds with strange effect, and it is with almost a start that we rise at the Ascription, and receive the peaceful benediction. Soon we are out in the dark and foggy streets, amongst the noise and rattle of the city, from which we have escaped for two quiet hours, and in our walk homeward Milton's noble lines came into our minds as a summing up of the afternoon:

And let my due feet never fail
To walk the studious cloister's pale,
And love the high embowed roof,
With antic pillars massy proof;
And storied windows richly dight,
Casting a dim religious light;
There let the pealing organ blow
To the full voiced quire below,
In service high and anthem clear,
As may with sweetness thro' mine ear
Dissolve me into ecstasies,
And bring all heaven before mine eyes.

—*Exchange.*

REPORTS.

ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

MASTER'S OFFICE.

MONTEITH v. MERCHANTS BANK.

Estoppel—Evidence of an accomplice—Evidence against the assigns of a deceased person—R. S. O. c. 62 sec. 10—Acts constituting an executor de son tort.

The letters of administration to an administrator were revoked after judgment in an action brought by him as plaintiff to recover certain assets of the estate, and new letters were granted to one P. who thereupon obtained an order of revivor in such action directing the further proceedings to be carried on by P. This order of revivor was subsequently discharged; and the plaintiffs (who were defendants in such action) applied to have it ruled in this action that the judgment obtained before the revocation of letters was *res judicata* against P.

Held, that by the discharge of the order of revivor the action was without a plaintiff, and could not operate as an estoppel against P.

Where certain creditors and the administrator were parties to an order authorizing the compromise of an action respecting certain assets of the estate, they were held to be bound by it in an action for the administration of such estate.

An accomplice in a criminal act is not estopped from giving evidence that certain securities given by him were void by reason of his criminal act; but such evidence should not be held sufficient to invalidate such securities in a civil suit, unless materially confirmed by other evidence, and especially where the holder of such securities was no party to the criminal act.

A decision against the assigns of a deceased person should not be given unless the evidence of the witness against such assigns is corroborated to the material evidence. R. S. O. c. 62 sec. 10.

The party who gives or sells the goods of a deceased person to another, is subject to the liability of an executor *de son tort*. If it were not so there would be no end to the number of persons who might be charged.

Where a person takes the goods of a deceased person under a fair claim of right, though unable to establish such title completely, he is not liable to be charged as executor *de son tort*.

[Mr. Hodgins, Q.C.—January 26.

In an administration suit certain unsecured creditors of the testator sought to attack certain warehouse receipts, given by the testator to the plaintiffs and others, on the ground that they were invalid and therefore void against such unsecured creditors. The Master ruled that he had no jurisdiction to try any such an issue, but on appeal BOYD, C., held that he had. The reference then proceeded under the state of facts set out in the present judgment.

Rae and *Miller*, for the banks.

W. Barwick, for Walsh

J. A. Paterson, for the unsecured creditors.

J. Macgregor, for the administrator.

THE MASTER IN ORDINARY:—The order on appeal from my judgment in this case declares that any creditor or set of creditors, or the administrator is at liberty to attack or resist any claim sought to be proved against the estate in any way whatever; and directs that "the said Master is to try and determine any issues that may be raised thereon."

I had ruled that neither under this Chamber Order for administration, nor under General Order 220 had I jurisdiction to try the validity of the statutory securities called warehouse receipts given by the testator in his lifetime, nor whether such securities were fraudulent and void against the general creditors of the testator.

But under the broad terms of the order on appeal, evidence has been received on all the issues raised by the unsecured creditors and the administrator against the claims of the Merchants Bank, the Dominion Bank, and James Walsh.

The litigation respecting these warehouse receipts has been going on for some time in each of the Divisions of the High Court. About the time the infant defendant, then claiming to be administrator, obtained the *ex parte* order for administration, he instituted suits impeaching these warehouse receipts against the three parties named. The proceedings in these suits have been proved before me, and they furnish some original illustrations of legal procedure not to be found in our authorized books of practice.

Monteith v. *Merchants Bank* was a suit in the C. P. D. by the infant as administrator to compel the bank to account, as executor *de son tort*, for the proceeds of certain goods received and sold by the bank after the testator's death.

The bank claimed title to the goods under the warehouse receipts given by one Herson to the testator in the usual form, and which the testator had endorsed to the bank as collateral security for certain discounts.

The action was tried at the Toronto Winter Assizes, 1884, before ROSE, J., without a jury, whose findings were as follows:—

"I find as a fact that the goods claimed were covered by the warehouse receipts produced by the bank, and were taken by the bank under and by virtue of such receipts.

"I find that the bank advanced the moneys secured by the receipts.

"I find that Herson who signed the receipt was lessee of the cellar where the goods were stored and warehoused.

"I find that Monteith represented to the bank that Herson was a warehouseman and had warehoused goods for him for years, and on such representation had obtained the advances.

"I hold that Herson cannot be allowed to give evidence that the warehouse receipts were false and fraudulent; that the plaintiff is not in any better position than the deceased, and cannot claim the goods as against his representations on which the moneys were obtained, and that the defendants are entitled to judgment with costs.

"The action is one which is not in accordance with one's notion of the commonest principle of morality, and reflects discredit on all the parties concerned in prosecuting the claim."

After the trial the letters of administration to the infant plaintiff were revoked, and letters of administration, *durante minore ætate*, were on the 9th May, 1884, granted to John James Pritchard, one of the defendants in this administration proceeding.

Pritchard thereupon obtained an order of revivor in that action by which it was ordered that the proceedings therein should be continued by him as administrator and plaintiff in the room of Monteith removed.

Under some precedent with which I am at present unfamiliar, the receiver (appointed in this matter under an order dated 29th April, 1884), with the assistance of the bank, applied in Chambers and obtained an order in *Monteith* v. *Merchants Bank* rescinding the order of revivor—thus enriching our list of precedents with the novelty of an action pending in one of the Superior Courts without an *actor* or plaintiff; the order with grim justice declaring that "all further proceedings in this action are *stayed*."

After giving evidence of the proceedings in that action, counsel for the plaintiffs asked me to find that, under the judgment of ROSE, J., the question as to the validity of the warehouse receipts was *res judicata*; but as no analagous precedent could be found, I had to rule that an action without a plaintiff could not operate as an estoppel against an administrator who had been so unceremoniously hustled out of the suit he was prosecuting for the estate he represented.

Monteith v. *Dominion Bank* was brought in the Chancery Division to compel this bank to account, as executor *de son tort*, for goods of the testator received and sold by them under similar warehouse receipts after the testator's death.

The action was not tried; but on the 15th March, 1884, an order was made in Chambers upon the application of the defendants in that action as follows: "It is ordered that John J. Pritchard, of the City of Toronto, in the County of York, clerk, be and he is hereby appointed the *next friend* of the above named Frederick William Monteith in this action; and that this action be and the same is hereby dismissed out of this Court: both parties paying their own costs of suit."

Thus a new precedent, differing from *Rutland* v. *Rutland*, Cro. Eliz. 378, was added to the practice, whereby an official of one of the Courts suing in a representative capacity in right of the testator, *i.e.*, in *autre droit*, and not for a personal right, was allowed the intrusive companionship of a *prochien ami* or next friend, and of one nominated by his antagonist.

Monteith v. *Walsh* was a similar action in the Q. B. D. against the claimant Walsh to compel him to account, as executor *de son tort*, for certain other goods of the testator replevied by him after the testator's death under similar warehouse receipts.

In that action a similar order of revivor was obtained by Pritchard as in *Monteith* v. *Merchants' Bank*. The precedent previously established of expelling the plaintiff from his suit was not followed; but the receiver, who obtained the opinion of three counsel against the possible success of the suit, joined with the present plaintiffs, and obtained an order in Chambers in this administration matter, and in the presence of the solicitors for the unsecured creditors and for Pritchard and Walsh, authorizing a compromise, whereby the action of *Monteith* v. *Walsh* was dismissed without costs.

The unsecured creditors and the defendant Pritchard were parties to that order of compromise and must be held to be bound by it; and without commenting upon the propriety of the receiver's application, I must hold that, before this tribunal at any rate, the order of the Master in Chambers in authorizing the compromise is final.

The further oral evidence shews that after Monteith's death, and before any of the banks appeared at the warehouse, Herson, who had given these warehouse receipts, went with his solicitor, Mr. Macgregor, to the place where the goods were stored and posted up the following notice which was drawn up by his solicitor: "From this pile west and north is the property of the Dominion Bank and Merchants Bank, of which I am warehouseman, and have given warehouse receipts, J. Herson."

The bank's officers, when they arrived at the warehouse, found this notice up; and then Herson and his solicitor pointed out to them the goods covered by their warehouse receipts. Shortly afterwards the sheriff's officers arrived with a writ of

replevin in Walsh's case, and Herson, who swore that he had tried to keep possession of the goods for the banks, then told the bank's officers that they might take the goods themselves, which, sometime afterwards, they did.

Herson was examined as to the validity of the warehouse receipts; and, if his evidence is to be credited, he and Monteith were guilty of a misdemeanor, one in giving and the other in obtaining money on, false warehouse receipts., His evidence, therefore, is that of an accomplice in a criminal act; and although I held that he was not estopped from giving evidence that these warehouse receipts were false and fraudulent, my experience in conducting criminal prosecutions induces me to recognize the applicability of the directions usually given to juries by judges of Assize, viz.: to regard with distrust the admissions of an accomplice, and not to give effect to them unless materially confirmed by other evidence. That salutary rule of experience is, I think, specially applicable to a civil case where the party, whose title under those statutory securities is attacked, was in no way, direct or indirect, a party to the criminal act of the criminal parties. Herson claimed no protection before giving his evidence; his evidence is unsupported, and is negatived by his various warehouse receipts and by his declarations and acts in the presence of the bank's officers; and is also negatived by the written and parol declarations made by Monteith in his lifetime.

The Evidence Act R. S. O. c. 62 s. 10 provides that in a suit against the assigns of a deceased person an opposite party shall not obtain a decision in respect to any matter occuring before the death of the deceased person, unless his evidence is corroborated by some material evidence.

The spirit, if not the letter of this act, applies to this case, and therefore on both grounds I decline to give effect to Herson's evidence.

Even if these warehouse receipts were invalid, I could not on the evidence find that the banks had made themselves executors *de son tort*. Applying the cases to what occurred immediately after the death of Monteith, it would be more reasonable to hold that Herson had placed himself under that liability. He and his solicitor went to the warehouse before the bank officials, and when the latter arrived Herson claimed by parol and in writing to be in possession of the goods as warehouseman, and subsequently told the banks to take them.

"If a man give or sell the goods of an intestate to A. this does not make A. an executor *de son tort*; or if he claim a property in the goods as a gift of the intestate:" Comyn's Dig. Adm. c. 2. This rule was applied in *Paull* v. *Simpson*, 9 Q. B. 365. A lessee died intestate during the term of the lease; his widow without taking out administration entered, and paid rent to the landlord; and then with her concurrence her son-in-law took the premises and continued to the end of the term. It was held that although she might be, A was not, executor *de son tort*. WIGHTMAN, J. said: "The passages from Comyn's Digest are express authorities on this point. If this were not so there would be no end to the number of persons who might be charged." PATTESON, J. added: "If one takes the goods of the deceased and hands them to another, this shall charge only the giver as executor *de son tort*.

So where a person sets up a colorable title to the possession of the goods of a testator, though he may not be able to establish a completely strict and legal title, such title is sufficient to exempt him from being charged as executor *de son tort*: *Femings* v. *Jarrat* 1 Esp. 335. In that case Lord KENYON, C. J., observed: "If the defendant came to the possession by color of a legal title though he had not made out such title completely in every respect, he should not be deemed an executor *de son tort*.

The reason for the rule is stated in the case of an executor thus: "If an executor takes the testator's goods on a claim of property in them himself, although it afterwards appears that he had no right, since such claim is expressive of a different purpose from that of administration as executor, he is not liable:" Toller on Executors 43.

The cases in the United States Courts are to the same effect.

In *King* v. *Lyman*, 1 Root (S. C.) 104, where goods had been taken under a bill of sale, evidence was tendered to show that the bill of sale was fraudulent. But the evidence was rejected; and it was held that the holding and disposing of goods and chattels conveyed by a deceased in his lifetime would not make the party taking an executor *de son tort*. Although the bill of sale might be frandulent as to creditors it was good and valid between the parties.

Debesse v. *Napier*, 1 McCord (S. C.) 106, was a case when deceased had goods in the hands of a factor for sale. The factor had a lien on them for his commission and charges. Deceased drew an order on the factor for the whole proceeds of the goods after satisfying his charges, which order the factor accepted. After deceased's death the factor sold and applied the proceeds as directed, and it was held that he had the right to do so.

If a person sets up in himself a colorable title to the goods of a deceased; as when he claims a lien on them, though he may not be able to make

out his title completely, he will not be deemed an executor *de son tort: Densler* v. *Edwards*, 5 Ala 31.

So when a deceased had mortgaged certain chattels but the chattels had remained in the mortgagor's possession up to the time of his death, and the defendant then took and sold them; it was held that the taking of the chattels into his possession under a fair claim of right did not charge upon such person any liability as an executor *de son tort: Smith* v. *Porter*, 35 Me. 287. See also *Claussen* v. *Lafrenz*, 4 Greene 224.

The cases referred to and many others also show that the administrator Pritchard is shut out by the fraud or criminal act of the testator from impeaching the validity of these warehouse receipts.

On the evidence before me I find that after the testator's death Herson took possession of these goods; that he claimed such possession of them as the warehouseman who had given warehouse receipts for them; that he told the bank's officers that they might take the goods; that thereupon and by virtue of their warehouse receipts the banks took and disposed of the goods; that they had a fair claim of right to take the goods, and in no way took them as characteristic of the office of an executor, or so as to make them chargeable with the liability of executors *de son tort*.

I am still inclined to think that when the question of jurisdiction is further considered, it will be found that the new action of account under R. S. O. c. 107 s. 30 by one set of creditors against another set of creditors who have obtained the proceeds of a testator's estate beyond their *pari passu* proportions, and by virtue of securities which are valid against the personal representative cannot be prosecuted under a Chamber order for administration and on oral pleadings in the Master's office. If it can, then every fraudulent conveyance of property made by a debtor to a creditor in his lifetime, and not impeached, may be set aside under similar Chamber orders for the administration of such debtor's estate. The cases where this action of account has been enforced show that it lies where creditors have realized their claims out of the assets of the estate under judgments against the personal representative: *Bank of British North America* v. *Mallory*, 17 Gr. 102; *Taylor* v. *Brodie*, 21 Gr. 607.

The claims made by the unsecured creditors and the administrator under the order on appeal, are dismissed with costs.

COUNTY COURT OF YORK.

LANG V. GIBSON.

Mechanics' lien—Garnishment—Priority.

One G. did some repairing for T. and furnished the materials which he purchased from H. After the completion of the work, T. was garnished in the Division Court for the amount of a note held by one L. against G., L. having learned that T. had not fully paid G. for his work. After the service of the garnishee summons, but within thirty days after furnishing the last of the material, H. filed his lien under R. S. O. cap. 120, and intervened in the garnishee suit, claiming to be entitled under his lien to the money in T.'s hands.

Held, that the lien took priority, and that garnishee must fail.

[McDOUGALL, JJ.—Toronto, Feb. 11.

McDOUGALL, JJ.—This is an action against the primary debtor for a note, Trinity College garnishees. Judgment has been given against the P. D. and the contest is between the primary creditor and Harris & Co., who claim to have a lien against the garnishees. The contest is as to which of them is entitled to the fund admitted to be due Gibson by the garnishees, Trinity College.

The work was completed on the 13th October, 1884, and Harris & Co., in their lien, as filed, state that the last material was supplied on the 13th October. Their lien was not filed until the 3rd November, 1884, and the garnishing process was served on the garnishees on the 20th October, 1884. *Query*—Which has priority? The material furnished here by Harris & Co. was not supplied to Trinity College, but to Gibson, the P. D., who was making certain repairs to the College buildings. There was no contract between the College authorities and Gibson. What he did was jobbing work only, to be paid for by the day and according to its value.

R. S. O. cap. 120, sec. 3, gives a lien to every mechanic, etc., etc., "or other person doing work upon or furnishing materials to be used in the construction, alteration or repairs of any building," etc., "by virtue," etc., "of furnishing," etc.

Sec. 8 is to the following effect: All persons furnishing materials to or doing labour for the person claiming the lien, in respect of the subject of such lien, who notify the owner of the premises sought to be affected thereby, within thirty days after such material supplied, etc., etc., shall be entitled to a charge therefor *pro rata* upon any amount payable by such owner under said lien.

Sec. 4, as to the lien under sec. 3, enacts: That the statement of claim (for the lien) may be filed *before* or *during the progress* of the work aforesaid, or *within thirty days thereafter*.

Sec. 11 enacts: That all payments made in good faith by the owner to the contractor or sub-con-

tractor, etc., before notice in writing by the person claiming the lien has been given such owner, etc., etc., shall operate as a discharge *pro tanto* of the lien credited by the statute.

Sec. 1 of cap. 17, 1878, Ont., restricts this payment to ninety per cent. of the price to be paid for the work; and allows the remaining ten per cent. to be paid after the expiration of ten days from the completion of the work, unless the owner is meanwhile notified in writing of the existence of a claim or lien.

The Act of 1882, cap. 15, gives workmen a lien for thirty days' wages, and in case there is a contract for the work in question, gives such lien for wages to the extent of ten per cent. of the contract price, priority over other liens.

Now, here, the claim is not for wages—nor is there a contract.

It is a well settled principle of law, that a garnishing or attaching creditor can acquire no higher or better rights to the property or assets attached or garnished than the defendant had when the attachment took place; unless he can show some fraud or collusion by which his rights are impaired. Garnishment is a purely statutory proceeding and cannot be pushed in its operation beyond the statutory authority under which it is resorted to. It is a proceeding *in rem*. It is, in effect, a suit by the defendant in the plaintiff's name against the garnishee, without reference to the defendant's concurrence, and indeed in opposition to his will. Hence the plaintiff usually occupies as against the garnishee just the position of the defendant, with no more rights than the defendant had, and liable to be met by any defence which the garnishee might make against an action by the defendant.—(Drake on Attachment, 432.)

If the property, when attached, is subject to a lien *bona fide* placed upon it by the defendant, or subject to a lien by express statutory enactment, that lien must be respected and the garnishment postponed to it. The statute says that nothing shall avail the owner as against the lien-holder, except *bona fide* payment before notice of the lien. An attachment or a garnishee proceeding does not amount to an assignment of the debt. It is not in effect an execution. It is merely a plaint or claim, and amounts to nothing beyond tying up the fund until it is crystalized into a judgment.

Under our Mechanics' Lien Act, the lien commences from the furnishing of the materials—is good for thirty days after supplying the articles *without registration*, and is then extended sixty days farther by registration before the expiration of the thirty days. It can only be defeated in one way—that is by payments made *bona fide* and without notice of the lien. Here there is no pretence that there has been any payment, and the point to be decided is narrowed to this: Is the service of garnishing process or the attachment of the debt (before notice of the lien has been served on the owner, and before the expiration of the thirty days), at the instance of a creditor of the contractor equivalent in effect to the payment *bona fide* allowed by the statute?

I was at first under the impression that it might be so contended; but, under the authority of *ex parte Greenway*, *Re Adams*, L. R, 16 Eq. 619, and *Re Pillers*, L. R. 17 Ch. Div. 653, I am compelled to hold that, as the lien is a statutory claim it cannot be defeated except in the manner pointed out by the statute itself. The garnishees no doubt could, had they chosen to do so, have paid the primary creditor's claim with Gibson's assent or upon his request, and have been discharged had such payment been made before they received notice of Harris & Co.'s lien or claim, but here they did not do so, and before the date when a judgment could have been obtained (18th November was Court day, I believe), they received notice of the lien. This notice—no payment having been previously made—at once perfected Harris & Co.'s claim and effectually prevented thereafter any payment to Gibson or to any one claiming (as the primary creditor in this case) through him.

Upon the other branch of the case, I have no doubt but that Harris & Co. had a lien under sec. 3, R. S. O. cap. 120. The material supplied was to be used in the repair of a building, the property of Trinity College—and they supplied it for such purpose.

I cannot conclude this judgment without adding that I heartily concur with the opinions of the many judges who have been called upon to interpret the various clauses of the Mechanics' Lien Act, and the amendments thereto, that the whole treatment of the subject is a "mass of complicated and embarrassing legislation." The conclusions I have arrived at, however, after careful consideration of the various clauses are those which I think are clearly deducible from the authorities.

My finding is that there is nothing due from the garnishees to the primary debtor available to the primary creditor, as the lien which I find has priority absorbs the whole fund garnished. The action will be dismissed against the garnishees with costs.

COUNTY COURT OF NORTHUMBERLAND AND DURHAM.

NEILL v. DUMBLE.

Altered note—Consideration.

An action on a cheque made by defendant in favour of plaintiff, given to retire a note endorsed by defendant alleged to have been altered by the maker, Henry Smith, by addition of the words "with interest at eight per cent."

R. W. Wilson and *W. R. Riddell*, for plaintiff.

J. W. Kerr, for defendant.

CLARKE, Co. J.,—*Held*, that the evidence showed that the note had not been tampered with, but that in any event the surrender of the note to the endorser was a good consideration for the cheque.

BRAUN v. GILDERSLEEVE ET AL.

Consequential damages.

An action in tort for being carried by the steamer *Norseman* past Cobourg to Port Hope and landed there on a ticket marked "Cobourg." Plaintiff suffered severely from the ill-treatment received. The jury brought in a verdict for $53.

R. W. Wilson, for plaintiff.

J. W. Kerr, for defendant.

CLARKE, Co. J., reduced this verdict to $3, holding that consequential damages could not be awarded.

RECENT ENGLISH PRACTICE CASES.

WALMSLEY v. MUNDY.

Receiver — Reference to Master — Appeal — Queen's Bench Division.

The plaintiff having obtained judgment was, by an order made at Chambers, appointed receiver of the rents of some houses belonging to the defendant; the order was made without prejudice to prior incumbrances. G. having applied to discharge the order appointing the receiver on the ground that he was a second mortgagee under a deed executed by the defendant before the judgment in the action, the Queen's Bench Division referred the question as to the validity of G.'s mortgage to a Master, who, after hearing evidence, reported that the mortgage was a sham and had been executed in order to defeat the defendant's creditors. The Queen's Bench Division declined to review the evidence upon which the Master had acted, accepted his report as conclusive, and refused G.'s application.

Held, that inasmuch as the receiver was appointed under an equitable jurisdiction now vested in the Queen's Bench Division, the evidence before the Master might have been reviewed, and the Court of Appeal being of opinion on the evidence that the mortgage had been executed in good faith, discharged the order made at Chambers, whereby the plaintiff was appointed receiver.

[13 Q. B. D. 807.

BAGGALLAY, L.J.—The report of the Master would have been liable to review in Equity. In Courts of Common Law it has not been the practice to review the report of the Master; but it can hardly be argued that there is not power. I should have regretted to hold that no appeal would lie against the report of the Master; but, I should, of course, be bound by the weight of existing authority; this, however, is an equitable proceeding, and equitable proceedings must be adopted as a whole. The judges of the Queen's Bench Division ought themselves to have reviewed the evidence, or at least to have referred the matter back to the Master for additional consideration.

BAILEY v. BAILEY.

Imp, O. 14, r. 1 (1883)—O. J. A., rule 80.

Order to sign final judgment—Alimony pendente lite—Debt or liquidated demand.

An order to sign final judgment will not be made under the above rule when the action is for arrears of alimony *pendente lite*, payable under an order of the Probate and Divorce Division.

[13 Q. B. D., 855.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Ferguson, J.] [Dec. 20, 1884.

CANADIAN LAND & EMIGRATION CO. v. MUNICIPALITY OF DYSART ET AL.

Injunction—Court of Revision—Fraud—Jurisdiction—Costs—Stay of proceedings pending an appeal.

Motion for an injunction to restrain the Court of Revision of the Municipality of Dysart from raising the assessment of the plaintiffs'

wild lands in the municipality. The plaintiffs set up in their statement of claim that they had appealed in respect of their assessment as being too high to the said Court of Revision, and that the members of the Court of Revision, by a fraudulent conspiracy amongst themselves, and from interested motives, in face of facts leading obviously to a contrary conclusion, and without any evidence to support the same, had not only dismissed the appeal but, on a cross-appeal brought in respect of the said assessment as too low, had greatly increased the amount of the said assessment.

Held, on demurrer *ore tenus*, that inasmuch as an appeal lay from the Court of Revision to the Stipendiary Magistrate, the plaintiffs should have appealed accordingly, and could not come to this Court for an injunction, at least until they had exhausted their other remedies.

The above judgment having been given, the plaintiffs applied for a stay of proceedings, pending a re-hearing or appeal.

Held, that there was jurisdiction to make the order, which could go upon terms.

At any time before formal judgment issued by the Court the judgment delivered, or a part of it, may be recalled, and a term imposed or a change made.

The defendants delivered a statement of defence in the action, but before any evidence was given at the trial, demurred *ore tenus*. The plaintiffs contended that under these circumstances the defendants should be allowed no more costs than if they had demurred to the statement of claim and succeeded on the demurrer.

Held (January 21st, 1885), that the dismissal of the action must be with costs. The case was of a peculiar character, presenting difficulties, and was one of much importance, involving a large sum of money.

W. Cassels, Q.C., for the plaintiffs.

S. H. Blake, Q.C., for the defendants.

Proudfoot, J.] [January 2.

THOMAS v. INGLIS.

Fixtures — Property in chattels under written agreement—Intention when affixed to freehold—Injunction.

T. being liquidator of a company which was being wound up, sold the manufactory to H. for $9,000, part in cash and the balance secured by a mortgage on the premises. At the time of the sale there was an engine, boiler, pullies, etc., among the machinery on the premises, but no mention of them was made in the mortgage. H. afterwards undertook to sell the engine, boiler and pullies, but T. objected to his so doing until assured that they would be replaced by better machinery. H. purchased from J. and H., the defendants, another engine, boiler, shafting, hangers and pullies to replace the old ones upon certain conditions, set out in agreements in writing, one of which was as follows: "And it is hereby agreed between the parties that the property in . . . (machinery) is not to pass to the said H., but is to remain in the said J. and H. until the full payment of the price, . . . but the said H. to have possession at once and to use the same until any default made in the payment of the price . . . when the said J. and H. may resume possession." The engine and boiler were placed upon a stone foundation and bricked over in a building on the premises, other than the one from which the old ones had been removed, but they could be removed by taking down a part of the wall of the building in which they were placed and without injury to the old building, and the hangers and pullies were bolted to joists but could be removed without injury to the building if done carefully. H. failed in business assigned his estate for the benefit of his creditors, and made default in payment, and J. and H. began to remove the machinery.

In an action brought by T. for an injunction restraining the defendants J. and H. from such removal. It was,

Held, that under the circumstances and in cases of this kind the intention when the chattels were affixed to the freehold must govern, and that the plain agreement, evidenced by writing between H. and the defend-

ants, was that the property in the machinery should not pass from the defendants to H. until they were paid for and the plaintiff must fail.

Tilt, Q.C. and *Mulock*, for the plaintiffs.
McCarthy, Q.C., for the defendants.

Proudfoot, J.] [January 28.

POWELL v. CALDER.

Chattel mortgage—Security—Preference—Judgment creditor—Interpleader—Bona fides—Void transaction—Infancy.

S. & W., a firm of whom W. was a minor, becoming embarrassed arranged with H., the managing man of J. G. & Co., their principal creditor, to give security for their debt. At the instigation of H. two notes for the amount of their indebtedness, maturing at short dates, were made by S. & W., and endorsed to J. G. & Co. by P., who was a brother-in-law of J. G., and connected with him in another business, and a chattel mortgage was given by S. & W. on everything they had in their business to P. to secure him, and $50 was paid him by J. G. & Co. for endorsing the notes. A few days after the mortgage was given C. caused the sheriff to seize S. & W.'s goods under an execution in his hands delivered subsequent to the making of the mortgage.

In an interpleader action between P. claiming under the chattel mortgage, and C. claiming under his execution it was,

Held, that no distinction could be made between J. G. & Co. in the transaction, and that if the mortgage was invalid it must be for want of *bona fides;* that the transaction only assumed the shape it did in order to avoid the statute against fraudulent preferences; that pressure will not validate a security unless it be a *bona fide* pressure to secure a debt, and without a view of obtaining a preference over the other creditors; that the notes matured at such short dates no time was given to the debtor, no new advance was made and no security given that the notes or the mortgage would not be enforced when they fell due, and that upon the whole case the mortgage was "null and void against the creditors."

Semble—That the infant's share did not pass by the chattel mortgage, nor by the assignment for the benefit of creditors which was afterwards made, but that as C., the plaintiff, seized under an execution it must be assumed that his judgment was properly recovered.

Meredith, Q.C., and *Gibbons*, for the plaintiff.
Lash, Q.C., for the defendant.

Ferguson, J.] [February 4.

WRAY v. MORRISON.

Injunction—Owners in severalty of halves of a house—Implied grant—Natural right of support.

The facts of this case were peculiar. In 1878 G. W. conveyed by a voluntary deed to M. W., his wife, a certain lot of land in the City of Toronto, by metes and bounds. There were several houses on the lot, but no reference was made to them in the conveyance in any way. In 1883, also by a voluntary deed, M. W. reconveyed, by metes and bounds, to G. W. one half of the lot so conveyed by him to her in 1878. In this conveyance, also, no reference at all was made to the houses on the land. In 1884 M. W. died, leaving all her property, real and personal, to M., the defendant, an adopted child of herself and her husband, by general devise, not specifying any particular property. One of the houses above referred to, as being on the lot conveyed in 1878, was so situate that half the house was on the half of the lot reconveyed by M. W. to G. W. in 1883, and the other half was the half of the lot retained by M. W. Shortly after the death of M. W., the defendant M. began to threaten G. W. that she would pull down and demolish the half of the said house which was on the half of the lot claimed by her under the devise of M. W., and on January 8th, 1885, actually commenced to tear down the sheeting which was round the base of the said half of the house, with a view, as was naturally admitted, of carrying out her said threats.

G. W. now moved for an *interim* injunction to restrain M. from forcibly interfering with the house, or with one C., a tenant the of house, placed therein by G. W. in the lifetime of M. W., and for a mandatory order for repair of damages already done, and by consent the motion was turned into a motion for judgment. The plaintiff rested his case

chiefly on the doctrines of implied grant, and the natural right to support.

Held, that the plaintiff was entitled to a perpetual injunction and order of restitution as asked.

A. H. F. Lefroy, for the plaintiff.

J. Tilt, Q.C., for the defendant.

PRACTICE.

Boyd, C.] [Nov. 19, 1884.

RE JOSEPH HALL MANUFACTURING CO.

Winding up order—45 Vict. c. 23 C.—Carriage in Master's Office—Jurisdiction of Master in Chambers.

On the application of Peter Ryan, a creditor of the Joseph Hall Manufacturing Co., the Master in Chambers on the 4th November made an order for winding up the Company, under 45 Vict. c. 23 C. Ryan's application was made by a solicitor who had formerly acted as solicitor for the Company.

Three other creditors of the same Company now applied to the Court for a similar order to that obtained by Ryan, and to set aside Ryan's on several grounds, or in the alternative for an order giving them the carriage of the proceedings under Ryan's order in the Master's Office.

Held, that it is preferable to have the winding up conducted by solicitors who are totally disconnected with the Company to be wound up.

It was not competent for the Master in Chambers to make an order under section 77 of the Act as amended by 47 Vict. c. 39, s. 5 C., referring the winding up to the Master in Ordinary. That may be done by a judge as in comformity with the usual course of proceedings in other causes and matters, but it is not the practice, save in one or two exceptional cases, to have references ordered by the Master in Chambers to the Master in Ordinary.

The intention of the Act is that the Master in Chambers, or Local Master, or Master in Ordinary may grant a winding-up order and conduct all the proceedings necessary therefor in his own office and before himself as a judicial officer.

The carriage of the proceedings was accordingly given to the applicants.

William Roaf, for the applicants.

Moss, Q.C., for Ryan.

Dalton, Q.C. / Rose, J. [Dec. 19, 29, 1884.

MINKLER V. MCMILLAN.

Discovery—Partner—Rule 224, O. J. A.

An action against an endorser of a promissory note brought by a member of the firm of bankers who discounted it. The firm was composed of two members only, B. & M. B. & M. dissolved partnership, and the action was brought after the dissolution in the name of M. only.

On the application of the defendant the Master in Chambers made an order under rule 224, O. J. A., for the examination of and the production of documents by B. as a person for whose immediate benefit the order was being prosecuted.

On appeal from this order.

ROSE, J., thought the evidence as to the interest of B. unsatisfactory, but refused to set aside the order of the Master, varying it however by directing that the examination of B., and his affidavit on production should not be used except for the purpose of discovery.

Millar, for the appeal.

Clement, contra.

C. P. Div.] [Jan. 3.

RE MCCALLUM V. GRACEY.

Prohibition—Division Court—Cause of action—43 Vict. c 8, s. 8-12 O.

A motion for prohibition to the First Division Court of the County of Halton, on the ground that the defendants did not reside within the jurisdiction, and that the whole cause of action did not arise therein.

An action brought upon a promissory note by the administratrix of the payee against the executor and executrix of the maker.

The note was dated, "Milton, 17th September, 1877," and was for $100 payable three months after date at Milton, with interest at

per cent. per annum. The amount claimed was $149.50.

The maker died in the County of Essex long after the maturity of the note; her will was proved in Essex, and the defendants at the time of the action resided in that county.

Held, that the death of the maker, the circumstances of her making a will appointing the defendants executors, and the proving of the will by the executors, were no part of the cause of action which was complete before the granting of the probate.

Held, also that the Court sought to be prohibited had jurisdiction by virtue of 43 Vict. c. 8, s. 8 and 12 O.

Aylesworth, for the motion.

Alan Cassels, contra.

Boyd, C.] [Jan. 15.

CAMERON v. CAMERON.

Production of documents—Unsent letters.

In an action to establish a will, which the defendants impeached for want of testamentary capacity and set up a prior will, the defendant included in his affidavit of production, as Nos. 19 and 20 in the schedule of letters, copies of letters, from himself to the testatrix, dated 29th December, 1882, and 8th March, 1883, but objected to produce them for inspection on the ground that they were never mailed or sent to their destination.

The Master in Chambers ordered the letters to be produced and the defendant appealed.

Held, that all memoranda and writings, or pieces of paper with writings on, which may throw light on the case, whether they would or would not be evidence *per se*, are subject to production unless they can be protected, and the mere fact in the case of a letter that it was not forwarded to its destination is no ground of exemption.

Huson Murray, for the defendant.

A. H. Marsh, for the plaintiff.

Rose, J.] [Jan. 23.

NAPANEE, TAMWORTH & QUEBEC RY. CO. v. MCDONELL.

Dismissing action—Want of prosecution.

Upon a motion to dismiss the action for want of prosecution the Master in Chambers ordered that the plaintiffs' statement of claim, filed pending the motion, should be allowed to stand as good and sufficient, and refused the motion to dismiss.

Upon appeal,

Held, that the filing of a statement of claim is not a sufficient answer to a motion to dismiss. The plaintiffs not having, in the opinion of the learned judge, sufficiently explained and offered excuse for a delay of nearly two years, and not having shown a probability of speeding the action, the learned judge allowed the appeal, and dismissed the action with costs.

McPhillips, for the appeal.

Lefroy, contra.

Rose, J.] [Jan. 30.

PLUMMER v. LAKE SUPERIOR NATIVE COPPER CO.

Judgment—Foreign corporation—Liquidation.

Leave was given to sign final judgment under rule 80, O. J. A., against a company incorporated in England, having its head office there, and in process of liquidation there, but doing business and having assets and liabilities in Ontario.

Shepley, for the plaintiff.

Rae, for the defendants.

Galt, J.]

REYNOLDS v. BARKER.

Security for costs—Temporary residence.

An order for security for costs was made against the plaintiff by His Honour Judge Benson, Junior Judge of the United Counties of Northumberland and Durham, on the ground that the plaintiff resided out of the jurisdiction.

GALT, J., reversed this order, following *Redondo* v. *Chayter*, 4 Q. B. D. 453, where the plaintiff resided temporarily within the juris-

diction for the purpose of bringing the action, and expressed his intention of remaining until the litigation was over.

R. W. Wilson, for plaintiff.

Wm. Kerr, Q.C., for defendant.

Osler, J.A.]

GIFFORD v. GIFFORD.

Appeal from award.

The defendant appealed from the award of His Honour Judge Benson on various grounds, the main one being that part of the plaintiff's account was wrongly allowed.

Held, following the case of *McEwan* v. *McLeod*, Ont. A. R. 239, that although appeal would lie from a consent order of reference, that in this case the arbitrator had made a fair award that should not be disturbed.

Holman and *R. W. Wilson*, for defendant.

Aylesworth, contra.

Dalton, Q.C.]

MERCHANTS' BANK v. MONTEITH.

EX PARTE STANDARD.

Insurance for wife and children—40 Vict. c. 20—Administrator not trustee of such moneys—Jurisdiction of Master—Payment into Court.

A testator insured his life for the benefit of his wife and children. The policy provided that the money should be payable as might be directed by will. The testator by will appointed executors and gave his wife the income of his estate for life, and after her death the *corpus* to his son. The executors renounced probate, and, after revocation of a prior grant to the son who was then a minor, administration was granted to the defendant P. The policy provided that the money might be payable to the executors or administrators. But the Act 47 Vict. c. 20, O. provided that such policy moneys to which infants were entitled should be payable to a "trustee, executor or guardian." P. claimed the moneys as administrator, whereupon the insurance company, under s. 15 of the Act and G. O. 197, and O. J. A. rule 541, applied to the Master in Ordinary in Chambers for leave to pay the moneys into Court.

THE MASTER *held*, (1) That voluntary applications to pay in money may be made in Chambers. (2) That under O. J. A. rule 541*a* he had jurisdiction by virtue of the administration proceedings before him to make the order. (3) That by the renunciation of the executors there was no "trustee, executor or guardian competent to receive the share of the infant." (4) That the Act excluded the administrator from any claim to the fund, and his receipt would not be within the protection of the Statute. (5) That the administrator was not a trustee of the will, except as holding surplus assets, after administration with notice of a trust. (6) That the money was no part of the estate subject to the control of creditors and when paid in should be "ear-marked," and not mixed with the other funds of the estate.

On appeal by the administrator P.,

PROUDFOOT, J., reversed the Master's Order.

Rae, for insurance company.

D. Black, for the infant.

J. A. Paterson, for the unsecured creditors for the motion.

J. MacGregor, for administrator and widow.

BOOK REVIEWS.

BRITISH COLUMBIA LAW REPORTS. Edited by P. Æ. Irving, Barrister-at-Law, under the authority of the Law Society of British Columbia.

MR. IRVING will be remembered by many in Toronto, and we can only say that if he proves himself as good a reporter as he did a cricketer, the profession in British Columbia may be congratulated. We confess we have not ourselves experienced any yearning for additional reports, but the learned judges of British Columbia are no doubt as competent to aid in the development of British Law as their brethren in other Provinces. These reports are issued in excellent shape, the size of the pages being considerably larger than in our own reports, which we think an improvement. So far as our perusal of the number sent enables us to judge we should say the reports were carefully prepared. In the case of *Peck* v. *Reg.* we stumble across a gem, Gray, J., dismissing a peti-

tion with the words: "Without one harsh English expression, I may say, I know of nothing so adequately descriptive of the case as an old monkish couplet of the middle ages,

'Mel in ore, verba lactis,
Fel in corde, fraus in factis.'

Let the petition be dismissed with costs against the petitioners."

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

Chitty's Equity Digest, 4th ed., by William Grant Jones and Henry Edward Hirst, Vol. 1 containing the titles "Abandonment" to "Bankruptcy." London, 1883.

The Laws of Patents, Designs and Trade Marks, as contained in the Act 47 Vict. c. 57, to amend and consolidate the Law relating to Patents for Inventions, etc., by James J. Aston. London, 1883.

A Digest of Patent Law and Cases, incorporating the provisions of the Patents Act, 1883, by H. A. A. Grindlay, London, 1884.

Amos and Ferrard on the Law of Fixtures, 3rd edition. London, 1883.

The Law of Mines, Quarries and Minerals, by R. F. McSwinney. London, 1884.

The Law of Husband and Wife, within the jurisdiction of the Queen's Bench and Chancery Division, by Montague Lush. London, 1884.

A complete treatise upon the New Law of Patents, Designs and Trade Marks, being the Patents, Designs and Trade Marks' Act, 1883, by E. M. Daniels. London, 1884.

The Institutes of the Law of Nations: a Treatise of the Jural Relations of Separate Political Communities, by James Lorimer. London, 1884.

Rawlinson's Municipal Corporations, 8th edition. London, 1883.

The Municipal Councillors' Handbook, being a summary of the Municipal Law of Ontario, for general public use, by J. J. Kehoe, of Osgoode Hall, Barrister-at-Law, 1884.

Joint Stock Companies' Manual, for the use of Shareholders, Directors, and Officers of Companies, and the general public, by J. D. Warde, 1884.

FLOTSAM AND JETSAM.

The *Law Journal* says the £10,000 awarded to the plaintiff in *Finney* v. *Cairns* (otherwise Garmoyle) is probably the largest amount of damages ever recorded in this country in an action for breach of promise of marriage. The nearest approach to it is £3,500, given in 1835 to a solicitor's daughter for the loss of the alliance of a solicitor who had inherited a considerable fortune from his father (*Wood* v. *Hurd*, 2 Bing. N. C. 166). In 1866 the sum of £2,500 was awarded to a milliner's daughter as compensation for losing a husband in the shape of a young gentleman with £700 a year. *Berry* v. *Da Costa*, 35 *Law Journal Report* C. P. 191); but there were circumstances in the case tending to make the damages exemplary. In former times apparently it was more common for disappointed husbands to bring actions than now, and in the reign of William and Mary £400 was awarded for the loss of a lady worth £6,000 (*Harrison* v. *Cage*, Carth. 467)—the largest sum we believe awarded by unsympathetic jurymen to a male plaintiff. No doubt as large, and perhaps larger sums than the present have been paid out of court; but we now have an assessment, agreed upon by all concerned and sanctioned by a jury, of a countess's coronet at £10,000.

New Application of Equity.—Last December an officer of the School Board at Crewe made a proposal to the British Empire Mutual Life Assurance Company through their agent. The proposal was accepted, but the premium not paid. On the 8th inst., the proposed life was drowned through the breaking of the ice on which he was skating. It came to the knowledge of the directors that the deceased had made some arrangement with the company's agent for the payment of the first premium out of certain moneys due from the agent to him, and the company decided to consider the assurance as effected, and drew a cheque for the amount for which the deceased intended to assure.

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 1884.

During this term the following gentlemen were called to the Bar:—Samuel Clement Smoke, William Durie Gwynne, Stephen Frederick Washington, Thomas Thomson Porteous, Alexander Duntroon McIntyre, Matthew Munsell Brown, William Grant Thurston, Thomas Edward Williams, John Stewart, Napoleon Antoine Belcourt, George Washington Field, Francis Henry Keefer, Douglas Armour, Flavius Lionel Brooke, Alexander Carpenter Beasley. The names are arranged in the order in which the candidates were called.

The following gentlemen were admitted as students-at-law:—Graduates, James Morris Balderson, Alexander Robert Bartlett, Joseph Hetherington Bowes, Samuel William Broad, George Filmore Cane, John Coutts, George Henry Cowan, Robert James Leslie, Archibald Foster May, John Mercer McWhinney, James Albert Page, Horatio Osmond Ernest Pratt, Thomas Cowper Robinette, Robert Karl Sproule, Ernest Solomon Wigle, James McGregor Young, Roderick James Maclennan, George Frederick Henderson, Samuel Walter Perry, Richard S. Box, William Wallace Jones, William Louis Scott, Edmund Kershaw. Matriculants: Henry Herbert Johnston, Albert E. Baker, Herbert Holman, Charles D. Macaulay, George Albert Thrasher, John Williams, Seymour Corley. Junior Class: Henry Elwood McKee, Edward Lindsey Elwood, Walter Scott MacBrayne, Edwin Owen Swartz, Joseph Frederick Woodworth, Owen Richards, William Allan Skeans, Richard Lawrence Gosnell, Frederick Ernest Chapman, Nathaniel Mills, James McCullough, jun'r., John McKean.

The following gentlemen passed the examination of Articled Clerks:—John Alfred Webster, Alexander William McDougauld.

BOOKS AND 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 Gov-

ernment 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 Jusisprudence; 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 year, 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

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