Canada Law Journal.

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DIARY FOR JULY.

1. Sun.... *Sixth Sunday after Trinity.* Long vacation begins. Dominion Day. Confederation, 1867.
2. Mon.... Co. Ct. term (except York) begins. Heir and Dev. sitt. begin.
6. Fri..... Last day for service of notice of Appeal from Ct. of Rev. to County Judge.
7. Sat..... County Ct. term (except York) ends. Gen. Simcoe, first Lieut.-Gov. of U. C., 1792.
8. Sun.... *Seventh Sunday after Trinity.* Cyprus ceded to England, 1878.
11. Wed. .. Canada invaded by U. S., 1813.
14. Sat..... W. P. Howland first Lieut.-Gov. of Ontario, 1868.

TORONTO, JULY 1, 1883.

WE are glad to learn that Messrs. Lefroy and Cassels have in an advanced state of preparation, and are about immediately to publish, "Notes of Practice Cases," embracing short references to all Canadian and English decisions and *dicta* having reference to the Judicature Act, subsequent to the annotated editions of Mr. Maclennan, and Messrs. Taylor and Ewart.

ON receiving the Ontario Acts for 1883, the profession will be struck at once by the unusual bulk of the volume. This is partly caused by an elaborately compiled table showing how the text of Harrison's Municipal Manual has been amended by the Consolidated Municipal Act, 1883. This, as we understand, has been compiled by Mr. F. J. Joseph, so well known as the editor of Harrison's Municipal Manual, and also one of the editors of Robinson and Joseph's Digest.

VARIOUS rumours are in circulation at Osgoode Hall as to probable judicial appointments. At present nothing has been decided but it is thought probable that Mr. Justice Cameron may be promoted to the Court of Appeal. The profession will be glad to see Mr. Cameron appointed to any position which would be pleasant to himself, and there is no position on the Bench which he would not grace by his learning, talents and personal worth.

THIS journal has always endeavoured, so far as it could, to stand up for the interests of the profession and of the public generally, as against the machinations of legal quacks and unlicensed conveyancers. At vol. 18, p. 86, we called attention to enactments in Manitoba and Australia, which aim at putting a stop to this nuisance. All, except the aforesaid gentry themselves, will be glad to see that the Chancellor took occasion to speak out on the subject, with judicial calmness and force, in connection with the case of *Dunlap* v. *Dunlap*, in which he delivered judgment on the 20th inst. The learned Chancellor there says :—"This litigation affords another example of the mischief that arises from the employment of unlicensed persons in that branch of the law which, of all others, is most abstruse and technical. It is unsafe to entrust the preparation of instruments affecting real property to unskilled and unprofessional hands, and one cannot doubt that much bitter contention and many of the disastrous results of family litigation would be avoided if the law in this Province threw safeguards around the practice of conveyancing in some such way as is found efficacious in the Province of Manitoba."

A RECENT *Gazette* announces the appointment of William Davis Ardagh, recently Deputy Attorney General of Manitoba, and before that of the Ontario Bar, as County Judge of

the Eastern Judicial District of Manitoba. Mr. Ardagh commenced his professional career as a partner in the firm of which the late Hon. John Crawford, afterwards Lieut.-Governor of Ontario, and the present Chief Justice Hagarty, were partners. He was for many years connected with the editorial management of this journal in conjunction with the late Chief Justice Harrison (then at the Bar), and others. We claim to know whereof we speak when we say that the Government has been fortunate in being able to secure the service of one so competent as Mr. Ardagh for the position of County Judge for the judicial district which contains the City of Winnipeg. A sound lawyer of large experience of men and things, a most conscientious, painstaking, and industrious man, of the highest personal character, one who the longer he is known the more he is valued, he will not fail to give satisfaction to all whose opinion is worth having, in his new sphere of duty. We notice that his appointment is favourably spoken of in the Winnipeg papers, where they look forward to his relieving the Superior Court Judges to a considerable extent from the undue pressure of work which has fallen upon them.

THE LIQUOR LICENSE ACT, 1883.

So much has been said lately in the daily papers in respect to the alleged "sad mistake" of the person who drew the Dominion Licensing Act, that it will not be going beyond our province as a legal journal to consider wherein the supposed mistake is said to appear, and to discuss the question in the light of the ordinary rules for the interpretation of statutes. The Municipal Act, (R. S. O. c. 174, s. 74), as amended by the 42 Vict. c. 31, s. 2, Ont., enacts that, "No person who is a license commissioner, or inspector of licenses, or police magistrate, shall be qualified to be a member of the council of any municipal corporation;" on the other hand the Liquor License Act of 1883, or the McCarthy Act, as it has come to be called, provides (sect. 5) that, "There shall be a Board of License Commissioners, to be called 'the Board,' composed of three persons for each license district—the second commissioner shall be the warden of the county or mayor of the city. When there is both a warden and a mayor having jurisdiction within the license district, the former shall be second commissioner."

Behold, exclaim the objectors, a very palpable blunder. The "second commissioner" is like Kingsley's amphibious animal, which can't live on the land and dies in the water. Under the Ontario Act he can't exist in the municipal council, if he is a license commissioner, while under the Dominion Act he only exists by virtue of being the warden of the county or mayor of the city. We confess that there is a certain plausibility in all this. Let us see, however, whether the position is sustainable from a legal point of view, which is the one by which it must eventually be judged.

Now, no doubt, a statute may be said in a sense to "always speak." The operation of statutes is often extended to matters of subsequent creation: (Wilberforce on Statute Law, p. 166). But there are some modifying rules of statutory interpretation which have to be considered if we wish to discuss these two enactments in a judicial spirit, and from a judicial point of view.

Beyond question, if the objection be rightly taken, a blunder, if not a mischievous absurdity, has been perpetrated by the draftsman of the Dominion License Act. But it is laid down in the books that whenever the language of an enactment admits of two constructions, according to one of which it would be unjust, absurd, or mischievous, and according to the other, reasonable and wholesome, it is obvious that the latter must be adopted as that which the legislature intended: (Maxwell on Statutes, p. 179-180; Hard-

castle's Statutory Law, p. 29 sq.) And an example is cited which bears some analogy to the case under consideration. A certain by-law authorized the Poulterers' Company in London to fine "all poulterers in London or within seven miles round," who refused to be admitted into their company. The courts held that inasmuch as no poulterer could legally belong to the company who was not also a freeman of the city, the by-law was to be construed as limited to those poulterers who were also freemen: (*Poulterers' Company* v. *Phillips*, 6 Bing. N. C. 314). If the courts had held otherwise the unhappy poulterer who was not also a freeman would have been in almost as dreary a plight as that in which our "second commissioner" is alleged to be. He could'nt belong to the company because he was'nt a freeman, while on the other hand he would be fined for not belonging to the company because he was a poulterer.

Again, no doubt, a Dominion Act cannot in any way be supposed to repeal, or be intended to repeal, a Provincial Act, which is not *ultra vires*; but at the same time the principles on which the courts deal with supposed inconsistencies and repugnancies between two statutes *in eadem materia*, cannot fail to apply to the case of Dominion enactments and Provincial enactments which are supposed to be inconsistent and repugnant. Now it is laid down that if two statutes are inconsistent the greatest care will be taken and their provisions will be most strictly scrutinized before the Court comes to the conclusion that the earliest of the two is repealed by implication: (*Escot* v. *Martin*, 4 Moo. P. C. at p. 130; *Charlton* v. *Tonge*, L. R. 7 C. P. at p. 183; Wilberforce on Statute Law, p. 318). Not only is repeal by implication not favoured, but any construction involving it is to be rejected in favour of any other which the language will rationally bear: (Maxwell on Statutes, p. 134.) Again it is a general presumption that the legislature does not intend to exceed its jurisdiction: (*ib.* p. 118.) Lastly, when the objects of two apparently repugnant Acts are different, no repeal takes place: (*ib.* p. 153).

Let us then, bearing these rules and principles in view, again consider the two enactments under discussion. We say without hesitation no court would hold them to be repugnant. The Ontario Act says:—"No person who is a license commissioner *shall be qualified* to be a member of the council of any municipal corporation." The policy of the enactment is obvious. A license commissioner running for municipal office would have in his hand a great and potent weapon of corruption, no less a potent weapon than alcohol. Beer and the Bible are said to have carried the late Lord Beaconsfield into power, and whiskey without the Bible cannot but have its weight. The McCarthy Act in no way militates against this Provincial legislation. It merely provides that when once a man is established in office as warden of a county, or mayor of a city, he shall be *ex officio* one of the Board of license commissioners. Having, under the protection of the Ontario Act, been elected by the *sober* sense of the municipality to the chief office in its gift, who could be more fitted to legislate in the interests of sobriety and temperance? At all events, the policy which would debar the holder of municipal office from being a license commissioner, would be entirely distinct from that which debars a license commissioner from being a candidate for municipal office. The object of the one enactment is distinct from that of the other. The Ontario enactment aims at preventing a man who holds the position of license commissioner from standing for municipal office. The Dominion Act says that a man who *has attained* a certain municipal office shall be a license commissioner. The objects of the two Acts being different, and the one not interfering with the effectuation of the object of the other, they cannot be considered as inconsistent or repugnant.

LAW SOCIETY.

EASTER TERM.—46 VICT., 1883.

The following is the *resume* of the proceedings of the Benchers during Easter Term, published by authority :—

During this term the following gentlemen were called to the Bar, namely—C. L. Mahoney, (with honors), P. D. Crerar (with honors). Mr. Mahoney was awarded a gold medal and Mr. Crerar a silver medal.

The following other gentlemen were called, namely :—Messrs. R. W. Leeming, C. G. O'Brian, M. MacKenzie, C. W. Plaxton, Edward Poole, W. A. McLean, G. F. Ruttan, A. Foy, G. T. Ware, A. J. Williams, R. W. Armstrong, J. D. Gausby, A. D. Kean, David Lennox, L. C. Smith, A. E. W. Peterson, W. H. Brouse, F. E. Curtis, A. O. Beardmore. H. C. Hamilton, C. R. Irvine, J. F. Canniff.

The following gentlemen received certificates of fitness, namely :—Messrs. A. J. Williams, R. W. Leeming, C. L. Mahoney, C. G. O'Brian, P. D. Crerar, C. W. Oliver, M. MacKenzie, G. F. Ruttan, R. W. Armstrong, T. A. Snider, A. O. Beardmore, W. H. Brouse, A. D. Kean, L. C. Smith, J. J. A. Weir, C. E. Start, R. M. C. Toothe, A. P. E. Panet, W. H. Hewson, A. D. Howard, T. H. Dyre, W. H. Barry, J. Carruthers, J. B. Hands, J. Lane.

Mr. A. H. Macadams, who passed his examination last term, received his certificate of fitness.

The case of Mr. H. C. Hamilton was referred to the Legal Education Committee for report.

The following gentlemen passed the First Intermediate Examination (with honors) and were awarded Scholarships, namely :—Mr. G. H. Esten, First Scholarship, Mr. C. J. Mickle, Second Scholarship, Mr. A. McLean, Third Scholarship.

The following other gentlemen passed, namely :—Messrs. F. C. Powell, P. McCullough, H. J. Wright, S. Love, H. C. Fowler, W. T. McMullen, James Smith, F. A. Roe, W. N. Irwin, R. Armstrong, H. M. Mowat, E. A. Miller, G. H. Stephenson, A. G. Campbell, J. R. O'Reilly, W. H. Blake, I. F. Grierson, G. E. Burns, R. A. Dickson, E. T. Graham, F. H. Stoddart, M A. Everetts, Robt. Walker, H. W. Mickle, W. A. F. Campbell, W. B. Raymond, D. A. Haggart, A. Wilkin, E. W. Boyd, L. C. Raymond, E. M. Henry, J. Baird, T. Bennett.

The following gentlemen passed the Second Intermediate Examinations (with honors) and were awarded Scholarships, namely :—Mr. D. C. Ross, First Scholarship, ; Mr. J. A. Hutcheson, Second Scholarship ; Mr. W. A. Dowler, Third Scholarship. The following other gentlemen passed, namely :—Messrs. G. W. Field, R. V. Sinclair, H. B. Elliott, Jno. Greer, J. Denovan, A. G. Murray, W. M. Brown, T. J. F. Hilliard, W. D. Gwynne, R. Christie, H. G. MacKenzie, A. Burwash, J. T. Sproule, A. C. D. McIntyre, A. E. Overell, G. C. Thomson, A. C. Muir, J. W. Ryerson, W. C. Livingstone, A. J. Richardson, T. E. Williams.

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

GRADUATES—Robert Franklin Sutherland, Archibald MacDonald Ferguson, Walter Hunter, Calvin Donald Hossack, Ed. Albert Holman, Edmund James Bristol.

MATRICULANTS—S. W. Burns, R. A. Grant, F. H. Kilbourne, A. J. Forward, H. J. Snelgrove.

JUNIOR CLASS—A. M. Grier, H. I. Cowan, G. H. Douglas, W. E. Hastings, A. D. Scatcherd, M. H. Burtch, J. B. Davidson, R. H. Hall, W. Lawson, W. C. P. McGovern, F. E. Walker, C. Horgan, R. R. Ross, C. A. Ghent, H. N. Rose, J. R. Code, F. W. Carey, D. Sinclair, W. Stafford, J. Fraser, W. Geary, H. M. Clelland, S. R. Wright, A. McNish, G. M. Brodie.

Mr. Donald Ross was allowed his examination as an articled clerk.

May 21st, 1883.

Present :—Messrs. Crickmore, Moss. J. F. Smith, Murray, Irving, Bethune, Leith and S. H. Blake.

The Report of the Reporting Committee on the subject of the Supreme Court Reports was presented by Mr. J. F. Smith.. Ordered that it be considered on Saturday, 26th instant.

The Report of the Special Committee on the subject of the formation of a Benevolent Fund was presented by Mr. Murray. Ordered that it be considered on Saturday, 26th instant.

Mr. Murray gave notice that on Tuesday, the 22nd instant, he would move the appointment of a committee to consider and report on the subject of remuneration of Counsel and Solicitors and of preventing unqualified practitioners and conveyancers from receiving remuneration. And that such committee should have power to add to their numbers as well from members of the Society who are not of the Bench as from members of the Bench. And that an appropriation be made from the funds of the Society to defray the necessary expenses of printing, postages, &c., and the travelling expenses of any member of the outside Bar.

Mr. J. F. Smith gave notice that he would on Saturday the 26th instant, move that Trinity Term of this Society, for the year 1883 and thereafter, commence on the first Monday after the 21st September in each year, and that the examinations which should be held in August in this year and each succeeding year be held in the third, second, and first weeks in September instead of in the same weeks in August, and that rule 3 of the rules of the Society be amended accordingly.

Mr. Murray gave notice that he would on Saturday, the 26th instant, move that the meetings and also the examinations in Trinity Term be abolished.

LAW SOCIETY.

Tuesday, 22nd May, 1883.

Present—Messrs. Leith, Martin, Crickmore, Maclennan, S. H. Blake, Foy, Murray, Irving, J. F. Smith, Bethune, Read, Ferguson.

On motion of Mr. Murray in the absence of the Treasurer, Mr. Irving was appointed Chairman.

Mr. Maclennan, in the absence of Mr. Hoskin, the Chairman, presented the Reports of the Discipline Committee in the several matters of, O'Brian *v.* Butterfield; John B. Wood, and Wm. E. Grace.

The Report *re* O'Brian and Butterfield was received and read, ordered for immediate consideration and adopted.

Ordered that the Secretary do transmit copies of the Report to both Mr. O'Brian and Mr. Butterfield and inform them that it was adopted by convocation.

The Report *re* John B. Wood was received and read, ordered for immediate consideration, and adopted.

Ordered that the Secretary do inform Mr. Wood of the conclusion arrived at.

The Report *re* W. E. Grace was received and read, ordered for immediate consideration and adopted.

Ordered that the Secretary do inform Messrs. Grace, Campion and Johnston of the decision in their case.

Moved by Mr. Maclennan, seconded by Mr. Read, and ordered, that the Secretary do inquire and state on Saturday next the name of the Solicitor to whom Mr. H. H. Bolton is now under articles of service; and further, that the Solicitor's attention be called to Mr. Bolton's letter paper, and that he be asked for any explanation he may be desirous of making.

The office of Examiners and Lecturers having become vacant, ordered that the Secretary cause to be published the usual advertisement for four gentlemen to fill the vacant positions, the applications to be in the Secretary's hands not later than 30th May.

Ordered that a call of the Bench be made for Friday, the 1st day of June next, at which meeting the Examiners are to be appointed.

Mr. Read, pursuant to notice, moved that the thanks of Convocation be given to the Treasurer and Messrs. Wicksteed and Irving for the assistance given by them in procuring original copies of the Consolidated Statutes for the Library.

Carried.

Saturday, 26th May, 1883.

Convocation met.

Present—The Treasurer, and Messrs. Leith, Crickmore, Murray, Irving, Moss, J. F. Smith, Robertson, Foy, Cameron, Kerr, Guthrie, and Bethune.

The Minutes of last meeting were read and approved. Mr. Crickmore moved, seconded by Mr. Murray, that Mr. Blake be Treasurer of the Society for the ensuing year.—Carried unanimously.

Ordered that the Chairman of the several standing Committees for last year and Mr. Moss be appointed a Committee to select and report names of members of Convocation for the various standing Committees for the ensuing year.

Mr. Crickmore, from the said Committee, reported the following lists. namely:—

Legal Education.—A. Leith, J. H. Ferguson, C. Moss, J. Hoskin, J. F. Smith, D. Guthrie, T. B. Pardee, J. MacKelcan, J. Crickmore.

Library.—J. Bethune, H. Cameron, J. Beaty, Dr. McMichael, J. H. Ferguson, C. Moss, S. H. Blake, J. Bell, A. Irving.

Discipline.—A. Leith, J. Maclennan, J. Beaty, J. K. Kerr, T. Robertson, H. C. R. Becher, E. Martin, Dr. McMichael, J. Hoskin.

Finance.—J. J. Foy, J. Crickmore, E. Martin, S. H. Blake, L. W. Smith, H. W. M. Murray, W. R. Meredith, A. S. Hardy, D. B. Read.

Reporting.—J. Bethune, B. M. Britton, H. Cameron, F. MacKelcan, D. McCarthy, J. F. Smith, H. C. R. Becher, E. Martin, J. Maclennan.

County Library Aid.—A. Hudspeth, H. Cameron, H. C. R. Becher, W. R. Meredith, T. Robertson, B. M. Britton, A. S. Hardy, E. Martin, J. K. Kerr.

Journals of Convocation.—C. F. Fraser, J. J. Foy, J. Maclennan, T. B. Pardee, J. K. Kerr, J. Hoskin, C. Moss, D. McCarthy, B. M. Britton.

Ordered that the standing Committees do consist of the gentlemen named in the lists reported.

Mr. Murray moved, pursuant to notice, that the meetings and also the examinations in Trinity Term be abolished.

Ordered that the whole questions raised by Mr. Murray's and Mr. Smith's notices be referred to the Legal Education Committee to report at the next meeting of Convocation.

Mr. Murray moved, pursuant to notice, and it was ordered, that a committee composed of Messrs. Leith, Murray, Read, and Irving, be appointed to confer with members of the Bar as to the propriety of extending an invitation to Chief Justice Coleridge on the occasion of his visit to America, and, if thought advisable, to call a meeting of the Bar for the consideration of the matter and for taking such action as may be thought proper.

Mr. Hector Cameron gave notice that he would at the next meeting of Convocation move that no higher or exceptional fee should be charged to persons to be called to the Bar under sub-sections 3, 4 and 5 of section 1 of chapter 139 of the Revised Statutes of Ontario than to those applying for call under sub-section 1 and 2.

The Report of the Legal Education Committee containing the returns of the working of the Law School was presented by Mr. Crickmore.

Mr. Murray gave notice that he would on Friday, the 1st day of June next, move that the Law School as it at present exists be continued for a further term.

LAW SOCIETY.

Friday, June 1st, 1883.

Convocation met.

Present—The Treasurer, and Messrs. Maclennan, S. H. Blake, Moss, Ferguson, Crickmore, Hudspeth, Foy, Irving, Robertson, Leith, MacKelcan, Kerr, Britton, L. W. Smith, J. F. Smith, Murray, Read, Martin, Bethune, Guthrie and McCarthy.

Mr. Crickmore, from the Legal Education Committee, reported on the notices of motion as to Trinity Term referred to that Committee, as follows :

REPORT AS TO TRINITY TERM.

To the Benchers of the Law Society in Convocation.

The Report of the Legal Education Committee upon the reference to them by Convocation as to proposed change in the commencement of Trinity Term, beg to report as follows :—

1. That having regard to the interests of the Students and their course of study and the intermediate examination as well of the students as the articled clerks, it is expedient that there be as little change as possible in the times of the commencement of the present terms of the Society.

2. That as many of the Benchers have expressed a desire that they should not be required to meet in Convocation during the long vacation in the Courts, which is now extended to the first of September, your Committee have considered that a change of the commencement of Trinity Term from the first Monday after the twenty-first of August to the first Monday in September may be made without causing any inconvenience in the course of study and examinations of the students.

3. Or, Trinity Term may be made to commence on the second Monday in September, and the length of the term shortened to that week.

4. That the usual examinations before Term may, without inconvenience, take place at the same relative times before Term as at present.

Signed, JOHN CRICKMORE.

The Report was read and received, and ordered for immediate consideration.

Mr. Crickmore moved that the meeting of Convocation for Trinity Term do hereafter begin on the first Monday in September, and that the several examinations for that Term be fixed with reference to that day as the first day of the Term. Ordered accordingly.

Mr. Crickmore, from the Committee on Legal Education, reported on the subject of the applications for examinerships.

Mr. Delamere was elected Examiner on Commercial and Common Law. Mr. Armour was elected Examiner on Real Property. Mr. Marsh was elected Examiner on Equity. Mr. Reeve was elected Examiner on Criminal Law, the Law of Torts, and Maritime Law.

Mr. Murray moved, pursuant to notice, that the Law School be continued for the further term of two years.

Mr. MacKelcan moved in amendment to substitute the words "one year" for "two years."

Amendment carried.

The main motion as amended was carried as follows :—

Ordered that the Law School be continued for a further Term of one year.

Mr. Maclennan moved the adoption of the Report of the Committee on Reporting, recommending that the subscription to the Supreme Court Reports be continued for another volume and that twelve hundred copies be ordered, at one dollar and fifty cents per copy.

Mr. Robertson seconded the motion, which was carried.

Saturday 9th June, 1883.

Convocation met.

Present—Messrs. Crickmore, Irving, Meredith, MacKelcan, Bethune, J. F. Smith, Moss, Read, S. H. Blake, Murray and H. Cameron.

In the absence of the Treasurer, Mr. Maclennan was appointed Chairman.

Mr. Murray moved second and third reading of the rule relating to the Law School.

The rule was read a second and third time and passed as follows :—

RULE FOR THE CONTINUATION OF THE LAW SCHOOL.

1. The Law School is hereby continued until the last day of Easter Term, 1884, subject to the rules passed by this Society on the establishment of said School in Michaelmas Term, 1881, as hereby amended.

2. Rule No. 9 respecting the Law School is hereby repealed, and the following substituted therefor :

The Lecturer for the time being who has held the position for the longest period, shall be the chairman of the Law School.

Mr. Smith moved the following rule in accordance with the report of the Legal Education Committee on the subject of Terms, namely :

RULE AS TO TERMS.

Rule 3 shall be repealed, and the following rule substituted therefor :

3. The Terms of the Society shall be the same as provided for by sect. 11 of the Superior Courts of Law Act, except that Trinity Term shall begin on the first Monday in September, and shall end on the Saturday of the following week.

The rule was read a first, second and third time and passed.

Mr. Cameron moved, pursuant to notice, seconded by Mr. Crickmore, that no higher or exceptional fee should be charged to persons to be called to the Bar under sub-sections 3, 4 or 5 of section 1 of chap. 139 of the Revised Statutes of Ontario, than to those applying for Call under sub-sections 1 and 2.

Mr. Moss moved in amendment, seconded by Mr. Blake, that the subject of the motion gener-

ally be referred to a special committee of Messrs. MacKelcan, Crickmore, Bethune, J. F. Smith, Maclennan, and H. Cameron. Carried.

It was moved by Mr. Crickmore, seconded by Mr. Meredith, and ordered, that a book be procured in which shall be entered all rules of Convocation as the same shall be passed or altered, and those which have already been passed since consolidation, and that it be referred to the Committee on Journals of Convocation and Printing, to carry into effect this resolution.

Convocation adjourned.

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

PRACTICE.

BINGHAM v. HENRY.

Practice—Evidence on commission—Professional expert.

[June 7—Mr. DALTON, Q.C.

In this action, which was brought by certain persons, who were grain dealers and commission merchants, to recover a balance alleged to be due them by the defendant on certain transactions connected with the purchase of corn by the plaintiffs for the defendant in New York, the plaintiffs obtained an order for a commission on interrogatories to New York, to examine, amongst others, one Erastus Cooke, and delivered the interrogatories to be administered to the defendant in accordance with the practice.

The interrogatories were as follows :—

1. By what law are the rights of principal and agent governed in transactions such as those set out in said copy of proceeding, where such transactions are entered into in the City or State of New York?

2. According to said law what are the rights and liabilities and duties of the principal in such transactions where the circumstances are similar to those set out in what is called the statement of claim herein?

3. According to said law what are the rights, liabilities and duties of the agent in such transactions where the circumstances are similar to those set out in said statement of claim?

On June 6, 1883, *Lefroy* moved to strike out the above interrogatories on the ground, among others, that they were evidently addressed to a professional witness, and it was not proper that the evidence of professional men, or experts of any kind, should be taken on commission. Such witnesses should be produced at the trial. He referred to *Russell* v. *Great Western Ry. Co.* 3 U. C. L. J. 116.

H. J. Scott, contra.

Mr. DALTON, Q.C.—The questions objected to refer to the law of New York State applicable to the contract between the parties. The objections are rather to the issue of a commission for the purpose of such evidence. The question would seem to require almost a treatise on the law of the State on the subject. It is urged that cross-examination will be necessary. It would be better that the evidence should be taken in open court. It is impracticable to frame cross-interrogatories to such general questions. To save expense and time I refer this motion to the learned judge in Chambers. See L. R. 1 P. D. 107 ; 20 Ch. D. 760.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

COTTON CO. v. CANADA SHIPPING CO.

Sale by agent—Undisclosed principal—Tender and plea of payment.

Action by respondents to recover the price of a cargo of 810 tons of coal sold by I. M. & Co., their agents, through W., a broker. They bought and sold notes, stated that the coal, 810 tons, was sold to arrive at $3.75 per ton of 2240 lbs., "buyers to have privilege of taking bill of lading or re-weighing at sellers' expense." I. M. & Co. were known to be general agents of the respondents. The appellants elected to have the coal as per bill of lading without having it weighed, but three weeks later, on weighing it in their own yard, without notice to the vendors, they found the cargo to contain only 755 tons 580 lbs. The appellants pleaded that their contract was with I. M. & Co., and that the respondents had no action; and by a second plea they alleged that they had offered part of the amount claimed to I. M. & Co.

which they had tendered to the respondents without acknowledging their liability, which sum they now brought into Court.

Held, affirming the judgment of the Court of Queen's Bench, (FOURNIER and HENRY, JJ. dissenting),

1. That by their plea of tender and deposit in in Court the appellants had acknowledged their liability to the respondents on the contract.

2. That under the circumstances the appellants were prevented by their agreement from claiming a reduction in the price for the deficiency in quantity.

Beigue and *Trenholme* for the appellants. *Leflamme*, Q.C., and *Davidson* for respondents.

G. T. R. Co. v. WILSON.

Verdict—Motion for judgment on verdict—Motion for new trial—34 Vict., cap. 4, sec. 10.

The respondent obtained verdict from a jury in the Superior Court District of Iberville, for injuries caused by the negligence of the appellants. The motion for judgment on the verdict was not made before the Superior Court, District of Iberville, but was drawn up and placed on the record while the case was pending before the Court of Review at Montreal. That Court, on motion, directed a new trial, but the Court of Queen's Bench, on appeal, held that the jury having found that the respondent was lawfully on the highway when the accident occurred and that the appellants could, by the exercise of ordinary care and diligence, have avoided it, rejected the motion for a new trial and directed judgment to be entered for the respondent.

Held, TASCHEREAU and GWYNNE, JJ. dissenting), that the Queen's Bench was right.

Per TASCHEREAU and GWYNNE, JJ. The Superior Court sitting in review at Montreal has no jurisdiction to determine a motion for judgment upon the verdict in a case tried in one of the rural judicial districts, and therefore the Court of Queen's Bench had no power to enter judgment for the respondent upon the verdict.

Per GWYNNE, J.—The Court of Review, on a motion for new trial in the first instance, having in its discretion granted same, judgment should not have been reversed on appeal.

S. Bethune, Q.C., and *McRae*, for appellants. *Carter*, Q.C., and *Dawson* for respondent.

SHAW v. ST. LOUIS.

Appeal to Supreme Court of Canada—Final judgment as to part of demand.

The respondent claimed of the appellants $2,125.75 balance due on building contract. The appellant denied the claim, and by incidental demand claimed $6,368 for damages resulting from defective works. On 27th March, 1877, the Superior Court gave judgment in favour of the respondent for the whole amount of his claim, dismissing the appellants' incidental demand. This judgment was reversed on review on 29th December, 1877. On 24th November, 1880, the Court of Queen's Bench held that the respondent was entitled to the balance claimed by him from which should be deducted the cost of rebuilding part of the defectively constructed work, in order to ascertain which the case was remitted to the Superior Court, by whom experts were appointed to ascertain the damage, and on their report the Superior Court on 18th June, 1881, held that it was bound by the judgment of the Court of Queen's Bench, and deducting the amount awarded by the experts from the balance claimed by the respondent gave judgment for the difference. This judgment was affirmed by the Court of Queen's Bench on 19th January, 1882.

Held, on appeal, that the judgment of the Queen's Bench of the 24th November, 1880, was a final judgment as to the merits, referring to the Superior Court only the question of the cost of re-building, that the Superior Court, when the case was remitted to them, rightly held that it was bound by that judgment, and that the respondent was entitled to the balance thereby found due to him, and therefore this appeal should be dismissed.

Kerr, Q.C., for the appellants.

Doutre, Q.C. and *Ouimet*, Q.C, for respondents.

BAIN v. CITY OF MONTREAL.

Assessment for flagstone paving—Resolution of City Council—Validity of proceedings—Onus of proof—37 Vict, cap. 51, sec. 192 (Q.)—C. C. arts. 1047, 1048.

Under 37 Vict., cap. 51, sec. 192 (Q), the respondents' Council, adopting the reports of the road and finance committees, ordered a flagstone paving to be laid in front of the appellant's property, amongst others, half of the cost to be

paid by means of a special assessment on the proprietors and usufructuaries in proportion to the frontage of their properties. The appellant was assessed on 27th January, 1877, and during 1877 and 1878 she paid the assessment, including interest, in three instalments, two payments being made after notice and request given and made under the above Act, and the third without notice. She made the payments without protest or reserve and without objecting to the construction of the pavement. The action was brought to recover the amount so paid.

Held, affirming the judgment of the Court below, (HENRY and GWYNNE, JJ., dissenting) that the presumption was that, when the appellant paid the amount of the assessment, she was aware of the grounds on which she now relies to recover the amount, and that the payments were not made through error nor under *contrainte*, but voluntarily.

Held, also, that the respondents in laying pavements in parts of the City, only the cost of which was to be paid by assessment according to the frontage of the respective properties and not in proportion to the cost of the part laid opposite each property, were acting within the scope of the power conferred upon them by 37 Vict., cap. 51, sec. 192.

Barnard, Q. C. and *Creighton*, for the appellants.

Rae, Q. C., for the respondents.

BANK OF MONTREAL v. PERKINS.

The Banking Act—Advances on Real Estate.

B., on 29th January, 1876, transferred to the appellants by notarial deed an hypothec on certain real estate in Montreal, made by one C. to him, as collateral security for a note which was discounted by the appellants and the proceeds placed at B.'s credit on the same day on which the transfer was made. The action was brought by the appellants against the insolvent estate of C. to set aside a prior hypothec given by C. and establish their priority over it.

Held, affirming the judgment of the Court of Queen's Bench, that the transfer by B. to the appellants was null and void as being in contravention of the Banking Act, 34 Vict., cap. 5, sec. 40.

Laflamme, Q.C., for the appellants

Benjamin, for the respondents.

REGINA v. MCLEOD.

Petition of Right—Government Railway—Negligence—Crown, not common carriers.

The suppliant purchased a first-class ticket to travel from Charlottetown to Souris, on the P. E. I. Railway, which is owned by the Dominion of Canada, and worked under the management of the Minister of Railways, and while on his journey he sustained serious injuries, the result of an accident to the train. The learned Judge at the trial found that the road was in a most unsafe state from the rottenness of the ties, and that the safety of life had been recklessly jeopardized by running trains over it with passengers, and that there had been a breach of the contract entered into by Her Majesty through her authorized agent to convey the suppliant safely and securely on said journey, and he awarded $36,000 damages.

Held, (FOURNIER and HENRY, JJ., dissenting) that the establishment of Government Railways in Canada is a branch of the public service, created by Statute for purposes of public convenience, and not entered into upon or to be treated as private mercantile ventures, and therefore, that a petition of right does not lie against the Crown for injuries resulting from the non-performance, misfeasance, wrongs, negligence, or omission of duty of the subordinate officers or agents employed in the public service.

Held, also, that the Crown not being a common carrier, is not liable for the safety and security of passengers using government railways.

Lash, Q.C., and *Hodgson*, Q.C., for the Crown.

Davis, Q. C., and *A. F. McIntyre*, for the respondent.

GIRALDI v. LA BANQUE JACQUES CARTIER.

Agency—Payment—C. C., art. 1143—Parties.

S. Giraldi acquired during the life of his first wife, M. A. Bosna, who died in 1845, certain immoveable property which formed part of the *communante de biens* existing between them. At his death, in 1869, after his marriage with Henriette Senecal, his second wife, he was greatly involved. His widow, H. S., having accepted, *sous benefice d'inventaire*, the universal usufructuary legacy made in her favor, by S. G., continued in possession of his estate as well as of that of M. A. Bosna, the first wife, and administered both, employing one G, to collect,

pay debts, &c. Shortly afterwards, at a meeting of S. G.'s creditors, of whom the respondents were the chief, a resolution was adopted authorizing H. S. to sell and licitate the properties belonging to S. G., with the advice of an advocate and the cashier of the respondents, two of the creditors, and promising to ratify anything done on their advice, and they resolved that the moneys derived from the sale or licitation of the properties should be deposited with the respondents, to be apportioned amongst S. G.'s creditors, *pro rata*. G. continued to collect the fruits and revenues and rents and acted generally for H. S. under the advice aforesaid, and deposited both the moneys derived from the estate of S. G. and those derived from the estate of M. A. Bosna, the first wife, with the respondents, under an account headed "succession, S. Giraldi." The Bank subsequently paid out some of these monies on H. S.'s cheque. At her death there remained to the credit of the account "succession, S. Giraldi," a sum of $9,635.59, for which this action was brought by the heirs and representatives of Dame M. A. Bosna.

Held, (*per* STRONG, TASCHEREAU and GWYNNE, JJ. RITCHIE, C. J. and FOURNIER and HENRY, JJ., contra) that as between the heirs Bosna and the Bank there was no relation of creditor and debtor, nor any fiduciary relation, nor any privity whatever; and as the moneys collected by G., belonging to the heirs Bosna, were so collected by him, as the agent of H. S., and not as that of the Bank; and, as the representatives of H. S. were not parties thereto, the appellants could not recover the moneys sued for.

Beigue and *Trenholme*, for the appellants.

Globensky, Q.C., for the respondents.

HARRINGTON v. CORSE.

Will, construction of—C. C. art. 889—Direction of testator to pay debts—Legatee of hypothecated property.

On 30th April, 1869, H. S. being indebted to J. P. in $3,000, granted an hypothec on certain real estate. On 28th June, 1870, H. S. made his will, which contained, amongst others, the following clause:—"That all my just debts, funeral and testamentary expenses, be paid by my executors, etc." By another clause he left to W. H., the appellant, in usufruct, and to his children in property, the real estate which he had hypothecated.

Held, reversing the judgment of the Court of Queen's Bench (STRONG, J., dissenting): 1. That the direction to pay debts included the debt of $3,000 secured by the hypothec.

2. That under art. 889 of the Civil Code a particular legatee is not liable without recourse against the heir or universal legatee for a debt of the testator's secured by hypothec on the immoveable property bequeathed to him.

Doutre, Q.C., for the appellant.

Strachan Bethune, Q.C., and *Robertson*, for the respondants.

QUEEN'S BENCH DIVISION.

IN BANCO.

JACKSON v. CASSIDY.

Promissory note—Attachment.

A negotiable promissory note not yet due, cannot be attached under Rule 270 O. J. A.

REGINA v. MALCOLM ET AL.

Trespass—Fair and reasonable supposition—C. S. U. C. cap. 105, 25 Vict. cap. 22, 33 Vict. ch. 27, sect. 2—Conviction—Certiorari.

The defendants were convicted of a trespass under C. S. U. C. cap. 105, as amended by 25 Vict. cap. 22. They appealed to the Sessions, which affirmed the conviction. The conviction was then brought into this Court, and a motion was made to quash it on the ground of want of jurisdiction in the convicting justice, inasmuch as it appeared by the evidence, and by affidavits filed, that the defendants acted under a fair and reasonable supposition that they had the right to do the acts complained of within the meaning of the above statutes.

Held, that that was a fact to be adjudicated upon by the convicting justice upon the evidence, and therefore that a *certiorari* would not lie for want of jurisdiction.

W. H. P. Clement, for the motion.

Aylesworth, contra.

TROTTER v. CHAMBERS.

Married woman—Separate property.

The plaintiff and her husband were married before 1859. In 1870 he, being free from debt, purchased land and had it conveyed to his wife, the plaintiff, who, with the rents and profits there-

of, she and her husband not living on the land, with money raised by mortgage thereof, and with money borrowed from her sons, the plaintiff purchased the chattels in question herein, which were seized under execution against the husband.

Held, that the chattels were her separate property within the meaning of R. S. O. cap. 125, sect. 1, and free from the debts of her husband.

Armour, J.] [May 16.

REGINA v. CLARKE.

Conviction—House of ill-fame—32-33 Vict. c. 32.

Held, that a conviction under 32-33 Vict. c. 32, sect. 2, ss. 6, for being an *unlawful* (instead of an *habitual)* frequenter of a house of ill-fame, and which adjudged the payment of costs, which is unauthorized by the statute, must be quashed.

That section makes the being such habitual frequenter a substantial offence, punishable as in sect. 17, and does not merely create a procedure for trial and punishment.

In Banco.] [May 26.

O'BRIEN v. CLARKSON.

Assignment in trust for creditors—Trustee's powers.

An assignment in trust for creditors contained a clause which, amongst other things, empowered the trustee to sell for cash or on credit, and *with or without security*, for the unpaid purchase money.

Held, that the introduction of the words "with or without security," was immaterial, and did not invalidate the assignment, there being no proof of any design on the part of the debtors to so enable the trustee to unfairly delay the realization of the assets.

In Banco.] [May 26.

CANAVAN v. MEEK.

Sale of land—Assumption of mortgage by purchaser—Liability to pay off and protect vendor.

M. conveyed land to the plaintiff subject to a mortgage to the T. & L. Co. for $2,000, and one to C. for $500, which the plaintiff covenanted to pay, and save M. harmless therefrom. The plaintiff then conveyed to the defendant in consideration of "$1,050 and assuming the payment of the mortgages" aforesaid, the defendant gave back a mortgage for the balance of purchase money. He went into possession and paid some interest on the T. & L. Co. mortgage. Subsequently a new arrangement was made and the defendant's mortgage was discharged, and a mortgage for $1,850 was given by the defendant to the plaintiff, which included the amount of three promissory notes for $350 and other items besides the balance of the purchase money. There was no covenant for payment therein. The T. & L. Co. mortgage fell due and was not paid, and the plaintiff paid C.'s mortgage of $500.

Held, that the defendant was bound to pay off the T. & L. Co. mortgage, and relieve the land therefrom, and indemnify the plaintiff against it if personally liable thereon.

CHANCERY DIVISION.

Boyd, C.] [June 6.

MAGURN v. MAGURN.

Alimony—Foreign divorce—Marriage—Domicil.

Action for alimony. The defendant was born at Kingston, in 1845. He went to the States in 1862, and travelled about there from place to place till 1868, when he took up his residence in St. Louis till April, 1870. He then began going round the country on the business of his firm, returning to St. Louis at intervals, but not residing there till 1875. In October, 1870, he married the plaintiff at Detroit. He and his wife travelled together for the most part of the interval between that and the close of 1873, when they rented a house at Kingston, and lived there till May, 1875. In 1875 the husband returned to St. Louis, and lived there till April 10, 1876. Then he took his wife to St. Joseph, in Missouri, returning himself to St. Louis. He filed a petition for divorce in the Circuit Court of Missouri, on April 26, 1877, on the ground that his wife had for a year deserted him; the decree for divorce was obtained by default, after personal service on the wife on June 19, 1877. In September, 1877, the defendant married again and went to England, where he lived till September, 1881, when he returned to Toronto. The evidence showed that the plaintiff's residence at St. Louis was in order to comply with the law of Missouri, by which it is necessary that the plain-

tiff should reside in the State at least one year before bringing a suit for divorce.

Held, the divorce did not operate in this Province so as to bar the plaintiff's claim for alimony. The domicil of the husband, both at the time of the marriage and at the time of the divorce, was Canadian. His domicil of origin was Canadian, and it was never changed during his wandering and unsettled life in the States, the original domicil of the defendant continued unless he proved that he settled in that foreign country with the intention of abandoning that domicil, which he had not proved. A *de facto* removal to a home in the new country with an *animus non revertendi* and an *animus remanendi* was necessary to change the domicil. No such settled and fixed intention on the plaintiff's part of adopting the States as his home was shown here. And though his residence in the States might have been sufficient to justify the annulment of the marriage as regards the particular State or the United States, this had no such effect as regards the rights of the wife in Ontario, for with regard to the rights, duties, and obligations arising from marriage, the law of the domicil must be looked to.

J. Maclennan, Q.C., for the plaintiff.
S. H. Blake, Q.C., for the defendant.

Boyd, C.] [June 6.

BANK OF OTTAWA v. MCMORROW.

Evidence—Onus—Promissory note not duly stamped till after repeal of Stamp Act—31 Vict., c. 1, ss. 3, 7—42 Vict. c. 17, s. 13—45 Vict., c. 1.

Where the defendant, being sued on a promissory note, did not dispute the signing thereof, nor the consideration, but swore that the said note was not duly stamped before the repeal of the Stamp Act, nor until after action brought, although he had communicated the fact of that omission to the plaintiffs before he was sued; and the plaintiffs denied that the defendant had so notified them; and the evidence showed that when the note came to the plaintiffs' hands it appeared to be properly stamped.

Held, the defendant could not be allowed, upon his own unsupported testimony, in such a case, to escape liability. The *onus* was on him to establish that the stamp was not duly affixed, and that the omission to duly stamp was *so intelligibly* communicated to the plaintiffs that it could be said they acquired the knowledge of the defect at the time alleged by the defendant before action.

To cure defect in stamping by double stamping forthwith was, under the Stamp Act, 42 Vict., c. 17, sec. 13, an inherent right, existing during the currency of the instrument, and accompanying its possession; and, since under the Interpretation Act, 31 Vict., c. 1, ss. 3, 7, vol. 36, the repeal of an act shall not affect any right existing or accruing before the time of the repeal, therefore the said right still exists notwithstanding the repeal of the Stamp Act.

Christie, for the plaintiff.
Mahon, for the defendants.

Boyd, C.] [June 6.

CLOW v. CLOW.

Will—Construction—Tenant for life—Waste.

A testator devised certain land as follows:—"I will devise and bequeath unto my wife for and during her natural life all that parcel of land (describing it). . . . I also will and bequeath unto her, my beloved wife, everything real and personal, within and without; and it is hereby understood that the property above described shall be under the control of my said beloved wife. After the demise of my wife it is my will and pleasure that the aforesaid real estate shall descend to my nephew and his heirs."

The testator had no other real estate than the said land, and there was nothing to which his language, importing that his wife was to have control of everything real, as well as personal, could be referable, unless it affected the said land.

Held, the intermediate clause had no effect on the life estate expressly given to the wife, and there was nothing to change or enlarge the usual character of such a life estate, so as to render the tenant for life dispunishable for waste.

White v. *Briggs*, 15 Sim., 17; S. C. in app. 2 Phil., distinguished.

Deacon, for plaintiff.
Webster, for defendant.

Wilson, C. J. C. P.] [June 6.

MARTIN v. MILLS.

Right of tenant to redeem—Waiver—Confirmation of lease by mortgagee.

A tenant for years may redeem a mortgage. There is, however, no absolute right of redemp-

tion. It rests in the discretion of the Court to grant it or refuse it, according to circumstances. The lease must be a beneficial one to the tenant.

Held, in this case, where a tenant for years under a demise made subsequent to a mortgage, sought to redeem the lands in the hands of the mortgagee, who had obtained an order for foreclosure in a suit to which the present plaintiff was not a party, the lease being a beneficial one, the plaintiff had a right to redeem, in the event of the mortgagee refusing to accept him as a tenant.

Held also, although the plaintiff had at one time, before commencing this action, offered to give up possession on payment of $40, yet inasmuch as this offer had not been accepted by the defendant or acted upon at any time, the plaintiff had done nothing to waive or prejudice his rights of redemption as such lessee by such offer.

After action brought for redemption, however, the defendant (the mortgagee who had foreclosed) offered to confirm and adopt the the lease held by the plaintiff. Before action brought the defendant had refused so to do, and had, indeed, sold the property to a purchaser, said sale being not made subject to the lease. The purchaser had full notice of the lease :

Held, the tardiness of the defendant in consenting to affirm the lease, only affected the costs ; the defendant had done nothing that debarred her from confirming the lease and accepting the plaintiff as tenant, and as she was willing now to confirm the lease, the plaintiff could not redeem.

It may be said, as a rule, that every one having an interest from the mortgagor in the land, can redeem the mortgagee.

Arnoldi, for the plaintiff.
Beck, for the defendant.

Wilson, C. J. C. P.] [June 6.

VARDON v. VARDON.

Action for alimony—Right of plaintiff to compromise—Rule 97—Enforcement of compromise—Separate negotiations for settlement carried on simultaneously between clients and their solicitors respectively—"Without prejudice."

A married woman can not only bring an action for alimony against her husband in her own name, but she can also compromise it, or deal with it as she pleases, just as any other suitor can : *Beasant* v. *Wood*, L. R. 12 Ch. D.; *Hart* v. *Hart*, L. R. 18 Ch. D. 670.

If the plaintiff and defendant have agreed to certain terms of settlement of such a suit, such contract can be enforced against the defendant : *Wilson* v. *Wilson*, 1 H. L. Cas. 538.

If, in such a case, negotiation with a view to a settlement are carried on between the parties by means of letters marked "without prejudice," and if, by means of such letters, a perfect contract has been come to between the parties, the letters may be given in evidence to prove the binding contract notwithstanding the restrictive words.

If parties to an action authorize their solicitors to enter into negotiations for a settlement, and while the negotiations are proceeding, one party, unknown to his solicitors or to the solicitors of the other party, writes to the other party personally withdrawing from the negotiations, and the respective solicitors, not knowing what has taken place between their clients meanwhile, conclude the terms of a settlement, such settlement will not be binding on the party who had thus withdrawn from the negotiations, because the other party had direct notice of his withdrawal. In such a case the one principal has direct notice from the other principal that the negotiations have been put an end to.

Semble, if in such a case the principals had, between themselves, entered into an agreement, and the solicitors, in ignorance of what the clients were doing, had previously concluded a different agreement, the agreement made by the solicitors would bind, because prior in time, and made by and under the full authority of the principals.

On the same reasoning where the two principals negotiate, and either perfect a contract or put an end to proposals for one before the delegated power to their agents has been fully exercised, the acts of the principals are the binding acts, and the subsequent acts of the agent are of no avail as against their principals.

Blackstock, for the plaintiff.
Bain and *Gordon*, for the defendant.

Wilson, C. J. C. P.] [June 6.

EDWARDS v. MORRISON.

Mortgage—Priority—Notice.

On April 4, 1863, M. the owner of land, mortgaged in fee to the Canada Permanent L. & S. Com-

pany, his wife barring dower. On May 21, 1867, M. conveyed to a trustee to the use of his wife in fee. This deed was void as against creditors. On March 14, 1868, M. mortgaged the same land to the company in fee, his wife barring dower. On Dec, 17, 1872, M. again mortgaged the same land to the company in fee, his wife barring dower. These three mortgages to the company represented the same debt. No further advance was made on the second or third mortgage, but they were taken merely in extension of time of payment. On Dec. 21, 1874, M. mortgaged the land in fee to one G., his wife barring dower. On March 6, 1876, G. assigned to the plaintiff. On June 7, 1876, M. and his wife jointly mortgaged in fee to the plaintiff.

At the time the plaintiff took the assignment of the G. mortgage, on March 6, 1876, he had express notice and knowledge of the three mortgages to the company. He knew the company claimed their whole debt against the land, because they had the legal estate by their first mortgage, and he knew also of there being a defect in the title of the company by their second and third mortgages, by reason of M. being the grantor, and not his wife; but he did not know of the circumstances making the deed to the trustee of May 21, 1867, void as against creditors:

Held, the plaintiff was, under the above circumstances, bound, as a subsequent mortgagee, in respect of title, but more especially in respect of the state of accounts between the company and M. and his wife; and the company could maintain their priority in respect of their second and third mortgages as against the plaintiff. The knowledge which the plaintiff had before and at the time of the purchase of the mortgage from G. of the defect of title of the company under their second and third mortgages, by reason of the husband being the mortgagor instead of his wife, did, as a matter of title, while the legal estate was vested in the company, enable the company to maintain their priority in respect of the two mortgages as against the plaintiff. Moreover, the plaintiff acquired his title with a knowledge that the company claimed a debt represented by the three mortgages, and took it, subject to such claim of the company. The three mortgages represented the same debt, and the last mortgage might be taken as a statement of accounts, at the time the last mortgage was taken, between the company and M. The plaintiff, therefore, could not claim priority as against the second and third mortgages of the company.

McMichael. Q. C., and *Hoskin*, Q.C., for the plaintiff.

Lash, Q. C., for the defendant.

Boyd, C.] [June 6.

FALKINER v. GRAND JUNCTION RY.

Company — Directors — Solicitor and client — Payment of Solicitors by salary.

Where the directors of a railway company passed a by-law enacting that the salary of the plaintiff, as solicitor of the company, should be fixed at $1,000 per annum:

Held, the by-law was within the competence of the directors: R. S. O. c. 66, sec. 47. Without express power it is the right of the directors of a railway company to appoint necessary officers and agents of the company, and to provide for their manner of payment. The agreement to pay the solicitor a fixed sum as a yearly salary in lieu of paying items in detail, is neither illegal nor unusual, whether it provides for the past or the future.

Dougall Q.C., and *Cassels*, for the plaintiff.

Cameron, Q.C., for the defendants.

Proudfoot, J.] [June 7.

COWAN v. PESSERER.

Will—Powers of appointment—Election of Widow—Separate Devises—Construction.

A testator devised certain lands to his wife "to be held and enjoyed by her so long as she shall live and remain unmarried. After my decease and after her decease, or in the event of her marrying again, then from and after such second marriage, I will and devise the same unto my son, who shall be named by my said wife, by deed, under her hand and seal, and to his heirs and assigns, forever."

The widow married again, without having executed the power.

Held, the whole period of the life of the donee was allowed for the execution of the power, for though the power of appointing in respect to her decease must of necessity have been exercised before the event, that could not affect the construction of the second power of appointing in the event of her marrying again. The language would rather seem to indicate that in the latter case the power might be exercised after the

event, and, there being no specific limitation as to time, she might execute it any time during her life. Indeed the doubt would rather appear to be whether she could exercise it till after her marriage.

The testator also devised certain lands to his wife, to have and to hold the same unto his said wife, her executors, administrators, and assigns for the following uses :—To sell and dispose of the same as she should think proper and right, and the monies thereupon coming and arising to use and apply for the payment of his just debts, and for the maintenance of herself and her minor children and the education of such children as his said wife should see to be fit and necessary ; and he authorized his wife to convey to purchasers in fee, and directed that in the event of any of the said lands remaining unsold at the time when his youngest surviving child should attain 21, then the above devises and powers should cease, and the lands be subject to the trusts of his will previously declared, under which the lands were ultimately to be divided among his children.

The testator was twice married.

Held, the children and grandchildren of the testator's first marriage had no right to demand an account of the lands sold under the above provisions, or to investigate the amount required for maintenance, though the minor children might have had a right to claim a maintenance had it been refused.

Quære.—Whether wife did not take absolutely the balance of proceeds of sale not required for debts or maintenance.

In the case of separate devises, though the wife may be barred of her dower in one, she is not therefore barred of her dower in the others.

J. H. Macdonald, for the plaintiff.

Lash, Q.C., for adult children of 1st marriage.

T. S. Plumb, for infants of 1st marriage.

McTavish, for children of 2nd marriage.

Proudfoot, J.] [June 7.

EDWARDS V. PEARSON.

Will—Construction—Cumulative legacies.

A testator, by his will, directed his debts and funeral expenses to be paid by his executors, the residue he gave as follows :—"Secondly, I give, devise and bequeath to my beloved wife the sum of $150 annually, during the remainder of her natural life, or so long as she may remain my widow, the said sum to be received and accepted by her in lieu of dower, the said yearly allowance to be a lien upon my real estate and to be paid my said wife as she may need it, either quarterly or half-yearly." He also gave his wife his household furniture to dispose of as she might think proper. He then directed his executors to sell his farm and all his personal property except that previously disposed of, and out of the proceeds, first, to pay all his debts and funeral charges, etc., as aforesaid ; and then to each of his daughters $312 ; the balance then remaining was to be divided between his sons, subject to each of them securing to their mother an annual payment of $50 during the remainder of her natural life, the security to be satisfactory to her and his executors.

Held, there was an intention apparent on the face of the will that the annuities in favour of the wife were to be cumulative ; this appeared from the points of difference between the first annuity and the others, and the insufficiency of the estate to answer all the legacies was not a sufficient circumstance to vary this construction of the will. In the absence of any intention apparent on the face of the will, the rule is that where two legacies of quantity of equal amount are bequeathed to the same legatee in one instrument, there the second bequest is considered a repetition, and the legatee shall be entitled to only one legacy : Williams on Exec. Vol. 2, p. 1295.

Black, for the plaintiff.

C. Moss, Q.C., for the defendant Edwards.

Robinson, for the executors.

Proudfoot, J.] [June 7.

TOOMEY V. TRACY.

Will—Construction—Mixed fund—Interest on legacies.

Special case. A testator directed his executors to pay all his just debts and general expenses out of his personal property, and if that proved insufficient then he authorized them to sell so much of his real estate as would be sufficient to make up the deficiency. He then directed his land to be sold. Then he ordered the interest of all capital arising from the sale of the land to be paid yearly to his wife for her maintenance during her natural life. He then gave a number of charitable bequests and pecuniary legacies. There was no residuary gift.

Held, the testator had created a mixed fund to answer the purposes of his will. If the personalty was not sufficient for the payment of the debts, then the legacies were payable out of the proceeds of the land, if it was sufficient they were payable out of the mixed fund. So far as the charitable legacies were payable out of the proceeds of the land they were void. Test proposed by Sir S. Turner in *Tench* v. *Cheese*, 6 D. M. G. cited as sufficient for the disposal of this question.

Held also, interest was payable on the legacies which were payable out of the land from a year after the testator's death; and that, although, as the whole interest of the proceeds of the land was given to the wife for life, the capital had to be kept invested by the executors, and there was therefore no fund for the payment of legacies till her death.

The general rule is that legacies carry interest after the expiration of a year from the death, though payment be from the condition of the estate impracticable, and though the assets have been unproductive; and this rule applied here, for the words of the will imported a present gift, and the legacies did not form part of a trust to be executed in future, in which case a different rule applies: *Wood* v. *Penvyre*, 13 Ves. 325; *Lord* v. *Lord*, L. R. 2 Ch. 784.

J. J. Foy, for the plaintiffs.

C. C. McCaul, for the defendants, Thomas Tracy and Stephen Rogers.

Fitzgerald, for the heirs-at-law.

Divisional Court.] [June 11.

FOLEY V. CANADA PERMANENT L. & S. CO.

Deed of infant—Affirmation—Acquiescence.

Judgment of the Chancellor, noted *supra*, vol. 18, p. 423, (where, however, it is erroneously stated that no steps were taken to disaffirm the mortgage till Dec. 7, 1881; this should be "Sept. 7, 1882,") affirmed.

The rule may now be considered as well established that the deed of an infant is not void, but voidable, on his attaining his majority, if it prove to be injurious to his interest. Being voidable, he may disaffirm or affirm it on attaining majority. How this is to be proved, and within what time the option may be received, have long been subjects of controversy, but our own and the English cases establish that an infant is bound expressly to repudiate his contract within a reasonable time after arriving at majority, and that if he neglect so to do his silence will amount to an affirmance.

C. Moss, Q.C., for the plaintiff, (appellant.)

W. Cassels and *Leonard*, *contra.*

Divisional Court.] [June 11.

HOPKINS V. HOPKINS.

Devise of rent to attesting witness—25 Geo. II., c. 6, s. 1—R. S. O. c. 108.

Judgment of PROUDFOOT, J., noted *supra* vol. 18, p. 401, affirmed.

Although it is now settled that the provisions of 25 Geo. II., c. 6, s. 1, as to beneficial gifts to attesting witnesses of wills, do not apply to wills of mere personal estate, but only to such wills and codicils as were by the Statute of frauds required to be attested,—yet the testamentary disposition of the rents pending the lease could not be considered as only tantamount to a will of personal estate *quoad* the rents,—for rent issuing out of land is a tenement; it partakes of the nature of land and is within the Statute of Frauds, which relates to lands and tenements. Consequently the case had to be dealt with as if there had been a complete intestacy as to the land in question: and the collection of the rents by the executor, instead of by the heirs-at-law, the persons rightfully entitled, and the payment of them to J. H. was, in effect, a possession of the land by J. H., in favour of whom the Statute of Limitations ran.

Moss, Q.C. and *Nesbitt*, for plaintiffs.

Blake, Q.C. and *Lazier*, for defendant, Columbus Hopkins.

Boyd, C.] [June 20.

RE J. T. SMITH'S TRUSTS.

Repairs by tenant for life—Settled estates—Sale by court—R. S. O. c. 60, s. 85.

Petition under Settled Estates Acts. A testator devised certain property to M. H. for life, and afterwards to any child of M. H. who might survive her in fee. She had one child, aged ten, when she presented this petition, claiming to be allowed for expenditure made by her upon two houses on the land for much needed repairs, and lasting improvements to about $500, and for $100 paid to a tenant for improvements made by him under a promise from the testator that the tenant should be paid for them, and for a sale by the Court.

Held, the petitioner might be reimbursed the $100 from the testator's general estate, as the claim she paid appeared to be a debt due by the testator; but neither this nor the other expenditure could be charged on the land. It is against all the authorities to burden the estate with such charges. The petitioner could not be reimbursed the repairs, for the repairs of a tenant for life, however substantial and lasting are his own voluntary act, and do not arise from any obligation, and he cannot claim any charge for them upon the inheritance.

Held, however, it was a proper case for the sale or leasing, with a right to build, of the settled estate, for there was no means from the income of the property of putting it into a sufficiently remunerative condition to support M. H. and her child. M. H. was not obliged to support the infant, and it was imperative to deal with the property in such a way as to supply proper maintenance for the boy.

Arnoldi, for the petitioner.

PRACTICE CASES.

Osler, J.] [Nov. 10, 1882.

BOTHWELL ELECTION PETITION.

Election—Issue—Preliminary objections—Examination—37 Vict. (Can.) ch. 10.

Preliminary objections (sect. 10) presented after the expiration of five days from the service of the petition, are not void, as the time for their presentation may be extended (sect. 43), and by analogy to ordinary practice such extension may be obtained even after the expiration of the time originally fixed by statute, (*Wheeler* v. *Gibbs*,, 3 S. C. R. 347), they are at most irregular, and therefore the petition is not at issue under sect. 11, and an examination of the parties under sect 14 cannot be had while they remain undisposed of.

Holman, for the petitioner.
Beck, contra.

Osler, J.] [May 29, 1883

COULSON V. SPIERS.

Interpleader—Jurisdiction.

Upon the return of an interpleader summons taken out by a sheriff, the judge of the County Court of the County of Grey made an order protecting the sheriff, barring the claimant, and containing other provisions.

Held, on appeal, that an interpleader not being an action under sect. 91, O. J. A., but a proceeding in an action (*Hamelyn* v. *Bettleley*, L. R. 6 Q. B. D. 63), the Master in Chambers had jurisdiction to make such an order, (Rules 2 and 422, O. J. A.,) and so had the County judge.

Marsh and *Aylesworth*, for execution creditors.
Holman, for sheriff.

Proudfoot, J.] [June 2.

BUCKE V. MURRAY.

Dismissal for want of prosecution—Sects. 12 and 52, and Rule 255 O. J. A. and Chy. G. O. 276.

An appeal from the order of the Local Master in Hamilton dismissing the bill for want of prosecution.

Held, that there is no inconsistency between Chy. G. O. 276, and the O. J. A. sects. 12 and 52 and Rule 255.

The general rule still remains that an undertaking to speed the cause is not a sufficient answer to a motion to dismiss for want of prosecution, but it is still discretionary with the judge to say whether, under all the circumstances, the bill should be dismissed.

The Court, in the exercise of its discretion, allowed the plaintiff to go down to immediate trial, where a delay of a year and a half appeared to have arisen from the residence out of the jurisdiction of the defendant, and some hesitation as to proceeding with the case from the negligent manner in which the defendant was cross-examined under a commission executed out of the jurisdiction.

Muir, for the plaintiff.
Lash, Q.C., for the defendant.

Proudfoot, J.] [June 2.

MILLER V. BROWN.

Mortgagee in possession.

An application by the defendant O'Brien for leave to appeal from a judgment given on the 16th December, 1882, notwithstanding that the time for giving notice of appeal has elapsed.

Held, that the fact of the defendant being resident in England, and that by the judgment in question further directions are reserved, and

that in making up an account by a mortgagee in possession unexpected difficulties present themselves, owing to delays by the plaintiff and the death of parties who could give information as to changes, which would probably swell the account of the mortgagee, are not such special circumstances as will induce a judge to grant leave to appeal.

The distinction between applications for indulgence prior to decree and subsequent to decree, commented on.

S. H. Blake, Q.C., for the defendant Brown.
Hoyles, for the plaintiff.

Cameron, J.] [June 6.

ARKELL v. GEIGER.

Interpleader—Sheriff's costs—Scale.

Where execution issued out of the High Court of Justice, and the sheriff obtained an interpleader order under which an issue between the parties was directed to be tried in the County Court under 44 Vict. c. 70.

Held, that the sheriff was entitled to his costs under the interpleader order, to be taxed on the scale of the Court out of which the process on which he seized the goods issued.

Semble, that the parties to the issue should also have their costs prior to the order directing the issue on the Superior Court scale. *Beatty* v. *Bryce*, 90 P. R. 320, explained.

Clement, for the sheriff.
J. B. Clarke, for the execution creditors.
Aylesworth, for the claimant.

Proudfoot, J.] [June 6.

RE SOLICITOR.

Solicitor—Restoration to roll—Evidence.

Upon a petition by a solicitor who was struck off the roll on the 1st September, 1874, for not having paid over money collected by him for a client, to be restored to the roll, and to have the order striking him off rescinded, it was shown that the solicitor had now paid the money, and the consent of the creditor to the prayer of the petition was also produced.

Held, that corroborative evidence of the conduct of the solicitor during the period that his name was removed from the roll, should be furnished, and that notice of the application should be given to the Law Society.

An affidavit testifying to the propriety of the solicitor's conduct having been subsequently furnished, it was ordered that the solicitor be restored to the roll if the Law Society offer no opposition.

An order to rescind the order striking the petitioner off the roll, was refused.

Aylesworth, for the solicitor.

Boyd, C.] [June 6.

SULLIVAN v. HARTY.

Administration order—What matters may be investigated in taking the accounts under.

It is not necessary to file a bill or bring an action for administration except in cases where matters of misconduct are charged which would entitle a plaintiff to apply, at the outset of the case, for an injunction or a receiver; in all other cases in which this course has been taken, the extra costs occasioned thereby must be borne by the plaintiff.

Britton, Q.C., for the plaintiff.

Burton, J.A.] [June 6

LUMSDEN v. DAVIS.

Practice—Security on appeal—Insolvency of surety.

Where, in consequence of the insolvency of one of the sureties in a bond given by the appellant, on appealing to the Court of Appeal, it is considered advisable to obtain further or better security, the application for that purpose should be to the Court appealed from.

Boyd, C.] [June 6.

REN v. ANTHONY.

Infant defendants out of the jurisdiction—Practice in serving process.

An application for a direction to one of the taxing officers to tax plaintiff's costs of effecting service of process upon the infant defendants resident out of the jurisdiction.

BOYD, C. — The O. J. Act and rules do not in terms provide for the practice of serving of process upon an infant resident out of the jurisdiction. Rules 36 and 37 and 70 all apply to service within the jurisdiction. This appears, therefore, to be a case in which, under sect. 12 of the Judicature Act and the head note

of the rules of Court, the former practice remains in force. That practice is defined by G. O. 610 by which an order may be obtained upon *præcipe*, appointing a guardian *ad litem* on whom service is to be made. The official guardian is to be such guardian under sect. 75 of the Judicature Act. In *Weatherhead* v. *Weatherhead*, 9 P. R. 96, an application was made in Chambers for such an order, but that is not necessary under G. O. 610. I cannot give effect to the objection made against the taxing officer's ruling. Something may be allowed on the taxation if the personal service on the infants has facilitated the official guardian in communicating with them as their relatives, but beyond this I do not think I can interfere. I have conferred with PROUDFOOT, J., in arriving at this conclusion.

J. H. Macdonald, for the plaintiff.

Harcourt, for the official guardian representing the infant defendants.

Boyd, C.] [June 9.

MCLEAN V. THOMPSON.

Notice of trial, regularity of.

An action to set aside a fraudulent conveyance, brought in the Chancery Division of the H. C. J. The defendant, Garland, gave notice of trial at the Toronto June Assizes to the plaintiff and his co-defendant Thompson. The plaintiff applied to the Master in Chambers to set aside the notice, but his application was dismissed.

18th June—*A. C. Galt*, for the plaintiff, appealed from the Master's order, contending that the notice was irregular even if *Rymal* v. *McEachren*, (decided by the Master) 3 C. L. J. 106, should be approved. He argued that under the wording of Rule 255 O. J. A. one of two defendants cannot give notice of trial. The rule says, "either party may give notice of trial," "either party" must mean "the plaintiffs" or "the defendants," not "one of the plaintiffs" or "one of the defendants."

T. S. Plumb, for the defendant Garland, *contra*, cited *Rymal* v. *McEachren, (supra);* Rules 255, 264, 266 O. J. A.; Chy. G. O. 161; *Ambroise* v. *Evelyn*, 11 Chy. D. 759; *Crowther* v. *Duke*, 6 Dowl. P. R. 409; Griffith and Loveland's Judicature Acts, O. 35, rr. 4 and 4 a.

BOYD, C.—*Rymal* v. *McEachren, (supra)* of which I approve, decides that this action may be properly set down and tried at the current Toronto assizes. The only new question is whether it is open for one of two defendants, under Rule 255, to give notice of trial. Having regard to the former practice, I think that it is competent for one of several defendants, where the action is as to all ripe for trial, to bring the case on under Rule 255. "Either party" is to be read *any* party. That is the word used in the original of this part of the rule, namely, Chy. G. O. 161, and the late order repeating it No. 605. That order passed on 12th February, 1872, provides that in cases where issue is joined three weeks before the day appointed for the commencement of the sittings, and the plaintiff neglects to set down the cause for hearing at the sittings next after the cause being so at issue, any defendant may set the cause down for hearing . . . and may serve notice of hearing on the other parties to the cause. G. O. 163 provides that notice of setting down is to be served by the party setting down. These orders were to remedy the former practice which prevailed in England, which permitted one defendant to set down a cause and serve the plaintiff with *subpœna* to hear judgment, and then it devolved on the plaintiff to serve the other defendants: *Clarke* v. *Dunn*, 5 Mad. 474; *Smith* v. *Wells*, 6 Mad. 193. I regard this notice of trial as regularly given, and dismiss the appeal with costs in the cause to the respondent.

Mr. Dalton, Q.C.] [June 11.

MILES V. CAMERON.

Foreclosure—Motion to open.

A motion to open up a judgment of foreclosure.

It was sworn by the applicant that the mortgage debt and costs for which foreclosure was ordered, amounted to about $3,000, and that the value of the property was $7,000, and he clearly showed that his delay in paying the debt arose because he thought the effect of the judgment would be a sale of the property.

The Master found upon the affidavit filed that $7,000 was an over estimate, but that the claim was a good deal less than the value of the property, but did not feel justified in opening the foreclosure.

Motion dismissed with costs.

F. Arnoldi, for the application.

W. Fitzgerald, contra.

Boyd, C.] [June 18.

MCGANNON V. CLARKE.

Taxation—Costs of survey and plans—Master's fees.

An action to restrain waste and for ejectment. The plaintiff and defendant were the owners of adjoining lots, and the defendant claimed title to, and cut timber upon land enclosed by the plaintiff, the defendant claiming by possession, and also asserting that the line between the lots was not properly drawn. Judgment was given for the plaintiff with costs of the action. The costs were taxed by the Local Master at Ottawa, and were subsequently revised by one of the taxing officers at Toronto. Upon appeal by the plaintiff, desiring to have allowed certain items, which were disallowed upon revision :

Held, that the English Chancery Order 120 (1845) providing that the Master might allow such just and reasonable charges as appear to have been properly incurred in procuring evidence and the attendance of witnesses, has not been incorporated into our practice. Outlay for surveys and other special work of that nature made and undertaken in order to qualify the surveyors to give evidence, are not taxable as between party and party.

The taxing officer refused to allow charges for maps prepared to identify the details of the line mentioned in the judgment as that which the judge considered the true line, considering that although they were useful and convenient it was not proper, in the circumstances, to allow them. He also refused to allow charges for procuring a certificate of the state of the cause, for a letter advising of judgment, and for instructions on motion for judgment.

Held, that these were all within the discretion of the officer, and that his ruling should not be disturbed.

Held, that the Master at Ottawa, who is paid by means of fees and not by salary, acted properly under the Chancery Tariff of 23rd March, 1875, which allows him at the rate of $1 for each hour engaged in taxing costs.

F. Arnoldi, for the plaintiff.

T. Langton, for the defendant.

Mr. Dalton, Q. C.] [June 19.

ABELL V. PARR.

Foreclosure—Adding parties after judgment.

An action upon a mortgage for foreclosure. The original defendants, Henry and Joseph Parr, did not appear, and judgment of foreclosure was given against them.

Pendente lite, and before judgment, Hannah and Samuel Parr became interested in the equity of redemption, having been before the action, and still continuing to be, in possession of the mortgaged premises.

On the 1st of May, 1883, upon the application of the plaintiff, an order was made *ex parte* adding Hannah and Samuel Parr as parties defendant, and directing that they be bound by the judgment of foreclosure. Upon motion (11th June, 1883,) to rescind this order,

Held, that Hannah and Samuel Parr should have been added before decree, and should not have been made parties to a foregone judgment by which their rights were concluded. These persons, being in possession, must be heard in their defence by the proper tribunal before they can be turned out.

C. J. Leonard, for the added defendants.

T. Langton, for the plaintiff

COLE V. CAMPBELL.

Interpleader issue—New trial, when tried by jury—Application to the Divisional Court.

Upon the 5th June, 1883, the defendant in an interpleader issue applied to a single judge in court for a new trial of the issue, which was sent from the Chancery Division to be tried at the London assizes, and was there tried by a judge with a jury.

Held, that Rule 307, O. J. A. which provides that when there has been a trial by jury any application for a new trial shall be to the Divisional Court, embraces every application of this kind, not excluding interpleader proceedings.

Application enlarged before the Chancery Divisional Court.

No costs were given against the defendant in the first instance as the former Chancery practice authorized the application, and the plaintiff may have been misled by *Barker* v. *Leeson*, 9 P. R. 107, which was decided since the O. J. A. but in which the interpleader order was made before the Act, and no objection was taken to jurisdiction.

E. Stonehouse, for the defendant.

Colin Macdougall, for the plaintiff.