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THE profession will hear with very great regret that Mr. R. G. Dalton, Q.C., Master in Chambers, contemplates retiring from the position he has so long and so ably filled. His health has not been good for some years, and his duties have been arduous. These duties have been performed with the sincerest desire to do that which was right without fear, favor, or affection, and with a kindliness and courtesy that endeared him to all. The youngest student was always sure to receive the same attention and respect that was accorded to leaders of the Bar. If he had a fault, the thought that he may soon not be seen in his wonted place has banished the remembrance of it. He is a sound and able lawyer, with a judicial mind that would have made him an ornament to a higher position on our Bench. Mr. Dalton has indeed earned a holiday for the years that may yet be spared him—may they be many! The Government will meet the views of the profession and the public by providing for him a handsome retiring allowance, should he determine to resign his position.

THE Legislative mill of Ontario is again grinding out alterations to various acts and alterations and altered amendments thereof, and especially in reference to the subjects so dear to those of the rural population, who, we trust, spend a pleasant annual vacation in the metropolis, namely, assessment law and municipal matters generally. There are already a score of these before the House for consideration. We have heard nothing lately of the proposition for a biennial session. It is doubtful whether there will ever be a government strong enough to suggest such a change; but it would be a great saving of expense to the country, and would allow people time to see the working of a law before a dozen so-called amendments knock it into pi.

THE subject of the Grand Juries is receiving the attention of the Provincial as well as the Dominion authorities. The Honorable Mr. Hardy has introduced a Bill in the Ontario House to reduce the number of Grand Jurors to thirteen. The members of the Government, through the Attorney-General, stated that they did not see their way to recommend to the Dominion Government the abolition of Grand Juries; but it is evident that they are not satisfied with the law as it stands at present, and the action that has been taken is an indication either that their views are undergoing a change, or that they might, if they felt they had full control of the matter, go the length that we, amongst others, think desirable; but, so far as we understand the law, the Provincial Legislature has

no jurisdiction, even to do that w. ch they now assume to do. The last clause of the Bill, which provides that the Act should not come into force until a day to be named by the Lieutenant-Governor by his proclamation, rather indicates, reading between the lines, that they have some doubts themselves on the subject. Legislation as to Criminal Procedure belongs to the Dominion, and it seems to us that the proposed measure would come under that head. However that may be, the action now taken is another nail in the coffin of the Grand Inquest; for one of the arguments has been that by reason of the large number of jurors on the panel, justice is more likely to be done than in cases where the number is small.

WE are very glad to see that the Attorney-General has, with his wonted care for the welfare of the rising generation, introduced an Act respecting the use of tobacco by minors. The evil is a growing one and should be met at once. It has, during recent years, received the attention of many of the States of the American Union. One scarcely desires to criticise so commendable a measure, but there are three words in the second clause which might, we think, be left out (even if they are taken from some similar enactment) without doing any harm. The section provides that "any person *actually or apparently* under eighteen years of age," who has in his possession, or smokes, or in any way uses in a public street, or other public place, cigarettes, etc., shall be subject to a certain penalty. If eighteen is intended as the age of infancy as to smoking in public places, why subject one over that age to the penalty simply because he has a fatal appearance of juvenility? We are delighted, for example, at the youthful appearance of the veteran Premier of this Province—long may he live!—but who knows but that some near-sighted "bobby" might "run in" even him, should he recklessly use the fatal weed in public: and what would save him from punishment if "Brother Baxter" were to consider that he was apparently under the designated age? The words being in the alternative, a conviction might be held good if the defendant was apparently under eighteen. This is all the prosecution is called upon to prove, and the case might be proceeded with under that branch of the statute without reference to the *actual* age. What would be the result if the offence was proved under the word "apparently," and it was shown that *actually* the defendant was over the prescribed age? This ought to be considered. Then, how is the apparent age to be determined? By witnesses speaking from mere observation, or by the exercise of the perceptive faculties of the justice?

APPOINTMENT OF COUNTY JUDGES.

The question was asked in this JOURNAL last year by a correspondent as to whether it would not be better, as a rule, to appoint county judges from outside the local bar? Such was the opinion of that correspondent. Another correspondent took the same view, and gave cogent reasons for his opinion. Another subscriber writes us to the same effect. So far no one has expressed an opinion to the contrary.

It is not easy to see what can be said in favor of the present system, except that it is generally a matter of convenience to the person appointed. The fact of knowing the characters, peculiarities, and circumstances of those the appointee may be brought into contact with, as a judge, has a plausible aspect; but, when considered in all its bearings, this is really a reason to the contrary, as was well stated by our correspondent (*ante* vol. 27, p. 534).

It is almost impossible for a man, however right-minded he may be, to divest himself of all personal predilections and prejudices. His duty is to decide each case according to the evidence. It may not be so easy to do this when one of the litigants is an old friend in whom, perhaps, he has had reason to place confidence, and the other, it may be, one whose reputation may not be very good, or with whom the judge has had business disputes or personal difficulties. He will often unconsciously be swayed by influences that warp his judgment. Unknown to himself, elements will enter in and operate upon the workings of his mind other than those which should alone have weight with him.

Apart from the question of personal convenience and family ties, we venture to say that a person appointed to the County Court Bench would prefer, so far as his judicial duties are concerned, to act in a county other than the one in which he has practised. He would, for example, be glad to be relieved from the very unpleasant task of being compelled to listen to the wrangles of those who are his neighbors, and with one or both of whom he may be on terms of friendly intercourse, and of being compelled to remember constantly that *fiat justitia*, the result of which may very probably be that as to one or other litigant a friend will be offended or alienated.

Again, how often it happens—most unpleasant task of all—that some of the judge's intimate acquaintances are, through no fault of theirs perhaps, brought up before him on a judgment summons. In dealing with such a case he may be influenced, unconsciously, by motives which interfere with the granting of rights which suitors are entitled to. Would not any judge be better pleased to have to deal altogether with comparative strangers while performing the necessary duties of his office?

We are inclined to think, also, that the relations between the Bench and Bar would be much more pleasant and satisfactory if an outsider, rather than a local man, were appointed. The former would at once take his proper place. The old proverb of a prophet having no honor in his own country is of special force in this connection.

We trust we shall soon see a change from the old practice—a practice which there is no good reason to believe was begun and has been continued from a supposed political necessity. Can we hope that the dawn of a better day is at hand in this and in other matters? We trust we may. County judges should never be selected merely because they have been useful to or workers for the party in power. In any case their identity as politicians should, as soon as possible, be lost; and this will more readily be accomplished by a change of venue.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for January comprise (1892) 1 Q.B., pp. 1-124; (1892) P., pp. 1-17; and (1892) 1 Ch., pp. 1-58.

LIQUOR LICENSE ACT, 30 & 31 VICT., C. 94, S. 13—(R.S.O., C. 194, S. 73)—OFFENCE—PERMITTING DRUNKENNESS ON PREMISES—SALE OF LIQUOR TO DRUNKEN PERSON.

Edmunds v. *James* (1892), 1 Q.B. 18, is a decision under the English Licensing Act of 1872, which is identical in terms with R.S.O., c. 194, s. 72. The respondent was convicted of permitting drunkenness on his premises, the facts proved being that he had sold liquor to a drunken person. The appellant contended that though he might have been convicted of selling liquor to a drunken person, yet that selling liquor to a drunken person did not constitute the offence of permitting drunkenness on his premises: but the court (Mathew and A. L. Smith, JJ.) agreed that the conviction was right, that the making more drunk a man who was already drunk was a permitting drunkenness on the premises.

SALE OF GOODS—MARKET OVERT—CUSTOM OF LONDON—SALE TO SHOPKEEPER.

Hargreave v. *Spink* (1892), 1 Q.B. 25, although a decision not having any direct bearing in this Province, nevertheless deserves attention from the fact that the doctrine regarding sales in market *overt* is discussed. The defendants were jewellers having a shop in the city of London, at which they purchased the jewels of Mrs. Hargreave, the theft of which gave rise to the recent scandalous case of *Osborne* v. *Hargreave*. The defendants endeavored to protect themselves on the ground that by the custom of the city of London their shop was a market *overt*; but, it appearing that the purchase was not made in the shop adjoining the street, but in an upper show-room over the shop, the court (Wills, J.) held that this was not a market *overt* within the custom. The learned judge also discusses, but does not decide, whether the shop itself would be a market *overt* for the purpose of buying as well as selling goods of the kind usually kept therein for sale. The inclination of his opinion is against a shop in London being a market *overt* for buying goods by the shopkeeper. This custom of London, as the learned judge points out, is in derogation of the common law. In this Province, we presume, there can be no question that no such custom exists, and that, consequently, no sale in any shop could be protected as a sale in market *overt*.

PRACTICE—APPEAL—ORDER ALLOWING CRIMINAL PROSECUTION FOR LIBEL—"CRIMINAL PROCEEDINGS."

In re Pulbrook (1892), 1 Q.B. 86, Mathew and A. L. Smith, JJ., hold that an order giving a person leave to institute a criminal prosecution for libel under the Libel Amendment Act, 1888, is a "criminal proceeding," and therefore not appealable.

PRACTICE—SUBMISSION TO ARBITRATION—POWER OF COURT TO ISSUE COMMISSION TO TAKE EVIDENCE.

In re Shaw & Ronaldson (1892), 1 Q.B. 91, may be referred to simply to point out that it does not apply in Ontario. It appears from this case that in Eng-

land the court has no power to order the issue of a commission to take evidence for the purpose of an arbitration where no action has been brought. In Ontario there is express statutory provision enabling the court to do so: see R.S.O., c. 52, s. 49.

PRACTICE—MARRIED WOMAN—ACTION AGAINST MARRIED WOMAN—SPECIALLY INDORSED WRIT—LEAVE TO DEFEND ON PAYMENT OF MONEY INTO COURT—MONEY PAID INTO COURT BY DEFENDANT, RIGHT OF PLAINTIFF TO.

Bird v. *Barstow* (1892), 1 Q.B. 94, is one of the few cases in which a married woman's effort to escape from liability on her contract appears to have been unsuccessful. The action was brought on a covenant made by the defendant, a married woman: the writ was specially indorsed, and an application was made for leave to sign judgment notwithstanding the defendant's appearance. On this motion the defendant obtained leave to defend on payment of £500 into court to answer the plaintiff's claim. The action was tried and judgment given for the plaintiff, who naturally enough supposed that he would be entitled, as a matter of course, to resort to the £500 for the liquidation of the amount recovered: but Wright, J., decided at the trial that the money must remain in court pending an inquiry whether the defendant had separate property available in execution. The Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.), however, held that Wright, J., was wrong, and ordered the money to be paid out to the plaintiff.

PRACTICE—FOREIGN PARTNERSHIP—"CARRYING ON BUSINESS WITHIN THE JURISDICTION"—SERVICE OF FOREIGN FIRM.

In *Grant* v. *Anderson* (1892), 1 Q.B. 108, the defendants were a foreign firm, all the members of which were domiciled and resident in Scotland. They employed an agent in London, who occupied an office there, the rent of which he paid himself. He kept samples of defendants' manufactures on view, and his duty was to receive and transmit orders therefor, but he had no authority to conclude contracts for the defendants except upon express instructions. It was held by the Court of Appeal that the defendants did not carry on business within the jurisdiction, and could not, therefore, be sued in the firm name nor served with the writ as a firm under the amended Rules.

PRACTICE—JUDGMENT AGAINST MARRIED WOMAN—INTERLOCUTORY COSTS PAYABLE TO MARRIED WOMAN—SET-OFF OF COSTS—ORD. LXV., R. 27, S-S. 21—(ONT. RULE 1204).

In *Pelton* v. *Harrison* (1892), 1 Q.B. 118, the plaintiffs recovered judgment against the defendant, a widow, in respect of a debt contracted by her whilst under coverture, and subsequently obtained an order for the appointment of a receiver of certain property which, during the defendant's coverture, had been her separate property, subject to a restraint on anticipation. This order was set aside with costs, and the plaintiffs asked that their costs might be set off against the costs payable by the defendant in the action to the plaintiffs. This was resisted on the ground that while the costs payable to the plaintiffs were only payable out of the defendant's separate property, the costs payable to the defendant were payable to her as a *feme sole*. But the Court of Appeal (Lopes

and Kay, L.JJ.) refused to give effect to this contention, and reaffirmed what was laid down in *Holtby* v. *Hodgson*, 24 Q.B.D. 103, that a judgment against a married woman, though only enforcible against her separate estate not subject to a restraint on anticipation, is precisely the same as a judgment against an unmarried woman, except that in the case of a married woman there is no remedy on the judgment against her personally, such as by committal to prison or by proceedings in bankruptcy, unless she trades separately from her husband. The theory that a judgment against a married woman is a mere judgment *in rem* seems, therefore, to be abandoned.

NONSUIT BY JUDGE ON COUNSEL'S OPENING ADDRESS—NEW TRIAL.

In *Fletcher* v. *London & North-Western Ry. Co.* (1892), 1 Q.B. 122, the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.) were unanimous that a judge at the trial cannot, against the will of the plaintiff's counsel, order a nonsuit upon the opening address of the plaintiff's counsel, and they set aside the nonsuit entered by Wright, J., under such circumstances, with costs, and directed the costs of the former trial to abide the result of a new trial.

PROBATE—ADMINISTRATION WITH WILL ANNEXED—EXECUTRIX AND SOLE LEGATEE UNABLE TO BE FOUND—GRANT TO REPRESENTATIVE OF NEXT OF KIN OF TESTATRIX.

In the Goods of Ley (1892), P. 6, the sole legatee and executrix named in a will had not been heard of for forty years. Upon proof that she had been duly cited by advertisement, and that the Solicitor of the Treasury did not intend to apply for administration to her estate, a grant of administration with the will annexed was made to the representative of the next of kin of the testatrix.

PROBATE—WILL—NOMINATION OF EXECUTORS WRITTEN UNDER ATTESTATION CLAUSE—SUBSTITUTED EXECUTOR AND ATTESTING WITNESS.

In the Goods of Greenwood (1892), P. 7, a will contained no nomination of executors in the body of it, but below the attestation clause were the words "executors W.G. and C.S." There was an asterisk before these words, and an asterisk before the word "executor" wherever it occurred in the will. It was proved that these words were written before the execution of the will. After the execution the testator directed the name of "C.S.," who was also an attesting witness, to be erased with a knife, both in the place where he was nominated as an executor, and also where he had signed as a witness, and he directed the name of "W.S." to be substituted in both places, but did not re-execute the will, the original name being visible notwithstanding the erasure. Jeune, J., held that the nomination of executors in its original form was valid and should be included in the probate, and that the name of "C.S.," both as an executor and as attesting witness, must be restored.

ADMIRALTY—COLLISION—LATENT DEFECT IN STEERING APPARATUS—NEGLIGENCE—ONUS PROBANDI.

From *The Mc* ' *nts Prince* (1892), P. 9, two or three points of admiralty law may be learned. The action was brought by the owners of the *Catalonia* against the owners of the *Merchants Prince* for damages for a collision which took place by the latter vessel running into the former while at anchor in broad daylight.

The defendants admitted the collision, but pleaded that it was due to some late defect in the steering apparatus of their vessel. It was held that the onus of disproving negligence was on the defendants, and that they satisfied the onus of proof by showing that the steering gear was good of its kind, that it had been tried before the vessel left the anchorage to proceed on her voyage, and was found in good order and had previously failed to act, and that the collision was caused by its failure to act, the cause of which could not be discovered by competent persons, and therefore there was no negligence on the defendants' part, and they were not liable to the plaintiffs.

REDEMPTION ACTION—TENDER, SUFFICIENCY OF.

Greenwood v. *Sutcliffe* (1892), 1 Ch. 1, was an action brought to redeem. Prior to the action the plaintiff had tendered to the defendant a sum which he claimed to be sufficient to discharge the mortgagee's claim, being less than what the mortgagee claimed to be due. At the time of the tender the plaintiff said he did not admit the correctness of the mortgagee's accounts, and intended to take steps to dispute them and have the costs taxed. The mortgagee had refused to accept the sum tendered. Stirling, J., held that the plaintiff was only entitled to an ordinary judgment for redemption; but the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.) were of opinion that the plaintiff was entitled to an inquiry whether the amount tendered was sufficient, reserving further directions and costs (if it proved to have been enough), but otherwise the ordinary judgment for redemption to stand. As Bowen, L.J., tersely puts it, "A conditional tender is not an effectual tender in law, but a tender under protest is quite right. A man has a right to tender money, reserving all his rights, and such a tender is good providing he does not seek to impose conditions."

WILL—TERMINABLE LIFE INTEREST—"BECOME PAYABLE TO SOME OTHER PERSON"—RECEIVING ORDER.

In re Sartoris, Sartoris v. *Sartoris* (1892), 1 Ch. 11, a testator had bequeathed the income of his residuary estate to his son during his life, or until he should assign or dispose of the income or some part thereof, or "become bankrupt, or do or suffer something whereby the said income, if belonging absolutely to him, or some part thereof, would become payable to or vested in some other person." In October, 1890, a petition of bankruptcy was filed against the son, and in November, 1890, a receiving order was made. A meeting of creditors was held in December and adjourned to January, 1891, when it was again adjourned, and nothing further had been done in the matter. The question was whether the son's interest under the will had terminated. The Court of Appeal (Lindley, Bowen, and Fry, L.JJ.) affirmed Chitty's, J., decision that it had, because, although the income did not vest in the official receiver, it would by force of the receiving order have been payable to him had it belonged absolutely to the bankrupt.

WILL—DEVISE OF ADJOINING PROPERTIES TO DIFFERENT DEVISEES—RIGHT OF DEVISEE TO OBSTRUCT ACCESS OF LIGHT TO PROPERTY DEVISED TO ANOTHER BY HIS TESTATOR.

In *Phillips* v. *Low* (1892), 1 Ch. 47, a testator owned a house with windows the light to which passed over an adjoining field, which he also owned, and he

devised the house to one person and the field to another, and it was held by Chitty, J., that the devisee of the field could not interfere with the access of light to the house. How far this case would be now authority in this Province would have to be considered in connection with R.S.O., c. 111, s. 36. It is probable that the section only prevents the acquisition of an easement of light by prescription, and would not be found to interfere with its acquisition by implied or express grant, or devise.

The Law Reports for February comprise (1892) 1 Q.B., pp. 121-272; (1892) P., pp. 17-68; (1892) 1 Ch., pp. 57-100.

STATUTE OF LIMITATIONS—REAL PROPERTY LIMITATION ACT, 1874 (37 & 38 VICT., C. 57), S. 8—(R.S.O., C. 111, S. 23)—"JUDGMENT."

Hebblethwaite v. *Peever* (1892), 1 Q.B. 124, is a decision of Collins, J., upon the construction of s. 8 of the Real Property Limitation Act of 1874, and draws attention to a material variance between the English Act and R.S.O., c. 111, s. 23. The former reads: "No action * * shall be brought to recover any sum of money secured by any mortgage judgment or lien, or otherwise charged upon or payable out of any land, etc., but within twelve years, etc." The R.S.O., on the other hand, omits the word "judgment." The question in the present case was whether a judgment recovered in 1871, which was not in any way a charge upon the land of the debtor, was barred by s. 8. Collins, J., held that it was, because the section applied to all judgments, and not merely to those which had been made a charge on land. Having regard to R.S.O., c. 60, s. 1, s-s. 1, it would seem that in Ontario the period of limitation for bringing an action on a judgment is still twenty years; and see *Allan* v. *McTavish*, 2 Ont. App. 278; *Boice* v. *O'Loane*, 3 Ont. App. 167; *McMahon* v. *Spencer*, 13 Ont. App. 430.

DAMAGES—PENALTY—LIQUIDATED DAMAGES—SUM PAYABLE IN ONE EVENT ONLY—NON-COMPLETION OF WORKS BY DAY SPECIFIED.

In *Law* v. *Redditch* (1892), 1 Q.B. 127, the circumstances under which a stipulation for the payment of a sum in the event of default of performance of work within a specified time is to be regarded as a stipulation for liquidated damages is discussed. The contract in this case was for the construction of sewerage works, and it provided that the works should in all respects be completed and cleared of implements, rubbish, etc., by a specified day, and in default of "such completion" the contractor should forfeit and pay the sum of £100 and £5 per day for every seven days during which the works should be incomplete after the said date as and for liquidated damages. It was argued for the plaintiffs, the contractors, that the default provided for was a number of different things of varying degrees of importance, and therefore the amount named as liquidated damages was to be treated as a penalty according to the decisions in *Sloman* v. *Walter*, 2 W. & T., 6th ed. 1257, and *Kemble* v. *Farren*, 6 Bing. 141. The Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.), however, agreed with

Hawkins, J., that the default provided for was a single event, viz., the completion of the work, which was distinct from the clearing away of implements, etc.: but both Lord Esher and Kay, L.J., agreed that even if the clearing away was included in the word "completion," it was still but one event, and therefore the amount stipulated for was to be regarded as liquidated damages and not as a penalty.

PRACTICE—ARBITRATION—SUBMISSION TO SINGLE ARBITRATOR—REFUSAL TO CONCUR IN APPOINTING ARBITRATOR—NOTICE TO APPOINT—ARBITRATION ACT, 1889 (52 & 53 VICT., C. 49), S. 5—(R.S.O., C. 53, S. 39).

In re Eyre v. *Leicester* (1892), 1 Q.B. 136, was an application to the court to appoint a sole arbitrator, on the ground that the other party to the submission refused to concur in an appointment. The Arbitration Act, 1879, s. 5, provides that any party may serve the other parties "with a written notice to appoint an arbitrator," and, if the appointment is not made within seven days thereafter, the court, or a judge, may appoint an arbitrator (see R.S.O., c. 53, s. 39). The submission in the present case provided for a reference to a single arbitrator, and the notice served by the applicant was a notice "to concur in the appointment of a sole arbitrator." The principal question was whether this was a sufficient notice under the statute, and the Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.) held that it was.

PRACTICE—STAYING PROCEEDINGS—ARBITRATION—SUBMISSION—FIRE INSURANCE POLICY—ARBITRATION ACT, 1889 (52 & 53 VICT., C. 49), SS. 4, 27 (R.S.O., C. 53, S. 38; 52 VICT., C. 13, S. 7 (O.).

Baker v. *Yorkshire Fire & Life Assurance Co.* (1892), 1 Q.B. 144, was an action on a policy of fire insurance in which the defendants applied to stay the proceedings on the ground that the policy sued on contained a provision that any differences arising under it should be referred to arbitration. The plaintiffs resisted the motion on the ground that there was no submission to arbitration on their part within the meaning of the statute 52 & 53 Vict., c. 49, s. 4 (R.S.O., c. 53, s. 38), they not having signed the policy. Lord Coleridge, C.J., and A.L. Smith, J., however, affirmed the order of Charles, J., staying the proceedings, being of opinion that the plaintiff by suing on the policy adopted it as his contract.

LIFE INSURANCE — INSURANCE IN FAVOR OF WIFE — DEATH OF INSURED THROUGH CRIME OF WIFE—PUBLIC POLICY—RESULTING TRUST IN FAVOR OF INSURED'S ESTATE—MARRIED WOMAN'S PROPERTY ACT, 1882 (45 & 46 VICT., C. 75), S. 11.

Cleaver v. *Mutual Reserve Association* (1892), 1 Q.B. 147, is the case in which the notorious Mrs. Maybrick's right to a policy on the life of her husband, which had been effected by her husband for her benefit, came in question. The action was brought by the executors of her husband's estate, and also by the assignee of Mrs. Maybrick. The Divisional Court dismissed the action as to all the plaintiffs; but the Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.) held that, although neither Mrs. Maybrick nor her assignee could have any interest in the policy, as she had been found guilty of her husband's murder, yet that there was a resulting trust in favor of her husband's estate, and that therefore his executors were entitled to succeed.

TIME—COMPUTATION OF TIME—"WITHIN ONE CALENDAR MONTH AFTER."

In *Radcliffe* v. *Bartholomew* (1892), 1 Q.B. 161, a statute provided that a prosecution for an offence must be commenced "within one calendar month after" the commission of the act complained of. The prosecution was commenced on 30th June for an offence committed on the previous 30th May, and the question was whether it was in time. Wills and Lawrance, JJ., answered the question in the affirmative.

Notes on Exchanges and Legal Scrap Book.

ALIMONY NOT SUBJECT TO PRIOR DEBTS OF WIFE.—In *Romaine* v. *Chauncey*, New York Court of Appeals, Jan., 1892, it was held that alimony awarded to a wife as incidental to a decree of divorce in her favor cannot be appropriated to the discharge of a debt contracted by her and actually subsisting prior to the date of the decree.

ORIGIN OF TERM "ADVOCATE."—The term *advocatus* was not applied to a pleader in the courts until after the time of Cicero. Its proper significance was that of a friend who, by his presence at the trial, gave countenance and support to the accused. It was always considered a matter of the greatest importance that a party who had to answer to a criminal charge should appear with as many friends and partisans as possible. This array answered a double purpose, for by accompanying him they not only acted as what we call witnesses to character, but by their numbers and influence materially affected the decision of the tribunal. Not infrequently an embassy of the most distinguished citizens of the province was sent to Rome to testify by their presence to the virtues of the accused and deprecate an unfavorable verdict. Although in this point of view the witnesses who were called to speak in favor of the accused might be termed *advocati*, the name was not confined to such, but embraced all who rallied round him at the trial.—*Green Bag*.

RAILWAY COMPANY: PASSENGER PLACED IN APPARENT PERIL.—"A railway train, on which the plaintiff was a passenger, riding in the last car but one, stopped between stations at night. While it remained standing, another train was heard approaching from the rear on the same track. The conductor ran back with his lantern to stop it, and a passenger in the same car with plaintiff, looking out of the window, called out, 'Here comes another train running into us; we had better get out'; whereupon plaintiff and others rushed to the car door and leaped from the train, and plaintiff was injured by falling into a ditch. The approaching train was an engine and caboose moving about ten miles an hour, and was stopped within about thirty feet of the passenger train. Had it been a train of loaded cars, a collision could not have been prevented."

It was held that if by defendant's act plaintiff had been placed in a position of danger, or which he was justified in believing was dangerous, the defendant would be liable if plaintiff was injured in his attempt to escape if he used such care as a prudent man would use under the circumstances of the case.

We quote from the opinion: "In order to render the railroad company liable for injuries received in an effort to escape an apprehended danger, there must have been a reasonable cause of alarm, occasioned by the negligence or misconduct of the company. If the effort of the passengers to escape resulted from a rash apprehension of danger which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. But if, on the other hand, he be placed, through the negligence or unskilful operation of its trains by the railaoad company, in a situation apparently so perilous as to render it prudent for him to leap from the train, whereby he is injured, he will be entitled to recover damages, although he would not have been hurt if he had remained on the train." *Murray* v. *St. Louis & S.F. Ry. Co.*, 18 S.W. Rep. 50.

LIABILITY OF DIRECTORS.—The Supreme Court of Pennsylvania has recently rendered a most important and interesting decision in which the duties and liabilities of directors of banks were considered (*Swenzel* v. *Penn Bank*, Appeal of Warner, January, 1892, 23 Atlantic Reporter, 405). The litigation grew out of the wrecking of the Penn Bank of Pittsburgh, Pennsylvania, in the year 1884. "It is conceded on all sides that the losses and the disastrous failure of the bank were directly traceable to Mr. Riddle, its late president, now deceased. He practically emptied the vaults of the bank in carrying on a gigantic speculation in oil. This was done with the knowledge of the cashier and the co-operation of one or more clerks or subordinates. . . . The question is whether the directors ought to have known of these transactions, and whether their failure to know what the real plunderer was doing was such negligence on their part as to render them liable to the creditors of the bank."

This question the court proceeds to answer in the negative by independent reasoning and on authority. The court quotes some words of the late Sir George Jessel, which, we suppose, may be taken as fairly indicative of the attitude of the English courts:

"One must be very careful in administering the law of joint stock companies, not to press so hard on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at all. On the one hand, I think the court should do its utmost to bring fraudulent directors to account; and, on the other hand, should also do its best to allow honest men to act reasonably as directors. Wilful default no doubt includes the case of a neglect to sue, though he might, by suing earlier, have recovered a trust fund; in that case he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle."

In the Pennsylvania case the tendency to exonerate from liability directors who are personally free from fraud was certainly carried to considerable lengths. A rule adopted by several Pittsburgh banks is adverted to in the opinion:

"The reports of the bank's condition made by the president to the directors from time to time showed it to be in good condition, while in point of fact it was honeycombed with fraud, and its assets squandered in wild speculations. It may be asked, why did not the directors discover this by an examination of the books? The answer is that if they had examined every book in the bank, with a single exception, they would not have found the fraud. That exception is the individual ledger. All the frauds were dumped into this book and appeared nowhere else. The individual ledger contains the accounts of the individual depositors, and this book, by the rules of a large majority of the Pittsburgh banks, the directors are not allowed to see. This is a rule of policy on the part of most city banks, and the reason for it is at least plausible. A director largely engaged in business may have a number of rivals in the same business who are depositors in the bank. If he is permitted to examine their accounts, it gives him an advantage, and an insight into a rival's affairs that few business men would tolerate. Hence it is a question with many banks whether to adopt this rule or lose valuable customers, and they generally prefer the former. We are not speaking of the wisdom of the rule, only of its existence as bearing upon the question of the directors' negligence. Are they to be held to be guilty of gross negligence in not examining a book which, by the rules of their own bank, and of four-fifths of the other banks in Pittsburgh, the directors are not permitted to see?"

The gist of the decision is that directors "are only liable for fraud, or of such gross negligence as amounts to fraud," and the court further cites in support of the general result reached a decision of the Supreme Court of the United States (*Briggs* v. *Spaulding*, 141 U.S., 132).

Turning to the decisions in our own State, we do not find such a lax rule of accountability administered as in Pennsylvania. In *Hun* v. *Cary*, 82 N.Y., 65, our Court of Appeals criticises and disapproves of the doctrine laid down in Spering's Appeal, 71 Penn. St., 11, which case was much relied on in *Swenzel* v. *Penn Bank* (*supra*). Earl, J., remarks: "It seems to me that it would be a monstrous proposition to hold that trustees, intrusted with the management of the property, interests, and business of other people, who divest themselves of the management and confide in them, are bound to give only slight care to the duties of their trust, and are liable only in case of gross inattention and negligence." The opinion states the standard of care and responsibility as follows: "That the trustees of such corporations are bound to use some diligence in the discharge of their duties cannot be disputed. All the authorities hold so. What degree of care and diligence are they bound to exercise? Not the highest degree, not such as a very vigilant or extremely careful person would exercise. If such were required it would be difficult to find trustees who would incur the responsibility of such trust positions. It would not be proper to answer the question by saying the lowest degree. Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding

that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors who are chosen to take his place in the management and control of his property will exercise ordinary care and prudence in the trusts committed to them—the same degree of care and prudence that men, prompted by self-interest, generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence, and it is a gross breach of duty—*crassa negligentia*—not to bestow them. It is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subjects to which it is to be applied." See also *Brinkerhoff* v. *Bostwick*, 88 N.Y., 52.—*N. Y. Law Journal.*

ELECTRIC RAILWAY VERSUS TELEPHONE.—Cases involving a conflict of interests between telephone and electric railway companies are becoming more numerous. The Supreme Court of New York, in *Hudson River Tel. Co.* v. *Watervliet Turnpike and Railroad Co.*, 15 N.Y. Supp. 752, considered the question and seems to have held in opposition to the later current of authorities. The decision in that case was that a grant by the legislature and municipal authorities to a street railway company, to use electricity as a motive power, though it does not designate the particular system by which the power is to be supplied, does not give the company a right to use a system by the use of which the electricity will pass from the street and interfere with the current of a telephone company, which has previously lawfully erected its poles and wires on private property, where there are other systems which might be used by the railway company at a greater expense, but at less additional expense than would be required for the telephone company to change its system. When a street railway company is about to use electricity as a motive power, to be supplied by a system which will allow the current to escape to the wires of a telephone company, erected on private property, and to continuously interfere with and injure the business of the telephone company, an injunction will lie, there being no adequate remedy at law. From the lengthy opinion of the court we quote the following: "It will be observed in this case that the language in the legislative and municipal grant of authority to the defendant relates only to the power to be used by it and specifies no particular mode of its application. If the single trolley system was the only method of applying electricity as a motive power to cars, then the authority to use electricity might be said to contain an authority for the use of that system, notwithstanding its injurious effects upon others, provided the legislature has the constitutional power to grant a right to a corporation to invade private rights or destroy the property of other corporations or individuals; but as the case discloses that the single trolley system is not the only

method of applying electricity as a motive power for the propulsion of railroad cars, we are not called upon to examine the constitutional question. The referee having found that all injury to the plaintiff's business and property can be obviated by the adoption of the double trolley system or storage battery system, it follows that enjoining the use of the single trolley system would not deprive the defendant of the use of electricity as its motive power, but leave it in the beneficial enjoyment of the grant by the legislature and of the ordinance of the common council, neither of which confines the grant of the use of electricity to the single trolley system. The defendant having it in its power to avail itself of the use of electricity, conferred by the statute and ordinance, in a manner in which the rights of the plaintiff would not be affected injuriously, cannot be permitted to justify an injury to the plaintiff under such statute and ordinance. In the case of *Hill* v. *Managers*, 4 Q.B.D. 433, the Act of Parliament authorized the erection of an asylum for infirm and insane paupers in the Metropolitan asylum district in London, to be designated by the "poor-law board," and authorized the purchase and leasing and fitting up a building for that purpose. The Act referred to small-pox patients as among the class of persons to be provided for. Under this Act the managers erected a hospital in close proximity to the plaintiff's house, which the jury declared a nuisance. No precise definite site was fixed by the Act of Parliament, except a general designation of the Metropolitan asylum district in London. The commissioners might have selected a site which would not have injured the plaintiff. The defendant sought to justify under the Act. But it was held that the statutory sanction sufficient to justify the commission of a nuisance must be expressed: that the particular land or site for the hospital must have been defined in the Act: that it must appear by the Act, while defining certain general limits, that it could not be complied with at all without creating the nuisance. Lord Watson used this language: 'If the order of the legislature can be implemented without nuisance, they cannot, in my opinion, plead the protection of the statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance, unless they are also able to show that the legislature has directed it to be done. Where the terms of the statute are imperative, but submissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put in execution or not, I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for that purpose.' The reasoning and conclusion of the Court of Queen's Bench in the above case was adopted and fully acquiesced in by the Court of Appeals in the case of *Cogswell* v. *Railroad Co.*, *supra*. The rule, therefore, seems settled and of universal application, that when a grant is given by the legislature to conduct a business, in the conduct of which two or more ways exist, and by one of which the rights of others will be injuriously affected, and by the adoption of the other methods other parties will not be injured, a court of equity will interfere, and enjoin the use of the mode by which the rights of others will be injuriously

affected. We are cited to numerous cases by the learned counsel for the defendant where it is held that injuries remote and consequential must be submitted to by the citizen in the march of public improvements, and that the injury in such cases is *damnum absque injuria:* such as building locks in navigable rivers, cutting down on the line of abutting premises in excavating for public streets, and the like: but I have found no case like this, where the injury is direct and not remote, and where the Act has not been ordered by the legislature, where the court has refused relief or redress to the party injured. It is also urged by the learned counsel for the defendant that, as the electrical system to be used by the defendant in the propulsion of its cars has not been defined by the legislature, it must be left to the determination of the defendant as to what method or system it will adopt, and that the power of selection is not the subject of review. The doctrine, when applied to public bodies and municipalities, is sound, and supported by authority: but I think with private corporations and individuals a different rule obtains, and, while they may adopt such devices as they please, so long as their selection does not affect the rights of others, they are bound so to use their own as not to injure others. An individual may use for his own purposes a powerful, ferocious, and dangerous animal: but he must do so at his peril, and, if others are injured by such animal, known by the owner to be dangerous, no one would question the liability of the owner. But it is also said that the defendant has selected the best known method, and therefore cannot be interfered with in its use. It is true that the referee has found that the system of the defendant in the use of electricity as a motive power is the most efficient and economical system in use. It is equally true that the plaintiff's system of telephoning is shown to be the usual approved method, and it is not claimed that its use in any way injures the business of the defendant. Assuming, as we must, that each company, within their chartered privilege, is in the pursuit of laudable and useful business, no reason is perceived why they should not each be accorded the protection guaranteed by law to other business and pursuits, and in like manner be subject to the duties and obligations imposed by law. Wood, in his "Law of Nuisances," defines such rights and obligations as follows: 'Every person who, for his own benefit, profit, or advantage, brings upon his premises, and collects and keeps there, anything which, if it escapes, will do damage to another (subject to some exceptions for industrial interest), is liable for all consequences of his acts, and is bound at his peril to confine and keep it upon his own premises.' Wood, Nuis., p. 115, § 111. We see no reason why this principle is not applicable to the parties in action."—*Central Law Journal.* But see *Cumberland Telephone Co.* v. *Limited Electric Ry. Co.*, 42 Fed. Rep. 273, and *City, etc., Telegraph Ass'n* v. *Cincinnati, etc., Ry. Co.*, 30 Central L.J. 218 reversed in appeal. See also 27 C.L.J. 479. ED. C.L.J.

Reviews and Notices of Books.

History of Canada. By William Kingsford, LL.B., F.R.S. Vol. 5 received and will be further noticed hereafter. The contents of this volume are the history of Canada from the beginning of the Indian wars in 1763 to the invasion of Canada by the troops of Congress.

Manual of County Court Practice in Ontario, comprising the Statutes and Rules relating to powers and duties of County Court Judges, and the Jurisdiction, Procedure, and Practice of County and District Courts as to Appeals to the Court of Appeal, with Tariff, etc. By M. J. Gorman, LL.B. The Carswell Company (Ltd.), Law Publishers, 1892.

The profession are much indebted to Mr. Gorman for this manual. He is so very modest in his preface that we are led to assume that what he has done has been done conscientiously, and an examination seems to bear out this assumption. He does not pretend to do more than give the cases directly bearing on the Statutes and Rules, that is to say, there is none of the "padding" so common nowadays, and especially in the annotations of Statutes. What people want in books of this kind is the text with the decisions specially connected therewith, without the introduction of general law on contracts and one hundred other different subjects which have no special relation to the matter in hand, a custom which produces an expensive and unwieldly book, and whereby purchasers are deceived and disgusted.

The contents of this book before us are the Local Courts Act, the County Courts Act and amending Acts, the General Sessions Act and amending Act, the the County Judges Criminal Act, and the Unorganized Territory Act and amending Act, the County Court Tariff as to solicitor's fees and disbursements, and sheriff's fees, together with such of the Consolidated Rules and Sections of the Judicature Act as apply specifically to County Courts. Those sections of the various Acts upon which there have been decisions are carefully annotated with as much fullness as is consistent with the object the editor had in view.

Mr. Gorman calls attention to the fact, which has often been mentioned in these pages, that County Court Judges are, as he expresses it, "judicial packhorses for the performance of the ever-increasing burden of work which legislators, Federal and Provincial, see fit to impose upon them": and in connection with this he gives an instructive table of the additional duties of County Judges under Dominion and Ontario Acts—a goodly array.

Seeing this manual leads one to express surprise that something of the sort has not been published before. However, we have it now, and it will, we are sure, be very useful, and will, we hope, find a ready sale.

DIARY FOR MARCH.

1. Tues. ...Court of Appeal sits. General Sessions and County Court sittings for trial in York.
2. Wed.....Ash Wednesday.
5. Sat.....York changed to Toronto, 1834.
6. Sun.....*1st Sunday in Lent.*
10. Thur....Prince of Wales married, 1863.
13. Sun.....*2nd Sunday in Lent.* Lord Mansfield born, 1704.
17. Thur....St. Patrick's Day.
18. Fri.....Arch. McLean, 8th C.J. of Q.B. Sir John B. Robinson, C.J., Court of Appeal, 1863.
19. Sat.....P. M. S. Vankoughnet 2nd Chancellor of U.C., 1862.
20. Sun .....*3rd Sunday in Lent.*
23. Wed.....Sir George Arthur, Lieut.-Gov. of U.C., 1838.
26. Sat.....Bank of England incorporated, 1694.
27. Sun .....*4th Sunday in Lent.*
28. Mon ....Canada ceded to France, 1632.
30. Wed.....B.N.A. Act assented to, 1867. Lord Metcalfe, Gov.-Gen., 1843.
31. Thur....Slave trade abolished by Britain, 1807

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Ont.] [Nov. 16.

ELECTRIC DESPATCH CO. *v.* BELL TELEPHONE COMPANY.

Contract—Telephone service—Transmission of messages—Construction of term—Breach.

The Bell Telephone Co. sold to the Electric Despatch Co. all its messenger, cab, etc., business in Toronto and the good will thereof, and agreed, among other things, that they would in no manner, during the continuance of the agreement, transmit or give, directly or indirectly, any messenger, cab, etc., orders to any person or persons, company or corporation, except the Electric Despatch Co. An action was brought for breach of this agreement, such alleged breach consisting of the Bell Telephone Co. allowing their wires to be used by their lessees for the purpose of sending orders for messengers, cabs, etc.

Held, affirming the judgment of the court below (17 A. R. 292) and of the Divisional Court (17 O.R. 495), RITCHIE, C.J., doubting, that the telephone company could not restrict the use of the wires by their lessees; that, being ignorant of the nature of communications made over the wires by persons using them, the company could not be said to "transmit" the messages within the meaning of the agreement, and that they were under no obligation, even if it were possible to do so, to take measures to ascertain the nature of all messages sent over the wires and prevent any being sent relating to messenger, cab, etc., orders.

Appeal dismissed with costs.

Robinson, Q.C., and *Moss*, Q.C., for appellants, *Lash*, Q.C., for respondents.

Quebec.] [Nov. 17.

THE ONTARIO BANK *v.* CHAPLIN.

Joint and several debtors—Insolvency—Distribution of assets—Privilege—Winding-up Act, s. 62—Deposit with bank after suspension.

Held, (1) affirming the judgment of the court below (STRONG and FOURNIER, JJ., dissenting) *per* RITCHIE, C.J., and TASCHEREAU, J., that a creditor is not entitled to rank for the full amount of his claim upon the separate estates of insolvent debtors jointly and severally liable for the amount of the debt, but is obliged to deduct from his claim the amount previously received from the estates of other parties jointly and severally liable therefor.

Per GWYNNE and PATTERSON, JJ.: That a person who has realized a portion of his debt upon the insolvent estate of one of his co-debtors cannot be allowed to rank upon the estate in liquidation (under the Winding-up Act) of his other co-debtors jointly and severally liable, without first deducting the amount he has previously received from the other estate. R.S.C., c. 139, s. 62, the Winding-up Act.

(2) Affirming the judgment of the court below: A person who makes a deposit with a bank after its suspension, the deposit consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit.

Appeal dismissed with costs.

H. Abbott, Q.C., for appellant.

H. Greenshields for respondent.

BENNING ET AL. *v.* THIBAUDEAU.

Insolvency—Claim against insolvent—Notes held as collateral security—Collocation—Joint and several liability.

Held, affirming the judgment of the court below, that a creditor who by way of security for his debt holds a portion of the assets of his debtor, consisting of certain goods and promissory notes endorsed over to him, is not entitled,

until fully paid, to be collocated upon the estate of such debtor in liquidation under a voluntary assignment for the full amount of his claim, but is obliged to deduct any sums of money he may have received from other parties liable upon such notes or which he may have realized upon the goods, provided it is before the day appointed for the distribution of the assets of the estate on which the claim is made.

FOURNIER, J., dissenting on the ground that the notes having been endorsed over to the creditor as additional security, all the parties thereto became jointly and severally liable, and that under the common law the creditor of joint and several debtors is entitled to rank on the estate of each of the co-debtors for the full amount of his claim until he has been paid in full, without being obliged to deduct therefrom any sum from the estates of the co-debtors jointly and severally liable therefor.

GWYNNE, J., dissenting on the ground that, there being no insolvency law in force, the respondent was bound upon the construction of the agreement between the parties, viz., the voluntary assignment of February, 1882, to collocate the appellants upon the whole of their claim as secured by the deed.

Appeal dismissed with costs.

Bisaillon, Q.C., for appellant.

Geoffrion, Q.C., for respondent.

BELLECHASSE ELECTION CASE.

AMYOT *v.* LABRECQUE.

Election petition—Status of petitioner—Onus probandi.

The election petition was served upon the appellant on the 12th of May, 1891, and on the 16th of May the appellant filed preliminary objections, the first objection being as to the status of petitioners. When the parties were heard upon the merits of the preliminary objections, no evidence was given as to the status of the petitioners, and the court dismissed the preliminary objections. On appeal to the Supreme Court, it was

Held, reversing the judgment of the court below and following the decision of this court in the Stanstead election, that the onus was on the petitioner to prove his status as a voter (GWYNNE, J., dissenting).

Appeal allowed and petition dismissed.

Amyot for appellant.

Belleau, Q.C., for respondent.

ARGENTEUIL ELECTION CASE.

CHRISTIE *v.* MORRISON.

Election petition—Preliminary objections—Deposit of security—R.S.C., c. 9, s. 9 (f).

The preliminary objection in the case was that the security and deposit receipt were illegal, null, and void, the written receipt signed by the prothonotary of the court being as follows: "That the security required by law had been given on behalf of the petitioners by a sum of $1000 in a Dominion note, to wit, a bank note of $1000 Dominion of Canada; bearing the number 2914, deposited in our hands by the said petitioners, constituting a legal tender under the statute now in force." The deposit was, in fact, a Dominion note of $1000.

Held, affirming the judgment of the court below, that the deposit and receipt complied sufficiently with section 9 (f) of the Dominion Controverted Elections Act.

Appeal dismissed with costs.

Code for appellant.

Abbott, Q.C., for respondent.

LAPRAIRIE ELECTION CASE.

GIBEAULT *v.* PELLETIER.

Election petition—Preliminary examination of respondent—Order to postpone until after session—Effect of—Six months limit—R.S.C., c. 9, s. 32.

On the 23rd April, 1891, after the petition in this case was at issue, the petitioner moved to have the respondent examined prior to the trial so that he might use the deposition upon the trial. The respondent moved to postpone such examination until after the session on the ground that, being attorney in his own case, it would not "be possible for him to appear, answer the interrogatories, and to attend to the case in which his presence was necessary before the closing of the session." This motion was supported by an affidavit of the respondent stating that it would be "absolutely necessary for him to be constantly in court to attend to the present election petition," and that it was

not possible "for him to attend to the present case for which his presence is necessary before the closing of the session," and the court ordered the respondent not to appear until after the session of Parliament. Immediately after the session was over an application was made to fix a day for the trial, and it was fixed for the 10th of December, 1891, and the respondent was examined in the interval. On the 10th of December the respondent objected to the jurisdiction of the court on the ground that the trial had not commenced within six months following the filing of the petition, and the objection was maintained.

Held, reversing the judgment of the court below, that as it appeared by the proceedings in the case and the affidavit of the respondent that the respondent's presence at the trial was necessary, in the computation of time for the commencement of the trial the time occupied by the session of Parliament should not be included. R.S.C., c. 9, s. 32.

Appeal allowed with costs.

Choquette for appellant.

Lajoie for respondent.

PRESCOTT ELECTION CASE.

PROULX *v.* FRASER.

Election petition - Status of petitioner - When to be determined - R.S.C., c. 9, ss. 12 & 13.

In this case the respondent, by preliminary objection, objected to the status of the petitioner, and, the case being at issue, copies of the voters' lists for said electoral district were filed, but no other evidence offered, and the court set aside the preliminary objection without prejudice to the right of the respondent, if so advised, to raise the same objection at the trial of the petition. No appeal was taken from this decision, and the case went on to trial and the objection was renewed; but the court overruled the objection, holding they had no right to entertain it, and on the merits allowed the petition and voided the election. Thereupon the appellant appealed to the Supreme Court on the ground that the onus was on the respondent to prove the status and that the status had not been proved.

Held, affirming the judgment of the court below, that the objection raising the question of the qualification of the petitioner must be raised by preliminary objection and disposed of in a summary manner, and if the decision of the court thereon is not appealed from the court will not entertain such preliminary objection at the trial. R.S.C., c. 9, ss. 12 & 13.

Appeal dismissed with costs.

Belcourt for appellant.

Ferguson, Q.C., for respondent.

THE DOMINION SALVAGE & WRECKING CO. *v.* BROWN.

Action for call of $1000 - Future rights - R.S.C., s. 29, s-s. (b), of the Supreme and Exchequer Courts Act.

The company sued the defendant B. for $1000, being a call of ten per cent. on 100 shares of $100 each, alleged to have been subscribed by B. in the capital stock of the company, and prayed that the defendant be condemned to pay the said sum of $1000 with costs. The defendant denied any liability and that he was a shareholder, and the company's action was dismissed.

On appeal to the Supreme Court of Canada by the company,

Held, that the appeal would not lie, the amount being under $2000 and there being no such future rights as specified in s-s. (*b*) of s. 29, which might be bound by the judgment. *Gilbert* v. *Gilman*, 16 S.C.R. 189.

Appeal quashed without costs.

Goldstein for appellant.

Blake, Q.C., for respondent.

Man.] [Nov. 16.

ASHDOWN *v.* MANITOBA FREE PRESS CO.

Libel - Provisions of act relating to newspapers - Compliance with - Special damages - Loss of custom - 50 Vict., cc. 22 and 23 (Man.).

By s. 13 of 50 Vict., c. 22 (Man.), "The Libel Act," no person is entitled to the benefit thereof unless he has complied with the provisions of 50 Vict., c. 23, "An act respecting newspapers and other like publications." By s. 1 of the latter Act, no person shall print or publish a newspaper until an affidavit or affirmation, made and signed, and containing such matter as the Act directs, has been deposited with the

prothonotary of the Court of Queen's Bench or Clerk of the Crown for the district in which the newspaper is published. By s. 2 such affidavit or affirmation shall set forch the real and true names, etc., of the printer or publisher of the newspaper, and of all the proprietors; and by s. 6 if the number of publishers does not exceed four, the affidavit or affirmation shall be made by all, and if they exceed four it shall be made by four of them; s. 5 provides that the affidavit or affirmation may be taken before a justice of the peace or commissioner for taking affidavits to be used in the Court of Queen's Bench.

Held, (1) affirming the decision of the Court of Queen's Bench (6 Man. L.R. 578), that 50 Vict., c 23, contemplates and its provisions apply to the case of a corporation being the sole publisher and proprietor of a newspaper.

(2) That s. 2 is complied with if the affidavit or affirmation states that a corporation is the proprietor of the newspaper and prints and publishes the same; GWYNNE, J., dissenting.

(3) That the affidavit or affirmation, in case the proprietor is a corporation, may be made by the managing director.

(4) That in every proceeding under s. 1 there is the option either to swear or affirm, and the right to affirm is not restricted to members of certain religious bodies or persons having religious scruples.

(5) That if affidavit or affirmation purports to have been taken before a commissioner, his authority will be presumed, and need not be proved in the first place.

Section 11 of the Libel Act, actual malice or culpable negligence to be proved in an action for libel unless special damages are claimed.

Held, that such malice or negligence must be established to the satisfaction of the jury, and if there is a disagreement as to these issues the verdict cannot stand.

Held, further, that a general allegation of damages by loss of custom is not a claim for special damages under this section.

Per STRONG, J.: Damages by loss of custom must be specifically alleged and the names of the customers given; otherwise evidence of such damages is inadmissible.

Appeal dismissed with costs.

McCarthy, Q.C., for appellant.

Robinson, Q.C., for respondents.

[Nov. 17.

WHELAN *v.* RYAN.

Assessment and taxes—Irregular assessment—By-law—Validating Acts—Effect of—Crown lands.

In 1879 lands were purchased from the Dominion Government, but patents did not issue until April, 1881. The patentee conveyed the lands, which in 1882 were mortgaged to R. In 1880 and 1881 the lands were taxed by the municipality in which they were situate, and, the taxes not having been paid, they were in March, 1882, sold for unpaid taxes. The purchaser at the tax sale received a deed in March, 1883, and by conveyances from him the lands were transferred to W., who applied for a certificate of title thereto. R. filed a caveat against the granting of such certificate.

By the statutes under which the lands were taxed the municipal council must, after the final revision of the assessment roll in every year, pass a by-law for levying a rate on all real and personal property assessed by said roll. No such by-law was passed in either of the years 1880 or 1881.

45 Vict., c. 16, s. 7, makes all deeds executed in pursuance of a sale for taxes valid, notwithstanding any informality in or preceding the sale, unless questioned within one year from the date of their execution; and 51 Vict., c. 101, s. 58, provides that "all assessments made and rates heretofore struck by the municipalities are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby."

Held, affirming the decision of the Court of Queen's Bench (6 Man. L.R. 565), PATTERSON, J., dissenting, that the assessments for the years 1880 and 1881 were illegal for want of a by-law, and the sale made for unpaid taxes thereunder was void.

Held, *per* STRONG and GWYNNE, JJ., PATTERSON, J., *contra*: (1) The Acts 45 Vict., c. 16, s. 7, and 51 Vict., c. 101, s. 58, only cure irregularities, but will not make good a deed that was absolutely void, as in this case.

(2) That until the patent was issued by the Dominion Government, these lands were exempt from taxation. The patent did not issue until April, 1881. Hence the taxes for which the lands were sold accrued due while they were vested in the Crown.

Held, per STRONG, J., following *McKay* v. *Chrysler* (3 S.C.R. 436) and *O'Brien* v. *Cogswell* (17 S.C.R. 420), that the defects cured by 45 Vict., c. 16, s. 7, are only irregularities in the proceedings connected with the sale, as distinguished from informalities in the assessment and levying of the taxes.

Appeal dismissed with costs.

S. H. Blake, , for the appellant.

Cormully, Q.C., for the respondent.

STEPHENS *v.* MCARTHUR.

Construction of statute—Transfer of personal property—Preference—Pressure—Intent.

By the Manitoba Act, 49 Vict., c. 45, s. 2, "every gift, conveyance, etc., of goods, chattels, or effects . . made by a person at a time when he is in insolvent circumstances . . with intent to defeat, delay, or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect, shall as against them be utterly void."

Held, reversing the decision of the Court of Queen's Bench (6 Man. L.R. 496), PATTERSON, J., dissenting, that the meaning of the word "preference" in this Act is that which has always been given to the expression when used in bankruptcy and insolvency statutes; it imports a voluntary preference, and does not apply to a case where the transfer has been induced by the pressure of the creditor.

Held, further, that a mere demand by the creditor without even a threat of legal proceedings is sufficient pressure to rebut the presumption of a preference.

The words "or which has such effect" in the Act apply only to a case where that had been done indirectly which, if it had been done directly, would have been a preference within the statute. The preference mentioned in the Act being a voluntary preference, the instruments to be avoided as having the effect of a preference are only those which are the spontaneous acts of the debtor. *Molsons Bank* v. *Halter* (18 S.C.R. 88) approved and followed.

Held, per PATTERSON, J., that any transfer by an insolvent debtor which has the effect of giving one creditor a priority over the others in payment of his debt, or which is given with the intent that it shall so operate, is void under the statute whether or not it is the voluntary act of the debtor or given as the result of pressure.

Appeal allowed with costs.

Moss, Q.C., and *Wade*, for appellant.

Elliott, Q.C., for respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Full Court.] [Feb. 1.

REGINA *v.* COSBY.

Survey—R.S.O., 1877, ss. 34, 35, 36, 37—Road allowance between counties—Survey not conclusive—Admissibility of evidence.

The defendant was tried upon an indictment for obstructing a highway, being the town-line, or allowance for road between two counties. It was shown at the trial that the road allowance, at the request of the municipal councils of the two counties and under the instructions of the Commissioner of Crown Lands, was laid out by a surveyor in the years 1883 and 1884. During the trial the defendant offered evidence to prove that the work done by the surveyor was erroneous and wrong. The chairman of the General Sessions ruled that the evidence was inadmissible and the survey conclusive.

Upon a Crown case reserved,

Held, that the case was governed by the provisions of ss. 34, 35, 36, and 37 of R.S.O., 1877, c. 146; that monuments to be placed in compliance with these provisions must be placed at the true corners, governing points, or off-sets, or at the true ends of the concession lines; and it is only when so placed that lines drawn from them in the manner prescribed by the Act "shall be taken and considered to be the permanent boundary lines of such townships and concessions respectively"; and there is nothing in these provisions making the monuments referred to therein conclusive, whether rightly or wrongly placed, and nothing to prevent its being shown that they have been wrongly placed; and therefore the evidence

offered was admissible and the survey not conclusive.

Tanner v. *Bissell*, 21 U.C.R. 553; *Regina* v. *McGregor*, 19 C.P. 69; *Re Fairbairn and Sandwich East*, 32 U.C.R. 575; and *Boley* v. *McLean*, 41 U.C.R. 260, distinguished.

E. D. Armour, Q.C., and *Aylesworth*, Q.C., for the Crown.

W. M. German for the defendant.

Div'l Court.]

IN RE ELLIOTT *v.* BIETTE.

Prohibition — Division Court — Judgment for $200.70 — Interest — Amendment — Jurisdiction — Part prohibition.

A suit was brought in a Division Court to recover the amount of a promissory note and interest. At the time of the trial the amount of the note and interest was under $200, but the judge reserved his judgment, and when he came to give it he calculated interest up to that day and by inadvertence gave judgment for $200.70, a sum seventy cents beyond the jurisdiction of the Division Court.

Upon a motion for prohibition,

Held, that the judge could amend his judgment by striking out the seventy cents.

The award of interest did not oust the Court of jurisdiction; there was want of jurisdiction only in so far as the judgment exceeded $200, and prohibition should go only in respect of the excess.

Prohibition *quousque* granted, that is, until the judge should amend his judgment by striking out the seventy cents; or a partial prohibition prohibiting the enforcing of the judgment so far as the excess of seventy cents was concerned.

W. H. P. Clement for the plaintiffs.

W. M. Douglas for the defendant.

Div'l Court.]

ROSS *v.* BUCKE.

Defamation — Slander — Privileged occasion — Qualified privilege — Absence of actual malice — Evidence — Admissibility of — Falsity of slander — Justification not pleaded.

The defendant, who was the superintendent of a public asylum, said to T., a man who had formerly been a servant at the asylum, that the plaintiff, a maidservant at the asylum, who was engaged to be married to T., was "a contemptible thief." Justification was not pleaded. The evidence showed that the defendant honestly believed in the truth of the words spoken and that he had reasonable grounds for his belief.

Held, that the occasion on which the words were spoken was one of qualified privilege, and that the plaintiff could not recover in slander without proof of actual malice, the burden of which lay on the plaintiff. On the evidence the plaintiff failed to show actual malice, and the use of the qualifying adjective "contemptible" did not afford evidence of actual malice. The case should therefore have been withdrawn from the jury.

Coxhead v. *Richards*, 2 C.B. 569; *Whiteley* v. *Adams*, 15 C.B.N.S. 392; and *Stuart* v. *Bell* (1891), 2 Q.B. 341, followed.

Semble, *per* FALCONBRIDGE, J., that the defendant had not such a recognized interest in T.'s welfare as to justify as privileged the communication made to him without any request on T.'s part.

Semble, also, *per* FALCONBRIDGE, J., that evidence of the falsity of the slander given on the plaintiff's examination in chief should not have been received.

W. R. Meredith, Q.C., and *Weld*, for the plaintiff.

Osler, Q.C., and *Bartram*, for the defendant.

Div'l Court.]

COVENTRY *v.* MCLEAN.

Evidence — Action for relief against re-entry for non-payment of rent — Admissibility of evidence to show misrepresentations by lessee in obtaining lease.

To an action for relief against a re-entry made by a landlord for non-payment of rent, the defendant pleaded that he had been induced to grant the lease by reason of representations made by the plaintiff to the effect that he would improve and beautify the demised premises, which would enhance the value of other lands of the defendant, but that the plaintiff had not done as he represented he would, and that the defendant had been thereby damnified.

Held, that evidence tendered by the defendant to establish the truth of this defence was admissible in answer to the claim of the plaintiff for relief.

The origin, both of the suit for specific performance and of the suit for relief against a re-entry for non-payment of rent, is in the equitable jurisdiction of the court; the compelling performance in the one and the granting relief in the other is in the judicial discretion of the court, and in each the court has regard to the conduct of the party seeking to compel such performance or to obtain such relief.

Wallace Nesbitt for the plaintiff.

Walter Cassels, Q.C., for the defendant.

Common Pleas Division.

Div'l Court.] [Dec. 5.

STARES *v.* MACKELCAN.

Chattel mortgage—Renewal—Solicitor's liability—Omissions from mortgage—Effect of.

The defendants, who were solicitors under instructions for that purpose, took a chattel mortgage on E.'s goods, which was duly registered and forwarded to the plaintiff at W., where she lived. The mortgage was made on October 24th, 1888, and on October 21st, 1889, the defendant posted a letter to her notifying her that the mortgage should be renewed, which in due course should have reached her on the 22nd, giving ample time to renew, but which she did not receive until November 1st, after the time for renewal had expired.

Held, that no negligence on the defendant's part was shown.

Per ROSE, J., *quære*: Was any duty imposed upon the solicitors to give notice to the plaintiff of the necessity for renewal?

After the time for renewal had expired, the plaintiff consulted the defendants, and they drew up a new mortgage, but which they advised her would not be valid against E.'s creditors; and it was subsequently abandoned on this ground. From this mortgage was omitted the "stock in trade," the most valuable portion of the security, while from the first mortgage was omitted a provision for the mortgage covering substituted goods.

Held, that these omissions did not, under the circumstances, affect the plaintiff's rights, and therefore constituted no ground for an action against the defendants.

Wallace Nesbitt for the plaintiff.

MacKelcan, Q.C., for the defendants.

[Feb. 1.

REGINA *v.* ROWE.

Liquor License Act—Defendant—Whether compellable to give evidence.

On the trial of an offence under the Liquor License Act, R.S.O., c. 194, the giving of evidence is governed by Ontario legislation, and under s. 9 of R.S.O., c. 6, the defendant is neither a competent nor a compellable witness.

The Dominion and Provincial legislation on the subject considered.

DuVernet for the applicant.

J. R. Cartwright, Q.C., *contra*.

Practice.

Court of Appeal.] [Jan. 8.

BEGG *v.* ELLISON.

Parties—Specific performance—Title to land—Interest of strangers in land—Adding them as third parties or defendants—Rules 328-331.

In an action by vendors against the purchaser for specific performance of a contract for the sale of land, it was alleged in the defence that the plaintiffs were the owners of an undivided half interest only in the land, and had no title to the other half; and in the reply that if the persons alleged to be the owners of the other half interest ever had any interest, it was barred by the Statute of Limitations, and the plaintiffs were the sole owners. The plaintiffs also alleged that the defendant had accepted the title. The plaintiffs were in possession. Upon the application of the defendant, before the trial, an order was made in Chambers allowing the defendant to serve a third-party notice upon the persons alleged to be the owners of the other half. This order was set aside by a Divisional Court and an order made staying all proceedings in the action until the plaintiffs should add the third parties as defendants to the action and should make the necessary allegations against them so as to properly raise the question of the title to that part of the land to which they were alleged to have a claim.

Held, that neither order should have been made.

Rules 329 and 331 did not apply because it was not a case for contribution, indemnity, or

relief over; and Rules 328 and 330 did not apply because it was not shown to be necessary or expedient to decide any question in the action as between the original parties, or either of them, and the third parties.

Per MACLENNAN, J.A.: The question in the action, so far as title is concerned, is whether the plaintiffs have such a title as the court will compel the defendant to accept. If they clearly have such a title, they will succeed; if they clearly have not, they will fail: and if doubtful, the action will be dismissed. In any case there is no occasion for deciding anything as between either of the original parties and the third parties.

The Consolidated Rules relating to third parties discussed.

Glenn for the plaintiffs.

J. A. Robinson for the defendant.

MEREDITH, J.] [Jan. 21.

IN RE MCKENZIE.

IN RE LIND.

IN RE CAMPBELL.

Lunatics—Maintenance of—Inspector of prisons and public charities—Money in court—R.S.O., c. 245, ss. 1, 48, 49, 61.

Sections 48 and 48 of the Act respecting Lunatic Asylums and the Custody of Insane Persons, R.S.O., c. 245, providing that the inspector of prisons and public charities may take possession of the property of lunatics to pay for maintenance, do not apply to money in court.

Where the property of the lunatic is money in court, the inspector must apply for payment out under s. 61, and must show clearly that the person to whom the money in court belongs is a lunatic and that the purpose for which the money is sought is to pay charges for maintenance of the lunatic in a public asylum; but it is not necessary, having regard to s. 1, s-s. 2, that the person shall have been, or shall be, declared a lunatic.

J. F. Edgar for the inspector.

E. W. Harcourt for the official guardian.

Court of Appeal.] [Feb. 1.

PEER *v.* NORTHWEST TRANSPORTATION CO.

Venue—Change of—Rule 653—Preponderance of convenience—Discretion—Leave to appeal.

The question of changing the venue is to a great extent a matter of discretion. The present Rule 653 has not made any substantial change in the practice; and an overwhelming preponderance of convenience in favor of a change is still necessary.

Shroder v. *Meyers*, 34 W.R. 261; *Power* v. *Moore*, 5 Times L.R. 586; and *Briden* v. *Duncan*, 7 Times L.R. 515, referred to.

But where the venue had been changed by the Master in Chambers, affirmed by a Judge in Chambers and a Divisional Court, the Court of Appeal, though not satisfied that there was an overwhelming preponderance of convenience in favor of a change, refused to interfere with the discretion exercised by granting leave to appeal.

George Bell for the plaintiffs.

Douglas Armour for the defendants.

Q. B. Div'l Court.]

STRATFORD GAS CO. *v.* GORDON.

Pleading—Rule 423—"Embarrassing," meaning of—Allegations of facts showing probability of truth of pleading—Evidence—Duty of trial judge—Summary application to strike out pleadings—Unnecessary allegations—Verbosity—Discretion.

The plaintiffs were a gas company doing business in a city, and distributing gas by their mains throughout the city: the defendant was also the owner of gas works in the same city, from which he supplied certain buildings in the city. The statement of claim charged that the defendant laid, or caused to be laid, a pipe to communicate with the pipe belonging to the plaintiffs, or in some way obtained or used the plaintiffs' gas without the consent of the plaintiffs; and claimed the penalty given by s. 3 of the Gas and Water Companies Act, R.S.O., c. 164, and also the value of the gas alleged to have been taken.

The defendant, in thirteen paragraphs of his statement of defence, set out at length various

facts and circumstances, the gist of which was that the pipe mentioned in the statement of claim was so laid, or caused to be laid, by the plaintiffs, or by some one on their behalf, and not by the defendant: and also made therein allegations of a malicious course of conduct towards the defendant, affording reasons for the probability of the truth of the defence.

The thirteen paragraphs containing these allegations were moved against by the plaintiffs as embarrassing and irrelevant.

Held, that an embarrassing pleading under Rule 423 is one which brings forward a defence which the defendant is not entitled to make use of; but here the defendant was entitled to make use of the defence set up, and there was nothing in the paragraphs tending to prejudice or delay the fair trial of the action.

It might be that evidence of the course of conduct of the plaintiffs alleged by the defendant could not be permitted to be given; but that was a question for the trial judge, and not one to be determined upon a motion to strike out pleadings except in a plain case. Even if it was unnecessary to plead this course of conduct, that did not make the pleadings embarrassing.

The court should not hesitate to interfere with the discretion exercised in chambers where the defendant has been thereby deprived of his right to set up a defence which he is entitled to make use of.

Remarks on verbosity in pleading.

Glass v. *Grant*, 12 P.R. 480, approved.

W. H. Blake for the plaintiffs.

Idington, Q.C., for the defendant.

Q. B. Div'l Court.]

PALMER *v.* LOVETT.

Attachment of debts—Proceeds of sale of land—Interest of judgment debtor in, as tenant by the curtesy—Disclaimer of interest—Security for costs—Garnishing proceeding—No power to order.

A judgment debtor, having a supposed interest as tenant by the curtesy in certain land, joined in a conveyance thereof by his daughter to a purchaser, in which it was recited that he was entitled to that estate. His judgment creditor thereupon attempted to garnish the purchase money in the hands of the solicitor who acted for the judgment debtor's daughter, and the daughter claimed the whole of the purchase money, while the judgment debtor made no claim upon it. It also appeared that he never had claimed, and now expressly disclaimed any interest as tenant by the curtsey, and had joined in the conveyance at the instance of the solicitor for the purchaser, who was also the solicitor for the judgment creditor.

Held, that the money in the hands of the solicitor could not be garnished by the judgment creditor.

Per ARMOUR, C.J.: Assuming that the judgment debtor was tenant by the curtesy of the land sold, upon its sale he became entitled only to a life use of the purchase money, and this use could not be reached by garnishee process in the manner attempted.

Per STREET, J.: There is no debt due from the solicitor to the judgment debtor, nor can it be said that the moneys in the hands of the former are subject to any trust in favor of the latter, nor that any claim on his part affecting them exists. If he had an interest in the lands, he, in effect, released it to his daughter without any consideration, and the money is hers unless the release to her should be set aside as voluntary and a fraud upon his creditors.

The judgment creditor obtained an attaching order, which was set aside by the local judge who granted it; the judgment creditor then appealed to a Judge in Chambers unsuccessfully, and had given notice of a further appeal to a Divisional Court when his proceedings were stayed by an order of the Master in Chambers requiring him to give security for costs on the ground that he was insolvent and was proceeding for the benefit of another.

Held, that the order for security could not be sustained; the judgment creditor was not proceeding by either action or petition; and there was no authority for ordering security.

Re Rees, 10 P.R. 425, overruled.

Bartram for the judgment creditor.

Middleton for the garnishee and the claimant.

BOYD, C.] [Feb. 7.

MURRAY *v.* "MAIL" PRINTING COMPANY.

Discovery—Libel—Examination of officer of newspaper publishing company—Editorial writer—Disclosure of facts.

In an action against a newspaper-publishing company for libel contained in an article written

by a member of the newspaper staff, who procured special information therefor, under the supervision of the managing editor, and in which action the defendants pleaded justification,

Held, that the writer was not in the position of a sub-editor, nor could he be called an officer of the company, and he was not examinable for discovery under Rule 487.

Held, also, that no sufficient foundation was otherwise laid for his examination; for it did not appear that he could give information of any facts, but merely that he could indicate where he procured evidence of the facts in dispute upon the plea of justification.

W. B. Raymond for the plaintiff.

E. A. Hilton for the defendants.

QUEBEC.

COURT OF QUEEN'S BENCH.

Full Court.] Jan. 25.

ACCIDENT INS. CO. *v.* MCFEE.

Accident insurance—Risk incidental to employment—Breach of contract.

M., who was described in the application for insurance as "Superintendent of the International Railway," was insured by the company appellant against accidents. By one of the conditions of the policy it was stipulated as follows: "The insured must at all times observe due diligence for personal safety and protection, and in no case will this insurance be held to cover either death or injuries occurring from voluntary exposure to unnecessary or obvious danger of any kind, nor death or disablement . . . from getting or attempting to get on or off any railway train, etc., while the same is in motion." M., when travelling on the business of his railway, was killed while getting on a train in motion.

Held, that inasmuch as M. was insured as superintendent of a railway, and there was evidence that his duties required him to get on and off trains in motion, of which fact the insurers had knowledge, the condition did not apply, and the company was liable.

SUPERIOR COURT OF MONTREAL.

[Oct. 30.

COTTINGHAM *v.* GRAND TRUNK RY. CO.

Carrier—Goods refused by consignee—Sale by carrier.

Where the consignee refuses to accept goods from the carrier at the place of delivery, the carrier is not justified in selling the same by private sale without notice to the consignor or consignee; and a pretended authorization to sell by the consignee who has refused to accept the goods is without effect. The consignor in such a case is entitled to recover the value of the goods, less freight and storage.

MANITOBA.

COURT OF QUEEN'S BENCH

Full Court.] [Feb. 13.

MARTIN *v.* "THE FREE PRESS."

Libel—Fair comment—Justification Verdict rendered under misapprehension.

Held, (1) that where a defence of fair comment is set up, what is commented on must be facts admitted or proved to be true; publication of defamatory matter in the belief that it is true is no justification; an alleged libel which contains imputations on private character exceeds the limits of fair criticism: *Campbell* v. *Spottiswoode*, 9 B. & S. 769; and *Davis* v. *Shepstone*, 11 App. Cas. 187.

(2) Where there is a plea of justification on the record, the plaintiff may, if he chooses, in the first instance meet the justification, or leave such proof until the reply, but cannot divide his proof by calling evidence to meet the justification in the first instance, and more in reply, *Brown* v. *Murray*, R. & M. 254; and there is no difference where the plea is fair comment.

Quere: Whether under such a plea as the above the defendant is entitled to prove that a direct charge, such as the above, is true?

(3) Where it is clear, as in the present case, from the verdict of the jury, that they did not understand the judge's charge, or disregarded it and did not consider the question it was essential for them to consider and pass judg-

ment upon, a new trial should be directed; costs to be costs to the successful party.

DUBUC, J., dissenting.

Howell, Q.C., and *C. P. Wilson* for the motion.

Hagel, Q.C., *contra*.

DUBUC, J.] [Feb. 16.

MONKMAN *v.* FOLLIS.

Attorney and client—Power of attorney to compromise action after judgment.

Appeal from order of referee setting aside *alias* writ of *fi. fa.* After judgment entered and execution issued, plaintiff's attorney entered into an agreement for settlement and compromise with the defendant's attorney to take a sum considerably less than the judgment in full satisfaction for the same.

The plaintiff repudiated the settlement, and also swore that he had never given his attorney any instructions, authority, or consent to compromise the action or the judgment recovered thereon, and that his instructions to the attorney were that he should collect the judgment debt and costs in the usual way. The attorney also testified that he had no authority to make such a settlement.

Held, (1) as a general rule the authority of an attorney is determined on final judgment being signed, but it seems that he may after judgment sue out execution upon it within a year, or receive the damages without execution.

(2) The plaintiff by instructing the attorney to collect the judgment debt and costs in the usual way continued his authority after judgment, and so the attorney would retain the power to bind the client by a compromise; following *Butler* v. *Knight*, L.R., 2 Ex., 109.

Appeal dismissed with costs.

Monkman for plaintiff.

Ewart, Q.C., for defendant.

BAIN, J.] [Feb. 18.

HARRIS *v.* YORK.

Interpleader—Delay by sheriff—Forfeiture of order for protection by reason of damage caused by bailiff.

Appeal by claimants from order of referee directing an interpleader issue on the application of the sheriff of the Eastern District.

The sheriff's bailiff seized, on 1st of December last, about twenty stacks of wheat and three of oats on a farm where he swore the defendant resided. A notice claiming the grain was served on bailiff by claimants within a day or two after seizure, and sheriff received the notice on or about the 8th of December. After service of the notice the bailiff threshed the stacks and sold a portion of the grain for $201.60, and this money and the balance of the grain is yet in the sheriff's possession. Sheriff applied for interpleader on December 23rd, assigning as the reason for the delay that he had difficulty in getting definite information from the bailiff, who lives at Morden, and from the place the seizure was made.

The claimants filed affidavits stating that shortly after the grain had been stacked a heavy storm of rain and snow had occurred, which drove into the stacks, and that the bailiff, by threshing the stacks as they stood with the snow and ice in them, practically destroyed the grain, and the wheat, which, if properly threshed, would have been worth from fifty to sixty cents per bushel, was not worth more than twenty cents: the stacks should have been left till spring, and not threshed till the snow and ice had melted out and the stacks dried. The bailiff's affidavit stated that the reason for threshing as he did was that shortly before he seized both defendant and claimant, A. N. York, had arranged with a thresher to thresh the grain as soon as he could get around to the farm on which it was, and that having heard of the arrangement after he seized he thought it advisable that it should be carried out, as it was very difficult to get threshing done: so it was done by the thresher for him at the same time as it would have been done for others. Other facts appeared in the affidavits, but it is sufficient to state that the learned judge found that the affidavits showed, "*prima facie*, that substantial loss had been occasioned by the action of the bailiff in threshing the stacks when he did."

Held, (1) if the stacks were the claimants', and they have suffered by the bailiff's action, they should not be deprived of their right to take action against the sheriff.

(2) The sheriff was not entitled to an interpleader, as he had not applied promptly as soon as he had notice of the adverse claim, but chose to exercise his own discretion, and, ignor-

ing the notice of claim, proceeded to thresh and afterwards sell part of the grain: *Crump* v. *Day*, 4 C.B. 764; and *Tufton* v. *Harding*, 29 L. J. Ch. 225; *Boswell* v. *Pettigrew*, 7 P.R. 393. *Darling* v. *Collaton*, 10 P.R. 110, is unfavorable to the sheriff's contention.

Appeal allowed, and order of referee set aside with costs.

Davis for claimants.

Howell, Q.C., for sheriff.

Sutherland for execution creditor Harris.

Cumberland for execution creditor Abell.

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Responsibility for Payment of Cheques on forged signature. *Ib.*, Feb. 15.

Flotsam and Jetsam.

JUDGE.—One year, and fifty dollars fine.

PRISONER'S LAWYER.—I will move to have that sentence reversed.

JUDGE. All right; fifty years, and one dollar fine.—*Ex.*

AN old farmer from one of the back counties was the defendant in a suit for a piece of land, and he had been making a strong fight for it. When the attorney for the other side began his speech he said:

"May it please the court, I take the ground——"

The old farmer jumped up and shouted:

"What's that? What's that?"

The judge called him down.

"May it please the court," began the attorney again, not noticing the interruption, "I take the ground——"

"No, I'll be hanged if you do, either," shouted the old farmer: "anyhow, not until the court decides the case."

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Principal, W. A. REEVE, M.A., Q.C.

Lecturers: E. D. ARMOUR, Q.C.; A. H. MARSH, B.A., LL.B., Q.C.; R. E. KINGSFORD, M.A., LL.B.; P. H. DRAYTON.

Examiners: FRANK J. JOSEPH, LL.B.; A. W. AYTOUN-FINLAY, B.A.; M. G. CAMERON.

ATTENDANCE AT THE LAW SCHOOL.

This School was established on its present basis by the Law Society of Upper Canada in 1889, under the provisions of rules passed by the Society in the exercise of its statutory powers. It is conducted under the immediate supervision of the Legal Education Committee of the Society, subject to the control of the Benchers of the Society in Convocation assembled.

Its purpose is to secure as far as possible the possession of a thorough legal education by all those who enter upon the practice of the legal profession in the Province. To this end, with certain exceptions in the cases of students who had begun their studies prior to its establishment, attendance at the School, in some cases during two, and in others during three terms or sessions, is made compulsory upon all who desire to be admitted to the practice of the Law.

The course in the school is a three years' course. The term or session commences on the fourth Monday in September, and ends on the first Monday in May, with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's day.

Admission to the Law Society is ordinarily a condition precedent to attendance at the Law School. Every Student-at-Law and Articled Clerk before being allowed to enter the School must present to the Principal a certificate of the Secretary of the Law Society, showing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

Students, however, residing elsewhere, and desirous of attending the lectures of the School, but not of qualifying themselves to practise in Ontario, are allowed, upon payment of the usual fee, to attend the lectures without admission to the Law Society.

The students and clerks who are exempt from attendance at the Law School are the following:

1. All students and clerks attending in a Barrister's chambers, or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889, so long as they continue so to attend or serve elsewhere than in Toronto.

2. All graduates who on June 25th, 1889, had entered upon the second year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the fourth year of their course as Students-at-Law or Articled Clerks.

Provision is made by Rules 164 *(g)* and 164 *(h)* for *election* to take the School course, by students and clerks who are exempt therefrom, either in whole or in part.

Attendance at the School for one or more terms, as provided by Rules 155 to 166 inclusive, is compulsory on all students and clerks not exempt as above.

A student or clerk who is required to attend the School during one term only must attend during that term which ends in the last year of his period of attendance in a Barrister's chambers or service under articles, and may present himself for his final examination at the close of such term, although his period of attendance in chambers or service under articles

may not have expired. In like manner, those who are required to attend during two terms must attend during those terms which end in the last two years respectively of their period of attendance in chambers or service, as the case may be.

Those students and clerks, not being graduates, who are required to attend the first year's lectures in the School, may do so at their own option, either in the first, second, or third year of their attendance in chambers or service under articles, upon notice to the Principal.

By a rule passed in October, 1891, students and clerks who have already been allowed their examination of the second year in the Law School, or their second intermediate examination, and under existing rules are required to attend the lectures of the third year of the Law School course during the school term of 1892-93, may elect to attend during the term of 1891-92 the lectures on such of the subjects of said third year as they may name in a written election to be delivered to the principal, provided the number of such lectures shall, in the opinion of the principal, reasonably approximate one-half of the whole number of lectures pertaining to the said third year, and may complete their attendance on lectures by attending in the remaining subjects during the term of 1892-3, presenting themselves for examination in all the subjects at the close of the last-mentioned term, and paying but one fee for both terms, such fee being payable before commencing attendance.

The course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

Friday of each week is devoted exclusively to moot courts, one for the second year students and another for the third year students. The first year students are required to attend, and may be allowed to take part in, one or other of these moot courts. They are presided over by the Principal or the Lecturer whose series of lectures is in progress at the time, and who states the case to be argued, and appoints two students on each side to argue it, of which notice is given at least one week before the day for argument. His decision is pronounced at the next moot court, if not given at the close of the argument.

At each lecture and moot court the roll is called, and the attendance of students carefully noted, and a record thereof kept.

At the close of each term the Principal certifies to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student is to be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series, delivered during the term and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal makes a special report upon the matter to the Legal Education Committee. The word "lectures" in this connection includes moot courts.

Two lectures (one hour) daily in each year of the course are delivered on Monday, Tuesday, Wednesday, and Thursday. The moot courts take the place of lectures on Friday. Printed schedules showing the days and hours of all the lectures in the different subjects will be distributed among the students at the commencement of the term.

During his attendance in the School, the student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions, or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, students will be provided with room and the use of books for this purpose.

The fee for attendance for each term of the course is $25, payable in advance to the Sub-Treasurer, who is also the Secretary of the Law Society.

The Rules which should be read for information in regard to attendance at the Law School are Rules 154 to 167 both inclusive.

EXAMINATIONS.

Every applicant for admission to the Law Society, if not a graduate, must have passed an examination according to the curriculum prescribed by the Society, under the designation of "The Matriculation Curriculum." This examination is not held by the Society. The applicant must have passed some duly authorized examination, and have been enrolled as a matriculant of some University in Ontario, before he can be admitted to the Law Society.

The three law examinations which every student and clerk must pass after his admission, viz., first intermediate, second intermediate, and final examinations, must, except in the case to be presently mentioned of those students and clerks who are wholly or partly exempt from attendance at the School, be passed at the Law School Examinations under the Law School Curriculum hereinafter printed, the first intermediate examination being passed at the close of the first, the second intermediate examination at the close of the second, and the final examination at the close of the third year of the school course respectively.

Any student or clerk who under the Rules is exempt from attending the School in any one or more of the three years of the school course is at liberty, at his option, to pass the corresponding examination or examinations under the Law Society Curriculum instead of doing so at the Law School Examinations under the Law School Curriculum, provided he does so within the period during which it is deemed

proper to continue the holding of examinations under the said Law Society Curriculum as heretofore. It has already been decided that the first intermediate examination under that curriculum shall not be continued after January, 1892, and after that time therefore all students and clerks must pass their first intermediate examination at the examinations and under the curriculum of the Law School, whether they are required to attend the lectures of the first year of the course or not. Due notice will be hereafter published of the discontinuance of the second intermediate and final examinations under the Law Society Curriculum.

The percentage of marks which must be obtained in order to pass an examination of the Law School is fifty-five per cent. of the aggregate number of marks obtainable, and twenty-nine per cent. of the marks obtainable upon each paper.

Examinations are also held in the week commencing with the first Monday in September for those who were not entitled to present themselves for the earlier examination, or who, having presented themselves, failed in whole or in part.

Students whose attendance upon lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations, either in all the subjects or in those subjects only in which they failed to obtain fifty-five per cent. of the marks obtainable in such subjects. Those entitled, and desiring, to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time of such examinations, of their intention to present themselves, stating whether they intend to do so in all the subjects, or in those only in which they failed to obtain fifty-five per cent. of the marks obtainable, mentioning the names of such subjects.

The time for holding the examinations at the close of the term of the Law School in any year may be varied from time to time by the Legal Education Committee, as occasion may require.

On the subject of examinations reference may be made to Rules 168 to 174 inclusive, and to the Act R.S.O. (1887), cap. 147, secs. 7 to 10 inclusive.

Honors, Scholarships, and Medals.

The Law School examinations at the close of the term include examinations for Honors in all the three years of the School course. Scholarships are offered for competition in connection with the first and second intermediate examinations, and medals in connection with the final examination.

In connection with the intermediate examinations under the Law Society's Curriculum, no examination for Honors is held, nor Scholarship offered. An examination for Honors is held, and medals are offered in connection with the final examination for Call to the Bar, but not in connection with the final examination for admission as Solicitor.

In order to be entitled to present themselves for an examination for Honors, candidates must obtain at least three-fourths of the whole number of marks obtainable on the papers, and one-third of the marks obtainable on the paper on each subject, at the Pass examination. In order to be passed with Honors, candidates must obtain at least three-fourths of the aggregate marks obtainable on the papers in both the Pass and Honor examinations, and at least one-half of the aggregate marks obtainable on the papers in each subject on both examinations.

The scholarships offered at the Law School examinations are the following:

Of the candidates passed with Honors at each of the intermediate examinations the first shall be entitled to a scholarship of $100, the second to a scholarship of $60, and the next five to a scholarship of $40 each, and each scholar shall receive a diploma certifying to the fact.

The medals offered at the final examinations of the Law School and also at the final examination for Call to the Bar under the Law Society Curriculum are the following:

Of the persons called with Honors the first three shall be entitled to medals on the following conditions:

The First: If he has passed both intermediate examinations with Honors, to a gold medal, otherwise to a silver medal.

The Second: If he has passed both intermediate examinations with Honors, to a silver medal, otherwise to a bronze medal.

The Third: If he has passed both intermediate examinations with Honors, to a bronze medal.

The diploma of each medallist shall certify to his being such medallist.

The latest edition of the Curriculum contains all the Rules of the Law Society which are of importance to students, together with the necessary forms, as well as the Statutes respecting Barristers and Solicitors, the Matriculation Curriculum, and all other necessary information. Students can obtain copies on application to the Secretary of the Law Society or the Principal of the Law School.

THE LAW SCHOOL CURRICULUM.

FIRST YEAR.

Contracts.
Smith on Contracts.
Anson on Contracts.

Real Property.
Williams on Real Property, Leith's edition.
Deane's Principles of Conveyancing.

Common Law.
Broom's Common Law.
Kerr's Student's Blackstone, Books 1 and 3.

Equity.
Snell's Principles of Equity.

Statute Law.
Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.
Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.
Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.

Personal Property.
Williams on Personal Property.

Contracts.
Leake on Contracts.

Torts.
Bigelow on Torts—English Edition.

Equity.
H. A. Smith's Principles of Equity.

Evidence.
Powell on Evidence.

Canadian Constitutional History and Law.
Bourinot's Manual of the Constitutional History of Canada.
O'Sullivan's Government in Canada.

Practice and Procedure.
Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.
Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.
Leake on Contracts.

Real Property.
Clerke & Humphrey on Sales of Land.
Hawkins on Wills.
Armour on Titles.

Criminal Law.
Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.
Underhill on Trusts.
Kelleher on Specific Performance.
De Colyar on Guarantees.

Torts.
Pollock on Torts.
Smith on Negligence, 2nd ed.

Evidence.
Best on Evidence.

Commercial Law.
Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.
Westlake's Private International Law.

Construction and Operation of Statutes.
Hardcastle's construction and effect of Statutory Law.

Canadian Constitutional Law.
British North America Act and cases thereunder.

Practice and Procedure.
Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.
Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

THE LAW SOCIETY CURRICULUM.

Examiners: FRANK J. JOSEPH, LL.B.
A. W. AYTOUN-FINLAY, B.A.
M. G. CAMERON.

Books and Subjects prescribed for Examinations of Students and Clerks wholly or partly exempt from attendance at the Law School.

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. 123, Revised Statutes of Ontario, 1887, and amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act; R.S.O., 1887, cap. 44; the Rules of Practice, 1888, and Revised Statutes of Ontario, chaps. 100, 110, 143.

FOR CERTIFICATE OF FITNESS.

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

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

*The First Intermediate Examination under this Curriculum will be discontinued after January, 1890.