Canada Law Journal.

VOL. XIX. NOVEMBER 1, 1883. No. 18.

DIARY FOR NOVEMBER.

1. Thurs... All Saints' Day.
3. Sat..... Draper, C.J., died, 1877.
4. Sun..... *Twenty-fourth Sunday after Trinity.*
5. Mon.... Sir J. Colborne, Lieut -Governor U.C., 1838.
6. Tues.... First Intermediate Examination.
7. Wed..... First Intermediate Examination.
8. Thurs... Second Intermediate Examination.
9. Fri..... Prince of Wales born, 1841. Second Intermediate Examination.
11. Sun..... *Twenty-fifth Sunday after Trinity.*
13. Tues.... Ct. of App. sitt. begin. Examination for Certificate of Fitness.
14. Wed.... Examination for Call.

TORONTO, NOV. 1, 1883.

The English Married Women's Property Act, 1882, has been decided by Mr. Justice Chitty, not only to have secured to married women separate rights of property, but, also, to have enlarged their capacity for acquiring property. Formerly the rule was that if a gift were made to a husband and wife and a third person, the property was divisible into moieties, the husband and wife taking only half, and the third person the other half of the subject of the gift. This rule was based on the principle that "the husband and wife are all one person in law," Co. Lit. p. 187. The act, however, appears to have effectually displaced this old time theory; and a husband and wife are, in England, no longer one, but two, as regards right of property; and according to Mr. Justice Chitty's decision in *Re March Manden* v. *Harris*, 49 L. T. N. S. 168, under such a gift the husband and wife now take one third each, and the third person the other third. It does not appear that the reasoning adopted by Mr. Justice Chitty in coming to this conclusion can be made applicable to the construction of the Married Women's Property Act, of this Province, the phraseology of which does not appear to be as wide as that of the English Act. By the English Act a married woman is declared to be capable of "acquiring, holding and disposing by will, or otherwise, of any real or personal property, as her separate property, in the same manner as if she were a *feme sole* without the intervention of any trustee." A comparison of these words with those used in the R. S. O. c. 125, will show that they give much more ample rights. The words in the Revised Statutes are "may have, hold and enjoy all her real estate, whether belonging to her before marriage, or acquired by her by inheritance, devise or gift, &c., or in any other way after marriage, free, &c., in as full and ample a manner as if she continued *sole* and unmarried," s. 3; see also ss. 2, 4 and 5. None of these sections say in terms that she may acquire property as a *feme sole*, but simply in effect provide that having acquired it as a married woman may acquire property, she may hold and enjoy it as a *feme sole*.

REDEMPTION.

A case of some importance, regarding the law of mortgages, was recently disposed of by the Divisional Court of the Chancery Division. We refer to *Martin* v. *Miles*, *ante* p. 316. The action was one for redemption. It appears that the defendant, Miles, was the mortgagee of one Cameron, against whom a judgment and final order of foreclosure had been obtained. Prior to the foreclosure, however, Cameron had leased the mortgaged property to Martin, who was not made a party to the foreclosure proceedings, and who, as such lessee, now brought the present action to redeem the mortgage, notwithstand-

ing the foreclosure of his lessor—the mortgagor. The defendant offered to confirm the plaintiff's lease, and contended that under the circumstances the plaintiff could not insist on the right to redeem. The case was tried before Wilson, C. J. C. P., who gave effect to the defendant's contention, considering that the equity of redemption was an equitable right which the court was at liberty to enforce, or refuse to enforce, according to the circumstances of each case. The Divisional Court, however, were unanimously of opinion that the judgment of Wilson, C. J., should be reversed, Boyd, C., laying it down that "an equity of redemption is an estate in the land, and in all cases where the right to redeem has not been barred by the Statute of Limitations, it exists as a right and an estate over which the court has no discretionary power."

No doubt there is very high authority for the law as thus laid down in Lord Hardwicke's judgment in *Casborne* v. *Scarfe*, 1 Atk. 603, which may be well considered the leading case in favor of the theory that the equity of redemption is "an estate in the land" and not a mere equitable right. There are, however, other authorities to be found both in the English courts and our own, some of quite recent date, in which the view is maintained that the equity of redemption is an equitable right only, and not an estate in its proper legal acceptation, although confessedly subject to many of the incidents of an estate. For instance, Sir John Leach, in *Lloyd* v. *Lander*, 5 Mad. 290, when discussing whether the equity of a redemption of a bankrupt mortgagor could vest in his assignees without an actual conveyance, said, "after a mortgage in fee no estate is in form left in the bankrupt. The equity of redemption is not an estate, but an interest, and may well be considered as substantially vested in the assignees before a bargain and sale. Whatever therefore might be the case with respect to real estate generally, it would be difficult to establish that it is necessary to give the assignee a title to redeem against the mortgagee, that there should be a bargain and sale of the equity of redemption." And again, Sir James Bacon. V. C., in *Paget* v. *Ede*, 18 L. R. Eq. 125, speaking of an equity of redemption, says: "It is said that is an estate. But it is by a figure of speech only that it can be called an estate. It may be in some instances that a husband may have a title by courtesy, and that gavelkind and borough English may apply to it. All these are necessary consequences of the law which recognises the interest of a mortgagor in his equity of redemption, but they do not alter the nature of the interest or create an estate; and in my opinion it is a misapplication of terms to call an equity of redemption an estate in the proper, technical, legal sense. That it is a right is beyond all doubt." In the Court of Chancery, of this Province, the court has also acted on this view, notably in the well-known case of *Skae* v. *Chapman*, 21 Gr. 534; and also in *Kay* v. *Wilson*, 24 Gr. 212. In these cases treating the equity of redemption as an equitable right over which the court might exercise a discretionary power redemption was refused, although the claim of the plaintiff in neither case appears to have been barred under the Statute of Limitations.

In the former case Spragge, C., quoted with approval from Powell on Mortgages, where it is said that an "equity of redemption is defined by Sir Matthew Hale to be an equitable right inherent in the land," and again where he says: "But although the power of redemption be an ancient right which the mortgagor and all claiming under him, whether by voluntary conveyance or otherwise, are entitled unto, yet being a right originating in, and in fact created by, a court of equity, it is made subservient to their rules," and treating the case as one to be governed by the same rules as are applicable to any other case where the court is asked to relieve against a forfeiture, he refused redemption, not because the plaintiff's right was barred by the Statute of Limitations, but be-

cause he thought the countervailing equities would render it inequitable to grant the relief under the circumstances of that case.

But whether the mortgagor's interest is to be considered as "an estate," or not, it seems clearly established that it is an estate of a somewhat anomalous character, and may be released and surrendered by acts of the party entitled thereto, indicating a clear intention of abandoning the right of redemption, without any formal release or conveyance: See *Smyth* v. *Simpson*, 7 Moo. P. C. 223, S. C. 5, Gr. 104; *Holmes* v. *Matthews*, *Ib.* 108; *Roaeh* v. *Lundy*, 19 Gr. 243.

It seems somewhat difficult to reconcile the dictum of Boyd, C., in *Martin* v. *Miles*, which we have quoted, with the principle on which *Skae* v. *Chapman* and *Kay* v. *Wilson* were decided. If the equity of redemption be an estate, and not a mere equitable right, the enforcement of which is subject to the discretion of the court, it is difficult to see how redemption can properly be refused in any case on the mere ground of laches, where the delay has not exceeded the period allowed for bringing an action by the Statute of Limitations. One of two conclusions seems inevitable, either that the dictum of Boyd, C., is too wide, or the cases of *Skae* v. *Chapman* and *Kay* v. *Wilson* cannot have been well decided.

The principle on which *Faulds* v. *Harper*, 2 O.R. 405, proceeded, received a further confirmation in *Martin* v. *Miles*, and the doctrine was reaffirmed that any person having any interest in the equity of redemption is entitled to redeem the whole mortgaged estate, and his right of redemption is not limited to the redemption of the particular estate or interest he may have in the equity of redemption. In *Faulds* v. *Harper* the equity of redemption was vested in several tenants in common, some of whom were, and some of whom were not, barred by the Statute of Limitations, and it was held that the mortgagee could not claim that as to the shares of those who were barred the estate was irredeemable; and now in *Martin* v. *Miles* it has been determined that the foreclosure of a part owner of the equity of redemption does not render the interest foreclosed irredeemable as against a part owner who is not foreclosed, but that the latter, if entitled to redeem at all, is entitled to redeem the whole mortgaged estate, absolutely, notwithstanding the foreclosure. *Faulds* v. *Harper* is, we believe, now standing for judgment in appeal; but the principle which the Divisional Court laid down in that case we think will be found to be the correct one.

There is one practical lesson to be learned from the case of *Martin* v. *Miles*, which practitioners will do well not to overlook, and that is the necessity of joining, as defendants in an action for foreclosure, the lessees of the mortgagor, and in fact all persons claiming under him, however small their interest may be; for so long as any interest exists unforeclosed, the parties entitled thereto are entitled to insist on redeeming the mortgagee. In the case of *Martin* v. *Miles* we understand it was alleged that the mortgaged property had greatly increased in value since the foreclosure of the mortgagor, and hence the desire of the lessee to redeem.

JUDGE GOWAN.

It is at all times a most delicate task to write even a brief memoir of a public man who is still living. Much that, in justice, ought to be said in praise of your subject will sound like adulation; while to criticize with freedom will expose you to the imputation of unpleasant fault-finding. It is still more difficult, perhaps, to review the career of a man, eminent as a judge, who has retired full of honors from the service of his country, after discharging judicial duties for a period exceeding 40 years, especially when one feels a warm personal regard for the man. The length of this term of service is almost un-

paralleled in the judicial annals of the Dominion, and yet Judge Gowan has the satisfaction of retiring from an onerous post, with the knowledge, that though physically he feels the inroad made upon his health by his long judicial labors, yet that he retains in an unusual degree his faculties unimpaired, and is enabled by the blessing of Providence to enjoy his well-earned rest with the keen zest that arises from the possession of a vigorous intellect and a cultivated and well-stored mind. This merited enjoyment of ease and comfort will be materially enhanced by the feeling that the greater part of his past life has been usefully and profitably spent in the service of his country.

Appointed to the County Court of the County of Simcoe, in 1843, at the early age of 25, Judge Gowan has for over two score years discharged his duties as a County Judge, and during that period has probably done as much as, if not more than any living politician or judge, towards improving, cementing together, and building up our local Courts' judicial system to the perfection it has now attained. Developing before his appointment to the bench a singular readiness and skill as a legal draftsman, this rare ability has been constantly drawn upon by successive Governments, and the imprint of his legal capacity, his practical knowledge of the requirements of the country, and the marks of his patient industry can be traced in numerous statutes passed from time to time, and particularly in the various consolidations of the statutes which periodically the Legislature has been compelled to make in order to compress, prune and simplify our somewhat luxuriant and redundant law-making. Judge Gowan, in 1853, was one of the five Judges appointed to frame rules regulating the procedure in the Division Courts under the act of that year. In the year 1857 he was associated with the Judges of the Superior Courts of Common Law, to frame a tariff of fees for those Courts. He was also associated about the same time with the late Sir J. B. Macauley, in consolidating the Statutes of Upper Canada and Canada; and likewise with Mr. Justice Burns and Vice-Chancellor Spragge (the present Chief Justice of the Court of Appeal), in framing the rules and orders regulating proceedings in the Probate and Surrogate Courts. In 1869 he was appointed Chairman of the Board of County Judges, which position, we understand, he has been requested by Attorney-General Mowat to retain, notwithstanding his retirement from the County Bench—a graceful, and at the same time merited, acknowledgement of his past valuable services, and one which enables a much-desired bond of connection to be maintained between Judge Gowan and his brethren of the County Bench. In 1870 he was appointed by the Dominion Government one of a committee to consolidate the Criminal Laws, and about the same time received an appointment from the Ontario Government as one of five commissioners, to consider the feasibility of a fusion of the Courts of Law and Equity, a result since consummated by the Judicature Act. In 1873 he was nominated as one of the Royal Commissioners to enquire into the Pacific Railway scandal; his duties connected with this enquiry he discharged with his usual fidelity, fairness and conspicuous impartiality; and notwithstanding the excited political feeling of the period he seems to have escaped, with a slight sprinkling, the shower of abuse which was so indiscriminately poured (whether properly or not we offer no opinion) upon the party then in power, and upon all connected with them officially or otherwise. In 1874 Judge Gowan was appointed by the Ontario Government one of the Commissioners for the revision, consolidation and classification of the Public General Statutes relating to the Province— a work which was finally completed, much to the satisfaction of the public and the profession in 1877.

The foregoing is but a brief *resume* of some of the more important judicial and public work in which Judge Gowan has taken a

prominent part during the past 30 years of his life, but it by no means professes to be an accurate record of his manifold services to the profession and the state. It is well known that many important Acts of Parliament, and many valuable amendments of existing statutes have originated in his fertile brain, and any suggestion coming from this eminent Judge, with his known experience and ripe judgment, it may well be believed, was eagerly and gladly made use of by the officers of the Crown for the time being, and speedily these suggestions would be found reflected in the Statute Book.

Towards the organization and practical working out of our somewhat complicated municipal system, Judge Gowan has contributed more than perhaps any other one individual. Living himself after his appointment in a new District—brought into daily contact with the immigrant and the old settler, forced to hold his first Division Courts in localities to which for a time the only means of access would be a bridle path, and the only means of locomotion a saddle-horse or one's own stout legs—he was brought face to face with the wants and peculiar requirements of settlements hewn out of the primeval forest, and the learned judge thus acquired a practical experience which was open to few. This special knowledge, added to his well-known legal attainments, and the confidence which was felt in his judgment and knowledge in high quarters, gave him the opportunity to mould much needful and practical legislation —legislation which otherwise would have been largely theoretical and of questionable value. In all such matters Judge Gowan did not confine himself solely to the limited sphere of his local judicial duties, but with pen and voice brought under public notice any notable abuse, or suggested some sensible amendment of the existing law, which would bring order out of chaos, and tend to reduce the constant friction which is an incident to all newly devised systems no matter how carefully framed. Through such labors as his—and the labors of many others, too, who are entitled to be credited with efforts in the same direction—we have perfected a most flexible and workable system of local self-government, which, while a boon to the various local communities, is at the same time a monument more enduring than brass of the untiring energy and patriotism of men like the late Judge of the Judicial District of Simcoe.

Possessed of such qualities of mind and temperament as we have depicted, so singularly well adapted for judicial work, and judicial distinction, it may be a matter of some wonder why Judge Gowan has not many years since been translated to a larger arena and found a place upon the Superior Court Bench. We believe we are guilty of no impropriety in stating that such preferment has on more than one occasion been within his reach. The learned Judge has, however, always declined any such promotion. A certain natural tenderness of heart, notwithstanding his firmness of character and admirable judicial temper, has prevented him from accepting so responsible a position, since it would involve the necessity, in the higher place, of dealing with capital criminal offences, a duty from the performance of which his sensitive nature recoiled. Had he seen his way clear to accept promotion, his record would undoubtedly have been a fitting sequence to his brilliant career upon the County Court Bench. As a highly conscientious man, Judge Gowan no doubt felt that he was fitted for the position he found himself in, and that it was in his power, possibly, to do more for the advancement and improvement of our legal and municipal system as a County Court Judge, than he would be able to do if he occupied the higher place. The country, by this decision, though it lost the services of an able jurist in the Superior Court, gained largely, we venture to say, by his determination to serve her faithfully and well in the County Court.

JUDGE GOWAN.

Judge Gowan, it is conceded, was first amongst his County Court contemporaries, and his administration of justice in the County of Simcoe, has been a model for judicial imitation in the other Counties of the Province. His paramount influence in inducing order, system and accuracy of detail in the various departments presided over by judicial and municipal officers, within his jurisdiction, is acknowledged by all who have any acquaintance with the County of Simcoe. It is indeed wonderful that one man could do so much, but his heart was in his work and his officers and others caught his reflected energy. Few men could have discharged official duties for so long a period with such fidelity and credit, and to their latest year displayed such untiring activity and such mental vigor; and it is not given to all men to preside in a county for more than 40 years, and call forth such spontaneous and universal expressions of regret as those heard on all sides when Judge Gowan's retirement was announced.

Few of his decisions have been reviewed in the Superior Courts, and we believe throughout the whole of his judicial career but two of those pronounced have been reversed. There is therefore but little material upon which to base an estimate or express an opinion as to the literary style and matter of his written judgments. All of his that we have read, however, are clear in diction, dignified and concise. They are entirely free from any parade of learning or affectation. Two objects seem to absorb the attention of the Judge. 1—Properly to adjust the disputed rights of the parties. 2—To establish a rule by which similar questions may be solved in the future, and if possible to bring each case within the scope of some general principle which he has enunciated and defined, guarding it, however, with proper conditions and exceptions. Without resorting to forced interpretations or fanciful analogies, he seems anxious to support his opinions by legal precedents which he cites often and with great felicity. The soundness of his judgments and the care with which he prepared his decisions is evidenced by the fact before mentioned, that but two of his judgments appear to have been reversed on appeal. Judge Gowan occupies as strong a position in the hearts of his friends and acquaintances from his high personal character as from his judicial excellence. A kind thoughtfulness for others and a benevolent disposition endear him to the community in which he has heretofore passed his long and useful life. Spotless purity, entire freedom from undue influence, and an earnest desire to do justice have characterized him as a Judge; great force of character combined with cordiality and courtesy of demeanor, and a high consideration for the performance of his duties have distinguished him as a citizen.

We might refer, did space permit, to the many acknowledgments of valuable assistance given by him to many who, as text-writers and annotators, have endeavored from time to time to help their professional brethren in various departments of legal literature; but we cannot conclude this brief and imperfect sketch without an allusion to the fact that Judge Gowan was instrumental in founding the "Upper Canada Law Journal"; that he has ever been to us a devoted friend and a constant and valued counsellor, one whose interest and assistance have on many occasions shielded the venture from the rocks and shoals to which journalism is so constantly exposed. The columns of this Journal have often reflected his opinions on important matters; and if it has been a success, it is largely due to his many wise and pregnant suggestions, and to the deep personal interest he has always manifested in its welfare.

He takes with him into his well-earned retirement the best wishes of a large circle of friends and admirers for his future health and happiness. And we trust that in some way or another the country may still have the benefit of his talents and his ripe experience. His career is a brilliant example to those

who occupy similar positions of trust and dignity—to emulate which will be a duty, but to equal which will indeed be difficult.

We publish in another place the address presented to Judge Gowan by the Bar of his County on the occasion of his retirement, and his reply thereto.

RECENT ENGLISH DECISIONS.

The September number's of the Law Reports comprise 11 Q. B. D. p. 313-485; 8 P. D. p. 149-178; 23 Ch. D. p. 577-689.

BILLS OF LADING DRAWN IN TRIPLICATE—TENDER OF TWO ONLY—MERCANTILE USAGE BASED ON CREDIT NOT ON DISTRUST.

In the first of these the first case requiring notice is *Sanders Brothers* v. *Maclean & Co.*, p. 327, which is an interesting decision on bills of lading and mercantile law and usage in connection therewith. The action was brought by the vendors on a contract entered into between them and the defendants for the sale and purchase of cargoes of iron. The contract merely stated that the cargo was to be paid for in London in cash in exchange for bills of lading. Two parts of the bill of lading of the particular cargo in question were tendered to the defendants on August 3rd, 1880, but they rejected those on the ground that it appeared, by the parts of the bill of lading which were presented to them, that the bill of lading had been drawn in three parts, and two only were tendered to them. Thus, in the words of Brett, M. R., the question was whether, "where, by the terms of an ordinary contract of sale relating to goods shipped, payment is to be made against bills of lading, it is a part of that contract that all the existing copies of the bill of lading must be offered in order to entitle the sender of the goods to payment?" The Court of Appeal unanimously decided this question in the negative, and they held that if the purchaser refuses to accept the bill of lading tendered and to pay, he does so at his own risk as to whether it may turn out to be the fact or not, that the bill of lading tendered was an effectual one, or whether there was another of the set which had been so dealt with as to defeat the title of the purchaser as indorsee of the one tendered. As to this, Cotton, L. J., observes, at p. 339:—"Now although undoubtedly if the third part of a bill of lading should be indorsed and parted with to some party before the tender of the first part, such tender would not be a compliance with the contract, because that which would be tendered would not be an effectual bill of lading, yet, in my opinion, if the purchaser chooses to refuse to accept the cargo, because he does not know whether in fact the tender does comply with the terms of the contract, and whether the other part of the bill of lading has been parted with or not, he does so at his peril, and if it should turn out on investigation that in fact what was tendered to him was an effectual bill of lading, effectual to pass the property in the cargo, then he broke his contract by not paying the money, and by refusing to accept the cargo when such effectual bill of lading was tendered to him." Bowen, L.J., at p. 342, makes some very interesting observations on mercantile usage generally. He says:—"If we were to hold such a tender is not adequate, we must, as it appears to me, deal a fatal blow at this established custom of merchants, according to which, time out of mind, bills of lading are drawn in sets, and one of the set is habitually dealt with as representing the cargo independently of the rest. If the set, for purposes of contracts like the present, must always be kept together, the whole object, be it wise or unwise, of drawing bills of lading in triplicate is frustrated. For if one of the set were lost, or had been forwarded by the shipper or any subsequent owner of the cargo to his correspondent by way of precaution, the cargo becomes unsaleable. The only possible object of requiring the presentation of the third original must be to prevent the chance, more or less remote, of fraud on the part of the

shipper or some previous owner of the goods. But the practice of merchants, it is never superfluous to remark, is not based on the supposition of possible frauds. The object of mercantile usages is to prevent the risk of insolvency, not of fraud; and any one who attempts to follow and understand the law merchant, will soon find himself lost if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealing. The contrary is the case. Credit, not distrust, is the basis of commercial dealings; mercantile genius consists principally in knowing whom to trust and with whom to deal, and commercial intercourse and communication is no more based on the supposition of fraud than it is on the supposition of forgery."

TIME WHEN TENDER OF BILLS OF LADING TO BE MADE.

Before leaving this case it may be observed that in reference to a further point which came up in this case, though not necessary to be decided, Brett, M.R., expressed a view, which the other judges also incline towards, that the seller of goods under such a contract as that in question in this case, should make every reasonable exertion to forward the bills of lading to the purchaser as soon as possible after the shipment, but there is no implied condition in such a contract that the bills of lading shall be delivered to the purchaser in time for him to send them forward so as to be at the port of delivery either before the arrival of the vessel with the goods or before charges are incurred there in respect of them.

STOPPAGE IN TRANSITU—DELIVERY TO AGENT OF VENDEE—END OF TRANSIT.

The next case demanding notice is *Kendal* v. *Marshall, Stevens & Co.*, p. 356, which is on the subject of stoppage in transitu. The point of law illustrated by the decision is that though the goods purchased may not have reached the vendee, yet if they have been received by an agent of the vendee at some intermediate stage of their passage to the vendee, the transit is over for the purpose of the vendor's right of stoppage in transitu. As Brett, L.J., says, p. 365:—"When the goods have arrived at the end of the journey upon which they have been sent by the vendee's orders, and have been received by the vendee's agent upon his behalf, the right to stop is gone." Or, in words of Cotton, L.J.: "So long as the goods have not been delivered the right to stop in transitu remains; but in order to ascertain whether the right still exists it is necessary to look at the persons and the place to whom and at which, as between seller and buyer, the delivery is to be made. If the goods get into the hands of the buyer before reaching their destination the right to stop is gone; for it is only when the goods are in actual transit that the seller can prevent their delivery. The goods, however, may be sent to an agent of the buyer to be held for him, and to be disposed of as he may direct; in a case like that, the agent has no control over the goods except on behalf of the buyer, and he is merely employed to carry out the buyer's order, and the right to stop is lost, because the goods have reached their destination, and the transit as between buyer and seller is at an end. The transit from the seller to the buyer is the only one to be considered in determining whether the seller can exercise his right of stoppage. For this purpose it is immaterial that the buyer, when the transit from the seller to him is at an end, starts them on to a fresh destination. This is a fresh transit, not from the seller to the buyer, but by or from the buyer."

INSURANCE A CONTRACT OF INDEMNITY—SUBROGATION.

The next case which has to be noticed is *Castellain* v. *Preston*, p. 380, which is an appeal from the decision of Chitty, J., commented upon at some length in this Journal, *supra* Vol. 18, p. 296-7. It may be remembered there was here a contract for the sale of a house, on which a policy of insurance existed. Nothing was said in the contract as to the policy. After the date of the contract, but before the date fixed therein for the com-

pletion thereof, the fire took place, and the vendors received the insurance money from the company. The purchase was afterwards completed, and the purchase money agreed upon, without any abatement on account of the damage by fire, was paid to the vendor. The insurers then brought this action to recover the money paid by them on the policy, contending that the contract of insurance was merely a contract of indemnity, and unless they recovered in this action the defendants would receive double satisfaction. Chitty, J., however, held that the insurers were not entitled to recover back the insurance money from the vendors, either for their own benefit or as trustees for the purchaser. The Court of Appeal now over-ruled this, holding that the Company were entitled to recover a sum equal to the insurance money from the vendors for their own benefit, and it seems safe to predict that their judgments will hereafter be cited as the strongest authorities for the proposition that policies of fire or marine insurance are contracts of indemnity, and nothing more, and as enunciating the right of subrogation of insurers in its broadest and most extended form. The following passage in the judgment of Brett, L. J. puts this matter in a clear light, and is apparently concurred in entirely by the other judges: "In order to give my opinion upon this case, I feel obliged to revert to the very formation of every rule which has been promulgated and acted on by the Courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, *shall be fully indemnified, but shall never be more than fully indemnified.* That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong * * * The doctrine of subrogation does not arise upon any of the terms of the contract of insurance; it is only another proposition which has been adopted for the purpose of carrying out the fundamental rule which I have mentioned, and it is a doctrine in favour of the underwriters, or insurers, in order to prevent the assured from recovering more than a full indemnity; it has been adopted solely for that reason. It is not, to my mind, a doctrine applied to insurance law on the ground that underwriters are sureties. Underwriters are not always sureties. They have rights which sometimes are similar to the rights of sureties, but that again is in order to prevent the assured from recovering from them more than a full indemnity. But it being admitted that the doctrine of subrogation is to be applied merely for the purpose of preventing the assured from obtaining more than a full indemnity, the question is, whether that doctrine as applied in insurance law can be in any way limited * * * Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavor to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised, or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured can be or has been diminished. That seems to be to put this doctrine of subrogation in the largest possible

form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated. But it will be observed that I use the words, 'of every right of the assured.' I think the rule does require that limit * * * The contract in the present case (the contract of purchase) as it seems to me, does enable the assured to be put by the third party into as good a position as if the fire had not happened, and that result arises from this contract alone. Therefore, according to the true principles of insurance law, and in order to carry out the fundamental doctrine, namely, that the assured can recover a full indemnity, but shall never recover more, except, perhaps, in the case of the suing and labouring clause under certain circumstances, it is necessary that the plaintiff in this case should succeed"—p. 386-392. And Bowen, L. J., at p. 404, says of the above language of Mr. Justice Brett: "It does seem to me, that taking his language in the widest sense, it substantially expresses what I should wish to express with only one small appendage that I desire to make. I wish to prevent the danger of his definition being supposed to be exhaustive, by saying that if anything else occurs outside it, the general law of indemnity must be looked at." And he says in another place, that in all the difficult problems that arise in connection with the subject, he goes back "with confidence to the broad principle of indemnity."

A. H. F. L.

REPORTS

RECENT ENGLISH PRACTICE CASES.

IN RE PAYNE, RANDLE V. PAYNE.

Imp. O. 16, r. 8—Ont. r. 97—Action by next friend of married woman—Security for costs.

[L. R. 23 Ch. D. 228.

An action was brought by a married woman by her next friend, and an order was made that the next friend should give security for costs on the ground of poverty. That order not having been complied with the action was dismissed with costs. Afterwards the plaintiff, by a different next friend, brought another action for the same purpose.

Held, the second action ought to be stayed till the costs of the first action were paid.

PENRICE V. WILLIAMS.

Imp. O. 31. r. 12—Ont. r. 222.

Order of reference—Production of documents—"Matters in question in the action."

[L. R. 23 Ch. D. 353.

This was an application by the plaintiff, under the above English rule, that the defendants might be ordered to make an affidavit of the documents in their possession. The defendants objected on the ground (as was the case) that an order had been made by consent of the parties, referring the action and all matters in difference to the award of an arbitrator; and it was said that the effect of this order was that there was no longer any action or question in an action pending before the court, and therefore that the jurisdiction of the court was exhausted. The order relied on was an arbitration order, and provided that the parties should produce before the arbitrator all documents in their or either of their custody or power relating to the matter in difference; also that the party in whose favour the award should be made should be at liberty, after the service of a copy of the award on the other party, to apply for final judgment in accordance with the award.

Held, the effect of the order was that, for all practical purposes, the action, so far as the court was concerned, had disappeared in every respect, with the exception that the court had to allow judgment to be entered up according to

the award: that the duty of the court in this respect was of a purely ministerial nature, and there was, therefore, so far as the court was concerned, no "matter in question in the action" within the above rule, and the power of the court to make the order asked for, or any other judicatory order was gone.

Held, also, that under the order the whole jurisdiction as to discovery was in the hands of the arbitrator.

The rule that an order of the court carries with it "liberty to apply" though not expressly reserved, only applies when the order is one not of a final character.

LYDNEY AND WIGPOOL IRON ORE COMPANY v. BIRD.

Imp. O. 55, r. 2—Ont. r. 429.

Security for costs—Time for applying.

[L. R. 23 Ch. D. 358.

The old chancery rule that an application for security for the costs of an action must be made promptly, is inconsistent with the above rule, and must be taken to have been abrogated:

Held, therefore, that an application by a defendant for security for the costs of an action brought against him by a limited Company might be made after reply and notice of trial.

IN RE BROWN, WARD v. MORSE.

Claim — Counter-claim — Costs where both succeed.

[L. R. 23 Ch. D, 377.

When the plaintiff's claim and the defendant's counter-claim have both been successful, the plaintiff, in the absence of any special directions to the contrary, is entitled to the general costs of the action, notwithstanding that the result of the litigation is in favour of the defendant, and the defendant is entitled to receive from the plaintiff the costs of the counter-claim.

There will be no apportionment of such costs as would have been duplicated had the counter-claim been the subject of an independent action, but the plaintiff is not to recover as costs of the action any costs fairly attributable to the counter-claim.

KENNEDY v. LYELL.

Discovery—Privileged communications.

If the information of a party to an action as to matters of which discovery is sought, arises from privileged communications which he is not bound to disclose, as for example from information procured by his solicitors or their agents in and for the purpose of his defence to the action, and if the matters inquired into are not simple matters of fact, patent to the senses, as for example, if they are questions of pedigree, he ought not to be compelled to answer on his belief as to those matters.

Per COTTON, L. J.—"What is the ground on which all professional privilege is claimed? It is this—that having regard to the technical nature of our law it is of the utmost importance that no layman should be in anyway hindered from having the utmost freedom in communicating with his professional advisers, whether counsel or solicitors. There is also another principle, that no one is to be fettered in obtaining materials for his defence, and if he, for the purpose of his defence, obtains evidence, the adverse party cannot ask to see it before the trial. I do not think that this principle applies here, but I mention it that I may not be supposed to limit protection to the simple professional privilege which arises where information has been obtained through a solicitor."

ONTARIO.

(Reported for the LAW JOURNAL.)

ASSESSMENT APPEALS.

IN RE MIDLAND RAILWAY CO. OF CANADA AND TOWNSHIP OF NORTH GWILLIMBURY.

Assessment Act, s. 25—Land of Railway Co.—How to be assessed.

[McDOUGALL, J.J.—Sept., 1883.

The assessment of the Railway Company's lands in this township, was as follows:

1 1-2 acres - -	$2,500.00
50 acres - - -	2,500.00
	$5,000.00

The evidence showed that the average assessment of the ordinary farming lands on either side of the roadway (including the buildings) was $31.00 an acre. There was no separate

assessment of the land alone. It was argued that under R. S. O, c. 180, sec. 26, sub.-sec. 1, the same basis should be applied to the assessment of the Company's roadway, including the buildings situated on it, and that an acre and a half, which was the area of their yard at Sutton, and on which were erected their station buildings and warehouses at that point, should be assessed at the same value as the adjoining lands and that the buildings situated thereon should be assessed at what they are worth at the present time.

J. L. Biggar, for appellants.

John Paterson, for respondents.

McDOUGALL, J. J., *held*, that the point was well taken; that the law evidently meant that the roadway of a Railway Company should be assessed upon the average value of the lands adjoining, and not of the lands and buildings, but as in all other cases lands and buildings were not separated on the assessment roll, neither should they be so separated in the case of the Company's property, unless the buildings situated on the Company's lands were in excess of the average buildings situated on the farms adjoining. As to the 50 acres, the admitted area of the roadway in the township, exclusive of the acre and a half at Sutton, he held that the assessment therefor should be $1,550.00, being an average of $31.00 an acre, and that the acre and a half at Sutton, and the buildings thereon, should be assessed at their value, which was held to be $950.00. The assessment was therefore reduced from $5,000.00 to $2,500.00.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

MONKHOUSE v. GRAND TRUNK RY. CO.

Provincial railways—Railway employees, injuries to.

The plaintiff, a workman employed by the Grand Trunk Ry. Co., was injured while in discharge of his duties by reason of the improper laying of the rai s, his foot having been caught in one of the frogs of the road, for which injury he obtained a verdict for damages, which, on appeal, was set aside, and a verdict directed to be entered for the defendants; the Grand Trunk Railway not being included in the statute 44 Vict. ch. 22 (O.)

Bethune, Q.C., for the appellants.

Mulock, for the respondent.

MCLAREN v. CANADA CENTRAL RY. CO.

Negligence—Contributory negligence—Evidence.

On an appeal from the judgment of the Court below (32 C. P. 324) the Court being equally divided, the judgment of the Court below was affirmed with costs.

Bethune, Q.C., and *W. H. Walker*, for the appellants.

McCarthy, Q.C., and *Creelman*, for the respondent.

PLATT v. ATTRILL.

Costs of abortive hearing.

By reason of the retirement of Blake, V.C., (who sat in place of the C. J.) after the argument of this case, a reargument was directed by the Court.

Held, that the successful party was entitled to the costs of both arguments.

SAYLOR v. COOPER.

Right of way.

The judgment of the Court below (*ante* Vol. 18, p. 262) affirmed on appeal.

Moss, Q.C., for the appeal.

Bain, contra.

HOWES v. THE DOMINION INS. CO.

Mortgage, etc.—Fire Insurance—Change in character of risk.

The plaintiff executed a mortgage in favour of a Loan Co. whereby he covenanted to insure the buildings on the property, which he failed to do, but assented to the mortgagees doing so on his behalf, and they did effect an insurance in their own name instead of the plaintiff's, he repaying the amount of premium. The premises insured were described as a "two-storey frame, shingle-roofed building . . . owned and occupied . . . as a steam binding factory." . . . The property having been destroyed by fire

the Insurance Co. paid the amount insured and took an assignment of the mortgage from the Loan Co., and the plaintiff thereupon instituted proceedings against the insurance company, seeking to redeem the property on payment of what was due over and above the amount of insurance. In the course of the litigation it was shown that the premises instead of being used as a steam binding factory had been converted into a door and sash factory; of which change no notice had been given to the insurance company, although the change materially increased the risk.

Held, (reversing the judgment of the Court below), that the statutory condition as to change of occupation or use of the buildings without notice to the insurance company had been broken, thus invalidating the policy, and that the plaintiff was not entitled to any benefit thereunder.

COCHRANE v. BOUCHER.

Divisional Court, constitution of—Validity of judgment—Appeal.

In moving against a judgment of the Chief Justice, before whom and a jury the action had been tried, the full Court presided. When judgment was pronounced one of the puisne judges was absent, engaged in another court.

Held, that under the J. A. O. sec. 29, subs. 5, the judgment then delivered was invalid, and therefore could not be appealed against, and leave to appeal therefore was refused, but, under the circumstances, without costs.

Beck, for the defendant who moved.

NEILL v. TRAVELLERS INS. CO.

Leave to appeal to Supreme Court—Discretion of judge.

Held, (SPRAGGE, C.J.O., dubitante), that no appeal will lie from the order of a judge granting an extension of time within which to appeal to the Supreme Court. But *per curiam* where an appeal is from the exercise of discretion by the judge, the Court should not review such exercise of discretion.

Osler, Q.C., for the respondent who moved.

G. H. Watson, contra.

ARCHER v. SEVERN.

Will, construction of—Devise to creditor—Satisfaction.

The testator by his will, made in July, 1877, devised to his son G. certain real estate and brewery, expressing that "this devise to be accepted by and to be in full discharge of any and every claim he shall have against my estate at the time of my decease." In a subsequent clause the testator declared that in the event of selling lands specifically devised, the proceeds were to be substituted for the lands by charging the proceeds against the real estate of the testator. The testator was indebted to G. in the sum of $36,146.86, and on the 8th of October, 1879, the parties met and agreed that the testator should sell the lands in question, including the brewery, to G. for $27,000, and the brewery plant for $6,987.20, which was credited on G.'s claim against the testator. G. instituted proceedings against the estate of the testator, seeking to obtain payment of the amount for which the brewery premises and plant were sold, as having been devised to him, he swearing that he was ignorant as to the contents of the will.

Held, (reversing the judgment of the Court below), that the agreement entered into between the father and son superseded the devise to the son.

Bethune, Q.C., for appellant.

S. H. Blake, Q.C., for respondents.

CHANCERY DIVISION.

Ferguson, J.] [June 6.

CLARK v. DARVAGH.

Devise—Condition that devise should be forfeited if the infant devisee went and lived with his father.

Devise to executors of real and personal estate of a testator in trust for the benefit of his infant grandson, G. H., "until he arrives at the full age of twenty-one years, at which time I direct my said executors to give to my said grandson the whole of the said property, subject nevertheless to the provisions hereinafter mentioned: . . Should the said G. H. at any time time before coming of age go to live with his

father, W. H., he is to be disinherited of the whole or any portion of my estate, and the said estate so forfeited is to be then given to my son J. D., his heirs and assigns." Nothing was shown that W. H. had done anything to deprive himself of the right to the custody and control of his child.

Held, that the infant took a vested interest, and the direction to give the property to him on his attaining twenty-one, only had reference to vesting in possession; and the condition debarring him from living with his father was a condition subsequent, and was void. It was right in the eye of the law that the child should live with his father. He was, by law, compellable by the father so to do, and to live with the father, when the father so desired, was the duty of the infant so far as a duty can by law be cast upon an infant, and assuming this to be so the condition was void as against law.

W. P. R. Street, Q.C., for the plaintiffs.
W. Cassels, Q.C., for defendant Jas. Darvagh.
W. R. Meredith, Q.C., for infant defendant G. Hodgins.
T. G. Meredith, for defendant W. Hodgins.

Boyd, C.] [Oct. 10.

MALCOLM V. HUNTER.

Division of watercourse—Acquiescence—Statute of Limitations—Onus.

Action for damages and an injunction to restrain the defendant from diverting a creek running across his, the defendant's land, from the channel in which it was alleged to have flowed for more than twenty years; and the plaintiffs claimed an easement in respect of the said creek, which, previous to the diversion complained of, supplied water to the mill of the plaintiffs, situated on adjoining land. It appeared that the said channel was an artificial cut diverting the water in the creek from its natural outlet, and that this artificial cut was made at the instance and by permission of the then owner of the creek in 1860, in order to give a better supply of water to the mill of the plaintiffs, one of whom was his nephew, and in part to supply some drainage to his, the uncle's land. The plaintiffs admitted that this was the origin of the watercourse in dispute, and it appeared the subsequent user continued upon the same footing.

Held, the *onus* was on the plaintiffs to make out their right, and to show there was a change in the mode of user, after it had originated by the said permission, which they had not done, and the action must be dismissed with costs.

A. J. Wilkes, for the plaintiffs.
Fitch & Lees, for the defendant.

Boyd, C.] [Oct. 10.

LONG V. HANCOCK.

Fraudulent preference—Pressure—R.S.O. c. 118.

Interpleader issue. The Hamilton Knitting Company being indebted to the plaintiffs for a large overdue account, application was made by letter and verbally, on the part of the plaintiffs for payment or security. The letters stated that the plaintiffs did not care to wait longer for a settlement; that if the account was not closed at once it would be placed in an attorney's hands for collection; and that the plaintiffs must insist on a settlement. The verbal demands made by the plaintiffs were to the same effect.

In compliance the company, which was in insolvent circumstances, gave a chattel mortgage to the plaintiffs covering all their available assets; the mortgage recited that the plaintiffs had agreed to loan the company $5,000 on the said security, but the arrangement was that the plaintiffs should deduct the amount of the debt due them out of the pretended loan.

Held, that the above was a fraudulent preference, and there was no pressure to exempt the case from the provisions of R. S. O. c. 118.

The doctrine of pressure is not to be extended, and it has gone already to a length which approximates to absurdity. The proper conclusion from the facts of this case was that there was no *bona fide* pressure which induced the giving of the security, but that it was a device of a moribund company to prefer the plaintiffs to the other creditors, as all parties very well knew and designed.

Ferguson, J.] [October 19.

DUNN V. THE BOARD OF EDUCATION OF THE TOWN OF WINDSOR.

Mandamus to admit child to public school—Public school regulations—Want of accommodation.

Application for a *mandamus* to compel the defendants to admit the daughter of the plaintiff

into a certain public school in the town of Windsor, known as the Public Central School.

Mandamus refused, *firstly*, on the gro nd that the evidence showed that there was not accommodation at the school for the child ; and this is a valid answer to such an application, especially where it appears as it did here that there was sufficient accommodation for the child at the other public school in the said town ; *secondly*, on the ground that the application of the plaintiff was not made in the regular and proper way, under the Public School Regulations, inasmuch as it appeared that although the child in question was a registered pupil at the said other public school during the last term, she had not attended there at the commencement of the present term, as required by Public School Regulations, chap. 12, sec. 6, nor had the plaintiff applied to the inspector to have the child admitted to the Public Central School, as he should have done under chap. 12, sec. 7 of the said regulations.

N. W. Hoyles, for the applicant.
Foster, contra.

Ferguson, J.] [Oct. 22.

WYLD V. MCMASTER.

Motion to continue interim injunction long enough to enable applicant to have the decision of the Court of Appeal on the point involved, the same being well decided in courts of first instance.

Motion by the plaintiff to continue an injunction, so as to preserve the subject matter of the action *in statu quo*, not only until the trial, but until the case could be heard before the Court of Appeal, on the ground that the cases in courts of first instance were unquestionably against the applicant, and therefore unless time was given him to carry the matter to the Court of Appeal, he would be without substantial relief. The applicant relied on some expressions in the judgments in certain cases of what the opinions of the judges might have been but for the decisions in the books, to show that there was a probability that the existing authorities on the points in question would be over-ruled if the matter went to appeal.

Held, that the motion must be dismissed with costs. The defendant was entitled to the benefit of the laws as they existed at the time of action brought, and that which according to the law was his could not properly be kept from him for, perhaps, a long period, to the end that the plaintiff might have it determined whether or not such existing law was good and sound. This is an entirely different case to that of keeping property *in statu quo* pending an appeal in the same cause.

J. H. Macdonald, for the motion.
N. W. Hoyles and *W. Barwick*, contra.

Ferguson, J.] [Oct. 22.

BOLTON V. ROWLAND.

This matter came up on further directions after the report of the Local Master at London. The action was brought by a mortgagor for an account of moneys in the hands of the mortgagee, after a sale under the power of sale in the mortgage, and the Master had found by his report a sum of $136.38 in the hands of the defendant in favour of the plaintiff. The plaintiff now asked for the costs of the action.

Held, that the plaintiff was entitled to the costs of the action, although the defendant was a mortgagee, for this was not an action for foreclosure or redemption, but was a case of a defendant who had received money to the use of the plaintiff being sued for that money.

R. Meredith, for the plaintiff.
A. J. Cattanach, for the defendant.

PRACTICE CASES.

Proudfoot, J.] [June 27.

SYNOD V. DEBLAQUIERE.

Petition to open publication—Single judge—Material evidence.

A petition by the plaintiffs for leave to produce newly discovered evidence, and to re-open the case for its admission, after the judgment of the Court of Chancery in favour of the defendants had been affirmed by the Court of Appeal and the Supreme Court of Canada—was brought on for hearing before PROUDFOOT, J., in Court.

Held, that as the application might, before the O. J. A., have been made to a single judge, and as there is no provision in that Act specially ap-

plicable to the subject, the original practice of the Court remains, and the application was properly made to a single judge.

Held, that upon the discovery of material evidence publication may be opened even after judgment affirmed by the two Courts above.

The learned judge considered that what was proposed to be introduced as new evidence was not material, and dismissed the petition with costs.

S. H. Blake, Q.C., *C. Moss*, Q.C., and *Walter Barwick*, for the petitioners.

McCarthy, Q.C., *Alfred Hoskin*, Q.C., and *Arnoldi*, for the respondents.

Mr. Dalton, Q.C.] [Sept. 15.

TORRANCE v. LIVINGSTONE.

Counter-claim—Third parties.

An action by the plaintiffs as endorsees of a bill of exchange accepted by the defendant.

The defendant sets up that the bill was part of the price of goods bought by him from H. and G., the drawers, and the defendant files a counter-claim against the plaintiff, against H. and G. as defendants by counter-claim, claiming that the bill was transferred to the plaintiffs after maturity, with full notice and knowledge of the facts between the defendant and H. and G. and claiming from H. and G. $10,000 damages for breach of contract in respect of the said goods, and from the plaintiff and H. and G. the delivery up and cancellation of the bill sued on and other bills in the same transaction.

Upon the application of H. and G. the MASTER IN CHAMBERS struck out the counter-claim as against H. and G., and also struck out the names of H. and G. as defendants by counter-claim, following *Canadian Securities Co. v. Prentice*, 9 P. R. 329.

Worrell, for the defendants by counter-claim.

Aylesworth, for the defendant.

Mr. Dalton, Q. C.] [Sept. 21.

VICTORIA MUTUAL v. FREEL.

Principal and surety—Costs.

Judgment for a debt was obtained by the plaintiffs against the defendants, who stood to each other in the relation of principal and surety. The surety paid the plaintiffs the amount of their debt and costs, took an assignment of the judgments, and then proceeded to enforce against his principal.

Motion by the principal to reduce the amount endorsed to be levied on the writs of *fi. fa.* issued against him by the surety.

Held, that the costs as well as the debt were recoverable by the surety as against his principal.

Aylesworth, for the defendant Freel, the principal.

Clement, for the defendant Foley, the surety.

Wilson, C. J.] [September 28.

DONOVAN v BOULTBEE.

Notice of trial where trial postponed by order—Remanet.

Motion by the defendant to strike out this cause from the list of cases for trial at the Toronto Autumn Assizes, 1883. At the preceding Summer Assizes the cause was upon the list, and the trial was postponed by order of the judge at the trial, upon the defendant's application, with the condition that the defendant should pay the costs on the final result in any event of the cause. The Clerk of Assize placed the case upon the list for the next (Autumn) Assizes without any direction from the plaintiff or defendant. No notice of trial was served.

The MASTER held that in the case of a *remanet* no notice of trial is necessary under Rules of Court, 1876. Under the circumstances this case was not a *remanet* and a notice of trial was necessary. Order made without costs.

On appeal to WILSON, C.J., *held*, that a cause postponed by the order of the judge at the Assizes, upon the defendant's application, is a *remanet*, and no notice of trial for the next Assizes is necessary.

H. J. Scott, Q.C., for the defendant.

J. A. Donovan, plaintiff, in person.

Wilson, C.J.] [Sept. 28.

RAMSAY v. MIDLAND RY. CO.

Examination for discovery—Office of corporation—Station agent.

A station agent of a railway company is an officer examinable under R. S. O. c. 50, sec. 156. An appeal from the order of Mr. Dalton directing the agent of the defendants, at the Orillia station, to be examined as an officer of the corporation under sec. 157 of the C. L. P. Act.

WILSON, C.J.—The statute should, I think, receive a liberal construction, for the knowledge of the business and affairs is and can only be in the agents and officers of the company who transact it. How far the word "officer" may be carried I do not now consider, but I have no hesitation in saying that an office or agency established by or for the company at these stations, and a person appointed by or for the company to manage and carry on its affairs, of the important and diversified nature of which they consist at these stations, and possessing and exercising the extensive powers with which he is and must be entrusted to enable him to discharge his duties towards the company, do constitute such a person an officer of the company within the meaning of the statute.

Aylesworth, for the defendants.
Clement, for the plaintiff.

Appeal dismissed with costs.

Wilson, C. J.] [Sept. 28.

HOLLINGSWORTH v. HOLLINGSWORTH.

Security for costs—Application for affidavit of information and belief.

An appeal from the order of the local judge at Brockville refusing to direct the plaintiff to give security for costs.

An affidavit filed by the defendant, set out that:—"The said plaintiff has for some time past and is now residing, as I am informed and believe, out of the Province of Ontario, and beyond the jurisdiction of this Court, having taken up his residence in the State of New York, one of the U. S. A."

Held, that the foreign residence of the plaintiff is here positively sworn to, and the affidavit is sufficient in substance for the Court to act upon in ordinary security for costs.

Semble, that it is the better opinion that a statement of the plaintiff's residence out of the jurisdiction, on information and belief, is not sufficient to entitle the defendant to security for costs.

Tilt, Q.C., for the appeal.
A. H. Marsh, contra.

Appeal allowed.

Wilson, C. J.] [Oct. 12.

MORTON v. GRAND TRUNK RY.

Trial postponed—Second payment of fee on entering record.

Where the trial of a cause was postponed till the next assizes, "defendants to pay the costs"—

Held, that no second fee was payable to the Deputy Clerk of the Crown upon entry of the action for trial at the later assizes, and that when so paid by plaintiff such fee was not taxable against defendants.

Dickson (Blake, Kerr, Lash & Cassels), for the plaintiff.
Aylesworth, for the defendants.

Wilson, C. J.] [Oct. 12.

MERCHANTS' BANK v. HUSON.

Interpleader—Question to be tried—Issues.

Upon an interpleader application by the Sheriff of York there were two execution creditors, viz., the Merchants' Bank of Canada and one James Walsh and three claimants, viz., one Clarkson, the assignee of the execution debtor, for the general benefit of creditors, the Imperial Bank of Canada, and the Standard Bank of Canada, both claiming under warehouse receipts. The MASTER directed the trial of four issues, viz., (1) The Merchants' Bank and Clarkson, plaintiffs, against the Imperial Bank, defendants; (2) the Standard Bank, plaintiffs, against the Merchants' Bank and Clarkson, defendants; (3) the Standard Bank, plaintiffs, against the Imperial Bank, defendants; (4) the Merchants' Bank, plaintiffs, against James Walsh, defendant, (as to priority of execution).

Upon appeal by the claimants, the Imperial Bank of Canada,

WILSON, C. J.—I think the Merchants' Bank might be plaintiffs or defendants, and all the claimants joined as opponents, and the question would be whether the claimants or any, and if any, which of them, have the right to the goods as against the Merchants' Bank. If all the claimants had the better title as against the Merchants' Bank, the judge would not, under that issue, try the title between the claimants themselves. The claimants must settle their rights between themselves, the purpose of the issue having been answered by its being settled that the execution creditor is not to have his

execution satisfied out of the goods which were seized by the sheriff.

Order of the MASTER varied. For the first three issues set out above one is substituted, viz., the Merchants' Bank, plaintiffs, against the Imperial Bank, the Standard Bank, and Clarkson, defendants.

Aylesworth, for the sheriff and for Walsh.
Rae, for the Merchants' Bank.
Rose, Q.C., for Clarkson.
Shepley, for the Imperial Bank.
A. H. Marsh, for the Standard Bank.

Wilson, C. J.] [Oct. 16.

WHITE SEWING MACHINE CO. v. BELFRY.

Taxation — Duty of taxing officer — Division Court costs—Jurisdiction of Division Court.

An action for the price of two distinct parcels of goods sold and delivered. The defendants accepted a bill of exchange for each parcel, one bill being for $103.80, and the other for $106.40. At the time the action was brought the second bill had not matured, as was alleged by the defendants, and afterwards admitted by the plaintiffs. Upon the application of the plaintiffs the Master made an order, under Rule 322 O.J.A., for final judgment against the defendants for the first parcel of goods sold and delivered, *i.e.* for $103.80, with interest and costs of suit, including the costs of the application, "to be taxed according to the course and practice of the Court."

Under this order the Taxing Officer allowed the plaintiffs County Court costs on that part of his claim upon which they obtained the order for judgment, and he allowed to the defendant the full costs of the High Court of Justice on that part of the plaintiff's claim upon which the defendant succeeded, *i. e.* upon the claim for $106.40, the price of the second parcel of goods.

Upon an application by the defendants to revise the taxation of the officer:—

Held, that it was the duty of the Taxing Officer to look at the pleadings, and if necessary to receive affidavits so as to ascertain the facts of the case.

Held, that Division Court costs only should have been taxed to the plaintiffs, as the amount for which they obtained judgment was ascertained by the signature of the defendants, and was therefore within the competence of the Division Court.

Held, that the defendants should have Superior Court costs down to and including the statement of defence, which would not have been required but for the plaintiff claiming improperly the price of the second parcel of goods, which was not due, and also their costs of this application, with a set off *pro tanto* against the plaintiff's judgment and costs.

Aylesworth, for the plaintiff.
Shepley, for the defendants.

Ferguson, J.] [Oct. 19, 1883.

CARNEGIE v. FEDERAL BANK.

Examining witness before trial—Rule 285 O.J.A.

An action for an account of the dealings of the Federal Bank with certain shares of Ontario Bank stock pledged to the Federal Bank by the plaintiff.

Upon the application of the plaintiff the MASTER IN CHAMBERS made an order for the examination before the trial of Charles Holland, the Manager of the Ontario Bank, under Rule 285 O. J. A. Mr. Holland was not a party to the suit, nor was the bank of which he was an officer, nor was it shown that there was any reason for his examination, such as his being seriously ill, or his being about to leave the jurisdiction, but it was admitted that the object was to obtain discovery from a witness before the trial.

Upon appeal to FERGUSON, J.:—

Held, that Rule 285 O. J. A., does not contain authority to make an order for the examination before the trial of a person not a party to the action where no greater necessity for making it appears than the convenience of the party who applies for the order in presenting his case for the trial. *Fisken* v. *Chamberlain*, 9 P. R. 283, distinguished.

Cattanach, for the appeal.
J. R. Roaf, contra.

Appeal allowed with costs.

THE BENCH AND THE BAR.

The following was the address presented by the Bar of the County of Simcoe to His Honor Judge Gowan, on the occasion of his retirement from the Bench, with his reply thereto :

His Honor James R. Gowan, late local Judge of the High Court of Justice, and Senior Judge of the Judicial District of Simcoe.

We, the practising barristers and solicitors of the County of Simcoe, cannot allow the occasion of your retirement from the judicial bench to pass without testifying, however inadequately, the high esteem in which we hold you, and our regret that the relations so long existing between us, are about to be severed.

The benefits derived by this County during the last forty-one years from your high attainments and administrative ability, have been incalculable. Courts have been organised ; the legal business has been conducted with precision and decorum ; and the judgments you have given in the vast number of cases that have come before you, have been luminous, dignified and impartial. Nor can we forget that some of the most important enactments on our statute book owe their development and moulding into shape, to the sagacious advice you were at all times willing to afford, when called on by the rulers of the state.

And not to the county alone have your services been beneficial, for your system of organization, and the example of your courts, have spread beyond our borders, and have had marked influence in every county of the Province, but space will not permit us to enlarge on this, otherwise we should be led into a general reference to the affairs of the Province, and possibly of the whole Dominion, so great has been the influence of your abilities and industry in various directions during your term of office.

To us, you have ever been courteous, considerate and kind ; to your discouragement of all that is unworthy, by your inspiring sense of honour, we attribute the high standing we have attained, and we feel assured that the tradition of your career will be long remembered, not only by the generation now living, but by those who may come after us.

We accordingly contemplate with affectionate concern the withdrawal from us of one to whom we owe so much.

We trust, however, that your intended sojourn in a more genial climate will produce every good result, and that under the care of an all-disposing God, your return to us may be the commencement of a new era in your life, and you may be enabled to pursue it with continued usefulness.

That you may be sometimes reminded of the cordial relations that existed for so many years between yourself and the County of Simcoe, we desire to present you with the accompanying piece of plate, which we know you will value, not for its intrinsic worth, but for the feelings that prompted the gift.

On behalf of the Bar of the County of Simcoe.

J. E. P. PEPLER,
Secretary.

W. LOUNT, Q.C.,
Chairman of Committee.

Barrie, Oct. 16, 1883.

THE FOLLOWING IS THE REPLY :

Mr. Lount and Gentlemen,

I thank you with all my heart for the very kind address with which you have honored me. I wish I could feel that I fully deserved all you say. Ever sensible of my many deficiencies, I tried to make up for them by a laborious assiduity and exactitude in fulfilling every known duty to the utmost of my ability. It is the only merit I can claim, and I am by no means sure I could have done much had I been without the stimulus which a learned and energetic bar always gives to the Bench. And now, in retiring from the accustomed scene of my labors, and severing the relations that have connected us for so many years, the sadness, to me, is soothed by the regrets you express, whilst the approving testimony you bear to my humble services is the best award any public servant could desire.

When I recall the state of things as they were when I first set foot here, and the wonderful improvements that have, since 1843, been effected in our legal, municipal and educational systems, the increased facilities for travelling, and the marvellous progress and prosperity of the country at large, there is opened to me a wide and pleasant field for observation upon which I should like to dwell, but it is not possible to do so at present. This I may say, however : in no particular is progress so marked as in the growth of the Bar here and elsewhere, in numbers, in influence and trained knowledge.

The rapid flight of time is brought before me when I remember that of the present large Bar several of the seniors were school boys when I was appointed to the judicial office, and several others were born since my first Court was held in the District. It has been my great good fortune to be surrounded and aided in the discharge of my official duties by those whom I have known since their childhood, and never, in a single instance, has anything disturbed the pleasant relations between the Bench and the Bar in this judicial district. You can understand, then, how warmly I reciprocate all you can possibly feel towards me. I well know that the industry and ability of the Bar has smoothed many a difficulty for me in the way of judicial investigations, and it is exceedingly gratifying to me to recall the high professional tone which always prevailed, and could always be safely confided in, being grounded on convictions of duty, and a nice sense of honor—securing a liberality in

practice beneficial to clients, and speeding the disposal of matters really in dispute between litigants. I am proud to know that this Bar is conspicuous in the Province for the ability of its members, the number who have attained high position in their own peculiar field, as well as in public life, who have ably served the public in the courts and elsewhere with all the honesty, zeal and courage which have secured for our honorable profession its high standing amongst an educated and most intelligent people, very tenacious of their rights. Such is the simple fact, and if indeed I have in any degree impressed upon the profession my views of their honorable and responsible duties, I feel thankful indeed. I may repeat what I said on an occasion similar to the present, viz.: That I felt it was right that I should endeavor to discharge every duty faithfully and fearlessly: create confidence in suitors and to secure to them the full benefit of the several courts over which I presided, and to impress the public with the feeling of respect never withheld from a court of justice, however limited its sphere, where order and decorum obtain, and that from the first I felt that this could best be done with the aid of an educated and an honorable Bar, who would feel with me that we were all ministers of justice—all equally striving for the same great end. What I said fifteen years ago, I can emphatically repeat, that from the profession in this County I have always received the greatest aid in the discharge of my judicial duties, and it is to your cordial co-operation and support I am indebted for a measure of success that, unassisted and unsupported, I could scarcely have attained. In gladly according to the Bar every privilege they could fairly claim, in fostering a right feeling in their intercourse with each other, in publicly combating prejudices against them, I have ever felt I was strictly within the line of duty; but I think you will acquit me of the weakness which fails to look for the inherent merits of a case in admiration for the skill and zeal of counsel.

The kind consideration you have always shown me I have every confidence you will extend to my successors. It is a consolation to me to know that my learned brother Judge Ardagh takes my place. Educated in the county, and with an experience of some ten years on the Bench, the profession and public will not lose by the change. You all know Mr. Boys, who will be the Junior Judge, and his very honorable position at the Bar. With two such worthy men at the Bench of this Judicial District, both in the prime of life, the profession and the public, I repeat, will gain by my retirement.

Though giving up active duty I shall still consider myself as in a sense having harness on my back, being empowered still to take occasional duty; and I may here mention that the Government of Ontario continues me in the position of Chairman of the Board of Judges.

Let me say one word as to my retirement, as you are aware this is the largest Judicial District in the Province, having a population, not very long since, equal to that of Manitoba and British Columbia together. The duties are very onerous, requiring the services of at least two active men to perform properly and with promptitude in the various duties made incident to the Judge's office; and I felt the time had come when in justice to the public and my brother Judges I should make way for a younger man. My age and uncertain health demanded more repose than I could properly ask to take, and so I sought retirement, and after forty-one years of hard work, it cannot be said that my appeal to be relieved was in any sense premature. Indeed I have the satisfaction of knowing that His Excellency appreciates, as he is pleased to communicate, my "faithful, efficient and impartial conduct during my long term of Judicial service." You are good enough to refer to other work I have been engaged in—I did try to be of some use outside my official engagements, when employed in matters of public interest and concern. It was I felt only my duty to render such willing aid as was required of me by those who were anxious to promote all that was good and safe in the improvement of the law and its administration, and who were in the high position which enabled them to give effect to their desires. And should I return, as I trust I shall, with restored health, I hope to find some opening of usefulness, for I feel that I am not without a residuum of energy, and I could not well live an idle life.

I would fain say more, and with all the warmth that words can convey, but as I leave for England to-morrow, you know how much I am occupied, and how disturbing are necessary preparations, and you will excuse my imperfect expression of thanks. I should indeed be insensate if I was not touched deeply by your kindness. I may well feel honored by this last mark of your regard, and by the more than kind words you have addressed me.

His Honor here referred to the testimonial and said:

I shall praise it as my most valued possession, more to me than any other honor that could be conferred, for you use it to set the seal, as it were, to what you in your spontaneous kindness have said. It is not the only token I have had from the profession of their regard, and I should feel humbled to the very dust if I had not aspired from the first to accomplish some of the good that in your partial judgment you couple with my poor efforts.

I would thank you once again for the unbroken attention, respect and kindness of years, and my earnest prayer is that God may bestow upon you, and those dear to you, His richest blessings here, and an eternal life beyond.

I bid you an affectionate farewell.

JAMES ROB'T GOWAN.