Canada Law Journal.

VOL. XVIII. JUNE 1, 1882. NO. 11.

DIARY FOR JUNE.

1. Thurs. Parliament first met at Toronto, 1797.
2. Fri.... Fenian Attack, 1866.
3. Sat. .. Easter Sittings end.
4. Sun... *Trinity Sunday.*
6. Tue .. Toronto Assizes.
8. Thurs. First Meeting of Parliament at Ottawa, 1866.
11. Sun... *1st Sunday after Trinity.*
12. Mon.. County Court Term for York begins.
13. Tue .. County Court sitt. (except York) begin.
20. Tue .. Toronto Oyer and Terminer.

TORONTO, JUNE 1, 1882.

THE Hon. Mr. Justice Galt will take the summer assizes at the City of Toronto, the civil business commencing on June 6th, and the criminal on June 20th.

THE death is announced of Sir John Holker, one of the Lords Justices of the High Court of Appeal in England. He is to be succeeded in this position by Sir Charles Bowen, at present Judge of the Court of Queen's Bench.

ON Friday, the 26th ult., the Benchers appointed Mr. Lefroy to be Reporter of the Chancery Division of the Supreme Court, *vice* Mr. T. P. Galt, resigned. The appointment of one of our editorial staff to the position of official reporter will, we trust, be of advantage to our subscribers.

BY notice, published on the 17th ult., the hearing of all cases in the Court of Appeal set down for the 25th ult. has been postponed by order of the Court until the sittings commencing on the first Tuesday in September next, and the hearings in causes and matters which would have been in time, according to the practice of the Court, if they had been brought to a hearing at the sittings which were to have been held on the 25th ult. are to be held to be in time if brought to a hearing during the September sittings.

IT seems rather an extreme instance of judicial severity which was visited upon one Patrick Gordon the other day in England. The unhappy man conceived a desire to travel from Holyhead to Chester without paying his fare. He accordingly got under an express train, grasped the brake-rod with his hands and legs, and rode in this most perilous position for ninety miles without stopping. The feat seems almost inconceivable, and it is not surprising to read that by the time the train reached Chester the man was more dead than alive. He was, however, not only locked up, but sentenced to twenty-one days hard labour, *pour encourager les autres.* No doubt if this method of riding without a ticket became generally adopted it would be necessary to put it down, but we cannot help thinking that in this instance, so little likely to repeat itself, justice might have been tempered with a little more mercy.

THE latest and most handsome gift of the Incorporated Council of Law Reporting for England and Wales is now in the hands of subscribers to the Law Reports, and consists of a Digest of the whole of the Law Reports from their commencement in the year 1866, down to the end of 1880, with a Digest of the important statutes relating to England and Wales during the same period. The excellent plan has been adopted of prefixing the work with a table of names of cases, giving the defendant's names in alphabetical order as well as the plaintiffs; and also with

tables of statutes, which enables the reader to find at a glance whether any section has been judicially construed or expounded; while the cases followed, over-ruled or specially considered are also to be found collected together. The cost and trouble expended in the compilation of this work must have been immense, and with extreme liberality copies are being delivered in this country free of all expense. There can be no question that to subscribe to the Law Reports is the best method of compiling a law library of permanent value, and this last bonus will win many new subscribers. Meanwhile, non-subscribers can obtain the Digest, "so long as there are copies to spare," for £2 2s.

THE motion which Mr. Mercier succeeded in passing, by what appears to have been somewhat of a surprise, in the Legislative Assembly of the Province of Quebec, on the 27th ult, is of rather an extraordinary nature. It is to the effect that for the reasons therein set out, an humble address be presented to Her Majesty, praying that a measure be submitted to the Imperial Parliament for the amendment of the British North America Act, so as "to give to the popular branch of the Legislature the power to amend the local constitution without concurrence of the other branch, whenever, upon a message from the Lieut.-Gov., presented upon the advice of the Executive Council, such changes may become necessary for the improvement of our finances and to prevent the imposition of new taxes." The reason given for this proposed legislative *coup d'etat* is, that it is necessary "to simplify the too complicated machinery of our local constitution" for the sake of economy. The B. N. A. Act already provides, sect. 92, that in each Province the Legislature may from time to time amend the local constitution; and those who have read the graphic account of the negotiations which passed between the Imperial Government and the Local Government in connection with the "dead-lock in Victoria," given in Todd's Parliamentary Government in the British Colonies, will see that the Imperial Government is little likely to consider it proper to do, for such paltry reasons, in Quebec, what they considered it their duty to refuse to do for far weightier reasons in Victoria.

IT is curious how often the tedium of researches into law is relieved by unexpectedly coming across some strange glimpses into the more grotesque side of human nature,—as in the case of Mr. Dagg's matrimonial contract, to which we recently called attention,—or some brilliant and witty metaphor, (see 16 C. L.J. 155), or quaint judicial utterance. An example of the latter is afforded by a passage in the judgment of Jessel, M.R., in the recent case of *Couldery* v. *Bartram*, L.J. 19 Ch. D. 399, where it says:—"According to English common law, a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tomtit if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English common law, he could not take 19s. 6d. in the pound; that was *nudum pactum*. Therefore, although the creditor might take a canary, yet, if the debtor did not give him a canary, together with his 19s. 6d., there was no accord and satisfaction; if he did, there was accord and satisfaction. That was one of the mysteries of English common law. . . . Well, it was felt to be a very absurd thing that the creditors could not bind themselves to take less than the amount of their debts. . . Therefore it was necessary to bind the creditors; and, as every debtor had not a stock of canary-birds, or tomtits, or rubbish of that kind to add to his dividend, it was felt desirable to bind the creditors in a sensible way by saying that, if they all agreed, there should be a consideration imported from the agree-

ment constituting an addition to the dividend so as to make the agreement no longer *nudum pactum*, but an agreement for valuable consideration; then there would be satisfaction."

RECENT ENGLISH DECISIONS.

Proceeding with the Law Reports for April there still remain for review the cases in 19 Ch. D., pp. 311-519; 8 Q. B. D., pp. 317-444; 7 P. D., pp. 5-20.

PARTIES—PAYMENT INTO COURT—COSTS.

In the first of these, at p. 326, is the case of *Heatley* v. *Newton*. Here the plaintiff, who had purchased certain property at an auction, brought an action against the vendors and auctioneers to have the contract rescinded, the deposit, £1,300, repaid with interest, the costs of the action, and for damages. He alleged that no real bidding took place at the auction; that a number of pretended bids were taken by the auctioneer from time to time; that the whole was a fraudulent arrangement to run up the price; and that the auctioneer, as well as the vendors, must be treated as parties to the fraud; and that at all events a fraud was committed by the auctioneer in pretending to receive bids which he never in fact received at all. The auctioneers applied for liberty to pay the deposit into Court, and to have the action dismissed against them on such payment being made. The M. R. did not make the order exactly as asked, but he made an order that upon the money coming into Court, and upon the auctioneers undertaking to pay the interest on the deposit up to the time of payment into Court, and the costs *up to that time*, in the event of the Court holding the plaintiffs' to be entitled to such interest and costs, and of the other defendants' failing to pay them, the proceedings should be stayed as against the auctioneers. The Court of Appeal now held that this was not a proper order, for the reasons thus stated by Lindley, L.J., at p. 341:—"Any defendant, I apprehend, can stay proceedings in an action upon giving the plaintiff all he asks for as against him, and if the auctioneers had said to the plaintiff, 'Here is £1,300 interest and costs up to this time—let us go,' I could understand it; but that is not what they have done, nor what they intended to do. What they have done is this: they have paid the £1,300 into the Court in the hope that it would stop interest, (as to which I say nothing now, although my impression is rather against them,) and they say:—'We will not pay that to you, but we leave you to discuss with the vendors as to who is to have it; if you are right you will get it, and if you are wrong the vendors will get it; we have got rid of it and all liability as to the costs of the action subsequently to this time.' I am of opinion that they cannot take this course. They must abide the consequence of that which is alleged to be their wrongful act. If they are wrong they are liable to a judgment of £1,300 with interest and costs, and that liability cannot be got rid of by any such process as this. And therefore," he said, "the auctioneer's summons ought to have been dismissed with costs."

DISCOVERY—PARTIES.

An interesting subordinate point is discussed in this case. Counsel for the plaintiff argued that he was entitled to keep the auctioneers before the Court, apart from any question of personal pecuniary responsibility, upon the ground alone of being able to obtain discovery from them which would enable them to establish their case as against the other defendants. As to this Lush, L.J., says:—"I quite agree that you cannot claim to retain parties as defendants in a suit merely because you want to interrogate them; but it appears to me that where they are properly made defendants it is a ground for not letting them off summarily, that there is a very great advantage accruing to the plaintiffs from being at liberty to interrogate them instead of simply calling them as witnesses at the trial.

We all know that a person who calls a witness at the trial is not allowed to deal with him as if he were being cross-examined, unless the judge gives leave, upon the ground that he appears to be a hostile witness, which is a very different thing from extracting the information before the trial, and being able to read the admissions so made. No doubt answers to interrogatories by one of several defendants cannot be read as evidence against the others, but in order to make them evidence he must be called as a witness. On the other hand, we all know what great influence the admission of a co-defendant, especially one standing in the relation in which an agent does to the principal, has upon the conduct of the principal, and I cannot conceive that when these vendors, who say by their answer to interrogatories that they have no knowledge at all on the subject of whether there were mock biddings or not, find out, if they do so find out, by the sworn answer of the auctioneers, that they were mock biddings, that will not have very great influence on them as to whether they will further defend the suit or not. The auctioneers having been properly joined as defendants, it appears to me that the plaintiffs have a right to say:—'We will not forego a single advantage to which the presence of these parties as defendants entitle us.'" And Baggallay, L.J., appears not to dissent from these views on this point.

The case of *Walker* v. *Mottram*, p. 355, has already been noticed as reported in the *Law Journal* reports, supra p. 174, and the next case requiring notice appears to be *Sanders* v. *Sanders*, p. 373.

STATUTE OF LIMITATIONS—ACKNOWLEDGMENT—TENANTS IN COMMON.

In this case, which came on on admissions, the Court of appeal decided, (i.) that where a tenant in common has gained by the Statute an adverse title to another share of the property, no payment of rent or acknowledgment by him can restore the title which has been extinguished by the statute. Malins, V.C., had held that when the statute of limitations has run in favour of one and against another, and the former chooses afterwards to acknowledge the right of the latter, that acknowledgment, given after the expiration of the twenty years, restores the right of the latter. For he held the meaning of Imp. 3, 4 Will. IV. c. 27, sect. 28, (R.S.O., c. 108, sect. 15), to be that the right or title shall be extinguished in favour of those who desire it to be so, but not as to others. The Court of Appeal, however, over-ruled this, and followed *In re Alison*, L.R. 11 Ch. D. 284, as an express decision that when a statutory title has accrued, by the expiration of the time named in the statute, it cannot be defeated by a subsequent acknowledgment. (ii.) But the Court held that, as it was admitted that the tenant-in-common, claiming title under the statute, had paid a moiety of the rents to persons claiming under his co-tenant from 1864 to 1877, this raised a presumption that a similiar payment was made previously, and that as the admissions did not negative this inference, the defence on the Statute of Limitations could not be supported. Jessel, M.R., says as to this: "The payment of a moiety of the rents for thirteen years is good evidence that a moiety was paid previously."

FRESH EVIDENCE ON APPEAL.

(iii.) The appellant having applied for leave to adduce fresh evidence, the Court of Appeal refused leave, Jessel, M.R., saying: "The application is for an indulgence. He might have adduced the evidence in the Court below. That he might have shaped his case better in the Court below is no ground for leave to adduce fresh evidence before the Court of Appeal. As it has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has been discussed in Court. The exact point in which evidence is wanted having been discovered, to allow fresh evidence to be introduced at that stage would offer a strong temptation to perjury. Moreover,

speaking for myself, I think that when an application is made for an indulgence, the moral elements of the case ought to be taken into consideration. I am more inclined to grant it when what appears to be a substantially good and honest case is in danger of being defeated on technical grounds, than in favour of an attempt to defeat a good case on technical grounds."

PATENT—SLANDER OF TITLE—DAMAGES.

The decision of the Court of Appeal in *Halsey* v. *Brotherhood*, p. 386, which was based upon the authority of *Wren* v. *Weild*, L.R. 4 Q.B. 730, and which confirmed the decision of the M.R., in the Court below, appears clearly from the following extract from the judgment of Lord Coleridge, L.C.J. —"Here is a defendant in possession of a patent, who says, and, for all that appears, says with perfect *bona fides*, to the plaintiff and to persons who are going to deal with the plaintiff, 'Remember that what the plaintiff is making is an infringement of my patent and is an injury to my property, and I will tell you that if you proceed to injure my property I shall take proceedings against you.' The result of this may be injury to the plaintiff. Possibly in this case it has been injury to the plaintiff. I am quite content to assume that it has, but it appears to me that a statement made under such circumstances does not give a ground of action merely because it is untrue and injurious; there must be also the element of *mala fides* and a distinct intention to injure the plaintiff, apart from the honest defence of the defendant's own property." Or, as the point is put in a more general and more abstract form by Baggallay, L.J. —"It appears to me that an action for slander of title will not lie, unless the statements made by the defendant were not only untrue, but were made without what is ordinarily expressed as reasonable and probable cause, and this rule applies not only to actions for slander of title, strictly and properly so-called with reference to real estate, but also to cases relating to personalty or personal rights and privileges."

DUTY OF DRAWER TO STOP CHEQUE—BANKING.

The two points of law which are illustrated by *ex parte Richdale*, p. 409, may be concisely put as follows: (i.) there is no obligation, arising by contract or by law, on the part of the drawer of a cheque, given for value, to stop the payment of it for the benefit of a third party. The person who gave the notice to stop it would run the risk of the cheque being in the hands of a *bona fide* holder for value, that is to say, he would run the risk of having to pay the costs of an action by such a holder. (ii.) Where a customer pays a cheque to his bankers, in order that the amount of it may be at once placed to his credit, and the bankers carry it to his credit accordingly, they become immediately holders of the cheque for value.

COURT OF APPEAL—EVIDENCE.

In *ex parte Firth*, p. 419, it appears only necessary to notice certain dicta of Jessel, M.R., to the effect that the Court of Appeal cannot decide an appeal in the absence of the evidence on which the order appealed from was founded, although, if by some accident the notes of the evidence were lost, the appellant might apply by way of indulgence to the Court of Appeal to have the evidence taken over again, and the Court might or might not accede to that application.

WILLS—BEQUEST OF SHARE IN PARTNERSHIP—R.S.O. C. 106, SS. 25, 26.

The next case, *In re Russell*, p. 432, was, as Bacon, V.C., observes, "one of difficulty." The testator, after reciting that he was carrying on a certain business in partnership with his two brothers, demised and bequeathed: "all my part, share and interest, of and in the said co-partnership, trade or business, and of and in the real and personal estate which may be used, employed or invested therein, . . . and of and in the co-partnership debts, securities, and moneys to which I may be entitled at my decease," to the executors on certain trusts. After the making of this will, the testator acquired the shares successively

of each of his brothers in the partnership, and continued to carry on the business as sole owner until his death. The principal question was, whether the whole of the property in the business belonging to the testator at his death passed under the will. Bacon, V.C., held that it did, saying:—"When you find the scope of a man's will to be, 'I, being a manufacturer, in partnership, give to my wife the enjoyment of all the share in the business I am carrying on to which I may be entitled at my death,' it cannot be, because that property has become increased by his own purchases or by the death of his brothers, that the provision he has made is to be confined to the one-third of which he was possessed at the date of his will. That would be a very violent construction, and one which I think the Court is not compelled to adopt. . . . In my opinion the 23rd section of the Wills Act, (R. S. O., c. 106, sect. 25), has a direct application, and I hold that the acquisition of a larger interest does not affect in the slightest degree the disposition which the testator made of all the interest he had in the houses, chattels and other property, in the co-partnership business, although the partnership had ceased to exist, and he had become the sole owner of the property."

WILL—NEXT OF KIN "BY VIRTUE OF THE STATUTES" OF DISTRIBUTION.

In *Sturge* v. *G. Western Railway Co.*, p. 444, the testator's will contained an ultimate trust "for the person or persons who at the time such *respective* decease of my children shall, by virtue of the statutes for the distribution of persons dying intestate, be my next of kin, and if more than one, then in the shares, proportions and manner prescribed by the said statute." Hall, V.C., held that by these words the testator had created an artificial class, a class to be ascertained at a time posterior to the testator's death, by supposing that he had then died, *i. e.*, at the later date. "Looking at the whole will," he says, "I cannot divest my mind of the impression that the true construction of it is that the testator intended, and in effect said, at each of several periods you shall ascertain the class, and then the members of it are to take in certain modes, but the modes in which they are to take must be regulated by the Statutes of Distribution as nearly as the existing circumstances of the case will admit—the class being different from that which would have comprised the persons to take if it had been directed by me to be taken at a different period, viz., at my death."

PRACTICE—INFANT—WARD OF COURT.

De Pereda v. *De Mancha*, p. 451, illustrates two points which may be briefly mentioned as follows:—(i) Where in an administration action moneys are paid into Court to the separate account of an infant, this is sufficient to constitute the infant a ward of Court, though the infant be not a party to the said action, and though he may not have been served with notice of the judgment or of any of the proceedings in the action. (ii) Where, upon the hearing of a summons taken out for the appointment of a guardian to an infant, no order has been made, but, upon the suggestion of the Judge, an arrangement has been made as to access to the infant, *semble*, this is of itself sufficient to constitute the infant a ward of Court.

EASEMENT—LIGHT—R. S. O., C. 108, SECT. 37.

In *Seddon* v. *Bank of Bolton*, p. 462, two points require notice. The first (i) is shown by the following passage from the judgment, (Fry, J.):—"I have to ask myself upon whom does the burden rest of proving the enjoyment of the access of light for twenty years? The answer is plain—it rests on the plaintiff. Has, then, the plaintiff discharged that burden? I answer she has not, because there is no evidence tendered by her on which I can rely. . . . The defendant may, in my judgment, displace the whole effect of the affirmative evidence of the plaintiff in either of two ways. They may either show the existence of an obstruction at the commencement of the twenty years, or an interruption

at some period afterwards, or they may show —and in this case, in my judgment, they have shown —that the evidence of twenty years' enjoyment tendered by the plaintiff is evidence on which the Court cannot rely, because the plaintiff's witnesses are contradicted by other witnesses on whom the Court does place reliance." (ii) In this action, which was brought to restrain an alleged interference by the defendants with the plaintiff's ancient lights, the defendants adduced evidence to show that during parts of the period requisite to perfect the plaintiff's right a boarding had been erected by the then owner of the defendant's land which had interrupted and obstructed the lights in question. Fry, J., expressed an opinion, though not necessary to the decision of the case, that this did not alone amount to that kind of notice to the person interrupted of the person authorizing the erection of the boarding, which would make the boarding an interruption within sect. 4 of the Imp. Prescription Act, (R. S. O., c. 108, sect. 37). It may be observed that by Ont. 43 Vict., c. 14, sect. 1: "No person shall hereafter acquire a right by prescription to the access and use of light to or for any dwelling-house, work-shop, or other building;" and R. S. O., c. 108, sect. 36, which answers to the section of the Imp. Act under which the above action was brought, is thereby repealed. But R. S. O., c. 108, sect. 37, remains unaffected in its application to the other sections of the Act respecting prescription in cases of easements.

WILL—ABSOLUTE INTEREST—GIFT OVER ON DEATH.

In *in re Hayward*, p. 470, a testator bequeathed his residuary personalty to trustees in trust for the children of L., to be divided equally between them, and directed that:—"In case of the decease of either of them leaving a family, then such share as the parents would have taken shall be equally divided amongst the children of such deceased persons." Fry, J., held that these words pointed to a gift to take effect in the event of the parents dying before the time of taking, *i. e.*, before the death of the testator, the words of the gift over in this case being so clear; and therefore the case did not come within the principle, of which there was, he said in his judgment, no doubt, "that when a gift is made to a person in terms absolute, and that is followed by a gift over, in the event of the death of that person *sub modo* (that is to say, without issue or subject to any other limitation which makes the death a contingency,) the effect of the gift over is *prima facie* to prevent the first taker from taking absolutely, to convert the interest of the first taker into one subject to the contingent devise or bequest over."

RAILWAY—GUARANTEE OF VOID DEBT.

Of *Yorkshire Ry. Waggon Co.* v. *Maclure*, p. 478, it seems only necessary to say that though a certain loan to a railway company was held to be a void and illegal transaction as being contrary to certain Imperial Acts, yet certain of the directors having guaranteed the payment of the money loaned, the guarantee was held to be none the less valid, and the sureties liable under it. Kay, J., observes: "Probably the very reason in this case for requiring the guarantee was the doubt that existed whether the company could be compelled to repay the money. I asked for authority upon this point, but none was cited. I therefore must decide that the directors are liable upon their guarantees."

POWER—APPOINTMENT OF PORTIONS BEFORE REQUIRED.

Henty v. *Wrey*, p. 492, was a case on a point on which there appear to be very few decisions of recent dates. B. W., under a certain settlement, had a power of appointing portions charged upon real estate for younger children in proportion to the number of such children, "such sums to be an interest vested in and to be paid to the child or children for whom the same were intended to be thereby provided on or at such age, day, or time . . and to be divided between them . . in such shares, and to be attended

with such provisions for their respective advancement and education as the person making such charge should think fit." B. W. having only three daughters, *aged nine, and seven years, and one year*, appointed £10,000, being the full amount he was entitled to charge, for the portions of his three daughters, *to be a vested interest in such children respectively, immediately*, but to be paid at such times and in such proportions as he should by deed or will appoint, and in default of appointment to be paid to them share and share alike, at the age of 21 years or marriage if after his death, or, if the same should happen during his life, then at his death, with maintenance at the rate of £4 per cent. from his death. Kay, J., after observing that "it seems to be settled by authority that in the case of a portion charged on land, if no time is limited for the vesting or payment, and the child for whom it is intended should die under 21 and unmarried, the portion would not be raisable, but would sink for the benefit of the estate;" and after quoting the words of Kindersley, V.C., in *re Marsden's Trusts*, 4 Drew. 594, in which he says, amongst other things, that a power of appointing portions is "only one form of a discretionary trust to be exercised for the benefit of certain objects, or some of them. The objects of the power are the children of the marriage; and the purpose of the settlement was to make a provision for their benefit, but at the same time to reserve to the mother such a power as would keep the children under her control, and to enable her to distribute the property among them in such manner as, in her opinion, their respective wants and interests and the exigencies of the case might require;"—held, the above exercise of the power of appointment by B. W. was invalid. He says, p. 505:—"The principle seems to be, that a power of this kind being in the nature of a discretionary trust, the appointor must be taken to know that it is contrary to the nature of the trust to make an appointment so as to vest immediately portions in children of tender years, and such an appointment would therefore be so improper that the Court would control it by refusing to allow the portions to be raised if the children did not live to want them. If it were necessary to go further, I must say I think the facts are sufficient to raise what Kindersley, V.C., in the passage I have read, calls a 'judicial inference,' that the intention of the appointor, in making the portions vest immediately was to secure a possible benefit to himself. He had three daughters and no son. A year after the birth of the last daughter he makes this charge, to vest immediately upon an estate which, if no son should be born to him, would go to other persons. I cannot see any reason why these portions should be directed to vest immediately except to benefit himself. The portions would not be raisable till his death. He gave maintenance only from that time, and directed that they should be payable at twenty-one or marriage. He did not provide for any advancement meanwhile."

WILL—SOLICITOR TO TRUST ESTATE NAMED BY TESTATOR.

In the last case in this number, *Foster* v. *Elsley*, p. 518, the point decided appears clearly from the following extract from the judgment of Chitty, J.:—"The testator in this case has inserted a clause in his will that 'my solicitor, W. E. Foster, shall be the solicitor to my estate, and to my said trustees in the managing and carrying out the provisions of this my will.' . . . I am told that no case is to be found in the books like the one before me, where a testator has appointed a particular person as solicitor to his estate, but in analogy to the cases to which I have referred, I decide that the direction in this will imposes no trust or duty on the trustees to continue the plaintiff as their solicitor, and that being my decision I refuse this motion with costs."

A.H.F.L.

REPORTS

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

BARBER V. BLAIBERG.

Imp. Jud. Act, 1873, sec. 24; O. 16. r. 17—Ont. Jud. Act., sec. 16, subs. 4, Rule No. 107—Counter-claim—"Connected with the original cause or matter."

Where a grantee under a subsequent bill of sale is sued as in detinue by the grantee under a prior bill of sale, to recover goods of the grantor wrongfully seized, a counter-claim by him against the grantor, who has been made a party, for the money due to him under the bill of sale, is not a valid counter-claim under the above section and rule.

Feb. 15.—L. R. 19 Ch. D. 473.

Action for detinue brought by the grantee, one Barber, under a prior bill of sale against the grantee, under a subsequent bill of sale, one Blaiberg, who had removed from the premises of the grantor, Bass, certain goods and chattels. Blaiberg put in a statement of defence and a counter-claim, and he made Bass a party, and he asked against Barber and Bass for a declaration that he was entitled to full relief under the bill of sale to him, and in the alternative he asked, as against Bass alone, that Bass might be ordered to pay to Blaiberg the amount still due under his bill of sale, with interest and costs.

It was contended that the counter-claim against Bass was informal and should be dismissed.

FRY, J.—This counter-claim has not been opened on any point except the liability of Bass to pay this amount, said to be due on the bill of sale. . . The question, therefore, is whether the payment asked by Blaiberg from Bass is a matter "relating to or connected with the original cause or matter." The original subject of this cause is Barber's right to have the goods which Blaiberg has seized. The two matters are, in my judgment, totally distinct, and ought to be the subject of distinct litigation. Therefore, I think the objection taken to this part of the counter-claim is valid, and the other portion of the counter-claim having been abandoned, I dismiss the counter-claim with costs.

[NOTE.—*The Imp. and Ont. sections and rules are identical respectively.*]

HOWELL V. METROPOLITAN DISTRICT RAILWAY CO.

Imp. O. 4, 5, rr. 3, 8; Ont. rr. 371, 376—Garnishee order—"Debt due or accruing."

A "debt due or accruing" to a judgment debtor, and therefore capable of being attached by a garnishee order under Rule 371, must be an absolute and not merely a conditional debt.

Nov. 9.—L. R. 19 Ch. D. 508.

Aug., 1878. Defendants served plaintiffs with notice to treat in respect to a house belonging to him, under the Imp. Land Clauses Act.

Nov. 27, 1878. Jury fixed compensation at £3,650, and on same day the sheriff gave judgment for that amount.

Jan. 25, 1879. The defendants delaying the completion of their purchase, the plaintiff brought this action for specific peformance of the executory contract.

May 8, 1879. Plaintiff obtained judgment accordingly, subject to the usual enquiries as to title.

Jan. 7, 1880. The chief clerk certified to a good title, subject, *inter alia*, to certain garnishee orders *nisi*, and that such good title was first shown on Dec. 4th, 1878.

Feb. 9, 1880. An order was made, on further consideration, directing a conveyance and payment by the defendants of their purchase money into court.

June 28, 1880. The plaintiff executed an assignment of the property to the company, who shortly after paid the purchase money into Court.

Of the garnishee orders

(i) Some had been served after the verdict of the jury, but before good title shewn. (ii) Some had been served after good title shewn, but before writ issued. (iii) Some after writ issued, but before judgment. (iv) Some after judgment, but before the date of the certificate. (v) One after the date of the assignment and the payment of the purchase money into court.

Held, none of these garnishee orders affected the fund in court.

CHITTY, J., considering *seriatim* the various classes of garnishee orders, said:—

As to classes (i) and (ii)—"The sections of the Lands Clauses Act, under which the amount of purchase money and compensation is fixed by a jury and the judgment of the sheriff, do not have the affect of creating an absolute

debt due from the company to the landowner; they are merely part of the machinery provided by the Act for ascertaining the purchase money. . . . The plaintiff was not entitled to the money, either at law or in equity, except in executing or tendering a conveyance to the company."

As to classes (iii) and (iv)—"No distinction can be made between the issues of the writ and the obtaining of the judgment. . . Even upon judgment, a good title having been shown, the purchase money did not become a debt payable to the plaintiff. It appears to me that, though in one sense there may have been an equitable debt due to the vendor, there was not such a debt as could be attached. The purchase money was not a debt actually 'due or accruing' within the meaning of the garnishee orders, for the right to it was conditional upon the execution or tender of a conveyance by the vendor. The provisions of O. 45, r. 8 (Ont. rule 376) as to payment or execution being a valid discharge to the garnishee are inapplicable to a conditional debt."

As to (v.)—"With regard to the garnishee order obtained after that date (the date of the order on further considertaion) it is clear from the authorities that it could not affect the fund that was already in court, even though there had been a conveyance; for the money being in court, was no longer 'in the hands' of the garnishee as required by rule 3." (Ont. rule 371.)

[NOTE—*The Imp and Ont. rules are identical. Chatterton v. Watney, L. R. 17 Ch. D. 259; 17 C. L. J. 322, is another recent decision under these rules.*]

HOLLOWAY V. CHESTON.

Imp. Jud. Act, sec. 50; Ont. Jud. Act, 36—Appeal from Judge's order in Chambers.

Dec. 5.—L. R. 19 Ch. D. 516.

Defendants obtained, upon summons, a certain order from a Judge in Chambers. Plaintiffs thereupon served the defendants with a notice of motion for a certificate from his Lordship that he did not desire to have the summons reheard, so as to enable the plaintiffs to go direct to the Court of Appeal; or, in the alternative, that the order might be discharged.

CHITTY, J., said that he intended to follow the practice which had been adopted by the Master of the Rolls, and always to adjourn summonses into Court for argument or judgment in cases in which an appeal was desired. Where there was no such adjournment the proper course was to move to set aside the order made in Chambers, so that the Judge might have the opportunity of delivering a judgment which would enable the Court of Appeal to understand the reasons for his decision.

[NOTE.—*The Imp. and Ont. sections appear to be virtually identical.*]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

THE QUEEN V. DOUTRE.

Petition of Right Act—Counsel fees, Right of action for—Retaining services of an advocate P. Q. before Halifax Commission.

The suppliant, a barrister of the Province of Quebec, in this case, was retained by the Government of Canada in the British interest before the "Halifax Commision," which sat at Halifax, under the Treaty of Washington, 1877, to arbitrate upon the difference between Great Britain and the United States, in connection with inshore fisheries, etc. The suppliant, by his petition, alleged that he was retained by a letter from the Department of Justice at Ottawa, and there was contradictory evidence of an agreement entered into at Ottawa between the suppliant and the Minister of Marine and Fisheries as to the amount to be paid to the suppliant for his services. The Judge who tried the case found that the terms of the agreement were as follows: "That each of the counsel engaged would receive a refresher, equal to the first retainer of $1000; that they could draw on a bank at Halifax, $1000 a month while the sittings of the Commission lasted; that the expenses of the suppliant and his family would be paid, and that the final amount of fees or remuneration to be paid to counsel would remain unsettled until after the award of the Commissioners." The suppliant received $8,000, and claimed an additional $10,000 under his agreement. The award in favour of Canada was over $5,000,000.

Held, per FOURNIER, HENRY and TASCHEREAU, J. J., That by the law of the Province of Quebec an action will lie at the suit of an advocate or counsel against his client for professional services rendered by the former to the latter, under a contract in that behalf; and when such a contract is entered into between a counsel of the Province of Quebec and the Crown, as in this case, that a petition of right will lie to recover upon said contract, and as the suppliant had proved that there was an agreement to pay a reasonable amount, to be determined at the conclusion of the business, in addition to the amount paid, that the amount of $8,000 which had been awarded to suppliant by the Judge at the trial, was a reasonable and just *quantum meruit* and supported by the evidence in the case.

Per SIR WM. RITCHIE, C. J.—1st. That the agreement between the suppliant and the Minister of Marine and Fisheries took place at Ottawa in reference to the services to be performed by Mr. Doutre in Nova Scotia, and therefore is not to be governed by the law of Quebec. 2nd. That the right of a barrister to maintain an action for counsel fees is the same in the Province of Ontario as in Nova Scotia; that in neither Province could a counsel maintain an action for counsel fees, and therefore suppliant could not recover.

Per STRONG, J.—That there was no evidence of a contract to pay an additional amount of fees to suppliant, but there was evidence that the Crown had contracted to pay suppliant's expenses in addition to the fees paid, and for such expenses the suppliant was entitled to recover.

Per GWYNNE, J.—That as in England a counsel could not enforce a claim by Petition of Right for counsel fees upon an express contract, or or upon a *quantum meruit*, and that by the Petition of Right Act, sec. 19, clause 3, the subject is denied any remedy against the Crown in any case in which he would not have been entitled to such remedy in England under similar circumstances by the laws in force there prior to the passing of the Imperial Statute 23 and 24 Vict. c. 34, a Canadian counsel in the case of a contract with the Crown for his advocacy, cannot enforce such contract by Petition of Right, and therefore the appeal should be allowed.

Per FOURNIER and HENRY, J. J.—That counsel in the Dominion of Canada are entitled to sue for counsel fees.

Lash, Q.C., for appellant.

Laflamme, Q.C., for respondent.

THE QUEEN v. MCFARLANE ET AL.

Petition of Right—Government officer receiving tolls—Implied contract—31 Vict., ch. 12 (D.)—Con. Stats. Can. ch. 28—Negligent conduct of Government officer—Demurrer.

The respondents filed their petition of right in this case to recover from Her Majesty the value of certain logs, which became lost to them through the breaking of the boom in the Ottawa River, below the timber slide on the Madawasca, near Arnprior, and other damages and losses sustained by them, all, as alleged, through the improper and negligent conduct of the slide Master at that place, duly appointed by the Government under the provisions of ch. 28, Con. Stats. Can. and of 31 Vict. ch. 12.

The Attorney-General, on behalf of Her Majesty, demurred to the petition on the following grounds: 1. That Her Majesty is not liable for the losses sustained through the negligence of the slide master under the circumstances alleged in the petition; 2. That no contract between the suppliant and Her Majesty is shown in the petition: 3. That no liability exists on the part of Her Majesty by reason of the insufficiency of the boom referred to in the petition; 4. That Her Majesty is not liable by reason of any want of care in the selection or employment of the slide master referred to in the petition; 5. Because the public works referred to in the petition, being placed under the control and management of the Minister of Public Works, Her Majesty is not liable for the negligence of the persons having charge of said works under him.

The demurrer was argued in the Exchequer Court, before HENRY, J., who overruled it, and held there was an implied contract on the part of Her Majesty, through her agent, to carry safely the logs, and that a petition of right would lie for the breach of that contract by the improper and negligent conduct of the slide master, and for any negligence in keeping in use imperfect and insufficient booms and other appliances.

On appeal to the Supreme Court of Canada—

Held (reversing the judgment of the Court *a quo*) 1. That the public works referred to in

the petition are by statute vested in the Crown in trust for the public, and that Her Majesty is not liable for the negligent, unskilful or improper conduct of persons appointed by the Government to have charge of said works.

2. That the claim set forth in the petition is a tort pure and simple, and that a petition of right in respect of a wrong, in the legal sense of the term, shows no right to legal redress against the sovereign.

3. That the slide master, in receiving tolls which it was his statutory duty to receive, did not thereby enter into any contract either express or implied, on behalf of Her Majesty to carry safely the logs through the slide, and that the Crown was not, in respect to the logs in question passing through the slides, a common carrier.

Lash, Q.C., for the appellant.

Bethune, Q.C., and *McIntyre* for respondent.

THE QUEEN v. CHRISTIAN A. ROBERTSON.

Petition of Right—Fisheries Act, 32 Vict. ch. 60 (D.)—B. N. A. Act, 1867, secs. 91, 92 and 109—Fisheries—License to fish—Miramichi River—Rights of riparian proprietors in granted and ungranted lands—Right of passage and of fishing.

On January 1st, 1874, the Minister of Marine and Fisheries of Canada, purporting to act under the powers conferred upon him by sec. 2, 31 Vict., ch. 60, executed on behalf of Her Majesty to the suppliant an instrument called a lease of fishery, whereby Her Majesty purported to lease to the suppliant for nine years a certain portion of the South West Miramichi River in New Brunswick, for the purpose of fly-fishing for salmon therein. The *locus in quo* being thus described in the special case agreed to by the parties: "Price's Bend is about 40 or 45 miles above the ebb and flow of the tide. The stream for the greater part from this point upward is navigable for canoes, small boats, flat bottomed scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow."

Certain persons who had received conveyances of a portion of the river and who, under such conveyances, claimed the exclusive right of fishing in such portion, interrupted the suppliant in the enjoyment of his fishing under the lease granted to him, and put him to certain expenses in indeavoring to assert and defend his claim to the ownership of the fishing of that portion of the river included in his lease. The Supreme Court of New Brunswick having decided adversely to his exclusive right to fish in virtue of said lease, the suppliant presented a petition of right and claimed compensation from Her Majesty for the loss of his fishing priviliges and for the expenses he had incurred.

By special case certain questions were submitted for the decision of the Court and the Exchequer Court held *inter alia*, that an exclusive right of fishing existed in the parties who had received the conveyances, and that the Minister of Marine and Fisheries, consequently, had no power to grant a lease or license, under sec. 2 of the Fisheries Act, of the portion of the river in question; and in answer to the 8th question, viz.: "where the lands (above tidal water) through which the said river passes are ungranted by the Crown, could the Minister of Marine and Fisheries lawfully issue a lease of that portion of the river?" *Held*, that the Minister could not lawfully issue a lease of the bed of the river, but that he could lawfully issue a license to fish as a franchise, apart from the ownership of the soil in that portion of the river.

The appellant thereupon appealed to the Supreme Court of Canada on the main question involved: whether or not an exclusive right of fishing did so exist in the *locus in quo*.

Held, (affirming the judgment of the Exchequer Court) 1st, that the general power of regulating and protecting the Fisheries, under the British North America Act, 1867, sec. 91, is in the Parliament of Canada, but that the license granted by the Minister of Marine and Fisheries, of the *locus in quo*, was void, because said Act only authorizes the granting of leases "where the exclusive right of fishing does not already exist by law," and in this case the exclusive right of fishing belonged to the owners of the land through which that portion of the Miramichi River flows.

2nd.—That although the public in Canada may have in a river, such as the one in question an easement or right to float rafts or logs down and a right of passage up and down, &c., where ever the water is sufficiently high to be so used, such right is not inconsistent with an exclusive right of fishing, or with the right of the owners of pro-

perty opposite their respective lands *ad medium filum aquæ*.

3rd.—That the rights of fishing in a river, such as is that part of the Miramichi from Price's Bend to its source, are an incident to the grant of the land through which such river flows, and where such grants have been made, there is no authority given by the B.N.A. Act, 1867, to grant a right to fish, and the Dominion Parliament has no right to give such authority.

4th.—Per RITCHIE, C.J., and STRONG, FOURNIER and HENRY, J.J.—(reversing the judgment of the Exchequer Court on the 8th question submitted to that Court), that the ungranted lands in the Province of New Brunswick being in the Crown for the benefit of the people of New Brunswick, the exclusive right to fish follows as an incident, and is in the Crown as trustee for the benefit of the people of the province, and therefore a license by the Minister of Marines and Fisheries to fish in streams running through provincial property would be illegal.

Lash, Q.C., for appellant.

Weldon, Q.C., for respondent.

From Ontario.]

LAWLOR v. LAWLOR.

Estate tail—Mortgage of—Reconveyance to mortgagor—Effect of—R.S.O., ch. 111.

Held, (confirming the judgment of the Court of Chancery), that a mortgage in fee, executed by a tenant in tail, bars the estate tail, and vests the fee simple in the mortgagee, and a discharge of such mortgage, executed by a mortgagee under the provisions of the R.S.O., ch. 111, does not revest the estate tail in the mortgagor, but does that estate which the mortgagee had. HENRY, J., dissenting.

Stewart Tupper, for appellant.

M'Intyre, for respondent.

QUEEN'S BENCH DIVISION.

IN BANCO, EASTER TERM.

BEARINGER v. THRASHER.

Insolvency Act—Personal wrong—Discharge—Ca. sa.

The Court, affirming judgment of Cameron, J., *held* that a judgment against a bankrupt in action of seduction is a "debt due as damages for a personal wrong" within the Insolvent Act of 1864, and a discharge under the Act does not affect it. Also that a *ca. sa.* need not be returned and filed within a year from the judgment.

Bethune, Q.C., and *Clute* for appeal.

Holman, contra.

CHANCERY DIVISION.

Boyd, C.] [May 12.

MALCOMSON v. WADE.

Mortgage—Costs of sale, Bill of—Subsequent Incumbrancer.

In October, 1880, a sale was made of certain property under a power of sale contained in a mortgage. The solicitors of the mortgagee paid over to his agent in this country his principal money and interest, and detained, with the agent's sanction, a lump sum for their costs, but rendered no bill in detail. On the request of a subsequent encumbrancer the solicitors furnished him with a statement showing the settlement with their client's agent, but declined to furnish a bill of their costs in detail. The Master in Chambers directed the solicitors to deliver a copy of their bill of costs upon payment of the costs of such copy.

On appeal, BOYD, C., considered the circumstances of the case special, within the meaning of sect. 44 R. S. O., Cap. 140. He thought that the subsequent encumbrancer was entitled to see the items of the bill and judge whether to seek redress for any over-payment the mortgagee might have made to his solicitors.

Having regard to the state of the authorities no costs of appeal were given.

Shepley, for the appeal.

Small, contra.

Proudfoot, J.] [May 18.

TOWN v. BORDEN.

Will—Vesting—"Worldly estate."

A testator, by his will, "as touching his worldly estate" gave to his wife the use of all his personal property, for her support and the bringing up of his children; likewise he gave her the full use of his farm and buildings during her natural life, for her support and the bringing up of the

family, "and at her decease the whole of the personal and real property to be equally divided between my six children."

Held, the shares of the children vested on the death of the testator. *Baird* v. *Baird*, 26 Gr. 367, discussed and reconciled, and declared to be wrongly reported.

Held also, "worldly estate" includes, not only the corpus of the testator's property, but the whole of his interest therein.

Wood, (*Webster* with him), for the plaintiff.

Reynolds, for the defendant.

Proudfoot, J.] [May 18.

RE HOUSTON; HOUSTON v. HOUSTON.

Mortgage—Notice of payment off—Parol evidence.

Where a mortgagee comes in, under a decree for partition or sale and proves his claim, he cannot demand six months interest or six months notice.

Held also, following *Totten* v. *Watson*, 17 Gr. 233, that a parol agreement to pay a larger interest than that reserved by the mortgage is ineffectual to charge the land.

Small, for defendant J. Henderson.

Plumb, for the infant defendants.

Langton, for the plaintiff and other defendants.

Proudfoot, J.] [May 18.

RE CHARLES; FULTON v. WHATMOUGH.

Will—Vesting—Executory interests.

A testator left real and personal property to trustees on trusts to sell, and after providing for a certain annuity to the widow and for the education of the children, to invest and accumulate the surplus, and at the end of the period limited for the accumulation, to stand possessed of the same for the same trusts as were declared of the funds from which they proceeded.

He did not expressly limit the time during which the accumulations were to be made, but, in a subsequent part of the will, he directed that the trustees were to hold the trust moneys "after the death or second marriage of his wife, and his youngest child attaining 21 years," in trust for his sons and daughters in equal shares as tenants in common; and in the event of all his children dying, and in default of issue of such children attaining majority, he devised the whole estate, real and personal, to the trustees to be converted into money, and applied to founding an asylum for the dumb and blind.

Held, on a view of the whole scope of the will, so far as could be gathered from the confused language employed, and having regard to the fact that there was no direction that the division among the children was to be made "after the death or second marriage of his wife, and the youngest child attaining 21," but on the contrary the duties of the trustees with regard to the property were evidently not intended to cease then, and especially having regard to the devise over to the charity. The children, who survived the death of the wife and the majority of the youngest child, did not thereby and thereupon take absolute interests, but the estate continued in the trustees till the grand-children attained majority, and it was only then that the trusts could be deemed at an end, and failing the attainment of majority by the grand-children the property went to the charity; and the rule in *O'Mahoney* v. *Burdett*, L.R. 7 H.L. 388, and *Ingram* v. *Soutten*, ib. 408, applied.

Maclennan, Q.C., (*Langton* with him), for the petitioner.

Plumb, for the infant defendants.

W. Davidson, for the trustees.

[This same will came before the learned judge on a former occasion—23 Gr. 610: Rep.]

Proudfoot. J.] [May 18.

VILLAGE OF BRUSSELS v. RONALD.

Mortgage to municipality—R.S.O. c. 174, s. 454, sub-s. 5, (b).

In pursuance of a by-law, passed under the above section, and in consideration of a bonus granted thereunder, the defendant executed a mortgage of land, to the municipality of the Village of Brussels, conditioned for the carrying on of certain manufactures in the village for the term of 20 years, next ensuing the date thereof, without interruption for a longer period in any case than 12 months, and that he should at all times during the continuance of the said term of 20 years, have and keep invested in the said municipality at least $30.000. The by-law itself only required that the defendant should execute a mortgage for $10,000.

Held, the mortgage created a charge on the land to secure the performance of work and in-

vestment of money; but that it was not a charge for any specific sum, as none was mentioned in it, and it must therefore be taken to be a security for any damages the plaintiff might sustain from the failure of the defendant to perform his engagements, to an extent not greater than $10,000. For it could not have been the intention of the parties that upon failure, in some slight particular, to comply with the terms of the agreement running over a period of 20 years, the plaintiffs, (the mortgagees), would be entitled to foreclose, without an opportunity for the defendant to redeem; and though, as the mortgage was framed, it would appear to provide for a forfeiture of the estate on non-fulfilment of the agreement, this was a forfeiture which the Court would not enforce, but would relieve against, in accordance with the rule laid down by Lord Thurlow, in *Sloman* v. *Walter*, 1 Bro. C. C. 418.

Held also, R.S.O., c. 174, sect. 454, sub-s. 5 (b), authorises taking a mortgage in hand; the Act empowers the municipality to take security, and the word is wide enough to embrace a real security, and the legislature must therefore have intended to remove any incapacity in the plaintiffs to take or hold it.

J. A. McDougall, (with him *Shepley*), for the plaintiff.

Bruce, for the defendant.

Proudfoot, J.] [May 18.

GAIRDNER v. GAIRDNER.

Will—Vesting—Gift over—Contingency.

A testator, by his will, gave his homestead and certain personalty to his wife, while unmarried, for the maintenance and support of the family surviving him, until he or they should attain twenty-one, and afterwards for the maintenance of the wife for life. He then proceeded as follows:—"I further give and bequeath all my other personal and real estate, not hereinbefore mentioned, unto my executors in trust to dispose of and invest," and "upon my son Thomas attaining the age of 21 years, should he be my only child in trust, to pay to him and put him in possession of the said residue,"—but if there were more children, he directed that it should be divided amongst all, in the proportion of one part to a daughter and two parts to a son—"to be paid to him, her or them, by my executors, when they shall respectively attain 21." He then proceeded as follows:—"I further give and devise to my son Thomas, the homestead and farm aforesaid together with the household goods, etc., on the decease of my said wife, or at the time of her second marriage, should he have attained his twenty-first year. But should my said son be still in his minority, to be taken possession of by my executors, as aforesaid, till he attains his majority. And in case my son Thomas should not survive me or attain the age of 21 years, and in case I should have no other surviving child who shall attain the age of 21 years, or in case I should have no grandchild, then, and in that case," his real and personal estate was to be divided in certain proportions among the testator's brothers and sisters.

Held, Thomas took a vested estate, for that it did not appear that the testator intended it to be contingent either on his attaining 21 or surviving his wife.

Held also, the testator's intention was that the gift over should not take effect unless Thomas died under 21, without leaving a child. For as to the residue it was clear that, on attaining 21, Thomas was to have full possession and absolute control over it; and if there had been more children it was to be divided amongst all, and paid to them on their attaining 21, and language of that kind has always been construed as giving an absolute interest; and when a legatee, and the same rule must apply to a devisee, is to have the absolute control at a specified time, a subsequent gift over will be limited to take effect before the time; and that being the true construction as to the residue, the language must receive the same meaning as applied to the homestead.

Blake, Q.C., for the plaintiff.

Maclennan, Q.C., (with him *Loscombe*), for the defendant.

Proudfoot, J., Mr. Thom.] [May 22.

TORRANCE v. TORRANCE.

Taxation—Rule 442.

On the taxation of the plaintiff's costs the taxing officer disallowed the following items:—

1.—A charge of $2.00 for procuring a certain deed for use at the trial which the defendant's solicitor refused to admit. It was shewn that it

would have cost $30 to produce the person who had the custody of this deed.

2.—A charge of $7.73 for procuring from Montreal certain documents and a stock register whereby the expense of a commission to Montreal, to examine witnesses, was saved.

3.—"Instructions for statement of claim" was allowed, but "Instructions for reply" struck out.

The taxing officer held that he had power to tax charges for work done which caused a saving of expense only where the work was done between the solicitor on either side, and that one set only of instructions to plead could be allowed. On an application under rule 440, O.J.A.,

PROUDFOOT, J., allowed the first two items, but upheld the taxing officer's ruling as to the third.

Cattanach, for the application.

CHAMBERS.

Proudfoot, J.] [May 22.

BROWN V. BROWN.

Partition—Infants—Parties.

A partition suit commenced by summary application under Chy. G. O. 640.

The infants interested in the estate were joined as plaintiffs.

J. Hoskin, Q.C., as official guardian, moved to set aside the proceedings, on the ground that the infants should have been made defendants, and represented by the official guardian, under Chy. G. O. 640.

H. Symons for the plaintiffs.

Hoyles for the defendants.

PROUDFOOT, J., held that the infants were improperly joined as plaintiffs; that they should have been defendants, and represented by the official guardian; and directed a reference to the Master to fix the guardian commission as if he had been in the suit from the beginning. On consent of the guardian it was ordered that the proceedings taken for sale, if they prove to be regular, should stand, but this is not to be a precedent.

CORRESPONDENCE.

Supreme Court of British Columbia—The Thrasher Case.

To the Editor of the LAW JOURNAL.

SIR,—As one of that large and growing class from whom, as your readers, Mr. Alpheus Todd, (in his correspondence in the LAW JOURNAL of April 12th, under the above caption), invites a notice, I venture to address to you a few remarks upon his commentary in the *Thrasher Case*.

Previously to reading his letter I had always been under the impression that that well known writer was a close, careful, logical and impartial reasoner. It was with great astonishment therefore, I observed that his comment on the *Thrasher* judgment was *petitio principii* throughout. It begged the very questions adversely on which the judgment was mainly based. It did not attempt to enter into the details of the judgment it reviewed, or to discuss the reasoning on which it was founded. He merely states dogmatically that he differs from the conclusions of our judges on some of the constitutional issues of the case, and decides off-hand against the opinions of judges who have given time and research to the subject proportionate to its gravity and importance—who step by step have discussed with us in open Court our authorities, and the reasons for their conclusion; and, in the main point of their judgment we, as a bar, I may say almost without exception, concur. All his objections are fully met and disposed of in the judgment to which I refer your readers.

I have called the letter a review, but it is not a review. It is as though the writer should have said to himself:—"The judges have given their conclusions but the world will want to know what Mr. Todd thinks in the matter." It would at least have been expected of him that he would have discussed the question from the main point of view from which the the judges regard it; but like our Attorney-General here when arguing in Court, he entirely ignores the force given by so many of our Canadian judges to section 91—the chief controlling section and key-note of the B. N. A. Act. He ignores even its existence. Notwithstanding the multitude of authorities cited in the *Thrasher* judgment; he discusses none of them, and does not attempt to show how or by what authorities he arrives at his result.

Possibly he may consider himself bound in a strait jacket by previous public utterances in the direction in which his letter points, but that were unworthy of a candid writer of such good repute in search of legal truth. The change of his opinions in the *Letellier Case* should have taught him the lesson impressed by the judgment, that truth is many-sided ; and opinions on a new Constitutional Act must vary from time to time as different and new aspects of it to different minds, under the ever varying circumstances of a new country, present themselves for decision.

The point raised, if not an entirely new one in B.C., has now been formulated in legal shape for the first time for the formal opinion of a court. It would probably not have arisen now if it had not been persistently forced on by the local authorities in spite of remonstrances well known and appreciated for the last five years past; they by their deliberate action and legislation in judicial matters, would have brought the Courts and the administration of justice to a dead-lock for the second time, but for the vigorous proceedings of the Court, which, as one of the judges said, had thereby once more opened the door of justice for all suitors in search of redress. Like many other, especially the earlier, writers on the Constitution of Canada he approaches his subject and gets at his conclusion crab-fashion, *i. e.* backwards ; instead of boldly making for his port through the direct and open channel so carefully buoyed out by the framers of that organic measure—through section 91 of that Act, and the other sections in regular succession, he makes his advances first through a subordinate section (92). To that he attributes a completeness, definiteness and exclusiveness denied to it by the learned Canadian judges whose judgments paved the way and lead up to the present decisions of the B. C. Bench. The learned reviewer then construes the other sections by the reflected light thus obtained, and like our own Attorney-General in Court, can only view and construe the whole of the Act through the spectacles, or rather the blinkers, of section 92. Like that gentleman, he too entirely ignores the existence of section 91. And yet if he had really read any one of the judgments through he could not fail to have seen that section 91 was at least one main turning point of the Act. He shuts his eyes to the vast difference between the powers of the Legislature of a Province of the Colony of Canada (which the Dominion after all is) and the surpassing power of the Imperial Parliament, and claims for the Legislature of a single Province the legislative omnipotence of the Senate of an empire. The judgment does not say that the Colony (*i. e.* the Dominion) has no power over Court and Judges, although by no means the same or co-extensive with those of the Imperial Parliament. On the contrary it points to and insists upon the existence of the Dominion powers, subject to the limitations of the organic Act.

Of what use is Mr. Todd's reference to the Australian Colonies, which are full colonies, to whom the Colonial Laws Validity Act applies, as a measure of the legislative powers of a subordinate section or province of a colony which is governed by the B. N. A. Act? Section 91, which Mr. Todd so singularly ignores, is so fully treated in the judgment that it would weary you to repeat the long string of authorities there arranged on the subject. The pith of the judgment, as it affects the Supreme Court of British Columbia, may be shortly stated ; affects, though not in the same degree, more or less, all provinces beside British Columbia that are governed by the B.N.A. Act. The Local Legislature of the Province, had assumed the right to authorise the Local Executive, exclusive of the Judges, to make rules of procedure in the Supreme Court of British Columbia, and they proceeded to make such. Among others a rule restricting all appeals to the full Court, to correct the decision of a single Judge at Nisi Prius, which had previously been unrestricted. This restriction they made in various ways, but especially to allowing the full Court to meet once a year for 1881, in which year a full Court had presumably already been held ; thereby shutting the door against discontented suitors in want of a hearing before such full Court. The *Thrasher Case* was one of these. It was contended that this assumption was unconstitutional, and unless conferred on them by sec. 92, B.N.A. Act, it was so ; for the Local Legislature could not go beyond the letter of that section and sub-sections. Everything not therein specified, it was contended, was of excusively Dominion cognizance, (sec. 91). The only sub-section of section 92 relied on was sub-section 14. Section 92 gives the Provincial Legislature power,

"to make laws in relation to matters coming within the classes of subjects enumerated in the sub-sections." Sub-section 14 enumerated "the administration of justice, including the constitution, maintenance and organization of Provincial Courts, and including procedure of these Courts." The Supreme Court of British Columbia, (omitting reference to other Courts), was "constituted" long before the union of the province with the confederation. It was "organized" before confederation by Imperial authorities, and after such union by the Governor General. It is "maintained" under the *Terms of Union*, sec. 10, by the Dominion. The Supreme Court of B. C., therefore, is not within the description of "those" Courts in which alone procedure is controllable by the Local Legislature. And, not being within sub-section 14, it is not within section 92 at all; and, therefore, *by the sweeping force of sec. 91 is reserved exclusively to the authority of the Dominion Legislature.*

The judgments in the main affirmed, among other things, that the aforegoing contention was correct. And yet Mr. Todd says not a word about section 91. Has he forgotton what Lord Carnarvon said in the House of Lords on the passing of the B. N. A. Act, upon section 91?

I am aware that the resolutions and speeches which preceded and accompanied the passing of the Act are merged in the Act, still it is interesting reading in days when, as I believe, Ritchie, C.J., remarked, section 91 is so much neglected by expounders of constitutional law:—"Just as the authority (Lord C. says) of the Central Parliament will prevail when it comes into conflict with the Local Legislature, so the residue of legislation, if any, unprovided for in the specific classification (which he had just explained) will belong to the central body. It will be seen under the 91st clause that the classification is not intended 'to restrict the generality' of the powers previously given to the central Parliament, and that those powers extend to all laws made 'for the peace, order and good government' of the Confederation; terms which, according to all precedents, will, I understand, carry with them an ample measure of legislative authority."

In *The Canada Insurance Company* v. *Parsons*, in appeal before the Privy Council in the last English Law Reports, Sir Barnes Peacock says, as our judges do, that section 91 cannot be taken without section 92, or section 92 without section 91.

Our Chief Justice, Sir M. B. Begbie, in the *Thrasher* judgment, (see pamphlet, page 13), after citing section 92 and its sub-sections, adds:—"It must throughout be borne in mind that by the immediately preceding section (91) every topic of legislation was swept into the power, the exclusive power of the Parliament of Canada, (viz., the Crown, the Senate and Commons of Canada), except only such matters as by this Act (not any one section of it but the whole Act) are exclusively assigned to the Local Legislature."

Mr. Justice Crease, in the same judgment on the *Thrasher Case*, (pamphlet, pages 40, 41, 42 and 43), cites numerous authorities, and enters very fully on the effect of section 91, as he terms it, "the sweeping character of section 91," and after setting forth the theory of the Attorney-General (almost identical with that of Mr. Todd: one might imagine they had borrowed their views from each other), he adds:—"In order to construe such a theory it became necessary to ignore section 91 and the Imperial Vancouver Island Act of 1859, and that the learned Attorney-General effectually did. But then what is the value of an argument on the British North America Act, which entirely ignores section 91?"

Hear Mr. Justice Gray (same judgment, pamphlet, page 63), on the same subject:—"As must necessarily be the case, the discussion turns mainly on the 91st and 92nd sections of the B. N. A. Act." Then, after showing that the Supreme Court of B. C. was not in "those" Courts mentioned in sub-section 14 of section 92, that learned judge goes on to say, (page 68:—"The general authority conferred by 91 being to legislate on all matters, and coming exclusively within 92, the 129th section steps in authorizing legislation as to the existing Courts in the Province by the Parliament of Canada or the Local Legislature, as one or the other under the B. N. A. Act is entitled," adding:—"The Parliamnet of Canada has legislated on the subject." And yet in the face of these authorities, and the judgment *passim*, Mr. Todd makes no reference whatever in his comments, to the value placed by the judgment under his review to section 91 of the Great Constitutional Act of Canada.

Of the uncalled for reflection Mr. Todd makes,

on the protests of the Judges against local legislation which they deemed injurious to Courts, suitors, bench, bar, and the administration of justice generally, it behoves me not to speak, save that possibly he may have received communication, perchance at Ottawa, perchance at Victoria or elsewhere, which has, may be unconsciously, had an influence in biassing his mind. He speaks, as a fact, of an appeal having been made from the Judges to the Imperial authorities against the action of the Legislature. It certainly is not so stated in the judgment, and if he has no other source of information how inaccurately must Mr. Todd have read that document! This makes it the more remarkable, that he should thus unprovokedly and unnecessarily, (for it has no bearing on the case), have gone out of his way to cast reflections on judges, to whom, in his exordium, he declares Canada is already so much indebted, and the chief of whom from Imperial authority by Royal hand obtained the accolade of Knighthood, as an acknowledgment of a long career of faithful service as a Judge. However, with any personal misapphrensions of any sort we have nothing to do. Such matters can scarcely be of value to those who, like the writer, find their interest chiefly in the solution of the great constitutional points of construction of the B.N.A. Act, raised in the *Thrasher Case*, (now I hear under appeal), points which affect the relations of every province to the Dominion, and consequently are of surpassing interest to every

ONE OF YOUR READERS.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

The family laws of England and Islam.—*American Law Review*, May.

Evidence of foreign laws.—*Ib.*

Suzerainty: Medieval and Modern.—*Ib.*

Early English land law.—*Ib.*

Gifts *causa mortis*.—*Central L. J.*, May 12.

Presumptions of life, death and survivorship (continued).—*Ib.*

Estates by curtesy.—*Ib.*, May 19.

Repetition of telegraphic messages.—*Ib.*

Right of the prosecution to stand jurors aside.—*Ib.*, May 26.

Misconduct of counsel in argument.—*Ib.*

Contracts of carriers of goods.—*Irish L. T.*, May 20.

Savagery and civilization.—*Ib.*, (from *Times*).

Fractions of a day.—*Ib.*, (from *Justice of the Peace*).

Liability of Attorneys.—*Pacific L. J.*

A history of English judicature.—*London L. J*, May 6.

Wagers on horse races.—*Albany L. J.*

BOOK REVIEW.

A TREATISE ON THE LAW OF STOCK BROKERS. By Arthur Biddle and George Biddle, of the Philadelphia Bar. Philadelphia: J. B. Lippincott & Co. 1882.

This is an age of joint stock companies and syndicates; they are as numerous as Manitoba town lots. Old Blackstone talks about property, real, personal and mixed; but each individual hair of his horsehair wig would stand on end if he could return to this world and see how very "mixed" real property has become, when land is tossed about more easily, in these days, than was personalty in his day, and land syndicates and land companies carry on their operations mainly in the offices of stock brokers.

As the author says: "The transactions growing out of the sale and hypothecation of the securities dealt in at the stock exchange, already form, both in their number and magnitude, one of the most important branches of business in great commercial centres." It is therefore not surprising that a book should appear treating of the law governing the parties who, as agents, buy and sell such securities. This is the aim of the book, though it necessarily touches, more or less, upon the character of the thing sold and the questions arising out of the sale.

The first part of the book contains chapters treating of the stock broker—what he is; his connection with, and a description of the Stock Exchange and the Clearing House; also his relations with his principal, and with third parties. The second part deals with the sale of stock; part 3 with pledges thereof; and part 4 with the remedies of the parties for a breach of the contract of sale. The work has apparently been carefully done, so far as we have had an opportunity of judging, and like so many American text books the information is given in a pleasant, readable way.

TO CORRESPONDENTS.

A subscriber calls attention to an item in a country paper, wherein, after speaking of an action for slander, in which a good verdict had been obtained for the plaintiff, it is said: "There is a great deal of credit due Mr. ———, for the skilful manner in which he has directed the proceedings, etc." Our correspondent says that no doubt the item was written by the plaintiff's attorney, as a means of bringing himself before the public. We can scarcely believe that any professional man would be guilty of such an utterly objectionable proceeding, and we trust our correspondent is mistaken in supposing that the attorney either wrote or inspired the absurd item.

Law Society of Upper Canada.

OSGOODE HALL.

HILARY TERM, 1882.

The following gentlemen passed their examination and were called to the Bar :

Edwin Taylour, English Honors and Gold Medal ; Adam Johnston, Honor and Silver Medal ; Daniel Johnson Lynch, John Arthur Mowat, George James Sherry, Benjamin Franklin Justin, Thomas Ambrose Gorham, Charles Rankin Gould, James Lane, William James Cooper, Robert McGee, Henry Nason, William Johnston, Albert Edward Wilkes, George Frederick Jelfs, Henry Joseph Dexter, Stewart Masson ; the names are in order of merit.

The following gentlemen were called to the Bar under the Rules in Special Cases :—

Donald McMaster, Henry Gordon McKenzie.

The following gentlemen were entered on the books of the Law Society as students at law :—

GRADUATES.

Marcus Selwyn Snook, Stephen Johnston Young, Alexander Sheppard Lown, John Earl Halliwell, Patrick Macindoe Bankier.

MATRICULANTS OF UNIVERSITIES.

Nelson Sharp, Stephen Alfred Jones, Frank Burr Mosure, Edward Wesley Bruce, Robert Barry, Alexander Campbell Aylesworth, Thomas Hislop.

JUNIOR CLASS.

Willard Snively Riggins, Allan Napier McNab Daly, George Cooper Campbell, John Elliott, Alexander A. McTavish, John Dawson Montgomery, George Albert Lorcy.

Frank Ernest Coombe was allowed his examination as an Articled Clerk.

RULES
As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

1881.
- Ovid, Fasti, B. I., vv. 1-300 ; or Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20-36, B. V. c. 8-23.
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles, V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

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

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

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A paper on English Grammar.
Composition.
Critical Analysis of a selected Poem :—
- 1882—The Deserted Village. The Task, B. III.
- 1883—Marmion, with special reference to Cantos V. and VI.
- 1884—Elegy in a Conntry Churchyard. The Traveller.
- 1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencemen. of the Second Punic War to the Death of Augustust