Canada Law Journal.

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DIARY FOR MARCH.

1. Wed.... Court of Appeal sittings begin. St. David's Day.
5. Sun.... *2nd Sunday in Lent.* Osler, J., appointed.
6. Mon.... Name of York changed to Toronto, 1835.
7. Tue.... County Court for York, sittings begin. Court of Appeal sittings begin.
12. Sun.... *3rd Sunday in Lent.*
21. Mon.... Czar assassinated, 1881.

TORONTO, MARCH 1, 1882.

WE regret that circumstances have forced us to wait until our next issue before noting several current English practice cases now reported, we hope, however, to present our readers with a large instalment then, and so make amends for the small one in the present number.

A short time since an old subscriber in a country village, being underbid by a host of wayside form-fillers, thought he would economise by giving up the LAW JOURNAL. A few days ago we received a post card from him in these words:—"Please send me the journal again, I cannot do without it."

IT appears now that Sir George Bramwell instead of taking a territorial title, has been made a Peer of the Realm under letters patent, granting him the dignity of a Baron of the United Kingdom, under the name and title of Baron Bramwell, of Hever, in the county of Kent. He thus retains a name, under which, though a different title, he is best known to fame. We trust he may long live to enjoy it.

THE constitutionality of Provincial Legislation is beginning to be tested, and will doubtless so continue. In British Columbia, just before the mail left, an interlocutory judgment was being delivered in the *Thrasher-Vieux Violard* case, and it seemed probable that the Thrasher people would get a rehearing before all the Judges; but we shall soon know whether much of the legislation there directed against the Supreme Court is unconstitional, and whether the right of making rules of procedure is not to be returned to the judges.

WE see advertised in the February number of one of our most valued contemporaries, the *American Law Register*, a work which may easily escape the notice of the library committee, but the purchase of which would undoubtedly be an acquisition to the library. It is a digest of the *American Law Register*, from the commencement, published by D. B. Canfield and Co., Philadelphia. Anyone familiar with this most useful periodical will know what a mine of information on all kinds of legal questions the Digest referred to is likely to prove, and we hope soon to see it added to our shelves. While on the subject of the library, we cannot refrain from calling attention to the many gaping voids existing in our collections of American reports.

A vacancy having occured in the reportership of the Court of Appeal by reason of Mr. Tupper's change of residence to Winnipeg, Mr. Grant becomes reporter to the Court of Appeal, and Mr. Percy Galt, reporter to the Court of Chancery. The change of Mr. Grant to the Court of Appeal will be an advantage. It did not seem agreeable to the fitness of things that the Clerk of one Court should be reporter to another. The series of Chancery reports known by the name of Grant will be personally historical of

an old and valued officer, but the plan of naming reports after their compiler is an inconvenience which it will be well to get rid of. There were a number of applicants for the vacancy, and though some of them would have been a credit to the staff, there will be but one opinion that a most efficient, intelligent and courteous reporter has been secured in Mr. Galt.

It appears from an article in the *Central Law Journal*, for January 20th, that it is the practice across the border for the Court to limit the time of argument with consent of counsel on both sides. The writer says that this is done in many civil cases and in a few minor trials for crimes, and he cites decisions to show that the Court is always sustained in this. In many States the practice is somewhat regulated by Court rules. Thus, Circuit Court rule 63, of Michigan, provides that no more than two hours shall be allowed to either side for the summing up of a cause, unless the Court shall otherwise order, and the same is substantially true in New York. The general summary of the matter is that although a wide discretion is left to the Court in reference to the time of argument, it may be so abused as to make it necessary to reverse the case on appeal or to allow a new trial, and it often becomes material to the defense, whether sufficient time has been allowed in summing up to permit justice to be done.

We are glad to register a modest vote in favour of the admirable scheme, advocated by our contemporaries the *Central Law Journal* and the *Albany Law Journal*, but which we understand originated with the *Daily Law Register*, for the establishment of a uniform system of digesting and indexing. There can be no question that if a well-considered method of arrangement were uniformly adopted it would be a great assistance in that search for authorities and precedents which at present is often a most distracting and harassing task. Moreover, if the plan fixed upon should be based on sound scientific principles of division, the familiarity with it which would result from constant use would be a decided mental gain. The idea suggested of a convention of reporters, authors and legal editors, is a very attractive one, and if the delegates prepared themselves before meeting by giving thought and study to the subject, the basis might undoubtedly be laid for a practical realisation of the project. The idea is new to us, but we would suggest that the best method of proceeding would possibly be to invite the various Law Societies having direction of the issuing of official Law Reports to send delegates empowered to represent them. If the legal official bodies agreed on a uniform method of arrangement, the free lances of the profession would soon follow suit.

CONVEYANCERS.

We find among the statutes of Manitoba for 1880-1881, c. 25, an Act respecting conveyancers which shows that the powers that be in the sister Province do not find it so impossible to do justice in this matter to the profession and the public as our own rulers appear to do. Section 1 empowers the Lieutenant-Governor in Council, from time to time, to appoint conveyancers in and for the said Province. Section 3 provides that "Persons other than barristers and attorneys, duly admitted as such in this Province, desirous of being appointed as conveyancers, shall be subject to examination in regard to their qualification for the said office of conveyancer by any one of the Judges of the Court of Queen's Bench, and no person shall be appointed a conveyancer without a certificate from one of the Judges of the said Court that he has examined the applicant and finds him qualified for the office." Section 5 provides that conveyancers so appointed shall be liable for negligence just as attorneys

and solicitors are. And finally, section 6 clinches the matter by providing that no person or persons, excepting duly admitted barristers or attorneys, or persons appointed as hereinbefore provided, shall, for reward, hire or recompense, draw, pass or issue any conveyance, deed, indenture, contract, agreement, charter party or other mercantile documents, and any person violating this section shall be guilty of an offence under this Act, and be liable, on conviction thereo before any Justice of the Peace, to a fine not exceeding twenty dollars for each offence."

A somewhat similar enactment is in force at Victoria, in Australia. A correspondent there gives us a copy of it:—"Every person who shall for or in expectation of any fee, gain or reward directly or indirectly draw or prepare any conveyance or other deed or instrument in writing relating to any real estate or any proceedings in law or equity (other than and except barristers or attorneys and solicitors of the Supreme Court, or certificated conveyancers as hereinafter mentioned; and other than and except persons solely employed to engross any deed instrument or other proceeding not drawn or prepared by themselves and for their own account respectively; and other than and except public officers drawing or preparing official instruments applicable to their respective offices and in the course of their duty), shall be deemed guilty of a contempt of the Supreme Court and shall and may be punished accordingly for every such offence, upon the application of any person complaining thereof; or shall for every such offence forfeit and pay the sum of twenty pounds, to be sued for and recovered in a summary way before any two or more justices of the peace, &c." Our correspondent says that the provision is only partially successful as it is extremely difficult to trace cases to absolute proof, and a few of the lowest class of attorney are in the habit of lending their names to land agents and other middlemen, and so enable them to defy the provisions of the statute. The practice is kept alive by the public who very much encourage the preparation of transfers without the intervention of an attorney, as the illegitimate is cheaper than the legitimate practice and the great risk that is run is not apparent to uneducated man. The method of conveying land in use in Australia by means of a simple transfer consisting of a few printed lines which is registered, and immediately operates as a conveyance, of course encourages the practice of unlicensed conveyancing. However, as we have heretofore pointed out, these invaders are occasionally "brought up with a round turn," by the Australian Courts. There is in Manitoba and in Australia some semblance at least of fair dealing and justice to those who spend their time and money in acquiring a profession.

THE SUPREME COURT.

The third number of Vol. 5 of the reports of this Court have recently come to hand, containing the judgment in five cases. None of them can be said to be of very general interest to the Ontario Bar; some facts nevertheless, and conclusions worth noticing are deducible from the pages before us.

The latest judgments reported therein are those of *Gallagher* v. *Taylor* and *Jonas* v. *Gilbert*, delivered on February 11th., 1881. Two others were delivered in February and March, 1880, and another on January 12th, 1879. In two cases judgment was not delivered for upwards of six months, and in three others for nearly four months after the argument. In two of the cases it appears that the senior puisne judge took part in the judgment, but it is merely noted that he read a written judgment stating his reasons for his conclusion.

In the second number of this same volume published some time ago the state of things is very much the same, as regards delay in giving judgment after argument and in the publica-

tion of the Reports, though it is observable that two of the judgments reported therein, viz: *Erb* v. *G. W. R. Co.* and *Fitzgerald* v. *G. T. R. Co.*, were delivered in June, 1881, some months after the latest of those which appear in No. 3.

As to the delay on giving judgment, there is no doubt it is to some extent attributable to the fact that the Judges do not all reside in Ottawa, and the opportunity for consultation is thereby reduced. This consultation is of course a matter of vital moment. A free exchange of views and a cordial and full discussion of conflicting opinions, and a consequent elimination of legal truth should be one great advantage derivable from a large Bench. If this is wanting, confusion becomes worse confounded, and instead of one well considered judgment embodying the best opinion of the majority of the judges, after examining the points in question from all sides, we have a disjointed patch work of individual opinions that carries comparatively little weight with the profession, and is disastrous in its effect upon the administration of justice in the eyes of the public. There have been causes assigned for this state of things quite apart from the minor one already referred to, known to those within the inner circle; should these continue the country will not unnaturally clamour for a reconstitution of the *personel* of the court, or for its abolition. Not only should the very best talent that the country can produce be had at any price, but there should be that harmonious working and mutual personal respect amongst the members of the Bench, without which it will be in vain to expect beneficial results for the public. The Court has so far been a failure, partly owing to the inherent difficulties of our confederation, partly to the fact that the best talent has not always for some reason or other been taken advantage of, and partly owing to the difficulties and infirmities of a personal nature which we do not care to enlarge upon.

The delay in issuing the reports is said to be sometimes owing to the difficulty of obtaining the MSS. from some of the judges. If this be the case the reporter should see that the judgments are taken down by a stenographer at the time of their delivery. The judges are under no obligation to deliver their MSS. to the reporter, nor could a judge under such circumstances complain that what he stated in Court was not his judgment, or needed alteration. This course would soon remedy the supposed evil and the blame would then rest on the right shoulders. The present condition of affairs must be pronounced unsatisfactory, and it is high time that the Government, who must know all about the evils complained of, did something to make this most important Court more what it was originally intended to be than it is now.

RECENT DECISIONS.

Proceeding with the December number of L. R. 18 Chy. Div., we still have the cases from p. 524 to p. 710 to review.

WILL.—EXECUTORY DEVISE.

The first case is *In re Lechmere* v. *Lloyd*, in which the M. R. had to construe a devise to E. for life, and from and after her death to such of her children living at her death "as either before *or after* her decease" should, being males, attain 21, or, being females, attain that age or marry, in fee simple as tenants in common. He held that those of E.'s children who were adults took vested interests liable to open to let in the other children, who were minors, on their fulfilling the conditions of the will. He takes an important distinction, as appears at p. 528 of the judgment, where he says: "If the devise be to A. for life, and after her death simply to a class of children who shall attain 21 or marry, I agree that those members of the class who have not attained 21 or married at the death of the tenant for life, though they may do so afterwards, cannot take, according to the rule in

Festing v. *Allen*, 12 M. & W. 279; but here we have two distinct classes of the objects of the devise, the one being children living at the death of the tenant for life, and attaining 21 or marrying *before* the death, and the other being children living at the death and attaining 21 or marrying after the death. * * But to enable the second class to participate it is necessary to read the gift to them as an executory devise. The rule is that you construe every limitation, if you possibly can, as a remainder, rather than as an executory devise. It is a harsh rule; why should I extend it? Why should a gift that cannot possibly take effect as a remainder, not take effect as an executory devise? I see no good reason why it should not." And he refused to follow *Brackenbury* v. *Gibbons*, L. R. 2 Ch. D., 417, which he said was, so far as he was aware, the only other case in which the words here used occur.

MARRIAGE SETTLEMENT—COVENANT BY INFANT WIFE.

The next case, *Smith* v. *Lucas*, p. 531, is like *Dawes* v. *Tredwell*, which we noted *supra*, p. 68, one upon the effects of covenants in a marriage settlement. *Dawes* v. *Treadwell* is not referred to in *Smith* v. *Lucas*, but the distinction would appear to be, that in the latter case it was agreed and declared between and by the parties thereto, and the husband covenanted that he *and his future wife*, and all other necessary parties, would bring into settlement after-acquired property of the wife. In such case, says Jessell, M. R., p. 543: "It is quite settled by authority that if the wife is of age a proviso or agreement of that kind has the effect of a contract entered into by her; it is a covenant on the part of the wife as on the part of the husband." He went on in this case to hold that if the wife is a minor, and the covenant is for her benefit, it is voidable only and not void, and is binding upon all property coming to her during coverture for her separate use, *without a restraint on anticipation*, until she avoids or disaffirms the covenant as to such property; but that if she elects to conform the covenant, she thereby binds only that separate property to which she is entitled at the date of the confirmation. As to this last point, he says, p. 545, after referring to the recent case of *Pike* v. *Fitzgibbon*, L. R. 17 Ch. D, 454: "I think that the power of disposal given to a married woman as regards her separate property is simply a power to dispose of existing property, and not a power by contract, or *quasi* contract—for she cannot strictly contract—to dispose of other property while she is a married woman.'

HOTEL—RECEIVER.

In *Truman* v. *Redgrave*, p. 547, the M. R. appointed a receiver and manager of an hotel on the interlocutory application of the mortgagees, who had been prevented by the mortgagor from taking possession under the mortgage, and also granted an injunction restraining the mortgagor from interfering with the management. He refused to listen to the objection that if he appointed a receiver and manager of the hotel, the person who had the license might be liable to be summoned for some dereliction of duty on the part of the receiver.

STATUTE OF LIMITATIONS.

In the next case, *Bray* v. *Tofield*, p. 551, the question came up, whether a claim against a testator's estate on a promissory note would be kept alive by reason of an administration action having been commenced by another creditor within the period allowed by the statute, although the decree therein was not obtained until the said period had expired. The M. R. held it would not be kept alive; and he warns creditors not in future to rely on the case of *Sterndale* v. *Hankinson*, 1 Sim. 393, in which Sir John Leach, V. C., held that every creditor has, after the filing of a bill in equity, an inchoate interest in a suit instituted by one on behalf of himself and the other creditors, to the extent of preventing the former being held barred in equity through his having relied on the latter obtaining his decree within the six years. As to

this case, the M.R. observes (i.) that although the Statute of Limitations did not affect Courts of Equity, because it only applied to what were commonly called common law actions, now bills of equity have been abolished, and wherever it is an action to recover a debt upon a contract, the statute is binding upon the High Court in every case in which it applies ; (ii.) it is no longer necessary, nor is it the practice, as far as personal estate is concerned, to bring an action by one creditor on behalf of others ; (iii.) a decree can be obtained now in a very few days, and therefore the reason for the decision in *Sterndale* v. *Hankinson*, no longer applies, and *cessante ratione legis, cessat ipsa lex.*

COMPANY—JURISDICTION.

Of *Cercle Restaurant Co.* v. *Lavery*, p. 555, it seems only necessary to say that it affirms the jurisdiction of the Court to restrain by injunction a person claiming to be a creditor of a company from presenting a petition to wind up the company, where the debt is *bona fide* disputed, and the company is solvent.

EQUITABLE PRIORITIES—INNOCENT PURCHASERS.

The next case, *Keate* v. *Phillips*, p. 561, is "a most singular case," (per Bacon, V. C., p. 575), the Court having to decide, under very complicated circumstances, whose right was to prevail as between several innocent parties who had equally suffered through fraud. Without going into the facts minutely, it seems possible to state the points which came up for decision with sufficient clearness. They were as follows : (i.) A fraudulent mortgagor obtained an advance upon the security of a fictitious lease. His solicitor, fully conscious of the fraud, stood by while the mortgage was being completed, and received the mortgage money. The question was whether, from this conduct of the solicitor, it must be inferred that he *represented* that the fictitious lease to the mortgagor, and then the underlease from the mortgagor to the mortgagee, was a valid, genuine, legitimate transaction. As to this Bacon, V. C., merely observes : "Those are the slenderest representations, so far as the evidence goes, that can be conceived,"—and proceeds to deal with the next point : (ii.) The said solicitor at the time of this transaction had an interest in the property in question, viz.: an equity of redemption, which he had mortgaged to one L. And the question now arose whether, assuming his above-mentioned conduct did amount to a representation, as maintained, he did, by virtue and by force of this representation, charge the property in which he had this equity of redemption ; and whether, as a consequence, when he acquired, as at a subsequent date he did acquire, the absolute beneficial interest in paying off L.'s mortgage, the defrauded mortgagee had a right to have the representation carried out to its full extent, and to the extent of making a charge upon the property supposed to be comprised in the fictitious lease, so as to give the defrauded mortgagee a prior equitable charge as against subsequent purchasers for value without notice. As to this Bacon, V. C., said, p. 577, that he had never heard of, and did not believe there was any case in which the principle in question had been carried to such an extent ; that, assuming the solicitor had been guilty of misconduct for which he could be punished, and a wrong which could be redressed against him personally, he was, nevertheless, at a loss to see how it touched the estate. This, he said, brought it close to the common law doctrine of estoppel :—"But the doctrine of estoppel is purely legal. There is no case in which a trustee, having made a fraudulent representation by which he was bound, or even a fraudulent conveyance, when he got his legal estate confirmed, but still remaining a trustee, was so estopped as to deprive the persons beneficially entitled to the estate which was theirs, and of which he was the trustee and trustee only. The doctrine of estoppel, therefore, in my opinion, has no place whatever in the case before me. * * * Where is the case to be found that says that a man who has committed a misde-

meanour and contracted an equitable liability is not at liberty afterwards, with a *bona fide* purchaser, to deal with the thing which in his hands might be charged, but which when once out of his hands it is impossible that a Court of Equity can ever reach so as to make the subject itself—the substance,—liable for the nefarious transactions into which this man entered. * * * It cannot be said that because a man commits a misdemeanour with relation to a certain estate, that the estate is thereby for ever bound." (iii.) The third point decided in the case was that M., an innocent purchaser for value (a mortgagee), with whom the *genuine* title deeds were deposited, was, though subsequent in date, entitled in priority over two prior purchasers for value who had been defrauded by means of the fictitious leases. As to this Bacon, V. C., said, p. 579, —M. lent his money, and had and retains possession of the deeds. * * * Then, if it be a true principle of the Court of Equity that you cannot take from a purchaser for valuable consideration without notice anything which he has acquired, how can I say that the mortgage made to M. is not a mortgage first in point of rank on this estate?" And he also observes, p. 575,—"The rule *Qui prior est tempore potior est jure* is a very convenient rule when it can be applied, but when a case is accompanied by circumstances so complicated as the one before me, it is impossible solely to rely on that well-established rule of law."

COMPANY—CONTRIBUTORIES.

The next case *In re London, Bombay, and Mediterranean Bank*, p. 581, appears to be one of first impression: (per Hall, V. C., p. 584). A company with full knowledge allotted 140 shares to a *feme covert*, at the request of her husband, who paid the deposit and subsequent calls. The husband afterwards sold and transferred these 140 shares, executing the transfer for his wife, or in her name. All these transactions took place without the wife's knowledge. Subsequently the company was ordered to be wound up, and the wife was placed on the list of contributories as a past holder of these shares, as to which it was held, on summons taken out on her behalf, that she was liable only to the extent of such separate estate as she was entitled to or had power to dispose of during the coverture. The liquidator of the company, having now learnt that the wife had been ignorant of the transactions with regard to the shares, applied to have the list of contributories rectified by inserting therein the names of the executors of the husband (now deceased) instead of that of the wife, so as to make his estate liable in respect of the 140 shares. But Hall, V.C., refused the application, saying that there was no case that he was aware of in which the register had been rectified where the name had been put upon the register deliberately by the company without any fraud or concealment whatever; and that the non-communication to the wife of the fact that the shares had been put into her name, could not have the effect of varying the actual effect and operation of the transaction.

Ex parte Apyleyard, p. 587, fitly comes under the same heading as the last case. It seems only necessary to say in regard to it that a director of a company, which was being wound up, having been put on the list of contributories in respect of 500 shares, sought to prove in the winding up against the company in respect of an alleged breach of contract by the company, that he should have these 500 shares as fully paid up, and, the breach of the contract by the company having been established, he was held entitled to prove in the liquidation for damages for calls made or which might be made on the shares.

WILL—LAPSE.

In *in re Spiller*, p. 614, a testator, having given the residue of her estate equally among A. B. and C., and such of the children of D. as were living at the date of her will, and D. having died before the date of the will, leaving no children, it was held there was no intestacy, because there was no gift, and that the whole residue was divisible among A. B. and C.

CONVEYANCING—RIGHT OF WAY.

The decision in *Barkshire* v. *Grubb*, p. 616, can be best and most shortly given in the words of Fry, J., at p. 622: "When there are two adjoining closes, and there exists over one of them a formed and constructed road, which is in fact used for the purpose of the other, and that other is granted with the general words, 'together with all ways now used or enjoyed herewith,' a right of way over the formed road will pass to the grantee, even though that road had been constructed during the unity of possession of the two closes, and had not existed previously."

ESTATE PER AUTRE VIE.

In Re Barber, p. 624, may also be disposed of shortly by saying that the principle on which the decision proceeds is that the analogy of a fee simple estate is to be applied, so far as it can be applied, both as to the capacity and incapacity of alienation of an estate *per autre vie.*

WILLS—"FINAL DIVISION" OF ESTATE.

In *in re Wilkins*, p. 634, Fry, J., held that where a testator gave certain shares in the residue of his estate to the children of legatees in case the legatees should die before the "final division" of his estate, he must be held to have meant by "final division" the period of one year from the testator's death. At p. 637 he says:—"On the supposition that the testator was influenced by the motives which ordinarily actuate mankind, I think that I am bound to conclude that he had this period in his mind, because no inconvenience would on that interpretation result from the terms of his will."

COMPANY—CONTRIBUTORY.

Of the next case, *in re Albion Life Assurance Society*, p. 639, it seems only necessary to note that on the construction of the articles of association of the Assurance Society in question, it was held that a policy-holder who had assigned his policy, ceased to be liable as a contributory, although no other person had been made liable to contribute in respect of his policy in his stead.

A few cases still remain to be noticed in this December number of the Chancery Division Law Reports, which we hope to deal with in our next number together with those in the small instalments of January and February Law Reports, and in the *Law Journal* reports for the same month.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

ONTARIO.

MCDOUGALL V. CAMPBELL.

Mortgage—Agreement to postpone—Non-registration—Priority.

In 1861 W. M., the owner of real estate, created a mortgage thereon in favour of J. T. for $4,000. In 1863 he made a subsequent mortgage in favour of J. M., the appellant, to secure $20,000, which was duly registered on the day of its execution. In 1866 W. M. mortgaged to C., the respondent, the lands mortgaged to J. M. for the sum of $4,000, which was intended to be substituted for the prior mortgage of that amount, and the money obtained thereon was applied towards the payment thereof, and J. M. executed an agreement that the proposed mortgage to respondent should have priority over his. In 1875 J. M. assigned his mortgage to the Quebec Bank to secure acceptances on which he was liable, which assignment was registered, and superseded the agreement, which had never been registered, and the existence of which J. M. had not mentioned to the bank. C. filed his bill against the executors of W. M., and against J. M. and the bank. The Court of Chancery held that the respondent was not entitled to relief upon the facts as shown, and dismissed the bill. The Court of Appeal affirmed the decree as to all the defendants except J. M., who was ordered to pay off the plaintiff's mortgage, principal and interest. J. M. thereupon appealed to the Supreme Court.

Held, (Strong, J., dissenting) that as J. M. could not justify the breach of his agreement with C., J. M. was bound both at law and equity to indemnify C. for any loss he sustained by reason of such breach. Decree of the Court of Appeal affirmed.

Maclennan, Q.C., and *Armour*, for appellant.
J. A. Boyd, Q.C., for respondent.

QUEBEC.

DUPREY, ET AL., v. DUCONDIE.

Sale en bloc—Deficiency—Warranty, effect of.

By a deed executed October 22, 1866, for the purpose of making good a deficiency of fifty square miles of limits which respondents had previously sold to appellants, together with a saw-mill, the right of using a road to mill, four acres of land, and all right and title obtained from the Crown to 256 square miles of limits, for a sum *en bloc* of $20,000; the respondents ceded and transferred, "*with warranty* against all troubles generally whatsoever" to the appellants, two other limits containing 50 square miles: in the description of the limits given in the deed the following words are to be found, "Not to interfere with limits granted or to be renewed in virtue of regulations." The limits were, in 1867, found in fact to interfere with anterior grants.

Held, that the respondents having guaranteed the appellants against *all troubles whatsoever* the latter were entitled, pursuant to Art. 1518 C. C., P. Q., to recover the value of the limits from which they had been evicted proportionally upon the whole price, and damages to be estimated according to the increased value of said limits at the time of eviction, and also to recover, pursuant to Art. 1515, C. C., for all improvements, but as the evidence as to proportionate value and damages was not satisfactory it was ordered that the record should be sent back to the Court of first instance, and that upon a report to be made by experts to that Court on the value of the said limits proportionally upon the whole price and on the increased value of the same at the time of eviction, the case be proceeded with as to law and justice may appertain.

HENRY and GWYNNE, JJ., dissenting.

Bethune, Q.C., and *Trenholme*, for appellants.
Pagnuelo, Q.C., and *Conville*, for respondents.

EXCHEQUER COURT.

Taschereau, J.] [Montreal.

THE QUEEN v. MCNALLY, and WM. MCNALLY, CLAIMANT.

Information in rem—Onus probandi.

The Queen, on the information of the Attorney General for the Dominion of Canada, prayed that a certain quantity of drain pipes, etc., seized as dutiable goods upon which duty had not been paid, remain forfeited. Wm. McNally intervened and claimed the goods.

At the trial, the counsel for the plaintiff called upon the claimant to open the case, the counsel for the claimant contended that the Crown was bound to make out a *prima facie* case.

Held, that under the Customs Act, that the claimant was bound to prove he had paid the duties, and therefore the burden of proof was on him.

Fournier, J.]

MCPHERSON v. THE QUEEN.

Appeal under 42 Vict., ch. 8—Award—Damages resulting from obstructing access to property—Personal damages not proper subjects of compensation—31 Vict., c. 12, sec. 34—Direct or consequent damage to property.

The official arbitrators to whom the Minister of Public Works referred the suppliants' claim for damages sustained by them in consequence of and during the construction of the extension of the Intercolonial Railway at Halifax, awarded the suppliant $500. On an appeal to the Exchequer Court under 42 Vict., c. 8, the amount awarded was increased to $3,633.00. The facts are briefly these:—

Suppliant was a ship-builder and owner of a ship yard in Halifax, to which he had access on the north side from Young Street, and on the south side by the harbour of Halifax. The railway was extended along 150 feet of these premises, and Young Street was raised from 2½ to 5 feet; facing the property on the south-east the level of the railway is 19 feet above the suppliant's land. During the progress of the works a drain was built which extended 120 feet on suppliant's land, and some damage was caused to his property by the breaking up of the embankment. The suppliant proved that the construction of the railway through Young Street

obstructed that access to his ship yard, and that in consequence his property had become useless as a ship yard, and had depreciated in value of over 33 per cent.; he also proved that in consequence of the frequent passing of the locomotives there was extra danger of fire, and higher rates of insurance were asked; also that he had suffered personal damage in his business to the extent of $1,200 per annum.

Held, that the building of the drain on suppliant's land, and obstructing of access by way of Young Street to his ship yard had caused "a direct damage to suppliant's property" within the meaning of these words in 31 Vict., c. 12. sec. 34, and for which he was entitled to claim compensation, and which, in this case, he had proved to amount to $3,633.

Held also, that the damages claimed for loss of business and extra risk of insurance were personal damages, and too remote and not such damages for which claimant was entitled to claim compensation under the statute.

(*Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 216, and *Henry Ricket* v. *The Directors, etc., Metropolitan Ry. Co.*, L. R. 2 H. L. 175, followed.)

Gormully, for appellant.

Lash, Q.C., for respondent.

QUEEN'S BENCH DIVISION.

IN BANCO. DEC. 5, 1881.

WILSON v. GILMOUR.

Ejectment—Life lease—Exception.

R G., owner in fee, leased to his daughters three acres with right of way to a well, orchard and dwelling, after his wife's death, for their lives or that of the survivor. Afterwards he conveyed to his son, W. G., the land which included the three acres, subject to a mortgage, the son having notice of the agreement between R. G. and his sisters. Then W. G. conveyed to plaintiff, "Subject to right of R. G.'s wife and daughters to occupy the house and three acres during the life of them or the survivor, and the right to and from the well," and subject to the encumbrance. The plaintiff executed this deed, and he brought ejectment against the daughters for the three acres.

Held, that the demise of the three acres operated as the creation of an immediate term, with right of occupation by R. G.'s wife during life, and that "Subject to, &c.," in the deed to plaintiff, amounted to an exception, or as a regrant of the three acres to her vendor.

Bethune, Q.C., for plaintiff.

Maclennan, Q.C., contra.

DEC. 1, 1881.

DEVLIN v. QUEEN INS. CO.

Fire policy—No statutory conditions—Wilful negligence.

The statutory conditions were omitted from a fire policy, stated, however, on its face to be subject to the Co.'s conditions indorsed thereon, one of which was that the insured was to use every effort to save and protect the property on pain of forfeiture of policy. The finding at the trial was that plaintiff wilfully neglected to save the property, and it was *held* to be a policy with statutory conditions alone.

J. K. Kerr, Q.C., for plaintiff.

Osler, Q.C., for defendant.

NORTH OF SCOTLAND MORTGAGE CO. v. UDELL.

Mortgage—Equity of redemption—Merger—Burden of proof.

Defendant, a mortgagor, covenanted to pay principal and interest; he then granted his equity to plaintiff for a mere nominal sum. He gave plaintiff his note for portion of the interest. In an action on the covenant in the mortgage for payment, the jury were directed that if the grant of the equity and note were accepted by plaintiff in full of the covenant, to render a verdict for defendant; but if accepted on condition it should not so operate, to find for plaintiff; that there being no evidence as to how this was, it must be taken to have been accepted in full of the plaintiff's debt, the charge being merged. The verdict having been for defendant, the Court *held* there was no misdirection, the burden of proof that there was no merger being upon plaintiff, and they refused to interfere.

Bethune, Q.C., for plaintiff.

Moore, contra.

NOBLE V. CORPORATION OF TORONTO.

Overflow from sewers—Liability of corporations—Negligence—New trial.

Plaintiff was tenant of premises on Queen and Bathurst streets, in Toronto. Plaintiff's drain, which the defendants made at plaintiff's lessor's charge, connected with a main sewer on Queen street, which extended to the west. In this, at Portland street, was a wall, for the purpose, as alleged, of keeping the flow separated and sending it easterly and westerly. There was a drain on Bathurst street, south of Queen, and afterwards, some three or four years before suit, a drain was made on Bathurst street to the north of Queen. A creek was constructed into this, the water being at times some six feet in depth, and several by-streets were drained into the same. Plaintiff's premises were flooded several times within the time before suit above stated, the ground of action being the flooding caused by a continuous rain of from eight to nine hours. It was charged that the sewers had been, in the first place, badly made, and that there was negligence in not repairing, but the mere proof offered was the flooding and the facts before stated, when a verdict was given in his favour, but the Court granted a new trial, ARMOUR, J., *dissentiente.*

Bethune, Q.C., for plaintiff.

McWilliams, contra.

CHANCERY DIVISION.

Boyd, C.] [Feb. 1.

CLEAVER V. NORTH OF SCOTLAND MORTGAGE CO.

Vendor and Purchaser—Possession.

In an action for specific performance it was declared that the plaintiff was entitled to an abatement in the price of the land for non-delivery of possession to her, and because, though the crops had been advertised for sale, it was found that one-half thereof belonged to others to whom the defandants' mortgagors had, with the assent of the defendants, assigned them. It was referred to the Master to take an account of what allowance should be made the plaintiff, and the Master allowed for deterioration in value through neglect and non-cultivation, and charged the defendants with interest on purchase money received up to the time of delivery of possession.

Held, that there was no reason to interfere with his ruling, but that the contract might have been more nearly carried out by allowing interest on unpaid purchase money and charging the defendants with occupation rent for the time they had retained possession after it should have been delivered.

By the conditions of sale it was stipulated that the balance of the purchase money was to be paid one month after sale, and conveyance to be then made, but nothing was said as to delivery of possession.

Held, (1) that the expiration of the month being the time for the completion of the contract the purchaser ought *prima facie* to have been put in possession by the defendants at that time.

(2) That the purchaser was not bound to take possession while any part of the premises was occupied by third parties; and that in a case like the present the *onus* lies on the vendor of showing that the purchaser could safely take possession.

Marsh, for plaintiff.

Moss, Q.C., for defendant.

Proudfoot, J.] [Feb. 8.

DAVIDSON V. OLIVER.

Construction of will — Administration—Accounts.

The testator died in February, 1869, having by his will, amongst other bequests, given certain legacies to be paid in nine and thirteen years, and also devised two lots of land to his sons D. and R. respectively, subject to certain charges; the devisees to be put in possession of their respective lots when the youngest child attained 21, at which time D. and R. were to obtain one-half of the stock and implements then on said lots respectively; the other half thereof to be divided amongst other legatees. Before the youngest child attained majority an administration suit was instituted and in proceeding in the Master's office at Hamilton, that officer directed an account of the stock and implements on the several lots at the time of the reference, and being the proceeds of the old stock left thereon by the testator, and also those subsequently procured from the produce of the said lots, together with an account of the stock

and implements on hand and which were there at the death of the testator.

From this direction of the Master the defendants appealed on the grounds that they would be required to bring in an account only of the stock and implements left by the testator and remaining on the lands, and that if any further account was to be furnished it should be only of stock and implements purchased with the proceeds of the sale or obtained by the exchange of the stock and implements left by the testator. The Court, (PROUDFOOT, J.) however, being of opinion that the Master's direction was proper, dismissed the appeal with costs.

H. Cassels, for plaintiff.

Moss, Q.C., for defendant.

Proudfoot J.] [Feb. 13.

DICKSON v. CARNIGIE.

Riparian proprietor—Rights to reasonable uses of water.

A mill owner has not the absolute right to the natural and unobstructed flow of the water of a stream over his lands for the use of his mill, but his right is a qualified one and subject to the lawful and reasonable uses of the water by a mill owner above him on the same stream, and this although the user above him may be at times for any extraordinary purpose.

Richie and *English*, for the plaintiff.

W. G. Cassels, for the defendant.

Ferguson, J.] [Feb. 13.

SNARR v. GRANITE CURLING & SKATING CO.

Artificial lateral support—Material thereof—Damages by removal of support—Future damages—Costs.

The plaintiff was entitled to the lateral support by the defendants' land in which they made excavations for the purposes of a rink, whereby the plaintiff's land was damaged:—

Held, that in substituting artificial support, for the material support of soil which had been removed, the defendants might construct it of any material, provided that it was a sufficient support for the time being, and that they continued to maintain the plaintiff's land in its proper position.

Held also, that in estimating the plaintiff's damages past injuries only could be taken into account and no sum should be allowed for damages to arise in future.

The damages were assessed at $40, but judgment was given for the restoration of the plaintiff's land.

Held, that the plaintiff was entitled to her full costs of suit.

James Beaty, Q.C. and *J. C. Hamilton*, for plaintiff.

W. G. Cassels, and *Brough*, for defendants.

Proudfoot, J.] [Feb. 13

VANSICKLE v. VANSICKLE.

Will—Construction of—After acquired property.

The testator owned eighty acres of land and sold a part thereof; subsequently and on the 30th March, 1875, he made his will whereby he devised to his son N. the said eighty acres ("excepting so much thereof as I may have sold and conveyed"). Thereafter and shortly before his death he again acquired the part which he had sold.

Held, that though the will spoke from his death the after acquired property did not pass; for the testator had specified the subject matter of his devise, within which the property in question was not included.

J. Robertson, Q.C., for the plaintiff.

Smythe, for the defendant.

Proudfoot, J.] [Feb. 13.

BRALEY v. ELLIS.

Chattel Mortgage—Prior advances—Pressure.

Where there is a promise to execute a chattel mortgage, upon the faith of which money is advanced, or where there is a pre-existing duty to give such a mortgage, which is in consequence of pressure subsequently executed, the same is not void within the meaning of the act respecting fraudulent preferences.

Held also, that the doctrine of pressure which obtained before the insolvency laws, now occupies the same position since their repeal.

Gibbon, for the plaintiff.

W. G. Cassels, for the defendant.

Boyd, C.] [Feb. 15.

BARKER V. LEESON.

Chattel mortgage—Sale without renewal—Creditor—Interpleader—Setting up new title.

A chattel mortgage which has expired by effluxion of time, under R. S. O. cap. 119, sec. 10, and has not been renewed or refiled, ceases to be valid as against all creditors of the mortgage then existing; and a sale on default in good faith made by the mortgagee, though good as between the parties to the mortgage, cannot establish the mortgage as against creditors, but passes to the purchaser a title subject to the rights of any creditor who take steps to follow the goods.

A creditor to be within the meaning of the above section need not be a judgment creditor.

Remarks upon the policy of the chattel mortgage act.

In an interpleaders issue the claimant relied upon his purchase and bill of sale from the chattel mortgagee, and the issue was found against him.

Held, that he could not afterwards set up another title in the same issue, but that this was matter for a substantive application to the Court.

W. S. Gordon for execution creditor.

Patullo for claimant.

——— J.] [Feb. 22.

IN RE MACNAB.

Vendor and Purchaser's Act—Will—Construction—Power of Sale with executor's consent—Practice—Parties.

A testator devised to his wife during the term of her natural life a parcel of land, with power of sale at any time during her life, subject to consent of his executors. Testator appointed three executors, one of whom was deceased. A contract for sale having been entered into, it was objected by the purchaser that the consent of the surviving executors would not confer a valid title.

Held, 1. that in the state of the authorities, the title was not one that could be forced on a purchaser.

2. That under such general power the land could be sold in parcels.

3. That on an application to the Court under Vendor and Purchasers' Act, the only parties who need be represented, are those who would be parties to a suit for specific performance, and mortgagees, who had been made parties to the application, were dismissed with costs.

H. Cassels for petitioner.

J. Pearson for purchaser.

Moss, Q.C., and *Crickmore* for mortgagees.

CHAMBERS.

Mr. Dalton, Q.C.; Boyd, C.] [Jan. 18, 30.

LAPLANTE V. SCAMEN.

Vendor and purchaser—Title—Vesting order—Depreciation.

Held, that a purchaser at a sale of lands under a decree of the Court upon the usual conditions, is not bound to accept a vesting order.

Held also, that when the plaintiff, the vendor, was first mortgagee, and the purchaser, a defendant, was second mortgagee of the interest of A. S., who was out of the jusisdiction and refused to execute a conveyance, the purchaser could not be compelled to take a vesting order or a conveyance under the power of sale contained in the plaintiff's mortgage.

Held also, that until a good title is shown the purchaser is not bound to accept possession even though offered to him by the vendor, and that the purchaser was entitled to a reference to the Master to ascertain the amount of the depreciation, if any, caused by the property being left vacant and neglected pending the investigation of the title, although the vendor had offered to give possession to the purchaser pending the investigation of the title.

Beck, for plaintiff, moving.

Patterson, for the purchaser.

Mr. Dalton, Q.C.] [Feb. 1.

RE CLARKE.

Solicitor and Client—Taxation—Retainer.

In this case the order for the taxation of the solicitor's bill contained a clause ordering payment of the amount taxed within 21 days from the taxation. This was a motion to set aside the order.

MR. DALTON, struck out the order for payment, holding that the practice under the J. A. in these matters was governed by Rule 443, and similiar to the common law practice before the passing of the J. A. He directed the order for taxation to go in the terms of the Rule to ascertain simply the amount of the bill, without going into the question of a retainer.

S. R. Clarke, the solicitor in person.

J. A. Worrell, contra.

Wilson, C. J.] [Feb. 17.

IN RE MCCLIVE ET AL. SOLICITORS.

Attorney and Solicitor—Costs—Interest on costs.

A solicitor may entitle himself to interest upon his bill of costs by demanding it in writing.

The taxing officer has no power to allow interest unless the matter has been specially referred to him by the order for taxation.

J. H. Macdonald, for the solicitors.

Aylesworth, contra.

Dalton, Q.C.—Proudfoot, J.] [Feb. 22.

NORVAL V. CANADA SOUTHERN RAILWAY. CUNNINGHAM V. THE SAME.

Costs—Certificate of judgment of Court of Appeal—Practice.

Two decrees of the Court of Chancery were affirmed with costs by the Court of Appeal. Orders were made in Chancery Chambers (18th February, 1880) making the certificate of the judgments in appeal orders of the Court of Chancery.

The defendant then appealed to the Supreme Court, which allowed him a new trial without costs, permitting him to set up a defence then raised for the first time, but was silent as to the costs incurred in the courts below.

The plaintiff issued executions under the orders made in Chambers.

Mr. DALTON set aside the executions.

On appeal, PROUDFOOT, J., *held* that the orders in Chambers were regular, and until set aside might properly be acted upon, and should have due effect given them until reversed.

Appeal allowed with costs.

H. Cassels, for the appeal.

Cattanach, contra.

Cameron, J.] [Feb. 24.

IN RE WILTSEY V. WARD.

Division Court—Appeal—Prohibition.

Plaintiff brought an action for $140 in a Division Court and recovered judgment. Defendant applied for a new trial which was refused, and from this decision he appealed to the Court of Appeal. After the bond in appeal had been perfected, and while the appeal was pending, defendant applied for a prohibition to the Division Court on the ground of jurisdiction.

Held, that such an application could not be entertained until the matter was out of the Court of Appeal.

Aylesworth for the plaintiff.

McDonald for defendant.

Mr. Dalton, Q.C.] [Feb. 25.

LIGHTBOUND V. HILL.

Pleading—Amendment—Judgment, opening up.

Plaintiff signed judgment against defendant in default of a plea and issued execution. At the time the suit was brought defendant was insolvent, and plaintiff alleged no fraud in his declaration.

Held, that the plaintiff should not be allowed, after the lapse of two years, to open up the judgment and amend the declaration by alleging fraud.

Holman, for plaintiff.

Aylesworth, for defendant.

REPORTS.

ONTARIO.

CHANCERY DIVISION.

(Reported for the LAW JOURNAL.)

GRANT V. GRANT.

Administration—Partition—Time for granting.

An order for the administration of an estate of a deceased person was refused on the ground that twelve months had not elapsed from the death of the deceased, and no special circumstances were shown, although the administrator was one of the applicants.

An order for partition of the realty was also refused when the application was made within six months of the death of the person whose estate was sought to be partitioned. The Rule laid down by the Partition Act, R. S. O. c. 101, s. 6, held applicable.

[February 15.—Boyd, C.

T. S. Plumb moved on notice under Orders 638 and 640 for administration and partition or sale of certain property in the County of Haldimand.

Isaac Campbell, for the infants, consented to the order going.

H. Symons, for an adult defendant, objected (1) that administration could not be obtained within a year from the death of the intestate; (2) that partition could not be obtained till after six months from the date of the decease; (3) that the application should have been made to the local Master, the lands being all in one county, and no special cause being shown. He referred to *Re Slater*, 3 Chy. Ch. R. 1; *Vivian* v. *Westbrook*, 19 Gr. 461, R. S. O. c. 101. s. 6; *Barry* v. *Barry*, 19 Gr. 458.

Judgment reserved.

THE CHANCELLOR—An administration, and partition, or sale, are sought by the administrator and some of the next of kin and heirs-at-law of an intestate. No special reason is given for applying within six months of the death. It is clearly too soon to apply for administration under *Slater* v. *Slater*, 3 Chy. Ch. R. 1, and I think the analogy of the Partition Act, (R. S. O. c. 101, s. 6,) limiting six months from the death may very well apply to this case, see *Bennett* v. *Bennett*, 8 Gr. 446. The policy of the statute should apply to all partition matters regarding the lands of a person deceased whether testate or intestate. I refuse the application with costs.

(See *Rowsell* v. *Morris*, L.R. 17 Eq. 20—Rep.)

CHAMBERLAIN V. ARMSTRONG.

Mortgage suit—Rules 45, 78—Judgment by default in action commenced in local office.

When an action is commenced in a local office, judgment for default of appearance, or pleading, must be entered in the local office.

An action for foreclosure, sale or redemption of mortgaged property is not within Rule 45, and no order allowing service is necessary, and on default of appearance judgment may be entered on præcipe, according to the former practice in Chancery.

[February 15—Boyd, C.

This was an action for foreclosure of a mortgage. The writ had issued from the office of the Deputy Registrar at London.

Two of the defendants had been served with the writ of summons out of the jurisdiction, and an order had been made by the Master in Chambers simply allowing service. The defendants had not appeared. On applying to the Registrar to enter judgment he had refused to do so in the absence of an order as to the manner of proceeding in the action, and as to the mode in which plaintiff was to prove his claim as provided by Rule 45 *(e.)* And because the writ having been issued from a local office a judgment for default of appearance or defence must be entered in the local office.

H. Cassels, for plaintiff, now applied *ex parte* for a direction to the Registrar to enter the judgment, or for an order authorizing the entry of judgment on præcipe. He contended that the clause in Rule 45 *(e)* commencing "and if the defendant does not appear, etc.," only applied to cases where the action is one not coming within the clauses *a*, *b* and *c*, and that no order to proceed was necessary.

THE CHANCELLOR—Without pronouncing any opinion as to the proper construction of Rule 45, I think this being a mortgage case it is governed by Rule 78, and as under the former practice the plaintiff would have been entitled to judgment on præcipe without an order, he is entitled to it now.

On conferring with PROUDFOOT, J., however, we concur in thinking that it is better to confine actions commenced in outer offices to the local offices. It will be known there if appearance is

entered or not, and whether the judgment may be properly signed as on default. (See *Dougall* v. *Wilburn*, 1 Chy. Ch. R. 155,)

LEE V. CREDIT VALLEY RAILWAY CO.

Creditors suit—Injunction restraining action by creditor dissolved.

In a creditor's suit against a Railway Company a Receiver had been appointed and a reference as to creditor's claim directed, and an action brought by a creditor against the company for unliquidated damages had been restrained by injunction, and leave given to the plaintiff in the action to prove his claim in the Master's office; but, before doing so, the Receiver passed his accounts and was discharged by consent of the parties to the suit. On a subsequent application by the creditor who had been so restrained, the injunction was dissolved, but without costs.

[February 14, 15.—Boyd, C.

This was an action brought by creditors, on behalf of themselves and all other creditors, against the defendant Railway Company, and on the 19th May, 1880, decree had been made by consent appointing a Receiver of the railway, and referring the cause to the Master to take accounts of creditors' claims.

On the 8th February, 1881, on the application of the plaintiffs, an order had been made by BLAKE, V.C., restraining the plaintiff in an action of *Wrigley* v. *The Credit Valley Railway Co.* then pending in the Queen's Bench for the recovery of damages for wrongful dismissal from the Company's employment, from further prosecuting that action, and giving him leave to prove his claim in this suit before the Master.

On the 4th March, 1881, a statute was passed by the Ontario Legislature (44 Vict., c. 61,) enabling the company to consolidate its bond debt by the issue of new preferential bonds, and making provisions for the payment of 50c. in the dollar on the claims of all creditors other than bondholders, who should accept the benefit of the Act.

In pursuance of the arrangements authorized by the Act, the claim of the plaintiffs, Lee & Co. against the Company, was satisfied, and by consent of the parties to this suit an order was made on the 5th June, 1881, discharging the Receiver.

Wrigley had refused to proceed to prove his claim before the Master.

Meek, for Wrigley, now moved to dissolve the injunction, and for leave to proceed with the action. The passing of the Act, 44 Vict., c. 61, and the discharge of the receiver had so altered the condition of affairs that the plaintiff ought no longer to be restrained from carrying on his action.

Blackstock, for the defendant company—The discharge of the Receiver is no ground for this application. Wrigley has still power to establish his claim, if any, before the Master, and the Company are prepared to give him every facility for so doing. The discharge of the Receiver does not preclude the plaintiff getting the benefit of the decree.

Cur. adv. vult.

THE CHANCELLOR—The order of BLAKE, V.C., was evidently made upon the footing that as all creditors were to come in and prove before the Master, it was more convenient to have Wrigley's claim disposed of by him; but on the passing of the Receiver's accounts and his discharge on the 5th June, the condition of affairs has been so changed as no longer to justify the continuance of this injunction. As the case was before, the plaintiff could not get execution as against the Receiver, but now the company is in possession of its own affairs and assets, and no reason exists for compelling Wrigley to come into the Master's office.

Order granted discharging injunction without costs.

RECENT ENGLISH PRACTICE CASES.

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

MARSDEN v. LANCASHIRE AND YORKSHIRE RAILWAY CO.

Imp. J. Act 1873, s. 18, 19. Ont. J. Act, s. 37.—Jurisdiction of Divisional Court.

Where at the trial of an action the Judge gave judgment for the plaintiff without costs, and the plaintiff afterwards applied to the High Court to have this varied; *held*: the High Court had no jurisdiction to entertain an appeal from a final judgment, and the application of the plaintiffs ought to have been made to the Court of Appeal in the first instance.

[March 18, C. of A.—L. R. 7 Q. B. D. 641.

The above head-note sufficiently explains the point in question.

LORD SELBORNE, L. C., said in the course of his judgment:—

Myers v. *Defries*, L. R. 4 Ex. D. 176 shows that an alternative power is vested in the Divisional Court, and that it has a jurisdiction to disallow the costs. If the Judge at the trial has made no order as to the costs, the Divisional Court has power to disallow the costs; but if he has made an order under the power vested in him, then the Divisional Court has no jurisdiction. If the order of the Judge is wrong in point of law, an application to rectiy it must be made to the Court of Appeal. The present application is to alter a final judgment, and not to the alternative jurisdiction of the Divisional Court.

[NOTE.—*The sections of the Imperial and Ontario Acts are not identical. It may be added that Lord Selborne in this case expresses an opinion that the decision in Collins* v. *Welsh, L.R. 5. C.P.D. 27, as to the power of the Judge at the trial over costs, is correct.*]

ROBERTS v. DEATH.

Imp. O. 45, rr. 6, 7. Ont. O. 41, rr. 9, 10, (Nos. 374, 375.)—Garnishee proceedings—Absence of suggestion by garnishee.

Where in garnishee proceedings the money is trust money, or there is reasonable suspicion that it is trust money, the *cestui que trust* has a right under equitable procedure to come forward, provided he does so in time, and object to an order absolute being made; and he is not to be damaged by such an order merely because the garnishee will not act.

[C. of A. Nov. 18.—51 L. J. N. S. 14.

The above head-note is taken *verbatim* from the judgment of Brett, L. J., and is his own summary of the point of law and practice involved.

The following passage from his judgment makes the matter clearer:—

BRETT, L. J.—The order sought to be obtained under the garnishee proceedings was an order that a man who had obtained judgment really as trustee should pay over money so obtained to a creditor who had really no right to it. The money is the money of the *cestui que trust;* but it is said that as the garnishee made no suggestion to that effect, the *cestui qui trust* cannot make it, and that such an injustice is to be perpetrated by order of the Court. I cannot believe that such is the law. The rules are copied from sections 29 and 30 of the Com. Law Proc. Act 1860. (R. S. O. c. 50, s. 313), passed at a time when the common law courts could not give a remedy, although the courts of equity could. This order would, under the garnishee proceedings, be made absolute by a Master acting for a Judge sitting in a Court of equity. He would, therefore, have an equitable jurisdiction, and a Court of equity would never have made an order that money belonging to a *cestui que trust* should be paid away to a person not entitled to it. The Court will not be a party to such an injustice, although the suggestion could be made by the *cestui que trust* under rules 6 and 7. It seems to me that the Court would listen to a party coming forward either upon the issue of a garnishee order or upon a summons subsequently taken out in time, and would order the money to be paid over to the claimant if the fact was clear that it was trust money, and would decline to make the garnishee order absolute if the facts as to whether the money was trust money or not were in dispnte.

COTTON, L. J.—The money here is trust money, and there is obviously an equity, as in the case where goods in the hands of a trustee are not allowed by the Court to be taken in execution. * * * I am not satisfied it (the case) is not within the words of rule 7, which clearly seem to give the Court or Judge power to cite any other person, although the garnishee has made no suggestion. I do not, however, rely on that. * * * Under the circumstances, and independently of these rules, this money ought to have been paid into Court to abide the event of the question whether it is trust money or not.

LINDLEY, L. J.—There would have been no difficulty under the old practice, which was to file a bill and to claim an injunction; but now that injunctions have gone, there is some difficulty in seeing what is to be done. * * * The Court ought, in my opinion, to make an order under rule 7 that the money be paid into Court to abide the event of the enquiry whether it is trust money or not.

[NOTE.—*Imp. O. 45, rr. 6, 7 and Ont. O. 41, rr. 9, 10 are identical.*

CLARBROUGH v. TOOTHILL.

Imp. J. Act, 1873, ss. 3, 16—Ont. J. Act, ss. 3, 9; Rule 2.

[June 23. M. R.—50 L. J., 743.

Where an Act passed before the Judicature Act, and referring in terms to common law actions only, empowered a Judge by rule or order

to command the attendance of witnesses, and production of documents, at arbitrations holden under that Act. JESSEL, M. R., *held*, it was clear that such an order might now be made in the Chancery Division.

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

DIGEST OF RECENT DECISIONS IN UNITED STATES COURTS.

NAVIGABLE RIVER—RIPARIAN PROPRIETOR.

Courts will take judicial notice of the navigability of large rivers. *Wood* v. *Fowler.*—(S. C. Kansas) Central L, J., Feb. 10.

A riparian owner owns only to the bank and not to the centre of a navigable stream. Ib.

A riparian owner along a navigable stream does not own the ice which is formed on the stream adjacent to his land; and without first taking possession of and securing it, may not maintain an injunction to restrain a stranger from cutting and removing it. Ib.

CRUELTY TO ANIMALS.

Where the defendant killed, by a blow with a stick, a trespassing pig, for the purpose of protecting his wheat and corn, such killing is not the infliction of "needless" pain, within the meaning of the statute, for the prevention to cruelty to animals, although the act was unlawful; and such facts will not support a conviction under the act. *Grise* v. *State.* (S. C. Ark.) Ib.

MURDER—EVIDENCE.

Where the deceased, who was shot by assassins, in his dying declaration stated that the defendant and his confederates were distinctly recognized by him at the time of the shooting, which was corroborated by another witness' testimony of a conversation with the defendant, which tended to show his guilty knowledge and apprehension of arrest for the killing, and the defense was an *alibi* shown by those charged as being confederates and actors in the homicide, and their relatives, it was *held* that the evidence did not justify the court in granting a new trial on a conviction and sentence of the defendant to the penitentiary for eighteen years. *Norris* v. *People.*—(S. C. Ill.) Ib.

TRADE MARK—TRADE NAME OF A FIRM.

A trade name of a firm is property, and no other persons, without said firm's consent, or not having the same name, can use it in trade to the disadvantage or injury of said firm. Such trade-name may be assigned to a sucessor firm, which thereby obtains the same rights in said name as its predecessor had. *Howard* v. *Park.* (S. C. N. Y.)—Ib.

WILL—ESTATE UPON CONDITION.

A testator devised and bequeathed all the property of which he should die seized to his wife, "the same to remain and be hers, with full power, right and authority to dispose of the same, as to her shall seem meet and proper, so long as she shall remain my widow; upon the express condition that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain should go to my surviving children, share and share alike." *Held*, that, under this will, the widow took a life-estate, subject to be divested upon her ceasing to be a widow, with power to convey the life estate only.—*Giles* v. *Little*, S. C. U. S., Central L. J., Feb. 24.

CONTRACT—AUCTION SALE.

Although, in a case where auction sales are required by-law, it is illegal to make a private agreement of sale, and then go through the form of an auction sale to perfect such agreement, yet it seems that such a sale can be set aside only at the instance of some one interested in having the property bring its full value, and not at the instance of the purchaser; nor can such a purchaser set up such a defence to an action for the purchase money. *Porter* v. *Graves*, S.C.U.S., October Term, 1881.—*Ib.*

BOOK REVIEWS.

DRINKS, DRINKERS AND DRINKING; or the Law and History of Intoxicating Liquors. By R. Vashon Rogers, Jr., Barrister-at-Law. Albany: Weed, Parsons & Co., 1881.

Whatever Mr. Rogers writes is worth reading, that may be accepted as a fact of which the profession takes "judicial notice". He has established a reputation as an author in a line peculiar to himself, but his books are as satisfactory to the lawyer as to the general readers. The work that first brought him into notice, a graceful roadway of narrative built on a solid stonework of authorities, achieved a great success, and his essays on cognate subjects are always received and read with pleasure.

The first and second chapters of the book before us give an account of various intoxicants, and the rules and laws of divers nations relative to intemperance, both very interesting sketches, showing much research. In no other place we fancy could there be found anything like the information here collected, and it is put in a most readable shape. The next two chapters are devoted to definitions; then come dessertations on contracts, deeds, wills, marriage, rights, wrongs

crimes, civil remedies and statute law, as connected with drunkards and intemperance. The subject is not in itself a pleasant one and a perusal of the many incidents necessarily introduced, leads one to think that after all there must have been some truth in the old fable, that after leaving the Ark, Noah planted a vine, and killed a sheep, a lion, an ape and a sow, and having mingled their blood together poured it all on the plant, which then absorbed into itself the natures of these different animals; so that ever after the use of the fruit of the vine has given to the drinker in succession, the stupidity of the sheep, the boldness and ferocity of the lion, the nonsensical noisiness of the ape and the filthy brutishness of the sow; whilst the description of a drunkard's death, extracted from Browne's Medical Jurisprudence of Insanity, horribly true in its woeful details, would seem sufficient to turn even a "moderate" into a "teetotaler."

The latter part of the volume will be found most useful to the lawyer. The subjects are well arranged and the authorities copious and carefully selected.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

ANATOMY.

A system of Human Anatomy, general and special, by Erasmus Wilson, F. R. S., 10th edition, revised and enlarged: edited by George Buchanan, A.M., M.D., and H. E. Clarke. Philadelphia, 1880.

CONTRACTS.

The principles of the Law of Contract being a treatise on the general principles concerning the validity of agreements in the Law of England, 3rd edition, revised and partly re-written, by Fred. Pollock. London, 1881.

CONVICTIONS.

Paley's Law and Practice of summary conviction under the Summary Jurisdiction Acts, 1848 and 1879, including proceedings preliminary and subsequent to convictions, and the responsibility of convicting magistrates and their officers; with forms, 6th edition, by Walter H. Macnamara. London, 1879.

CORPORATION.

A manual of the Law applicable to Corporations generally; including also general rules of law peculiar to Banks, Railroads, Religious Societies, Municipal Bodies and Voluntary Associations, as determined by the courts of England and the United States. By Charles T. Boone, L.L.B. San Francisco, 1882.

MUNICIPAL CORPORATIONS.

Commentaries on the Law of Municipal Corporations, by John F. Dillon, L.L.D. 3rd edition. Revised and enlarged: 2 vols. Boston, 1881.

PARTNERSHIP.

Commentaries on the Law of Partnership as a branch of commercial and maritime Jurisprudence with occasional illustrations from civil and foreign law; by Joseph Story, L.L.D. 2nd edition, by William Fisher Wharton. Boston, 1881.

PLEADING.

Bullen and Leake's Precedents of Pleadings, with notes and rules, relating to Pleading. 4th edition, revised and adapted to the present practice in the Queen's Bench Division of the High Court of Justice; by Thomas J. Bullen, Esq. and Cyril Dodd, Esq.; in two parts. Part I. Stevens and Haynes. London, 1882.

PRACTICE.

Archibald's Country Solicitor's Practice, a handbook of the practice in the Queen's Bench Division of the High Court of Justice, with Statutes and Forms; by W. F. A. Archibald, Esq., Barrister-at-law, author of "Forms of summonses and orders, with notes for use at Judge's Chambers." London, Stevens & Sons, 1881.

WILLS.

A concise treatise on the Law of Wills; by H. S. Theobald, of the Inner Temple, Barrister-at-law, and Fellow of Wadham College, Oxford. 2nd edition. Stevens & Sons. London, 1881.

SALES.

A treatise on the law of sale of personal property, with references to the American decisions and to the French code and Civil law, by J. P. Benjamin, Esq., Q. C., of Lincoln's Inn, Barrister-at-law; third American from latest English edition, by Edmund H. Bennett. Boston, Houghton Mifflin and Co., 1881.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Conveyances in fraud of Dower.—*Central L. J.*, Feb. 10.

The genesis of perjury.—*London L. T.*

Liability of real estate for debts of deceased persons.—*Southern L. R.*, Feb.

Exemplary Damages for injuries to property, fraud, &c.—*Ib.*

Liability of Innkeeper for loss of guest's property.—*Irish L. T.*, Feb. 11

Notice of unrecorded deed to subsequent purchaser or attaching creditor.—*Central L. J.*, Feb. 17, 24.

Proof of foreign law.—*Ib.*

Sale of goods by parties lacking title.—*Ib.*, Feb. 24.

Mortgagee's rights against purchasers.—*Can. L. T.*, Feb.

The Rights of Volunteers under a Settlement.—*London L. T.*, Jan. 21.

Relief against forfeiture of leases—*Ib.*

Maritime Liens.—*Am. Law Register*, Feb.

Law Society of Upper Canada.

OSGOODE HALL.

MICHÆLMAS TERM, 1881.

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

GRADUATES.

Alexander George F. Lawrence, Charles Julius Mickle, Herbert McDonald Mowat, George Edward Evans, John Calvin Alguire, Donald McDonald Howard, John Armstrong, David Alexander Givens.

MATRICULANTS OF UNIVERSITIES.

John R. Shaw, Lewis Elwood Hambly, Samuel McKeown, John A. McLean, Alonze Edward Swartout, William James Tremcear, Frederick George McIntosh, George Francis Burton, James Vance, William Cherry.

JUNIOR CLASS.

Oliver Kelly Frazer, Thomas Reid, Noble Dickey, William Edgar Raney, William H. Sibley, A. M. Taylor, Franklyn Montgomery Gray, Marriott Wilson, Robert Stanley Hayes, John H. Bobier, William Leaper Ross, Samuel H. Bradford, Andrew Dodds, Richard Henry John Pennefather, William Edward Lount, Claude Foster Boulton, William Whittaker, John Wesley Ryerson, Marshall Orla Johnston, John O'Neill, H. D. Folinsbee, Edmund Montagu Yarwood, George Albert Jordon, Neil J. Clarke, Albert Edward Beck, Thomas Brown Patton, Frank Morris Gowan, Edgett William Tisdale, William Kenneth Cameron, Charles Henry Brydges, Horace Walpole Bucke, Edward Ernest Louis Pillsworth, John James Smith.

Herbert Dawson was allowed his examination as an Articled Clerk.

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

Rufus Shorey Neville, Ernest V. D. Bodwell, William Cayley Hamilton, Edward A. Peck, George William Begyon, John Henry D. Munson, Charles Crosby Going, Thomas Trevor Baines, Frank Marshall McDougall, Alfred Beverley Cox, Archibald James Sinclair, George H. Muirhead, Henry Yale, Sidney Wood, Newenham Parkes Graydon, James Russell, Archibald Stewart, Robert Cassidy, Victor Chisholm, William Humphrey Bennett, Frank Andrew Hilton, George Henry Smith, John Lawrence Dowlin, William Proudfoot, George Miles Lee, Daniel Fraser McWatt, Henry Boucher Weller, Nathaniel Mills: the names are arranged in order of merit.

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.