DIARY FOR APRIL.

1. Tues..Bismarck born, 1815.
5. Sat....Canada discovered, 1499.
6. Sun...Palm Sunday.
7. Mon..County Court Terms begin. County Court sitt. without jury (ex York) begin.
8. Tues..Supreme Court Act assented to, 1875.
9. Wed..Surrender of Gen. Lee, 1865.
11. Fri....Good Friday.
12. Sat....County Court Term ends.
13. Sun...Easter Sunday.
14. Mon..Easter Monday.
15. Tues..Lincoln assassinated, 1865.
18. Fri....First newspaper published in America, 1704.
20. Sun...Low Sunday.
23. Wed...St. George's Day.
24. Thur..Earl Cathcart Gov.-Gen., 1846.
27. Sun...2nd after Easter. Queen Victoria proclaimed Empress of India, 1876.

CONTENTS.

Canada Law Journal.

Toronto, April, 1879.

At the beginning of this year, case-law in the United States was represented by the immense number of 2,823 volumes of reported decisions.

The Government in England have brought in a Bill for the prosecution of offences. It provides for the appointment of an officer to be called the Solicitor for Public Prosecutions, who, under the direction of the Attorney-General, is to institute, undertake or carry on criminal proceedings. The rights of private prosecutors are not intended to be interfered with.

The research of Moncure Conway in his book on "Demonology" has brought to light a curious oddity in ancient Danish jurisprudence. He says it was an old-time custom in Denmark for Courts to sit with an open window, in order that the devil might easily fly off with the perjurer. It might be well to try the effect in modern law courts, especially in hot weather and during election trials, as we have no doubt it would tend to purify the administration of justice. There is a pathetic complaint of a Barrister in the London *Times* in which he suggests, "if ventilation is not to be granted to us when the Court is sitting, may we not have the windows and doors set open when the Court has risen?" So that till we have some more effectual method of exorcising the foul air of the law courts, it would be well to revive the old Danish practice.

It is satisfactory to learn that Mr. O'Brien has prepared a second edition of his useful work on the "Division

Courts Act." Having been favoured some little time since with some of the "copy," the writer of this note is in a position to speak of the exhaustive manner in which the subjects have been treated. The notes to most of the subjects have evidently been to a great extent re-written. It is in general a strong point in favour of a second edition of a book that the author is enabled, by a careful annotation during a course of years, to make each matter discussed more complete, both by correcting mistakes and supplying omissions. This, we learn, has been systematically done, and we have reason to think that the edition of Mr. O'Brien's book about to be issued, will be as much superior to the previous one as the later editions of Mr. Harrison's works were to his earlier ones. It will add largely to the value of the book that several of the most experienced County Judges have given valuable assistance in looking over the notes, and in giving suggestions as to a number of doubtful points.

The atmosphere of Maritime Courts in the United States, appears to have a very inspiriting effect upon the members of the profession who practise there. The following rather discursive eulogy we clip from an address of the Hon. Eli K. Price, welcoming the Hon. William Butler to a seat upon the Federal Bench and "to a jurisdiction extending around the globe."

"There is a history, a stir, and a life in the Maritime Law and Practice that exceed in interest those of all other branches of jurisprudence. Seamen and ships move ever on the unstable waters, and are moved by the forces of Nature. Skilfully the navigator must spread his sails to the winds, and watchfully guard the fires and steam that drive him onwards. The strife is with the elements; is with wind, water, fire, steam, and to strike the earth is its greatest danger. Sailors rejoice in the contest, and with all their faults they are to be kindly regarded; for without them Commerce cannot live, nor the nation have a navy for her defence; yet the master must be upheld in holding them to a stern discipline for the safety of ship, cargo, and all lives on board. In the memorable shipwreck on Melita, St. Paul had to say, 'Except these abide in the ship ye cannot be saved;' and every age has had the like experience."

MR. JUSTICE OSLER.

Many and rapid have been the changes lately in the *personnel* of the two Superior Courts of Common Law of the Province of Ontario, occasioned by the lamented death of Chief Justice Harrison, and by the removal of Mr. Justice Gwynne to Ottawa. The Common Pleas seems a different place altogether without the familiar face of its so long Chief, whilst the casual sightseer of a few years ago, going now to the Court of Queen's Bench, would see there faces, until lately, strangers in that room. Next term, the junior Court will witness another change, Mr. Featherston Osler taking the seat long filled by Mr. Galt, who now goes to the right of Chief Justice Wilson.

There were many rumours as to who the new judge would be, and many names were suggested; but it was only very shortly before his appointment that the name of the gentleman who now fills the office became prominent. Many who had not heard this suggestion, at first thought probably that some one more advanced in years, some older member of the Bar, some one better known to the public in political circles or on circuit, would receive the appointment; moreover Mr. Osler was not a Queen's Counsel—a strange omission, certainly, which has already been spoken of in this journal.

But though in these immaterial matters,

the appointment has been somewhat out of the usual course, there has been but one sentiment expressed both by the Bench, the Bar and the public, and that is one of entire approval. The selection is creditable to the Minister of Justice, and those who have advised him in the matter, and it is a fitting compliment to the profession, that one of the most honourable, upright, industrious, and learned of its members, should be chosen on his merits alone.

Mr. Osler is the eldest son of the Rev. Rural Dean Osler, now of Dundas, but for many years resident clergyman at Bond Head, in the County of Simcoe. He received his education, in part, at the excellent grammar school in Barrie, After leaving school, he entered the office of Patton, Bernard & Ardagh, where he was noted as a diligent and intelligent student, evincing that devotion to his profession, which has been a chief characteristic ever since. The writer, who was in the same office, well remembers the high opinion his masters, as well as his fellow-students, entertained for his studious industry and integrity of purpose. He subsequently came to Toronto, finishing his education in the office of the late Hon. John Hillyard Cameron. He was admitted as an Attorney in Michaelmas Term, 1859, and called to the Bar in Hilary Term, 1860. Mr. Osler was a Bencher of the Law Society, and was one of the most useful men in convocation.

When admitted to practice, he went into partnership with Hon. James Patton, who had then removed to Toronto. Mr. Thomas Moss, the present Chief Justice of the Court of Appeal, soon afterwards joined the firm, which was subsequently additionally strengthened by the late Chief Justice Harrison becoming the senior partner, in place of Mr. Patton. It is a circumstance worthy of record that all three members of the firm were within a few years raised to the Bench. There is another noticeable fact, that, for the first time, we believe, in Canada, a stuff gownsman has been appointed to the Superior Court Bench. This is not unknown in England, however, and there the result has been very satisfactory.

Mr. Osler, though his experience at Nisi Prius has not been very great, is known among his brethren as a most painstaking, well-grounded and thorough lawyer. We congratulate him upon his promotion, and predict for him a most useful judicial career.

COSTS WHEN A DEMURRABLE BILL GOES TO HEARING.

There is, apparently, some conflict between the later English and Canadian decisions upon the not unimportant question as to the awarding of costs in cases where a bill which might have been successfully demurred to has been answered instead, and is thereafter dismissed at the hearing. The general principle applicable to such matters is well expressed by the present Chancellor, in *McKinnon* v. *Anderson*, 18 Gr. 684: "Where there are two courses of procedure, one more expensive than the other, and the one that is the less expensive will serve the proper purposes of a party as well as that which is more expensive, and he yet chooses to take that course which is the more expensive, he is properly limited to the costs of that which is the less expensive." Indeed, in the earlier cases, the Court went beyond this equitable adjustment of costs, and deprived the defendant who failed to demur of all costs. Thus Jekyll, M.R., in *Tichburn* v. *Leigh*, 6 Vin. Abr. 365, pt. 14, laid it down that if a bill is brought for a matter properly determinable at law, the defendant ought to demur, and not suffer the cause to go

on to a hearing; and if the bill be dismissed upon hearing, the defendant shall not have costs, because it was his fault to let it proceed." In conformity with this doctrine is the decision of Lord Hardwicke, in *Earl Thanet* v. *Paterson*, Barnard, 247. And, in like manner, we find in the note to *Mitchell* v. *Baily*, 3 Madd. 62, that reference is made to a MS. case in 1749, where a bill to which the defendant might have demurred, but did not, was dismissed without costs, on the principle that unnecessary delay and expense were occasioned by the defendant's mode of defence. In *Hill* v. *Reardon*, 2 S. & S. 431, the bill involved a consideration of the jurisdiction of the Court upon a somewhat novel question, and the Master of the Rolls, on this ground, and because the defendants might have taken the opinion of the Court by demurrer, dismissed the bill at the hearing without costs. So in *Jones* v. *Davids*, 4 Russ. 277, the short question was whether the plaintiff could claim as a specialty creditor, and as the defendant neglected to have this question disposed of upon demurrer, which he could have effectually done, he was refused costs upon a dismissal of the bill. In *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492, the point in contest arose upon the construction of a will which was sufficiently presented in the bill, and no costs were given to a successful defendant who brought the case to a hearing instead of demurring.

The same views were entertained by Kindersley, V.C., who, in *Ernest* v. *Weiss*, 1 N.R. 189, dismissed the bill without costs, because the point on which he proceeded might have been raised by demurrer, and considerable expense saved thereby. To the same effect is *Webb* v. *England*, 29 Beav. 44, where the case was decided on the want of jurisdiction, and costs were refused, because it might have been equally well decided on demurrer. Again, where the plaintiff proceeded to interplead in a case in which, according to the rule of the Court, he was not entitled so to do, and the defendant, instead of demurring, came to interplead, the Court allowed each party to bear his own costs: *Cook* v. *Earl of Rosslyn*, 1 Giff. 167.

The rule of decision was somewhat modified in *Godfrey* v. *Tucker*, 33 Beav. 280, where Lord Romilly gave costs to about the same extent as if the objection had been taken by demurrer, although it would seem in that case the point on which the plaintiff failed was raised neither by demurrer nor by the answer. In *Nesbitt* v. *Berridge*, 32 Beav. 282, it was held that, though the bill contained charges of fraud against a defendant, he was not for that reason entitled to answer, if the bill was demurrable, and the Master of the Rolls refused costs where the defendant in such a case neglected to demur. This decision was followed by Mowat, V.C. in *Saunders* v. *Stull*, 18 Gr. 590.

After this current of decisions, all setting in the same direction, one is somewhat surprised to come across the views of Lord Justice James, in *Bush* v. *Trowbridge Water-Works Company*, L.R. 10 Ch. 461. He says: "I know of no rule that a defendant is obliged to demur, and run the risk that something may be picked out of the bill which will be enough to maintain it. If the plaintiff files his bill, and fails, he must pay the costs." The Lord Justice however goes on to explain the *ratio decidendi* of some of the older cases which were cited by saying: "A great many cases have been referred to where the Court was of opinion that there was some technical objection, or that there was some other point which might have been raised, and ought to have been raised, if the parties had acted reasonably by way of simple demurrer, which would have rendered the continu-

ance of the suit unnecessary, and the Court may take that into consideration in dealing with the costs of the suit." *Ib.* p. 463.

In *Pearce* v. *Watts*, L.R. 20 Eq. 492, Sir George Jessel (whose decision as to costs, in *Bush* v. *Trowbridge*, L.R. 19 Eq. 291, had been affirmed in appeal by the Lords Justices) dealt again with the same question in his usual incisive style: "It is urged," he said, "that the defendant might have demurred, and not having done so, is only entitled to such costs as he would have had in case he had demurred, and not to have the costs of the whole proceedings paid by the plaintiff. It seems to me, however, that the same principles ought to apply to a suit in this Court as to an action at common law. In an action at common law, the defendant may object to the form of the declaration, although all the witnesses are summoned, and if the objection be sustained, may sign judgment, and have the whole of the costs. This ought to be the rule here, and, in fact, was held to be the rule by the Lords Justices in the recent case of *Bush* v. *Trowbridge*." We are disposed to think that the Master of the Rolls here extends the principle of the decision of the case in appeal beyond its legitimate scope. The Lords Justices did not lay down a hard-and-fast rule, such as is indicated by Sir George Jessel. The true scope of the decision is, we think, given by the Chancellor, in the late case of *Gildersleeve* v. *Cowan*, 25 Gr. 460, where he is thus reported: "The case before the Lords Justices is an authority that it is not in every case where a bill may be demurrable and a party answers, and the bill is dismissed at the hearing, it must be dismissed without costs; but, on the other hand, it is not an authority that in a simple case where the bill is clearly demurrable, and a defendant answers, and the bill is dismissed at the hearing, it will not be dismissed without costs."

It is worthy of observation that the same points as are involved in *Bush* v. *Trowbridge* and *Gildersleeve* v. *Cowan*, were fully argued and elaborately adjudicated upon in the early case of *Simpson* v. *Grant*, 5 Gr. 273, which is not cited in the later decisions in the Ontario Court of Chancery. There the majority of the Judges lay it down that the authorities are all explicable on this principle, that parties are not permitted to adopt a tedious and expensive mode of procedure when an expeditious and inexpensive one is open, and would be equally effective. It is there said that nothing in the authorities warrants the proposition that when a bill presents numerous issues of law and fact, the defendant contesting the issues of law is bound, at the peril of costs, to have these issues disposed of on demurrer; but that all the cases tend to shew that, in a plain case, when all the questions can be effectually disposed of on demurrer, a defendant is bound to adopt that course, at the peril of costs. This case is worthy of being studied, and of being compared with the decision in *Bush* v. *Trowbridge*; and we venture to assert that it will be found that the principles enunciated in both cases are identical.

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

From Q. B.] [March 10.

PARSONS v. THE CITIZEN'S INSURANCE COMPANY.

Insurance—Statutory conditions—R. S. O. c. 162—Powers of Provincial Legislature.

The policy sued on, which was issued by the defendants who were incorporated since

the passing of R. S. O. c. 162, by the Dominion Parliament, had not indorsed upon it the statutory conditions referred to in the Schedule to the above Act, but had conditions of its own which were not made as variations in the mode indicated by the Act.

Held, affirming the judgment of the Court of Queen's Bench, that the defendants could not resort to their own conditions avoiding the policy for non-disclosure of a previous insurance by reason of such non-compliance, nor to the statutory conditions inasmuch as they were not printed on the policy.

Held, also, that a person insured under such a policy is entitled to avail himself of any statutory conditions in his favour, notwithstanding that it is not printed upon it, but the assurers are only entitled to avail themselves of such conditions, when they have them printed upon their policy.

Held, also, that R. S. O. c. 162 was not *ultra vires* as the Legislature of Ontario has power to deal with an Insurance Company incorporated by the Dominion Parliament in reference to insurances effected in Ontario.

Robinson, Q. C., for the appellant.
M. McCarthy, for the respondent.
Appeal dismissed.

From Chy.] [March 10

Peterkin v. McFarlane et al.

Purchase for value without notice—Registration—A. J. Act, sec. 50.

The bill, which was filed against McF., R., McK., and B., alleged that a deed made by the plaintiff and her husband in 1866 to McF., although absolute in form, was made only as security for a loan of $500 from McF. to plaintiff; that McF. sold to R. and M., who took with notice of the plaintiff's right to redeem; that R. and M. sold the land to B., who took with notice, and that B. gave a mortgage back, to secure part of the purchase money, which was not paid up. The defendant, B., who was the only appellant, admitted by his answer the alleged character of the conveyance from the plaintiff to McF., and that the sale by McF. to R. and M. was in fraud of the plaintiff; but he denied notice of the plaintiff's claim, and alleged that he was a purchaser for value without notice.

At the hearing, B., who was the only appellant, made an application for leave to file a supplemental answer, setting the up facts shewn by the evidence that his deed from R. and M., and their deed from McF., as well as his deed from the plaintiff, had been duly registered, which was refused.

A decree was made declaring that the conveyance to McF. was only as security for the repayment of the $500; that R. and M. bought with actual notice of the plaintiff's claim, and that B. bought from them with actual notice.

It did not appear whether the decision was on the ground B. had actual notice when he purchased, or that B., not having paid his purchase money, was affected by notice, although not received till the filing of the bill.

Held (Proudfoot, V.C., dissenting), that the evidence did not shew that B. had notice of the plaintiff's claim when he purchased; that the amendment should have been allowed, and that this Court had power now to allow it under the A. J. Act, sec. 50; but as it would not be proper to conclude the proof without an opportunity of producing further evidence, the case was sent down for another hearing.

C. Moss for the plaintiff.
Boyd, Q.C., for the respondent.
Appeal allowed, without costs. The costs of the hearing, and subsequent proceedings up to the entry of the decree, to abide the event.

From C.P.] [March 10.

Lawrence v. Ketchum.

Will—Description—Parol evidence.

The testator, who made his will in 1866, amongst other devises, bequeathed "all my real estate situated in the Township of Mono, in the County of Simcoe." It appeared that he had purchased lots 1 and 2 in the Township of Mono, in the County of Simcoe, in 1862, in 1863 Orangeville was incorporated as a village and annexed to the County of Wellington, lot No. 1

being detached from Mono, and comprised within Orangeville.

Held, affirming the judgment of the Common Pleas, that lot 2, which exactly fitted the devise, alone passed thereunder; and that parol evidence was inadmissable to show that the testator intended to include lot 1.

M. C. Cameron, Q.C., and *C. Robinson*, Q.C., for the appellants.

Bethune, Q.C., and *Beaty*, Q.C., for the respondent.

Appeal dismissed.

From Q.B.] [March 10.

Ulrich v. National Insurance Company.

Insurance Co.—Reference to Arbitration—Pleading.

In an action on a policy of insurance, the defendants, amongst other pleas, pleaded that the policy was subject to a condition, that in case differences should arise, touching any loss or damage after proof had been received in due form, the matter should, at the written request of either party, be submitted to impartial arbitrators, whose award in writing should be binding on the parties as to the amount of such loss or damage, but should not decide the liability of the Company under the policy; and that no suit or action against the Company for the recovery of any claim by virtue of the policy should be sustainable in any Court of law or Chancery, until after an award had been obtained, fixing the amount of the claim in manner therein provided, and averring that before the suit differences did arise, touching the plaintiff's alleged loss or damage, but the same had not been submitted to impartial arbitrators, nor was any reward of arbitrators fixing the amount of the plaintiff's claim under the policy, by reason of the alleged loss or damage made, before the commencement of the suit.

There was no averment of a written request to refer the dispute.

The plaintiff took no exception to the plea. At the trial the facts alleged in the plea were established, and the Judge directed a verdict for the defendants upon this plea, as a matter of law. The evidence was that no written request was made to refer.

Held, that the plea was clearly bad in omitting to allege such request, but that the plaintiff was not entitled to judgment, *non abstante veredicto*, for the defect would be cured by the verdict, as the written request might have appeared in evidence, but under R. S. O., cap. 50, sec. 129, the Court were at liberty to consider the whole case as disclosed by the evidence, without embarrassment from any defect in the statement of it upon the record, and a verdict must be entered for the plaintiff.

Ferguson, Q.C., for the appellants.

McMichael, Q.C., for the respondent.

Appeal dismissed.

From Chy.] [March 10.

Curry v. Curry.

Statute of Frauds—Parol evidence.

The Bill sought an account of the rents and purchase money received by the defendant upon the lease and sale of lot 18, containing 100 acres of land, which it alleged that the plaintiff's father (now dead) and the defendant, his brother, were jointly interested. It appeared that the deceased had for years assisted the defendant in improving and cultivating this lot, on which they lived. The defendant had spoken of his brother having a deed of 50 acres of the place on which he lived. It was shewn that the defendant, who had the fee of the whole lot, had, in 1850, made a deed to his brother of some land, which the plaintiffs insisted was 50 acres of this lot; but this deed could not be produced, owing to its either having been lost or destroyed. The defendant denied this, but he admitted having given his brother a deed of the adjoining lot 17 for the purpose of enabling him to vote. Lot 17 contained 120 acres, and the defendant's only interest in it was, that the person from whom he purchased lot 18 had accidently cleared a few acres on it, and the Inspector of Clergy Reserves reported that he claimed the lot, but he was never recognized as a purchaser, and never made any payment on account of the land. The deed to the deceased had never been registered, so that he might escape having his interest in the land made available to satisfy a verdict in a suit brought against him. In 1856 the defendant made a lease of lots 17

and 18 to F, which transaction was negotiated by the deceased, and in 1875 the defendant sold lot 18 to F, with his concurrence. The defendant swore that the deceased had never made any claim to the rent, and denied the whole case attempted to be made by the plaintiffs, but his evidence was not consistent.

Held, affirming the judgment of Spragge, C., that the evidence shewed that the deceased was the owner of half of lot 18, and that the plaintiffs were entitled to an account.

Maclennan, Q.C., for the appellants.

Blake, Q.C., (*Garrow* with him) for the respondents.

Appeal dismissed.

QUEEN'S BENCH.

IN BANCO, HILARY TERM.
March 8, 1879.

In re Centre Wellington Election.

Parliamentary Election—Recount of Votes under 41 Vic. chap. 6, sec. 14—Mandamus to Junior Judge of County—Jurisdiction.

The Court refused a mandamus to the Junior Judge of the County of Wellington to proceed with the recount of votes under 41 Vic. chap. 6. sec. 14, as being a matter not within its jurisdiction, but belonging to Parliament alone.

Maclennan, Q.C., for applicant.

McMichael, Q.C., *contra.*

Sowden v. Standard Ins. Co.

Insurance—Agent of Company acting for insured—Misdescription of premises—Right to recover—Statutory condition.

At the foot of an application for insurance, above the signature of the applicant, it was among other things expressly agreed, declared and warranted that if the agent of the Company filled up the application, he should in that case be the agent of the applicant and not that of the Company. The agent filled up the plaintiff's application in this case and in doing so unintentionally misdescribed the building insured in a particular, as found by jury, material to the risk:

Held, Armour, J, dissenting, that the plaintiff could not recover.

Held, also, that the above provision as to the agent was not in the nature of a condition requiring to be endorsed as a variation on the policy.

H. Cameron, Q. C., for plaintiff.

Bethune, Q. C., *contra.*

Wheeldon v. Milligan.

Husband and wife—Authority of wife to bind husband.

Plaintiff, being indebted to defendant for rent and otherwise, left the country with the intention of going to Manitoba. On his way he wrote the following letter to his wife: "As regards Mr. Milligan's affairs, I wish you to do the best way you can: but tell Mr. Milligan not to be afraid of me. I will see him all right. Now if Mr. Milligan will do the thing that is square that is all right; but I hope he will be a friend to you and I will be the same to him." On receipt of this letter plaintiff's wife sold his chattels at a valuation to defendant, and executed a surrender to him of the demised premises, of which defendant then resumed possession. Plaintiff returned in four or five weeks after his departure and sued defendant in trespass thereon, as also on the covenant for quiet enjoyment contained in the lease of the premises in question, but,

Held, that he could not recover, for that coupled with the evidence set out in the case the letter to his wife clothed her with authority to part with the property and surrender the premises to defendant.

McFadyen, for plaintiff.

Masson, for defendant.

Ballagh v. Royal Mutual Ass. Co.

Insurance—Statutory conditions—Variations—Reasonableness of condition.

Under the statutory conditions endorsed on a policy of insurance were printed, in different coloured ink, but in the same sized type, the words prescribed by sec. 4 of ch. 162, R. S. O. Then followed in much larger type and in the same coloured ink, the words, "additional conditions," and below this heading the following condition: "In

case any promissory note for a cash premium or for any payment or assessment on any premium note * * given to the Company or to any officer or agent, be not paid when due the policy * * shall be null and void, and the Company shall not be liable for any loss occurring before or after the maturity of such note :

Held, Armour, J., dissenting, that the statute had been sufficiently complied with as to the additional condition, which was sufficiently indicated and set forth so as to be binding upon the assured,

Held, Armour, J., dissenting, also, that that the condition was not an unreasonable one.

Robinson, Q. C., for plaintiff.

Bethune, Q. C., *contra*.

Regina v. College of Physicians and Surgeons of Ontario.

In Re John McConnell.

Medical practitioner—Conviction for felony—Erasure of name from register of physicians—37 Vic. ch. 30, ss. 34, 39—Mandamus to restore.

One C. was convicted in 1869 of manslaughter and sentenced to five years' imprisonment in the Penitentiary. Before its expiration his sentence was remitted, and in 1874 he applied to defendants for registration, and was duly admitted and placed upon the register as a bachelor of medicine. At the time of the application for registration the Secretary was not aware of the conviction, nor did he ask the applicant any questions. Subsequently on ascertaining the fact, under direction of the defendants, and without notice to C. the Secretary erased his name from the register.

Held, that C. had been guilty of no false or fraudulent representation within 37 Vict ch. 30, sec. 39, O.

Held, also that C's. case was not within sec. 34 of the same Act which referred to the conviction for felony of a person already registered, as C. had been registered without fraud or misrepresentation after the whole period of punishment had elapsed. A mandamus was therefore granted to restore his name to the register.

Robinson, Q. C. for applicant.

Kingsmill, contra.

Grand Hotel Co. v. Cross.

Custom—Right to drink waters of spring—Highway—By-law.

Where the land in question had only been granted by the Crown less than half a century,

Held, that there could be no custom established to drink the waters of a spring situate thereon.

The road leading to the spring had been closed by the Township Council by by-law in 1858, and another road laid out instead.

Held, per Hagarty, C.J., on the evidence set out in this case, that since that time the former road was not a public highway, but merely used for the convenience of persons frequenting the spring or the hotel and grounds connected therewith.

Held, also, *per* Hagarty, C. J., that the Court ought not after the lapse of so long a time to entertain objections against the by-law closing the road in question.

Per Armour, J., that the by-law in question had no effect to take away the character of the road as a highway.

C Robinson, Q.C., for plaintiffs.

Bethune, Q.C., and *Cross* for defendant.

Allen v. McQuarrie.

Action against Justice of Peace—Notice of action—Bona fides.

Held, in an action against a Justice of the Peace, where no notice of action is given, that a plaintiff in such action is entitled to have submitted to the jury, the question whether the defendant acted *bona fide*, or with colour of reason, in the act complained of, so as to entitle him to a notice of action under R. S. O. c. 73.

Hodgins, Q.C., for plaintiff.

Osler, contra.

O'Sullivan v. Victoria Ry. Co.

Master and servant—Negligence.

Plaintiff, an employee of defendants, was sent by the foreman of the works to exca-

vate earth from a bank below, while others were loosening it from above Whilst so engaged, a quantity of earth fell down upon him and broke his leg.

Held, that defendants were not liable, and a nonsuit was ordered to be entered.

H. Cameron, Q.C., and *Martin* for plaintiff.

Kerr, Q.C., and *Barrow, contra*

Superior Loan and Saving Society v. Lucas.

Mortgagor and mortgagee—Reformation of mortgage—Absence of redemise clause—Ejectment.

Defendant applied to plaintiffs, a money-lending company, for a loan of $2000, and was shewn by their manager a circular and loan table, the former declaring that the loan table was for the inspection of all, rendering borrowers free from the possibility of extortion, deception or fraud, *the loans being made at a fixed and uniform rate*, etc. The loan table shewed that the amount payable quarterly for 20 years on a loan of $1,000 was $26.85, defendant then signed an application for $2,000 repayable in 20 years quarterly according to the defendant's scale of repayments. This application was submitted to and passed by the board of directors, the manager then endorsed upon the application the quarterly repayment at $57.60 instead of $53.70, and sent it to the solicitors of the company who prepared a mortgage accordingly, for defendant's execution, and defendant executed it supposing it to be correct. The manager swore that he had told defendant the quarterly payment would be $57.60, but at the same time admitted that he had not informed him that the amount differed from the loan table, while the defendant positively denied the manager's statement. Defendant paid the first quarterly payment under the impression that it was correct, and the second was paid for him by one of the company's directors, but the third payment defendant refused to pay, when the plaintiffs brought ejectment; but

Held, that they could not recover, but that the mortgage must be reformed.

The mortgage contained no redemise clause, but the Court considering it beyond doubt both from the terms of the mortgage and the rules and regulations of the company that it was the intention of both parties defendant should retain possession until default, and there being in their opinion no default, refused to give effect to the objection that the estate was absolute in plaintiffs—and that they were therefore in any event entitled to possession.

COMMON PLEAS.

VACATION COURT.

February 21.

Kelly v. Earl.

Action for goods sold and delivered—Sale of liquors to persons accustomed to sell without license—Pleading—Evidence.

This was a special case submitted by an arbitrator for the opinion of the Court, under the terms of an order of reference, by consent of the parties.

The action was on the common counts for goods sold and delivered, to which, amongst other pleas pleaded, was the following one, allowed to be added by the arbitrator: that as to so much of the plaintiff's declaration as is for intoxicating liquors furnished after the month of August, 1876, the defendant says that he was not the holder of a license authorizing him to sell spirituous and malt liquors, but was accustomed to sell and did sell such liquors without license; and the plaintiff, well knowing that the defendant was so selling illegally, and with the intention of aiding and enabling the defendant to carry on such illegal traffic as aforesaid, sold to the defendant large quantities of spirituous and malt liquors, which liquors are part of the goods for the price of which the plaintiff seeks to recover in this action. The arbitrator found, that subsequent to such month of August, while defendant was not the holder of such license, but was accustomed to and did sell such liquors without license, the plaintiff knowing that the defendant was so accustomed to sell such liquors without license, sold to the defendant intoxicating liquors to the value of

$224.65, which said amount formed part of the plaintiff's claim.

Held, by Cameron, J., that the defence failed: that the plea was bad, in that it did not aver that the defendant was not one of the class of persons authorized to sell liquors without license, to wit, a druggist, who, under certain restrictions, may so sell; while the facts found did not go even so far as the plea, as it was not found that the liquors were to be sold by defendant, but it may have been merely for his own consumption.

C. Durand, for the plaintiff.
Winchester, for the defendant.

March 4.

The Ontario Copper Lightning Rod Company v. Hewitt.

Insolvency—Composition obtained by fraud—Action for deceit—Sufficiency—Pleading.

A declaration alleged that defendant was indebted to plaintiffs in a large sum of money, to wit, etc., besides the costs of a suit to recover same, and defendant fraudulently represented to plaintiffs that he was insolvent, and unable, by reason of the insufficiency of his assets, to pay said indebtedness in full, and by so representing induced plaintiffs to take a composition in respect of said debt and costs, whereas defendant was not insolvent, etc., whereby plaintiffs lost the difference, etc., and were put to costs in arranging the composition.

Held by Cameron, J., that it was no objection to the declaration that it did not aver that defendant knew he was not insolvent, because it charged the representation to be fraudulent; but that the declaration was bad because no damage was shewn; for if the plaintiffs were induced to take a less sum through the defendant's fraud the original cause of action still existed and plaintiffs could proceed with their former action.

B. B. Osler, Q.C., for the plaintiffs.
Dr. Spencer, for the defendant.

IN BANCO, HILARY TERM.

March 7.

Churchill v. Denham

Replevin Bond—Delay in proceeding—Damages.

In an action for breach of a replevin bond for not prosecuting the replevin suit without delay, the plaintiff at the trial was awarded, as damages, the amount of the rent distrained for. On motion in term on the defendants undertaking to bring the replevin suit down to trial at the next assizes, the damages were reduced to a nominal sum.

J. A. Proctor, for the plaintiff.
J. B. Clarke, for the defendant.

The Great Western Railway Company v. Hodgson.

Replevin—Property passing—Warehouse receipt, Validity of.

This was an action of replevin to try the question of the property in a quantity of pork and lard, the produce of certain hogs which had been taken out of the possession of the plaintiffs who were holding the same to the order of a firm in Chicago.

Held on the evidence set out in the case that the property had never passed out of the plaintiffs, and that they were therefore entitled to maintain the action.

A question was also raised as to the effect of a warehouse receipt given by a firm of packers and curers of pork, which, under the circumstances of this case, was held to be invalid.

Robinson, Q. C., for the plaintiff.
McMahon, Q. C., for the defendant.

McQueen v. Phœnix Mutual Insurance Company.

Insurance—Interim receipt—Necessity of endorsment thereon of asignment of property—Releases.

An interim receipt on a stock of goods was made, subject to the conditions of the defendant's printed form of policy then in use, one of which conditions was that, "if the property insured is assigned without written permission endorsed thereon by the agent of the company, duly authorized for such purpose, the policy shall hereby become void." After the insurance was effected, the plaintiff assigned the insured property to one M. in trust for the plaintiff's creditors. The

policy did not issue until after the fire. It appeared that when the assignment was made the defendant's agent was expressly notified thereof, and assented thereto, and stated that no notice to the company was necessary.

Held, that under the above condition, such endorsation should be made on the interim receipt; but that the agent, as he had the power to do, had waived it.

In an action on the policy, the plaintiff alleged that, after the payment of the creditors' claims, there would be a surplus coming to him, and he sued for the amount of the policy in trust for the creditors as for himself individually.

Held, that on producing releases from all the necessary parties of their claims, the plaintiff was to have judgment entered in his favour.

Robinson, Q.C., for the plaintiff.

Foster and *J. B. Clarke*, for the defendant

Britton v. Knight.

Lease to husband and wife for life—Acceptance by wife—Evidence.

S. S., the owner of certain land, arranged with his son T. S. to convey the land to him in consideration of the payment by him of certain moneys for S. S., and his forthwith reconveying the same to S. S. and his wife for their natural lives. The conveyance to the son, and his reconveyance of the life estate to S. S. and his wife was respectively executed. Subsequently S. S. and T. S. executed a mortgage of the land to the plaintiff, and after S. S.'s death the plaintiff brought ejectment against the widow of S. S. and two other defendants, her tenants. It was argued that the arrangement was never carried out, and that it was repudiated by the wife, and that she refused to accept the life estate.

Held, that the evidence shewed that the arrangement had been perfected, and that, even if a repudiation by the wife during her husband's lifetime would have any effect, the evidence failed to establish it; and that on the husband's death she asserted her right to the life lease, and now defends under it.

Held, therefore, that the plaintiff could not recover.

Osler, for the plaintiff.

McMichael, Q.C., for the defendant.

Black v. Coleman.

Excessive distress—Special damage—Married women—Separate property.—C. S. U. C., ch. 73, sec. 2.

Held, that there may be a recovery in an action for an excessive distress without proof of special damage.

Quære, whether C. S. U. C. ch. 73, sec. 2, applies to property acquired by a married woman after the 4th May, 1859, who was married prior thereto.

J. E. Macdougall, for the plaintiff.

J. E. Rose, for the defendant.

McCarthy v. Arbuckle.

Identity of deed—Conveyance after marriage in pursuance of prior parol agreement—Sufficiency of—Registry Act, 1865, sec. 62—Construction of—Lien for improvements.

In an action of ejectment, the plaintiff claimed under a deed from the patentee of the Crown to his father. The deed was not produced at the trial, but it was held that the evidence, set out in this case, sufficiently proved its existence and subsequent destruction by fire.

Where a deed of a wife's land was made to her husband after marriage, in pursuance of a parol contract therefor entered into prior to the marriage: *Held*, that this would not constitute the husband a purchaser for valuable consideration of such land.

Per Galt, J. Since the Registry Act of 1865, 29 Vic., ch. 24, sec. 62, a person claiming under an unregistered title from the patentee of the Crown, must register his title so as to protect himself against any subsequent deed or mortgage made for valuable consideration.

In this case the defendant claimed a lien for his improvements on the land.

Held, that the evidence shewed that at the time the defendant made the improvements, he did so under the belief that the

land was his own, so as to entitle him to such lien.

Snelling, for the plaintiff.

McMichael, Q.C., for the defendant.

Denmark v. McConaghy.

Case commenced with jury—Right to continue without jury—Title by possession—Evidence of—Trespass.

Where the trial of a cause begins and is entered into with or without a jury, it must be finished in that manner, unless the change in that mode of trial is made by consent of parties.

In an action of trespass to land, in which the plaintiff claimed, under the paper title, and the defendant by possession, after the trial of the case had been entered into with a jury, the learned Judge ordered the jury to be discharged, and then tried the case without a jury; and the counsel for the parties, though objecting to the change, continued to act without further objection.

Held, that the learned Judge had no authority to discharge the jury, but that by the counsel continuing to act in the case, the objection had been waived.

On the merits, the verdict was entered for the defendants, the Court being of opinion that the possessory title had been proved.

Robinson, Q.C., for the plaintiff.

Ferguson, Q.C., for the defendants.

Tuffts v. Mottashed.

Goods—Property passing—Replevin.

T. delivered certain articles to C. on the terms of a special contract contained in four notes signed by C., which were similar in form and as follows: "For value received, November 1, 1877, after date, we promise to pay to the order of T. $81.67. The consideration of this and the other notes is one artic apparatus, &c., which we have received of said T. Nevertheless, it is understood and agreed between us and T. that the title to the above mentioned property does not pass to us, and that until all such notes are paid the title to the aforesaid property shall remain in said T., who shall have the right in case of nonpayment at maturity, of either of said notes without process of law, to enter and retake and may re-enter and retake immediate possession of the said property wherever it may be, and resume the same. Payable at the Bank of Montreal here, &c." It appeared that C., without payment of the notes, sold the articles to the defendant, who was not aware when he bought that T. had any claim on them, but, on subsequently discovering it, offered to make a new bargain with T., but none was made. There was no demand and refusal of the articles. T. brought replevin, to which the defendant pleaded, (1) non *cepit*, and (2) that the goods were the defendant's and not the plaintiff's.

Held, that there must be a verdict for the defendant on the first issue, for that the goods came lawfully into the defendant's possession, so that without a demand and refusal trespass and trover would not lie, and, therefore, replevin; but that the plaintiff was entitled to a verdict on the second issue, as under the terms of the notes, the property in the articles was in the plaintiff.

Dougall (of Belleville), for the plaintiff.

Burdett, for the defendant.

Consolidated Bank v. Henderson.

Husband and wife—Note made by wife to husband—Endorsement by husband to plaintiffs for value—Liability of wife's separate estate.

A married woman, married after 2nd March, 1872, made a promissory note to her husband for his accommodation, which the husband endorsed for value to the plaintiffs. It was admitted that the wife had separate estate, and that she made the contract in reference thereto.

Held, that the plaintiffs were entitled to recover judgment against such separate estate.

Semble, per Wilson, C. J., that the judgment is not limited to the separate estate, but may be recovered against the married woman personally.

R. Martin, Q.C., for the plaintiffs.

Mackelcan, Q.C., for the defendant.

McGugan v. Manufacturers', &c. Mutual Ins. Co.

Insurance—Incumbrances—Assessment—Acceptance of note in payment of.

In an application for insurance on a saw mill, in answer to the question as the incumbrances, the applicant answered that the property was mortgaged to $500. It appeared that there was an additional mortgage thereon of $1,000, and that this application was one of three applications for insurance in the defendant's company, made at the same time and constituting one transaction, from which other applications the company were expressly informed of the existence of the mortgage in question.

Held, that under these circumstances the applicant could not be said to have omitted to have made known the existence of the mortgage in question.

For an assessment made on the insured's premium note, he gave defendants a note of himself and another person, which, it was contended, was accepted by the company in payment of such assessment, but held that the evidence shewed that the note was so received, but merely as a suspension of the debt during its currency.

Coyne (St. Thomas), for the plaintiff.

Ferguson, Q.C., for the defendants.

Miller v. Reid.

Insolvency—Action to recover money paid within thirty days of insolvency.

This was an action by plaintiff as assignee in insolvency of one A. to recover the amount of two promissory notes made by A., and paid by R. out of, as was alleged, money belonging to the insolvent, within thirty days before the insolvency, the defendant then being a creditor of A. and knowing his inability to pay his liabilities in full. At the trial the learned Judge found that the money was money belonging to R., &c., and he entered a verdict for the plaintiff. On motion in term to enter the verdict for the defendant, Wilson, C. J., was of opinion that on the evidence the verdict was right, and should not be disturbed, while Galt, J., was of opinion that the evidence shewed that the money was paid by R. under his personal undertaking to that effect, and that the verdict, therefore, should be entered for the defendant. The Court being equally divided, the verdict stood.

Walker (of Hamilton), for the plaintiff.

Mackelcan, Q.C., for the defendant.

Gauthier v. Canadian Mutual Ins. Co.

Insurance — Description — Warranty — Liquor sold on insured premises.

In a policy of insurance, certain premises were described as a two-story brick building, &c., occupied as a tenement dwelling. By a memorandum afterwards endorsed on the policy, the building was allowed to be "occupied as a refreshment room. No liquor sold." The policy was for a year, but was renewed by a renewal recept issued under sec. 32 of the Mutual Insurance Act. The building was occupied by a tenant of the plaintiff, and it was proved that liquor was sold in the building by the occupant, but without the plaintiff's knowledge or consent.

Held, that on renewal the memorandum became part of the description and binding as insured as a warranty that no liquor should be sold, and as liquor was sold the policy was avoided.

Robinson, Q.C., for the plaintiff.

Mackelcan, Q.C., and *Duff*, for the defendants.

Sly v. Ottawa Agricultural Ins. Co.

Insurance—Value of building—Misrepresentation of material fact—Avoidance of policy.

One of the statutory conditions endorsed on a policy of insurance provided that, "If the person insuring his buildings shall cause the same to be described otherwise than as they really are, to the prejudice of the company, or shall misrepresent any circumstance which is material to be made known to the company in order to enable them to judge of the risk they undertake, such insurance shall be of no force in respect of the property in regard to which the misrepresentation is made."

In the application for insurance in this case, the plaintiff stated that the estimated cash value of the building offered for insurance was $900, and obtained an insurance

thereon of $600. The jury found the buildings to be only worth $450.

Held, that the value of the buildings was a fact material to be made known to the defendants, and there being a misrepresentation of such fact, the insurance was avoided.

Smythe (Kingston), for the plaintiff.

J. K. Kerr, Q.C., for the defendants.

Ryan v. Ryan.

Statute of limitations—Possession as caretaker or agent—Subsequent entry of owner—evidence.

The plaintiff's father, who lived in the Township of Tecumseth, owned a block of 200 acres of land, consisting respectively of Lot 1 in the 13th and 14th concessions of the Township of Wellesley. In 1848, the father having offered plaintiff his choice of 100 acres of the block if he would live thereon and take care of the rest of the block, the plaintiff selected the south half of Lot 1 in the 13th concession, and lived thereon taking care of the rest of the block. In November, 1864, he sold his 100 acres, and in December following, having to give up possession to the purchaser, moved on to the north half of this Lot 1, where he has resided ever since. In January, 1877, the father died, having by his will devised the north half of this north half to the defendant, another son, and the south half of the same north half to the plaintiff. The defendant, claiming this south of the north half under the devise to him, entered upon it, whereupon the plaintiff brought trespass, claiming that he had acquired the title thereto by possession. At the trial the learned judge found that plaintiff entered into possession and so continued merely as his father's caretaker or agent, and he entered a verdict for the defendant. He also remarked, without finding thereon, on evidence given of an entry on the land by defendant as his father's agent within the last seven years, whereby it was contended that a new starting point for the statute had been created.

On motion to enter the verdict for the plaintiff.

Per Wilson, C. J.—The evidence showed that plaintiff was in possession, claiming adversely to and not as his father's caretaker or agent, and that the subsequent entry was not proved.

Per Galt, J.—The evidence established the subsequent entry; and *semble* plaintiff's possession was merely as caretaker or agent.

The court being equally divided, the rule dropped, and the verdict stood, but the rule was directed to be discharged to enable the case to be appealed if allowed.

Ward Bowlby (Berlin) for the plaintiff.

McCarthy, Q. C., and *King* (Berlin) for the defendant.

VACATION COURT.

March 14.

Stone v. Knapp.

Husband and wife—Action for deceit—Plea of coverture—Sufficiency of.

A declaration charged that the defendant, the wife of Solomon Knapp, by falsely and fraudulently representing to the plaintiff that she was authorized by her husband to order certain goods for the wedding outfit of his daughter Charlotte, and to pledge his credit therefor, induced the plaintiff to furnish the goods and charge the same to the husband; that in fact she had no such authority, and the husband being sued therefor denied his liability; and after verdict and judgment of the County Court for the plaintiff, the judgment was finally entered for the husband by the court of appeal. The plaintiff claimed as damages the value of his goods and his costs.

Plea—That the defendant during all that time was and is wife of Solomon Knapp.

Held, on demurrer, plea good.

Bethune, Q. C., for the plaintiff.

H. J. Scott for the defendant.

CANADA REPORTS.

ONTARIO.

COURT OF APPEAL.

(Reported for the Law Journal *by* F. Lefroy, *Barrister.*

Goyeau v. Great Western R'y. Co.

Practice—Appeal to Supreme Court—Time—38 Vict. ch. 11, secs. 25, 26, 28.

Where the 30 days allowed for appealing from the Court of Appeal by 38 Vict. ch. 11, sec. 25,

expired on a Sunday, without an order having been made allowing the appeal: *Held*, that this does not give the party wishing to appeal, the following day to procure his order, nor is it a "special circumstance" under sec. 26.

[January 29, 1879.—Burton, J.

Judgment in the above matter was given in the Court of Appeal, on Friday, December 6th, 1878, reversing the decree of the Court below, and dismissing the plaintiff's bill with costs. On Saturday, January 4th, 1879, the plaintiff filed security with the Registrar of the Court of Appeal, and on the same day served notice of filing it and of motion for allowance of the Appeal to the Supreme Court, returnable on Monday, January 6th. The motion was on that day enlarged at the request of the defendants.

W. Barwick, for the plaintiff, now moved for an order for allowance of plaintiff's appeal to the Supreme Court, the security required by 38 Vict. c. 11, sec. 31, having been filed.

H. Cassels, *contra:* The Court has no jurisdiction to entertain the application. By sec. 25 of the Supreme Court Act (38 Vict. c. 11), the appeal must be within 30 days from the pronouncing of the judgment appealed from, and by sec. 28 the mode of bringing an appeal is laid down to be—"That the party desiring so to appeal shall, *within the time hereinbefore limited in the case*, have given the security required, and obtained the allowance of the appeal." Here the 30 days expired on Sunday (January 5th), without an order having been made allowing the appeal. No special circumstances are shewn to warrant an order allowing the appeal after 30 days, under sec. 26 of said Act.

W. Barwick, in reply: The last of the 30 days being a Sunday the plaintiff has the next day for complying with the Act, and motion to have the appeal allowed was on that day brought on and enlarged at the defendant's request, and therefore this motion must now be treated as if held on that day. This appeal should be allowed under sec. 26.

Burton, J., after conferring with the other Judges, held the last of the 30 days limited by sec. 25 of the Supreme Court Act for the allowance of the appeal being a Sunday did not give the plaintiff the following day to procure his appeal to be allowed, and is not a special circumstance warranting an order enlarging the time for such allowance under sec. 26 of the Act.

Motion dismissed with costs.

COURT OF CHANCERY.

(*Reported for* The Law Journal, *by* F. Lefroy, *Barrister-at-Law.*)

CHAMBERS.

Re Ford.

Surviving executor—Power to sell—Case stated under Vendor and Purchaser Act.

Where a testator devised lot A, "with power to the executors herein mentioned, to sell and invest the proceeds," the devisee to receive the interest during his life, and after his death proceeds to be divided among the testator's family, —and also devised lot B, subject to a condition that "if the executors think best, and if his mother agree to it, they may sell the said property," and after payment of debts, divide the balance among the testator's family; and in the clause appointing the executors, the words "to see my will carried into effect" were added: *Held*, as to lot A, the surviving executor could make a good title in it to the purchaser, but as to lot B, by the death of the mother the power to sell is gone.

[Proudfoot, V.C., Jan. 20, 1879.

This was a case stated under the Vendor and Purchaser Act, R.S.O., c. 109, sec. 3, by petition of Thomas S. Ford. The facts of the case fully appear in the judgment of the learned Vice-Chancellor.

C. Moss, for vendors, asked for construction of the will of William Ford, and cited *Lane* v. *Debenham*, 11 Hare, 188; Lewin on Trusts, 319; Chance on Powers; Farwell on Powers, 373; *Brassey* v. *Chambers*, 16 Beav. 231, 4 De G. M. & G. 528, and cases there cited.

Boyd, Q.C., *contra.*

Proudfoot, V.C. — William Ford died on the 2nd Dec., 1870, having first duly made his will, containing, amongst others, the following dispositions: "I hereby give and devise to my son William, during his life, the use of the east half of the west half of lot No. 28 in the 5th Con. of the Township of Moore, with power to the executors herein mentioned to sell the said parcel of

land and invest the proceeds, my son William to receive the interest during his life, and after his death said proceeds to be equally divided among my family or their heirs . . . . . I leave and bequeath to my son Thomas S. Ford the south-west part of lot No. 26, Front concession, in the said Township of Moore, containing 3 acres, with the buildings and appurtenances thereon, with all my personal property, in consideration of money advanced by him to me, said notes which he holds or may hold bearing interest at the rate of 10 per cent. per annum, with the following conditions, viz., he is to support his mother during her life, and if the executors think best, and if his mother agree to it, they may sell the said property, real and personal, and if the proceeds are more than satisfy just claims, the balance to be equally divided among my family or their heirs within one year after his mother's death, and I bequeath my son, the said Thomas S. Ford, in consequence of the responsibility devolved on him in supporting his mother, that in any division of property that may be, he is to have two shares, and be allowed what is reasonable for supporting his mother, the executors to take care of minor's shares until they are of age. And I hereby appoint and constitute my son, Thomas S. Ford, and my son-in-law, Richard Thomas, the sole executors to see this my will carried into effect."

Both executors proved the will in Jan., 1871. The widow died before the date of sale after-mentioned, and William Ford, the son named in the will, pre-deceased the testator.

In May, 1877, Thomas S. Ford sold the lands mentioned above to John Hyde and William Cathcart—an abstract of title has been furnished—the purchasers object to the title that, under the will of William Ford, Thomas S. Ford has no power to sell the first parcel—and that Thomas S. Ford has no power, either as executor or as devisee, to sell the second parcel.

The petitioner prays that these objections may be considered and adjudicated upon by the Court. It was conceded that these questions might properly be presented for the consideration of the Court under the statute.

The first objection calls for a determination of the very much discussed question whether the survivor of two executors can exercise a power of sale given to the executors. The power is given "to the executors herein mentioned," and if a sale take place, the executors are to invest the proceeds. The direction that William is to receive the interest during his life, and after his death the proceeds to be equally divided among the family, appears to me to be a direction that the executors are to pay the interest to William during his life, and then to divide the proceeds. The investment is to be made by them, and it would presumably be made in their own names—there is no direction how it is to be made, but to enable the executors to preserve it for division, it would more properly be in their names than in others. And when so invested, the interest would require to be received by William through them, and the proceeds distributed to the family through them after his death. The clause added to the appointment of the executors, "to see this my will carried into effect," seems to point to the same conclusion. If this be the true construction of the will, then it is not a bare power in the executors, but a power coupled with an interest, vested in them in the character of executors, and, therefore, attached in this will to the office of executor. That it is given "to the executors herein named" is not equivalent to a power to them by name, involving the idea of a personal trust. In *Brassey* v. *Chambers*, 16 Beav. 231, 4 D. M. & G. 528, the power was given "to my executors hereinafter named," which Lord Romilly construed to mean that it was given to them *nominatim*, and not in their capacity of executors, but the Lords Justices dissented from this opinion. I cannot perceive an appreciable difference in effect between giving the power to "the executors herein named" and to "the executors hereinafter named." If in the one case it indicates that it is conferred upon them in their character of executors, it must have the same effect in the other.

The older books are full of cases on the subject, which have been collected and commented on by Lord St. Leonards in his work on Powers, 7th ed., 143 *et seq.* He says that at common law a naked authority given to several cannot survive. Therefore, if a man devise his lands to A for life, and that, after his decease, the estate shall be sold by the executors, naming them, as by B and C, his executors, or by B and C, who are not named executors—in that case, if one of them die during the life of A, the other cannot sell, because the words of the testator would not be satisfied. But where the words of the testator can be satisfied, a court of law will relax the rule. Therefore if three or more are appointed executors, and the devise is that the estate shall be sold by the executors generally, the survivors may sell, because the plural number of executors remains. In *Howell* v. *Barnes*, Cro. Car. 382, 1 Jones, 352, pl. 3, although it was holden that the executors took an authority only, yet it was determined that the survivor could sell,—it was not deemed necessary that the plural number should remain. Lord St. Leonards then states that Mr. Hargrave has endeavoured to establish that where the power is given to executors, or to persons *nominatim* in *that character*, the survivor may sell, as the power is given to them *ratione officii*; and as the office survives, by parity of reason the authority shall also survive, N. (2), Co. Litt. 113a, and adds, that the liberality of modern times will probably induce the courts to hold that in every case where the power is given to executors, as the office survives so may the power.

The conclusion he draws from the cases (p. 146) is—(3.) That where the authority is given to "executors," and the will does not expressly point to a joint exercise of it, even a single surviving executor may execute it; but

(4.) That where the authority is given to them *nominatim*, although in the character of executors, yet it is at least doubtful whether it will survive.

Mr. Williams, in his work on Executors (6th ed., 892 *et seq.*) quotes this as being the state of the law on the subject. Mr. Chance, Powers (s. 651 *et seq.*), criticises the cases cited by Lord St. Leonards and the conclusions deduced from them, and (sec. 669) seems to leave the question just as it had been left by him. Mr. Farwell, Powers (p. 372), states Lord St. Leonards' third conclusion, though not in the same words, practically to the same effect, adding *sed qu.*

Many other books might be referred to for a more or less extended mention of the subject, but adding nothing to the clearing up of the uncertainty.

In the American Courts, numerous cases have arisen involving this question. In *Putnam Free School* v. *Fisher*, 30 Maine, 526, 527, Shipley, C. J., said: "Where an estate is devised to executors *co nomine* in trust, the devise is made to the official not to the individual persons, and the whole trust vests in those who accept it and become executors of the will; and when an estate is so devised, or when the executors have by the will a power to sell, coupled with an interest in trust, a conveyance by survivors, or by those alone who accept the trust, will be good."

In this view of the law I concur; it appears to me to be consonant to reason, is supported by authority, by the opinions of some of our ablest writers, and is in accordance with the latest English decisions, *Brassey* v. *Chambers*, to which I have been referred.

I therefore hold that the surviving executor can make a good title in the first parcel of land to the purchaser.

As to the second parcel, it is very difficult to ascertain what the testator's real meaning was. He appears to devise the land and personal property to Thomas S. Ford, as a payment for money advanced by him, and in consideration of his supporting his mother during his life,—and, then, he gives his executors a power to sell the realty and personalty with consent of the wife, and if the proceeds are more than satisfy just claims, the balance to be equally divided among his family, and in that case Thomas was to have a double share. There was no previous devise of personalty, and no mention made of debts—probably he intended

this power to be exercised in case it should be necessary to sell to pay debts,—just claims. However that may be, it seems clear that Thomas takes a fee. That, by the death of the mother, the power of sale could not be exercised, as it required to be with her consent. The cases are collected by Mr. Chance (Powers, sec. 727, *et seq.*), and by Mr. Farwell (Powers, p. 117), and the rule seems to be that "If a power is given, to be executed with the consent of one or more persons, and that one, or any one of the others, dies, the power is gone." Franklyn's case, Moore, 61, pl. 172. The power of sale given by the will here became extinct on the death of the mother without having given her consent. Any sale now will be made in exercise of the right of ownership that Thomas possesses. The conditions mentioned in the will upon which Thomas took the estate, were to support the mother, and to sell with her consent. He has supported his mother, and the other condition has ceased; there remains, therefore, the right of ownership.

I think that Thomas S. Ford as devisee of this second parcel can make a good title to the purchaser.

CROSSMAN V. SHEARS ET AL.

Appeal—Payment of money paid in in lieu of bond—R.S.O. c. 38, sec. 27, subs. 4—ib. sec. 31.

Where a party appealed and paid into Court the amount of costs taxed to a defendant in the Court below, in lieu of giving a bond, and the appeal was allowed with costs, costs of the Court below being reserved, *Held*, party appealing was entitled to order for payment out of money so paid in, notwithstanding Defendant had given notice of appeal to Supreme Court.

[Mr. Stephens—Jan 29, 1879.

In this case a decree was made dismissing the bill as against one Irish, a defendant, with costs. The plaintiff appealed and paid into Court the amount of costs taxed to the said defendant in lieu of giving the bond as required by R. S. O. c. 38, sec. 27, subs. 4. The appeal having been allowed with costs (costs of the Court below being reserved until after the taking of the accounts in the Master's Office),

H. D. Gamble, now moved for payment out to the plaintiff of the amount paid into Court as aforesaid. He read the certificate of the Court of Appeal allowing the appeal, and the order making the same an order of this Court.

G. Morphy, contra. The defendants have given notice of their intention to appeal to the Supreme Court. By R. S. O. c. 38, sec. 31, an appeal is only a step in the cause, therefore the plaintiff is not entitled to have this money paid out until the appeal to the Supreme Court is dismissed. Besides by the judgment of the Court of Appeal, the question of the costs of the Court below is reserved.

Gamble, in reply: The money was paid into Court in lieu of giving the bond required by the Appeal Act. Now, if that bond *had* been given, the plaintiff having succeeded in the appeal, the condition of the bond would have been now fulfilled, and even if the defendants should succeed in this appeal to the Supreme Court, they could not have recovered on the bond. The defendant Irish, is not now entitled to be paid his costs, the question of the costs having been reserved until after the taking of the accounts in the Master's Office. Consequently, the plaintiff has as much right to ask security as against Irish, as Irish has to ask it as against him. He cited *Lindsay Pet. Co.* v. *Hurd*, 3 Chy. Ch. 16, and the judgment of Spragge, C. in *Billington* v. *Prov. Ins. Co.* not yet reported, and referred to R.S.O. c. 38, sec. 27, subs.4.

The REFEREE granted the order with costs.

ST. MICHAEL'S COLLEGE V. MERRICK.

Appeal from certificate of taxation—Proper time for appealing.

Where costs have been taxed and the amount entered in an order, an appeal from the taxation must be disposed of before the issue of the order, otherwise it is too late.

[Blake, V. C.—Feb. 24, 1879.

The plaintiffs appealed from the certificate of taxation of the costs of one of the defendants. The judge's order directing payment by the plaintiffs of the said costs as taxed had been issued.

Bain, for the defendant. The appeal should have been brought before the final issue of the order, which would on proper

application have been delayed for that purpose. The present application must of necessity be in the nature of a rehearing of the original order, otherwise two inconsistent orders would stand.

Donovan, contra.

Blake, V. C., sustained the objection and dismissed the appeal holding as above.

Appeal dismissed.

MASTER'S OFFICE.

McDearmid v. McDearmid.

Conveyancing — Release of dower to tenants in Common—Accrual.

Where a widow purported to release "All my dower . . . in, to, out of all that certain . . . lot" to two of more tenants in common, *Held*: (1) her dower was gone in the whole lot; (2) there was no accrual in favour of the other tenants in common.

[Mr. Taylor.—Dec. 9, 1878.

This was a partition suit. The widow claimed dower, and the question arose in the Master's Office as to what was the legal effect of a certain quit claim deed, dated January 8, 1869, by which J. McD., the widow, released as follows: "I . . . quit claim unto the said Donald McD. and Malcolm McD. their heirs executors and administrators all my dower or right or title to dower and arrearages of dower which I now have or can or may hereafter have or claim in to out of all that certain parcel or tract of land and premises . . . containing . . . 200 acres . . . and being composed of lot 31." Besides Donald and Malcolm there were four other persons entitled to shares in the land, subject to J. McD.'s right of dower, as tenants in common. Malcolm's interest had become vested in one Currie, and there had been divers cross conveyances between the parties.

Foster, for plaintiff: The widow cannot claim against the persons to whom she released. They were tenants in common, and have undivided shares; therefore her dower is gone in the whole. Or, if her claim is merely right of action, it is gone, and the result is the same. Donald has parted with his interest, and his grantee has a right to share in the dower.

Seton Gordon, for Currie: Dower can be assigned in equity, though not in law. The release does not speak of releasing the shares of the grantees, but all dower. A release to some tenants in common accrues to the benefit of all.

Hoyles, for Malcolm: The parties here are not joint-tenants, but only tenants in common, therefore there is no such accrual. Donald and Malcolm can claim to have the dower assigned to them. A stranger could have done so, therefore so can they. They are strangers to the estates of the other tenants in common. The quit claim deed is sufficient to pass a fee. He cited various authorities.

Foster, in reply: If Malcolm as assignee make a claim, and some of the parties were ready to assign to the widow her portion, out of what part of the land would she take it, the shares being undivided?

The Master: In my opinion, the effect of the release and quit claim deed of Jan. 8th, 1869, executed by J. McD., was to give her two sons, Donald and Malcolm, all her right to dower in the 200 acre lot. Then Donald conveyed to Malcolm all his interest in the east half, and Malcolm conveyed to Donald all his interest in the west half, so that Malcolm then owned his mother's life estate as doweress on the east half, and he was also entitled, subject to that life estate, to 2-11ths, and Donald had the same interest in the west half. By several mesne conveyances the interest Malcolm had in the east half is now vested in Currie, who is entitled thereto, including the widow's dower in that half, and to the shares which he has acquired from some of the other members of the family. The interest Donald had in the west half is now vested in Malcolm, who is similarly entitled.

Darling v. Darling: Re Rossas' claim.

Practice—Administration suit—Impeaching an instrument in the M.O. for fraud—Practice in such cases—G. O. 60.

Held, (1) An instrument may be impeached in the Master's Office for fraud, where the question legitimately emerges during a reference. (2) This may be done, though an executor be thereby delayed in passing his accounts, where the question raised affects the accounts, and where, moreover, the executor is charged with participation

in the fraud. (3) This may be done where the question of fraud is raised by persons served with copy of decree under G. O. 60.

[Mr. Taylor—Nov. 19, 1878.

This was an administration suit, and the following matter came up upon the proceedings in the Master's Office on the accounts of the executor, W. Darling. The point concerned the payment of a certain legacy and annuity under the will to Madame Rossa, a lady resident in Naples, to which legacy and annuity she had filed a claim. The executor contended that by a written instrument signed in 1859 Madame R. had renounced all benefits under the will on condition of receiving thirty ducats a month for life, and he said that the remainder of the said annuity had been paid to or expended for the benefit of one Herbert Darling, who by the will was to receive the corpus of the annuity after death of Madame R.

Bethune, Q.C., asked that Madame R. be made a party and proposed to impeach the settlement of 1859 on grounds of fraud and mistake.

Bain, contra, contended that an instrument cannot be impeached on grounds of fraud in the Master's Office.

The MASTER ruled that the question can be raised in the Master's Office. *McDonald* v. *Wright*, 12 Gr. 552, is directly in point. For this purpose a statement should be filed setting out the grounds upon which the settlement is impeached. It can then be decided whether the proceeding should be disposed of here or a bill directed to be filed.

A statement having been filed, the latter question came up for decision.

Bain (1) Onus rests on claimant to show that the executor can be called upon to answer her claim. (2) The executor is not directly interested. The chief question here is one of accounting, and he should not be harassed by proceedings to set this settlement aside. (3) Herbert and Madame R., though they have appeared and have consented to be bound by the Decree as though served under G. O. 60, are not parties for all purposes. (4) This is going further than *McDonald* v. *Wright*. (5) There has been more than twenty years' delay. (6) Fraud should be raised before the Court, not in Master's Office. (7) A commission to Italy should be necessary.

Moss, contra. (1) The executor represents all parties. (2) He is directly interested, and it was he who instigated the settlement. (3) Whenever any objection arises incidentally the Master has to dispose of it: *Buckland* v. *Rose*, 7 Gr. 440, *Dewar* v. *Sparling*, 18 Gr. 633, *Kersten* v. *Tane*, 22 Gr. 547. There is no reason against the Master proceeding. (4) Here the claimant, Madame R., has been brought in, and the Master must ascertain the rights of the parties and of the claimant if she has any. (5) If the arrangement is for the benefit of the estate, the executor is bound to contest the claim now made, and the Master cannot cast the matter on the Court.

Bain, in reply. The executor does not represent Herbert, who alone gets the benefit of what Madame R. gave up; and so he has no interest, and this suit should not be left hanging over him. If the Master finds Madame R. entitled to anything it can only be thirty ducats a month until the release is set aside.

THE MASTER held that, although it was necessary to consider and decide upon the agreement of 1859, this was no reason for refusing to entertain the claim of Madame R. He said:—"There may be cases when on a question raised in the Master's Office it would be proper for the Master to say a Bill must be filed and the question disposed of by the Court, but such cases must be very rare indeed. No question is raised here more important or more difficult than the questions raised there every day. The tendency of the practice and the object of numerous general orders passed during late years have been to extend the powers of the Masters and to enable and indeed require them to dispose of all matters which legitimately emerge during the progress of a reference pending before them. The question raised here has done so. Under the decree I am to take an account of the dealings of the Defendant William Darling with the estate of the testator. I have to

ascertain what payments he has made and whether these have been made to the proper persons. I have also to enquire who are the persons entitled to share in the real and personal estate of the testator, and in what proportions respectively. How can I make these enquiries and report on them to the Court without entertaining and disposing of the questions raised here?

It is said, however, that William Darling is here accounting for his dealings with the estate, and that he should not be delayed or hampered in doing so by this contention which is really one between two of the parties interested, and not between the executor and any other parties.

There may be cases in which an executor may be entitled to say that the passing of his accounts should not wait until all the questions arising in the suit are disposed of, and may claim to have a special report made as to the matters in which he is interested.

Here, however, he seems to have an interest in the question raised, upon the disposition of which his accounts may depend. The claimant by the agreement, the validity of which is now questioned, gave up out of the £100 to which she was duly entitled the sum of £25 in favour of Herbert Darling, and of the remaining £75 she gave up all but twenty ducats, or, in the event of her marrying, thirty ducats a-month to the executor, to make such use of it as he should in his conscience think most in accordance with the intention of the testator.

Besides, she alleges that it was the executor who formed the design of depriving her of the benefits conferred upon her by the will, and that he procured his father William Darling the elder to induce her to forego this; and that William Darling the eldor was, in fact, only the agent of the executor, and as such, made the representations and statements by which she was deceived and induced to make the agreement which she did.

The claimant may or she may not be able to prove these allegations. She may be unable to shew that any imposition was practised upon her, or any undue influence used; but, in the meantime, the claim as presented is such as to call for an answer from the executor.

The objection that neither the claimant nor Herbert Darling are parties to the suit is not a reason for refusing to entertain the claim, or requiring a bill to be filed. They are both persons who should be served under G. O. 60, and both have, without being served, appeared by their solicitors, waived service of process, and consented to be bound by the decree as if served.

That the persons to whom G. O. 60 applies are not now, as formerly, made parties in the first instance, is, as I understand it, simply to lessen the costs. Such persons, when they have been served, may, under the terms of the order, upon notice to the plaintiff, attend the proceedings under the decree, although they may not in every case get allowed the costs of doing so.

Now, for what purpose are they allowed to attend the proceedings under the decree if not to watch them, and take part in them, and to raise any questions necessary for protecting their interests, or securing their rights? Here the claimant is before the Court, the question raised is one which materially affects her interest, and I am bound to entertain and dispose of it.

The defendants, William Darling and Herbert Darling, should therefore file such statement or answer to the claim as they may be advised within a limited time. For this purpose, I think, twenty-one days should be sufficient.

IN THE COUNTY COURT OF THE COUNTY OF SIMCOE.

O'Neill v. Small and Sheriff.

Chattel Mortgage.

Where the payments to be made on a chattel mortgage extend over a year from its date, it is void as contrary to the policy of the Act respecting Chattel Mortgages.

[Jan. 11, 1879.—Gowan, Co. J.

This was an interpleader issue. The goods were seized under an execution, in favour of the defendants, against one Elizabeth Sullivan, a daughter of the plaintiff. The plaintiff's claim was founded on a chattel mortgage from Elizabeth Sullivan, dated 3rd January, 1878, and duly registered, containing the proviso, that if the mortgagor

paid $440.00, with interest at 6 per cent. from the 13th August, 1877, in quarterly payments in two years, from the 13th August, 1877, the instrument should be void.

The case was tried before His Honour Judge Gowan, without a jury, at the December sittings of the County Court, at Barrie.

O'Sullivan, for the defendant, contended that the mortgage was void, because: (1) It was to run over two years and a half, in respect of payment, which was contrary to the policy of the Act; inasmuch, as, by the Act, a mortgage is valid for only a year: *Beaty* v. *Fowler*, 10 U. C. R., 382. (2) This mortgage anticipated renewal, and yet renewal cannot be anticipated by a day. (3) Under sec. 6 of the Act, mortgages are expressly limited to a year, and *a fortiori* in this case, where there was present indebtedness, and no renewal was contemplated. (4) In sec. 2 there is language to show that the Legislature contemplated the money being "due or accruing due" at the time the affidavit of the mortgage was made. This is before any reference was made to a renewal, and could only refer to the mortgage money, "the sum mentioned in the mortgage."

Strathy, for the plaintiff. (1) A chattel mortgage for over a year is perfectly valid at Common Law, and this mortgage as *between the parties* could not be impeached. If such an instrument is rendered invalid by the Act, it can only be by express enactment or clear implication. (2) This chattel mortgage, if within the Act at all, is a mortgage within sec. 1. Everything required by that and the following sections was done, so that sec. 4 does not make the mortgage invalid. The only other section affecting the validity of such mortgage is sec. 10, but as the instrument has not run a year, that section could not make it void. (3) If it is urged that the chattel mortgage Act contemplates that no chattel mortgage shall extend over a year—and sec. 6 (which, however, does not affect such a mortgage as this) does certainly make a provision to that effect, and (see *Kough* v. *Price*, 27 C.P. 309), then this instrument is quite outside of the Act; and if so, the Common Law rules as to its construction must obtain: *Patterson* v. *Maughan*, 39 U.C.R. 371, at p. 379.

The learned Judge thought the mortgage void, on the grounds submitted, and entered a verdict in favour of the defendant.

In the following term,

Strathy, for plaintiff, moved for a *rule nisi* to set aside the verdict for defendants, and enter a verdict for the plaintiff.

Gowan, Co. J., in giving judgment, said in substance:—As the point was a new and important one, and as the intention is, I understand, to take the case to the Court of Appeal, it will save needless cost if I refuse a *rule nisi*, which I do, for I still think the objections taken at the trial good, and that the mortgage is void; what struck me more particularly in the points put forward on behalf of the defendant, contending that the payment running for a period of two years the mortgage was void under the statute; was that, as the security afforded by the mortgage under the Act "ceases to be valid" at the end of a year from its date, it could not at its inception be made security for more than a year, though a renewal of the security (from year to year it may be) is contemplated by the Act. A renewal may be effected as provided, but anticipation of that renewal is contrary to the policy of the law—it could never have been intended by the Act that a debtor should be able to lock up his chattel property from year to year or for an indefinite time. Sec. 6 relating to future advances and promissory notes restricts to a year for payment, and I quite think that the restriction in sec. 6 was to bring the security in conformity with the general terms of the Act and make it an annual security.

Rule refused.

NOVA SCOTIA REPORTS.

SUPERIOR COURT.

(*Before* DesBarres, McDonald, Smith, *and* Weatherbe, J. J.)

In Re Leake v. Laidlaw, Insolvents.

Insolvent Act—Statute of Limitations.

A claim less than six years old at the date of a writ of attachment is not barred by the Statute of Limitations because the six years expire before the declaration of a dividend.

[Halifax, Jan. 9, 1879.

In this cause, the claimant Yorke filed a claim against John Leake, one of the partners of the firm of Leake & Laidlaw, against whom a writ of attachment had been issued under the Insolvent Act of 1875. The claim was collocated on the dividend sheet of the partnership estate, and Chesley on behalf of the claimant or his assignee applied to have a separate dividend sheet of the private estate of John Leake prepared, and that this claim should be placed upon such separate dividend sheet. After this the Inspectors objected to the claim *in toto* on the ground, among others, that the debt was barred by the Statute of Limitations.

The Judge below (Judge Morse, of the County Court, District No. 5) held, although the debt was not barred by the Statute at the time of the assignment, that it became so before the declaration of the dividend, and as there were no other private claimants, he refused to order the preparation of a separate dividend sheet. From this decision, and the two orders founded upon it, an appeal was taken.

S. A. Chesley, for claimant, contended that the assignee took possession of the estate in trust for the creditors, and that the Statute of Limitations did not run against a trust; that the claim, not being barred by the Statute at the time of the assignment, must be allowed to rank on the estate, citing sec. 80 of the Insolvent Act of of 1875, and 2 Glyma and Jameson, 46, and 330.

Motton, Q.C., contra, contended that the Statute having commenced to run against the claim, was not barred by the assignment, and could not be suspended by any causes other than those set out in the Statute of Limitations itself, or express enactment in the Insolvent Act.

C. A. V.

DesBarres, J., delivered the judgment of the Court.

In the matter before us yesterday, we have all turned our attention to the question raised, and, as the counsel must have observed yesterday, there was a pretty strong opinion among us that the Judge had taken an erroneous view of the matter. It is hardly to be wondered at that he should have done so, not having had any authorities to assist him in forming his judgment. The strong impression we had yesterday has been confirmed by looking at the cases since. We think it would be monstrous if, in a case like this, a plea of the Statute of Limitations could be set up, and we are disposed to act upon our impression, and decide accordingly.

CORRESPONDENCE.

Appointment of Q. C.'s and J. P.'s.

To the Editor of Canada Law Journal.

Sir,—No lawyer acquainted with the subject of the Royal prerogative as connected with the working of our present constitution, can be surprised at the recent utterances of the Supreme Court of Canada on the attempted appointment of Queen's Counsel by the Local Governments. It is a mystery to most of the *profanum vulgus* who accept, it is to be hoped, with profound reverence the ordinary deliverances of those High Priests of Law who speak ex cathedra in our Provincial Temple, how they ever were brought to pronounce that the power rested in both Dominion and local Governments, and that an Act of the local Legislature could avail to transfer a prerogative like the appointment of Queen's Counsel from its royal source to an artificial reservoir. If the authority to make such appointments rests anywhere in Canada, it can be nowhere else than with Her Majesty's directly commissioned representative, the Governor-General. If any legislative authority in this Dominion can deal with

matters appertaining to the exercise of the prerogative, it can only be the Parliament of which that exalted personage is a constituent part. It does not follow that the Lieutenant-Governor is not in some very important matters, and in a very dignified sense, the Representative of the Crown within the Province; and that he may not have his prerogatives, *quasi* royal ones, some of them, in his subordinate sphere of authority. In minor matters, and more limited spheres, Clerks of Courts, Sheriffs, and other public officers, in a sense, represent the Crown. Even the petty peace officer, when he executes his warrant, arrests his prisoner "in the Queen's name."

But it seems most strangely to have escaped general attention the last eleven years that the same principle which governs the appointment of Queen's Counsel applies equally to Justices of the Peace, whose appointment is the peculiar prerogative of the Crown. Indeed, the application is more plain and obvious in their case, because it was by virtue of the Royal Commission that our Governors, before Confederation, appointed those officers. I do not yet know the terms of the present Governor-General's Commission, but I know that the Commission of a former Governor-General expressly authorized him to appoint Justices of the Peace and Coroners throughout the Dominion. I think it was Mr. (now Judge) Savery, when a member of Parliament from Nova Scotia, who called the attention of the Government to this part of the royal instructions, and inquired if it was the intention of Ministers to advise His Excellency to act upon it. From the report of a discussion that took place, it seems to have been conceded by many lawyers who ought to have known better, that if the local Governments had not the power, the local Legislatures could give it to them; as if those Legislatures could legislate away from Her Majesty's Representative any portion of the authority with which she had been graciously pleased to clothe him. One Maritime Province acted on the suggestion: (*See* Rev. Stat. N. B., ch. 29 p. 208) the Government of another, without even that pretext, coolly usurped the authority, and a sorry mess has been made of it! Why the average character of the appointments since 1867 has reduced a once venerated office to profound degradation; it was bad enough before, but every year since we have been taught that "beneath the lowest deep a lower deep still yawns." It is some solace to reflect that not one of these commissions is worth more than the ink it was written with. If it be not deemed desirable for the Dominion Government to make these appointments, Parliament (not the local Legislature) might *possibly* pass a valid enactment enabling the Governor-General to confer authority on the local Governors to make them subject to his ratification in each case, or to nominate them for appointment by him. Or I might venture to suggest that the Governor-General might have a "power of substitution" in these matters enabling him to delegate the authority to the local Governors. This, of course, depends upon Her Majesty's royal will and pleasure which might be invoked by an humble address of Parliament, praying her so to act. And if there be a doubt as to the authority of the Governor-General to appoint Queen's Counsel, Her Majesty might, in the same way, be induced graciously to confer upon him that authority, and included in the commission and instructions to his successors, but without such power of delegation. Then a judicious and careful selection might be made from our Bar, including, especially, those whom our local Government sought to honour, while they degraded the office. But among these, the stripling who has not won his spurs would step back into the ranks and bide his time; the man whose unprofessional practices render his society loathsome to his fellow-barristers would no longer take precedence of the upright and worthy; and the dissolute and abandoned would no longer carry his Q.C. into the haunts of prostitution, and trail the silk robe in the mire of profligacy and vice.

Yours, &c.,

Lex.

Nova Scotia, Feby., 1879.

[Whilst we do not pretend to have any knowledge of the character or fitness of the

gentlemen appointed by the local governments and above referred to, we do not feel justified in refusing to publish the letter of our esteemed correspondent. The subject is in itself a very important one; but we do not at present propose to discuss it, inasmuch as the question of jurisdiction spoken of is still before the Supreme Court. We shall, however, return to the subject again. Eds. L. J.]

Married Woman's Act.

To the Editor of The Law Journal:

Sir,—Notwithstanding an expression of his Lordship, Mr. Justice Patterson, in his well-considered judgment in *Standard Bank* v. *Boulton*, 3 App. R. 101, intimating that real estate acquired after the date of the passing of the Married Woman's Act of 1872, by a woman married before that Act took effect is such separate estate as can be bound by her contracts. The writer ventures to submit that such a construction of the Married Woman's Act now in force (cap. 125, R. S. O.) would not be correct. There can be no doubt but that such was the effect of the Act in question before the Revised Statutes of Ontario took effect (January 1, 1878), as is clearly laid down in *Adams* v. *Loomis*, 22 Grant, 99, and 24 Grant, 248; but the writer submits that this can be no longer law.

A perusal of sec. 1, cap. 16, 35 Vict. (Ont.) and of sec. 4, cap. 125 R. S. O., will at once indicate the great change in the Act as consolidated, which change was in effect made by cap. 7, 40 Vict. Schedule A (156). The Act as consolidated, and now in force, enacts that the *date of marriage* determines the powers a married woman shall have over *her real estate*. A woman married between the 5th day of May, 1859, and the 2nd day of March, 1872, has, during such marriage, over her real estate, no matter when acquired, merely the *jus prolegendi*, and cannot bind such real estate by her contracts—See section 3 of the Act as revised. A married woman after that date has, during marriage, all the powers of a *feme sole* over her real estate, and can bind it by her contracts made with reference to it—See section 4 of the revised Act. Probably no Statute passed in this Province has given rise to so much litigation as the Acts relating to married women, owing, probably, to the fact that the Legislature desired to protect her estate and extend her powers over it, but did not correctly appreciate how this should be accomplished.

The writer thinks that the Statute—as now revised—interfering with no vested rights, is less open to objection than the Act of 1872. At present, a husband married before the 2nd March, 1872, is not deprived of his tenancy by curtesy, no matter when his wife acquires her real estate; but such was not the law—see *Adams* v. *Loomis*—prior to the revised Act. It certainly was hardly fair that a husband who married before 1872 should be deprived of his estate in his wife's lands which previously he had, no matter when such lands were acquired, on birth of issue of the marriage. This anomaly no longer exists.

Solicitor.

Chancery Briefs.

To the Editor of Canada Law Journal:

Sir,—In the March number of the Law Journal, you refer once more to the annoyance and inconvenience suffered by the Judges from the omission of dates of pleadings in Chancery Briefs. I venture to suggest a simple, and I believe efficacious, remedy.

Let the Chancery practice follow that of the Common Law, and direct that every pleading shall bear date on the day it is filed—(see Rev. Stat. Ont., cap. 50, s. 88). The date should be inserted on the line immediately above the first paragraph of the Bill or Answer; then the copying clerk will find the date on the face of the document he is copying into the Brief, and he will no more omit the date in a Chancery Brief than he would in a Common Law Brief or Record. The difficulty now is, that the copying clerk, in order to get at the date of the filing, has to refer either to some other document, or perhaps to some memo. at the foot of or endorsed on the pleading, and that is an amount of care and attention which it is hopeless to expect.

Yours truly,

A. B. C.

Hamilton, 7th March, 1879.

Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 42nd VICTORIÆ.

During this Term, the following gentlemen were called to the Bar :—

William Egerton Perdue.
Elgin Schoff.
James Haverson.
John Cowan.
Ernest Henry Eden Eddis.
Edward Sydney Smith.
John Gilbert Gordon.
Joseph Alfred Wright.
Chester Glass.
Peter Vances Georgen.
James Pearson.
John Bishop.
Frederick William Barrett.
Thomas William Howard.
Daniel Bayarde Dingman.
John Inkerman MacCraken.
James Dowdall.
John Hodgins.
Reginald Gourlay.

And as special cases under 39 Vic. cap. 31 :—

John MacGregor.
William Jex.
Charles McMichael.

And the following gentlemen were admitted as Students-at-Law and Articled Clerks :—

Graduates.

Villeroi Switzer.
Henry Lincoln Rice.

Matriculants.

John Percy Lawless.
Thomas Hadzor Marshall.
Richard Henry Hubbs.
John Robertson Miller.
N. H. Beemer.

Juniors.

Stephen Frederick Washington.
William John Northwood.
John Graham Forgie.
Samuel Thomas Scilly.
Daniel Urquhart.
Levi Thompson.
Denis Joseph Mungovan.
Thomas B. Shoebotham.
Thomas Young Cain.
William Dickinson Farrell McIntosh.
John Dick Hepburn.
David Kirkpatrick J. McKinnon.
David Thorburn Symons.
James Bicknell.
Arthur Wellington Burk.
Lesslie Livingston Jackson.
Charles Creighton Ross.
Arthur Eugene Fitch.
Matthew Elliott Mitchell.
Robert Notman Ball.
George F. Cairns.
James Sidney Garvin.
Gerald Bolster.
Robert Christie.
Noble A. Bartlett.
Arthur Fred. James Spencer.
William Gilbert Macdonald.
Arthur William Johnson.

Articled Clerks.

William Henry Gordon.
Herbert Henry Bolton.
George Holmes Anderson.
Harold Victor Bray.
Edwin Duncan Cameron.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW 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.

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 — North America and Europe.
Elements of Book-keeping.

Students-at-Law.

Classics.

1879 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.

1879 { Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Eclog. I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1880 { Xenophon, Anabasis. B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

Translation from English into Latin Prose.

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

Mathematics.

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

English.

A paper on English Grammar.

Composition.

Critical analysis of a selected poem:—

1879.—Paradise Lost, Bb. I. and II.

1880.—Elegy in a Country Churchyard and The Traveller.

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

History and Geography.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects instead of Greek.

French.

A Paper on Grammar.

Translation from English into French Prose—

1878 and 1880 } Souvestre, Un philosophe sous les toits.

1879 and 1881 } Emile de Bonnechose, Lazare Hoche.

or German.

A Paper on Grammar.

Musaeus, Stumme Liebe.

1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.

1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer. / Die Kraniche des Ibycus.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the Final Examination, shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C.S.U.C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic, c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

For Call.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

For Call, with Honours.

For Call, with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

For Certificate of Fitness.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

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

SCHOLARSHIPS.

1st Year. — Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings Equity Pleading and Practice in this Province.

The Law Society Matriculation Examinations for the admission of students-at-law in the Junio Class and articled clerks will be held in January and November of each year *only*.