Canada Law Journal.

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DIARY FOR NOVEMBER.

16. Wed.. Wilson, J. Q. B., & Gwynne, J. C. P. 1868. Final Exam. for Attorney.
17. Thur.. Final Examination for Call.
18. Fri.. Hagarty, C. J., sworn in C. J. of Q. B. Wilson, J. sworn in C. J. of C. P. 1878. Final Exam.
19. Sat..
20. Sun.. *23rd Sunday after Trinity.*
21. Mon.. Michaelmas Term begins.
25. Fri.. Lord Lorne, Governor-General of Canada, 1878.
27. Sun.. *Advent Sunday.* Cameron, M. C., sworn in Q. B. 1878.
28. Mon.
30. Wed.. Moss, J. appointed C. J. of Appeal, 1877.

TORONTO, NOV. 15, 1881.

The *Central Law Journal* has with commendable candour "taken back" some thoughtless remarks anent the prosecution of the wretched Guitteau, in which his guilt and the invalidity of his intended defence were taken for granted. Thanks partly to the views expressed by the leading legal periodicals in the United States, and partly to the fact that the country has had time to think the matter quietly over, there is every reason to believe the prisoner will have a fair trial. The way in which the bar, at least at first, refused to undertake his defence was far from creditable. In this also, should there be any necessity, a better feeling would now prevail.

It may be remembered that in the review of the Dominion Acts of last session, contained in our number for Oct. 15th, we called special attention to the fact that chap. 13 forms an exception to what Mr. Alpheus Todd states in his Parliamentary Government in the British colonies as to none of the Dominion Naturalization Acts containing provisions bearing on the "property and civil rights of aliens;" it having been hitherto considered that this falls within the exclusive powers of the provincial legislatures under sec. 92 of the B. N. A. Act, although sec. 91 empowers the Dominion Parliament exclusively to legislate upon "naturalization and aliens." We publish in this number a communication which Mr. Todd has been kind enough to send us, commenting upon our observations with reference to the above subject.

A correspondent, whose letter appears in another place, takes exception to the ruling of a County Judge who holds that the practice at Common Law should prevail rather than that in Chancery as to the examination of parties in County Court cases. We think the Judge was right. Sec. 17, sub-sec. 10 does not, it seems to us, apply to the case in point. The section is an enactment amending and declaring the law hereafter to be administered on certain matters therein set forth; the 10th sub-sec., therefore, refers to rules of law rather than to rules of practice. It may not always be easy to draw the line between "law" and "practice," but it seems sufficiently clear at least as to the subject under discussion that the section does not apply. There is no Common Law right to examine parties; the authority comes by statute, and the statute in point declares at what stage of the proceedings the examination may be had. This provision is made applicable to County Court cases, and without it there could be no examination at all.

De minimis non curat lex is a maxim which may possibly even yet have some meaning, but there are two points in connection with Osgoode Hall which, although some may

consider them small, are well worth the attention of the powers that be. In the first place we would suggest that some official about the building should receive instructions to throw open all the windows in the library, law courts and passages in the building, every evening. The atmosphere would then be fresh and sweet by morning, and would scarcely have time to become so positively foul as it often does become at an early period in the day. In the second place, it is surely time that the Library Committee, or whoever the proper authorities are, should cease to labour under the suspicion of conspiring deliberately to destroy the eyesight of those members of the profession who have occasion to read or write in the library after 3.30 p.m., at this time of year. A long tube with a circle of gas jets coming down from the ceiling over the centre of each table—or a moderator lamp placed on each table, as soon as it commences to get dark, would remove what at present is a really serious grievance.

WE have received a fresh batch of our far-away contemporary, the *Australian Law Times*. From it we learn, amongst other things, that a bill has been introduced by a member of the Legislature at Melbourne, having in view the amalgamation of the two branches of the legal profession. Conveyancing in that happy country appears to be, as it ought to be, entirely in the hands of the legal profession. An application was made to Mr. Justice Higinbotham in Chambers, on behalf of the Law Institute of Victoria, for an attachment against two persons composing a firm of Land and Estate Agents for contempt of Court in preparing a deed relating to land, "they not being barristers, attorneys, solicitors or conveyancers." The defence was that although the agents had prepared the deed, they had subsequently paid a solicitor for revising it. His Lordship, however, declined to accept the excuse, and issued the attachment, which, however, was subsequently rescinded, the full Court not considering the evidence sufficient. The judges, at the same time, expressed their opinion that the circumstances were suspicious, and urged the impropriety of allowing any tampering with the safeguards provided for the public by the Conveyancing Act.

Will such a legal millennium ever arrive in this part of that Empire on which the sun never sets? Our circumstances are almost identical, but here, after, as it were, buying a profession, the law allows us to be robbed of our purchase by every impudent quack that has mastered the three great R's.

As to the nature of a defence in criminal cases, on the ground of insanity, since the murder of Mr. Garfield, volumes have been written. A recent article in the *International Review* has some sensible observations on the subject. We make an extract:—

"An individual may be medically insane and yet not a lunatic in a legal sense. His brain is diseased, either temporarily or permanently his mind is not in all respects normal in its action, and yet he is responsible for his acts. . . . While a knowledge of right and wrong can never be properly regarded as a test of insanity, it is a test of responsibility; and by knowledge of right and wrong is not meant the moral knowledge that a particular act would be intrinsically right or wrong—in other words, a sin—but that it would be contrary to law. In reality, however, the individual may not even have this knowledge; but he must have, in order to make him responsible, the mental capacity to have it. For ignorance is no excuse, and the safety of society imperatively requires that all should take means to make themselves acquainted with the laws of the land in which they live. Now, any individual having the mental capacity to know that an act which he contemplates is contrary to law, should be deemed legally responsible, and should suffer punishment. He possesses what Bain calls 'punishability.' If he does not possess this

capacity, then he ought not to be allowed to go at large; for he is a greater enemy to society than one who, with evil intent, has nevertheless sufficient reason to guide him. . . . . The question, therefore, in the case of a criminal, should not be, 'Is he insane?' but, 'Is he responsible?" When this change is effected, we shall hear very little about disagreement between medical experts and jurists relating to who should, and who should not be punished. And again no degree of insanity should absolve a criminal from the minimum amount of punishment that may be necessary to protect society against him and others like him. When there is less morbid sentimentality relative to the rights of certain kinds of lunatics, who are no better than wild beasts, we shall have fewer outrages to record, and few monsters in human form to perpetrate them."

The session of the Social Science Congress, which opened on Oct. 3rd ult., at the Exhibition Hall, Dublin, does not seem to have furnished much of special interest. The address of Lord O'Hagan, the President, related chiefly to the recent beneficial changes in the law of practice and procedure in Ireland. With reference to the recent abuses of the jury system in that country, he justly observes that it would be very unreasonable to form an adverse judgment as to the permanent action of a just principle, because, from a passing disturbance of the general mind, its application may have produced a temporary mischief. The section of jurisprudence and amendment of the law was opened by Dr. Ball, ex-Lord Chancellor of Ireland. He first mentioned the subjects set for discussion, which were :—

"1. Is it desirable that there should be periodical meetings of representatives of various States, to which all disputed international questions should be referred? 2. Should the procedure on private bill legislation in reference to local improvements be amended so as to facilitate inquiries on the spot by Parliamentary committees or otherwise? 3. Are any, and what, alterations in the jury laws desirable?"

The first he answered in the affirmative, citing a passage in support of his view from the celebrated treatise of Grotius, which first reduced the law of nations to a system. With regard to the second he expressed an opinion that, when the matter is minutely examined, there will be found a range of subjects, of lesser magnitude, over which central control is not so much needed, and as to which Parliament might safely delegate jurisdiction. On the third subject, which seems to be exciting so much discussion in many quarters, and on which Mr. Justice Cameron made some interesting and impressive remarks in his recent charge to the Grand Jury at the opening of the York Criminal Assizes, Lord O'Hagan spoke as follows :—

"The questions which arise in connection with the jury system as existing in England and Ireland seem to be principally in reference to the qualification of jurors, and the obligation of unanimity in order to a verdict. How far beyond the effect of a fixed qualification in limiting the number and securing the requisite fitness for discharge of their duty selection may be applied, and whether in criminal cases there should not be some mode of correcting erroneous conclusions of the jury, as in civil there is, from the power vested in the Court of directing new trials, are also matters respecting which difference of opinion prevails among jurists. With respect to unanimity, there can be no question that it enforces careful examination and sifting of the evidence, and tends to give weight to the decision, and to produce acquiescence in it. If disagreement is revealed, the defeated party may be expected to cite the favourable suffrages of the minority, and to insist that their authority is equal to that of the majority; while the external public will most probably regard the whole proceeding as infected with doubt and uncertainty. In criminal cases, the disclosure of the disagreement would place the members favourable to conviction in an invidious position; and this would particularly apply to trials of political offences. It would also embarrass the judge when awarding punishment, and the Executive Government afterwards in resisting applications for its remission. These considerations seem decisive,

if not in favour of absolute unanimity, certainly of requiring a considerable preponderance, in order to authorize a verdict to be received, so that the decision would have to encounter the dissent of merely a trifling minority. Forces entirely out of present calculation may disturb the social system. They may even be of such a character that the community has no resource except in a temporary suspension of privileges which, abused in their exercises, cannot otherwise ultimately be preserved."

This address was followed by a paper by Mr. Joseph Brown, Q.C., also on the subject of proposed alterations in the jury laws. He advocated majority verdicts, and the raising of the rating qualifications so as to exclude the less educated classes. With regards to the former he stated a fact of which we were not aware, that *most of the British Colonies* have reduced the number of a jury and adopted the verdict of a fixed majority, and have found the change satisfactory after many years' trial.

LEGAL PROCEDURE IN ENGLAND.

The report of the Committee on Legal Procedure, appointed by the Lord Chancellor of England in January, has now been published, and will be found in the Weekly Notes for October 15th. The Committee represented all branches of the profession, its members being Lord Chief-Justice Coleridge, the late Lord Justice James, Sir James Hannen, Mr. Justice Bowen, Lord Shand, the Attorney-General, the Solicitor-General, Mr. (now Mr. Justice) J. C. Mathew, Mr. R. T. Reid, Mr. John Hollams, and Mr. Charles Harrison. At this time, when the fervour for the reform of legal procedure is strong in the land, the Report will be read with great interest. It is carefully reviewed by our excellent contemporary the *Irish Law Times*, in its issue for October 15th. The article is too long to reproduce in full, but we shall make free use of it.

In the first place, then, the Committee have decided, after an examination of the Judicial statistics for 1879, that the writ of summons in its present form is effective in bringing defendants to a settlement at a small cost, and that it is inadvisable to make any alteration by uniting with it a plaint or other statement of the plaintiff's cause of action, which would add to the cost of the first step in the litigation.

The Committee had next to consider how far it was possible, in those cases in which litigation was continued after the appearance of the defendant, to adopt a procedure (1) for ascertaining the cases in which there is a real controversy between the parties; (2) for diminishing the cost of litigation in cases which are fought out to judgment. They arrived at the opinion that, as a general rule, the questions in controversy between litigants may be ascertained without pleadings. And accordingly it was resolved that the defendant shall, within, say 10 days after appearance, give notice of any special defences—such as fraud, the Statute of Limitations, payment, &c.; after which the plaintiff shall give notice of any special matter by way of reply on which he intends to rely; and that no pleadings shall be allowed unless by order of a Judge.

The effect of the rest of the Report is thus given by the *Irish Law Times*:

"Their next recommendation is that every action shall be assigned to a particular Master's list; and that at any time after the writ, appearance, and time for notice of defence, a summons for directions may be taken out by either party before the Master to whom the cause is assigned for directions as to any one or more of the following matters:—Further particulars of writ, further particulars of defence or reply, statement of special case, venue, discovery (including interrogatories), commissions, and examination of witnesses, mode of trial (including trial on motion for judgment and referenceof cause),and any other matter or proceeding in the action previous to trial. They, furthermore, distinctly approve of the happy-despatch style of procédure by 'omnibus' summonses,

for the existing practice of requiring a separate summons for each separate matter is to be discontinued; and upon any summons by either party, it shall be competent for the Judge or Master to make any order which may seem just at the instance of the other party. And any application which might have been made upon the summons for directions shall, if granted upon any subsequent application, be granted at the costs of the party so subsequently applying, unless the Master or Judge otherwise direct. Their next resolution is that discovery and interrogatories shall be limited to such discovery of documents or facts relating to any part of the matter in dispute as the Master shall order. The costs, unless otherwise ordered, shall be borne in the first instance by the party asking for discovery or interrogatories, and shall be allowed as part of his costs of suit, where, and where only such discovery or interrogatories shall appear to have been reasonably and usefully asked for. And with a view to diminishing the number of interlocutory appeals in matters of procedure, they resolve that the appeal from a Master shall be to a Judge in Chambers; and the appeal from a decision of a Judge at Chambers shall be to the Court in *Banc*, such appeal only to take place in cases of special difficulty and importance, when allowed by the Judge giving the decision, or with special leave of such Court. All motions by way of appeal from inferior Courts, applications to set aside awards, for attachments, *mandamus*, *quo warranto*, *scire facias*, to answer the matters of affidavits, to strike solicitors of the rolls, and for criminal informations are to be disposed of on notice of motion without any rule *nisi*.

"In the next place, they make the important recommendation that the mode of trial shall be by a Judge without a jury, but, on the summons for directions, on the application of either party, an order shall be made that the cause be tried by a jury, if it shall appear that the questions involved can conveniently be so tried; provided always that in the following cases the right of either party to a trial by jury shall be absolute—libel, slander, seduction, false imprisonment, malicious prosecution, breach of promise of marriage. And again, if it be made to appear to the Judge, at or after the trial of any case, that one of the parties was, a reasonable time before the trial, required in writing to admit any specific fact, and without reasonable cause refused to do so, the Judge should either disallow to such party, or order him to pay (as the case may be) the costs incurred in consequence of such refusal. * * And as to new trials it is resolved that, after the trial of any cause before a Judge and jury, the Judge may, upon application, certify that he is dissatisfied with the verdict, in which case a new trial shall take place unless the Court shall otherwise order. Neither party shall have a right to a new trial on the ground that some question has not been left to the jury which the Judge at the trial has not been asked to leave to the jury. The Court shall have power in such cases either to direct a new trial, or, with the view of saving a further trial, to draw all inferences of fact, or take further evidence, or direct inquiry. All applications for a new trial shall be by notice of motion, stating the grounds of application to the Court. Such applications shall be disposed of on the motion, without any rule *nisi*. And as to appeals the Committee resolve that all such from a Judge without a jury shall be to the Court of Appeal; and also where a Judge has directed a verdict for plaintiff or defendant; and the Court of Appeal shall thereupon have the power to dispose of the whole case. All applictions for a new trial in jury causes shall go to a Court in *Banc*, consisting of three Judges (of whom the Judge who tried the case shall not be one); the decision of this Court shall be final, except with their leave, or in case of difference of opinion, or where the subject matter of appeal exceeds £500. All appeals from the Court in *Banc* shall be to a Court of Appeal of not less than five Judges. And where a compulsory arbitration has been ordered, an appeal from the decision of the arbitrator shall be allowed on a question of law to the Court in *Banc*, whose decision shall be final except with their leave, or in case of difference of opinion, or where the subject matter of appeal exceeds £500.

"With respect to costs, the Committee recommend that there shall be a uniform scale and system in contentious business in all the divisions of the High Court."

Finally we may note that the Committee specially recommend that there shall be, as far as practicable, a uniform system of procedure in all the divisions, so that there shall be no inducement to bring actions, not

specially assigned, in one division rather than in another. In our review of Mr. Holmested's Manual of Practice in our last issue, we called attention to a similar suggestion made by him. The learned writer will be glad to see his views borne out by such high authorities.

RECENT DECISIONS.

The first case in the October number of the English Law Reports, Chancery Division, Vol. 17, p. 721-844 is *Nobel's Explosive Co.* v. *Jones, Scott and Co.*, which raises two somewhat novel and somewhat difficult questions in relation to the law of patents. These two questions are as follows: (1) Is the importation into England of a material manufactured abroad by a process patented in England, although for the purpose only of transhipment for exportation, and not for the purpose of having the material landed and stored in England, to be considered a continuing user in England of the invention, and hence an infringement? (2) Where the alleged infringers have acted merely as agents (*e.g.* as Custom House agents for an importing firm), and without having any personal interest, can they be held to have incurred any liability in respect to the infringement? The first question Bacon, V. C., decided in the affirmative on the authority of *Betts* v. *Neilson.* L. R. 3 Ch. 429, and because, having regard to the nature of the invention, and that its most essential quality was that it acquired for nitro-glycerine "the property of being in a high degree insensible to shocks," it appeared to him impossible to tranship or in any manner to handle or move the commodity made according to the invention without at the same time using the invention. It may be observed that the nature of the patented article in *Betts* v. *Neilson* was somewhat similar to the nature of the patented article in this case, and possibly the law in such cases may turn upon the nature of the patented article in each particular case: (see as to this *per* Baggallay, L. J. p. 744).

The second question Bacon, V. C., also decided in the affirmative. The learned V. C. grounded his views upon the law as laid down by Wood, V. C., in *Betts* v. *DeVitre*, 11 Jur. N. S. 9, 11, where he says: "This Court has always been in the habit of holding that anybody who takes part in a wrong of this description, is liable to be restrained from committing the wrong, and is answerable.' The Court of Appeal, however, over-ruled his decision as to this. James, L. J., says (p. 741): "Can anybody say that going to the Custom House and writing to the Custom House for Krebs & Co., (the importing firm) for a "warrant to discharge things from a ship into a barge is making the invention? Is it using it—is it exercising or vending it? . . . . A man who has no possession of the thing, and has no control over it, and who has no dominion or power to deal with it, to whom the safety or the want of safety is not of the slightest consequence, cannot be said to be using the invention; and that is the only way in which it could be said that these letters patent were infringed. . . . . . The Court of Chancery has always held a hand over agents, but then it appears to me they must be actually agents. They must be agents who are agents in the making, in the using, in the exercising, or in the vending of the invention. They must be actually agents whose agency is directly in the making, using, exercising, or vending." Baggallay, L. J. and Lush, L. J. concurred.

In *Re Gosman*, p. 771, Jessel, M. R. held that the Crown could not be charged with interest on the rents and profits received from the property of an intestate, while that property was in its possession, pending the establishment of their claim by the next of kin. "Interest," said he, "is only payable by statute or by contract."

A few pages on there come a succession of will cases. The first of these is *In re*

Lucas's will (p. 788), which forms a fresh illustration of what Malins, V. C., declares to be a rule of the Court, viz., that where there is a gift to a class of persons, with substitution to their issues in case of their dying—that means whether they are dead when the will is made, or die afterwards—the substituted class take in each case. *In re Potter's Trust*, L. R. 8 Eq. 52, was another case illustrating the same rule; and the present case decides that whether the testator did, or did not know that one of the class of persons was dead at the time the will was made, is immaterial. The next case, *Bland* v. *Dawes*, p. 794, decides that a legacy given to a married woman for her "sole use and disposal" vests in her as separate estate; thus agreeing with the decision in *Prichard* v. *Ames*, T & R. 222, where the words were "for her own use, and at her own disposal," and from these cases may be distinguished those in which the word "sole" is used alone, for the authorities (see per Malins, V. C. p. 797), show that this is not sufficient to confer separate estate.

The next case, *In re Hardy* (p. 798), is also a will case, involving two points (1) the testator having given to his wife "the legacy or sum of £500, which I demand to be paid to her *immediately* after my decease," it was held that this legacy to the wife had priority over all the other pecuniary legacies bequeathed in the will; and *Blower* v. *Morret*, 2 Ves. Sen. 420 was dissented from. "Where a man leaves money to be paid to his wife immediately," says the V. C., "she is not bound to wait until the executors can ascertain the state of the assets." (2) The testator having directed sums of £12,000 and £5,000 to be raised out of his estate, and invested in the securities therein mentioned, and the interest of the £12,000 to be paid to his wife during her life, and the interest of the £5,000 to be paid to his brother and sisters during their lives, and after the death of his wife, brother, and sisters, these sums to fall into the residue of the estate, and having then proceeded to give his brothers and sisters legacies of £6000 and £2000, and other small legacies, it was held the legacies of £12,000 and £5000 had priority over the other legacies. Malins, V C., in his judgment calls this second point one "of extreme nicety and doubt," but decided it in the above way on the ground that there was sufficient in the general frame of the will to reasonably satisfy his mind that the testator had intended to make and had made such a marked distinction between the legacies in which life interests only were given, and those in which the *corpus* was absolutely given, that the effect of the will was to give priority to the £12,000 and the £5000; and the two marks of this to which he specially alludes are (1) that the testator directed that on the £12,000 and on part of the £5000 interest should be paid to the respective beneficiaries *from the time of his decease;* and (2) that the testator directed the above sums *to be invested in a particular manner.*

The next case of *Havelock* v. *Havelock* at p. 807 requires some notice here, as being in the opinion of the V. C. "in its particular circumstances entirely novel." A testator left property to the value of £10,000 a year, to be *accumulated* for twenty-one years, and then held in trust for Sir H. Havelock, for life, with remainders over to his children in tail; and as Sir H. Havelock was possessed of a moderate income only, which was insufficient for the maintenance and education of his sons, to fit them for their prospective positions in life, Malin's, V.C., ordered that a sum of £2700 per annum should be allowed him for the benefit of the infants. He held the case to be in principle similar to that of *Bennett* v. *Wyndham*, 23 Beav. 521, 4 D. F. and J. 259, and referred to other cases as in substance authorities for the present decision. "It appears," said the V. C., p. 813, "that the testator was under the impression that Sir H. H. had a considerable fortune. I have no doubt of it, for it is the only way

you can account for his making his will in the terms he did, therefore I believe it would have been the intention of the testator, if his attention was called to the fact and he knew the true state of the facts, to have done what I am asked to do."

In re Pringle, p. 819, is another will case. A testatrix, by her will, after giving a pecuniary legacy and bequeathing furniture, leaseholds, and dock shares, gave "all the rest of her money, however invested," to her nephew, R. J. F. "under deduction of £50 to be paid to each of her executors." She then gave a number of specified articles, such as ornaments, plate, pictures, and house linen, to various other nephews and nieces, and appointed executors; and it was held by Hall, V. C., that the gift to R. J. F. was a general residuary gift, and included the furniture, leaseholds, and dock shares, the bequest of which had lapsed. The V. C. remarks, p. 823, that there is a difference in the judgments in *Lowe* v. *Thomas*, 5 D. M. & G., 315, before the Court of Appeal, and in *Stooke* v. *Stooke*, 35 Beav. 396 before the M. R. as to whether the fact of a specific gift coming after the gift to be continued must be held to show that the preceding gift could not have been meant to be residuary. He held there was sufficient in this will to enable him to hold that the above circumstance did not prevent he gift in question being residuary, for the gift of £50 was clearly demonstrative, and this being associated with or charged upon the gift of "all my moneys" appeared to show that the testatrix was there dealing "not merely with specific property, but also with that which affected and operated upon, or might operate upon, the general estate."

In the case of *Steel* v. *Dixon*, Fry, J., decided, upon principle, that a surety who has obtained from the principle debtor a counter-security for the liability which he has undertaken, is bound to bring into hotchpot, for the benefit of his co-sureties, whatever he receives from that source, even though he consented to be a surety only upon the terms of having the security, and the co-sureties were, when they entered into the contract of suretyship, ignorant of his agreement for security. He remarks, p. 831, that in coming to this conclusion he is much strengthened by American authorities to which he refers.

Lastly, *Partridge* v. *Baylis*, p. 835, is also a will case, in which a question arose as to the period of vesting of certain legacies. The decision, however, turned entirely upon the terms of the particular will, and the case does not call for any special notice here. This completes our reviews of the October number of the Law Reports, Chancery Division.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH.

Osler, J.] [Nov. 1.

JONES V. CANADA CENTRAL RAILWAY CO.

Railway debentures — B. N. A. Act—Ultra vires.

The plaintiff being holder of a debenture by the P. & O. R. Co., pursuant to 23 Vict. c. 109, put it in suit.

This company, by 27 Vict. c. 57, was empowered to issue preferential bonds and secure payments bv a mortgage to a trustee. 31 Vict. c. 44 (O), reciting the possession of the trustee and his being about to foreclose, directed the debentures to be changed into stock at so much in the dollar, and that holders should only claim on the company for conversion of the debentures into stock. An amalgamation took place under 41 Vict. c. 36 (C) between the B. & O. Co. and defendants, the latter holding that their liability on the debentures was cancelled by 31 Vict. c. 44 (O), and they were ready to accept the debentures in lieu of reduced stock. The third replication set up that the

Act was not binding, being a private Act, and plaintiff was not named in it, nor was he a petitioner, nor was he specially deprived of his rights thereby. Fourth replication—Act *ultra vires*, the debenture being payable in England, and was domiciliated there, and the holder resided there when Act passed.

Held, that the third replication was bad, for the Act included plaintiff, by referring to the class of holders to which he belonged.

Held, also, that the fourth replication was bad, as the Legislature was not confined by the words "property and civil rights in the Province," to legislation respecting bonds therein.

Watson, for demurrer.

MacKenzie, contra.

Osler, J.] [Nov. 5.

REGINA V. PALMER.

Liquor License Act—Extent of licensed premises.

Defendant had a license to vend liquor "in and upon the premises known as the Palmer House," which was situated on the fore portion of a lot belonging to defendant. The rear part of the lot was for several years enclosed and used as a fair ground, and within this defendant sold liquor and was convicted for so doing: *Held*, that the fair ground was not included in the license, and the conviction was upheld.

Fenton, for the Crown.

Murphy, contra.

[This case is similar in its general facts to *Reg.* v. *Fraser*, ante. p. 346 on which the appellant relied, but was successfully distinguished on some points.—EDS. C. L. J.]

CHANCERY.

Ferguson, J.] [Nov. 14.

WOLFFE V. HUGHES.

Practice—Setting aside judgment.

When a cause was called on for hearing, neither the defendant, nor any one on his behalf, appeared, by reason of which a judgment was pronounced in favour of the plaintiff. Subsequently the defendant applied for an order to set aside the judgment. The Court [FERGUSON, J.,] being satisfied that the absence of the defendant and his counsel was purely accidental, granted the order asked on payment of the full costs of the hearing including all reasonable disbursements to counsel, &c., together with the costs of the application. If this indulgence not accepted, subject to the terms proposed, the application to be refused with costs.

Spragge, C. J. O.] [Oct. 17.

MCARTHUR V. GILLIES.

Riparian owners—Water's edge—Boundaries—Obstructions to flow of water.

Although the rule is that the description of land situate on a stream, not navigable, the course of which goes to the water's edge or to the bank, carries the grant or conveyance to the thread of the stream and that the description continuing along the water's edge or bank will extend along the middle or thread of the stream, unless qualified by the context, still the grantee has no right by reason of such conveyance to erect any structure in the stream that may or can affect prejudicially the flow of the water, as regards the rights of other riparian owners.

Spragge. C. J. O.] [Oct. 17.

ARTLEY V. CURRY.

Boundaries—Original monuments—Surveys.

In questions relating to boundaries and descriptions of lands, the well-established rule is that the work on the ground governs, and it is only where the site of a monument on the ground is difficult of ascertainment that a sur-

veyor is authorized to apportion the quantities lying between two defined or known boundaries. Therefore, where the original monument or post planted as indicating that the north-west angle of a lot was situated at a distance of half a chain south therefrom, and another surveyor had actually planted a post at the spot so indicated, and subsequently two surveyors, in total disregard of the two posts so planted, both of which were easy of ascertainment, made a survey of the locality and placed the posts at a different spot, the Court [SPRAGGE, C. J. O.] disregarded the survey, and declared the north-west angle of the lot to be as indicated by the first mentioned monuments.

[These cases were heard before the Chief Justice of Ontario when Chancellor.]

Boyd, C.] [Oct. 26.

BURROWS V. DEAVENS.

Conveyance by illiterate person—Misrepresentations to party executing a deed—Husband and wife.

A married woman, who could neither read nor write, and was possessed of real estate, was asked to join in a conveyance by way of mortgage in order to bar her dower in her husband's land, and it was not explained to the husband that, by his wife joining, her estate would be liable in any way. In fact the husband and wife were made joint grantors, and jointly covenanted for payment. After the death of the husband proceedings were instituted against his widow to compel payment. The Court [BOYD, C.] under the circumstances declared the instrument invalid as against the separate estate of the widow and dismissed the bill with costs.

CHAMBERS.

Osler, J.] [Oct. 5.

GLASS V. GLASS.

Ejectment — Dower — Counterclaim — Decree —form of.

In an action of ejectment the defendant may set up a counterclaim for dower out of the lands in question.

Form of decree for such a case provided.

Holman, for plaintiff.

Van Norman, Q. C., contra.

Osler, J.] [Oct. 5.

MERCHANTS BANK V. CAMPBELL.

Execution against lands—Sale—Sheriffs fee—Poundage.

A sheriff has no right to poundage upon an execution against lands unless there has been an actual sale.

Osler, J.] [Oct. 14.

ROBERTSON V. CAULTON.

Arrest—Capias — Action — Amendment, affidavits, entitling of—Writ, form and amendment of.

Defendant was arrested under a writ of *capias* issued after action and before judgment and put in bail to the sheriff. He applied to have his arrest set aside on the grounds :

1. That the affidavit on which the order for arrest was obtained did not sufficiently state the cause of action.

2. That the affidavit was not properly entitled.

3. That the affidavit did not show sufficient cause for believing that he was about to leave the country with intent to defraud his creditors.

4. That the form of the writ of *capias* issued (*ca.re.* before action) was not the proper form of writ to be issued under the said order.

1. *Held*, that the writ of summons having been specially endorsed with the claim sufficiently described, the plaintiff should have leave to file an affidavit *nunc pro tunc* proving his cause of action.

2. *Held*, that the affidavit on which the order to arrest was obtained might be amended by adding the style of cause and division to which the action was assigned.

3. *Held*, that the fact of defendant's intention to leave the country, without a fraudulent intent being shown, was enough to justify his arrest, the debt not being denied.

4. *Held*, that the writ of *capias* and copy might be amended so as to make it the form of a writ of *capias* after action.

Held, also that a *capias* is now a proceeding in a suit, and that the action must be commenced by writ of summons.

H. J. Scott, for defendant.

Perdue, for plaintiff.

Proudfoot, J.] [Oct. 18.

BARKER V. FURZE.

Notice of trial—Chancery Division—Special Sittings—Entry of Action—Rule 266.

Thirteen days' notice of trial was give for a special sitting appointed to be held at Walkerton for the trial of actions in the Chancery Division. The Official Referee set aside this notice on the ground that Rule 266 required fourteen days' clear notice to be given, according to the Chancery practice.

Held, on appeal, reversing his decision, that Rule 266 refers only to the officer with whom the entry of action for such trial should be made, and that it left the time for entry, and the length of the notice of trial, to be determined by the preceding rules; ten days' notice of trial was, therefore, held sufficient.

W. S. Gordon, for the appellant.

Langton, contra.

Osler, J.] [Oct. 20.

REGINA V. ALLBRIGHT.

Liquor License Act—Certiorari—Hard labour—Amendment of conviction.

Defendant was convicted for the third time of having sold liquor without a license, and was sentenced by a magistrate to three months imprisonment with hard labour.

Held, that the magistrate had not power to impose hard labour, the provision in that behalf in The Ontario Liquor License Act being *ultra vires*.

Where a conviction is irregular in the sentencing part, and an application is made on a certiorari to quash it, the Court will not grant an amendment of the conviction.

Foster, for the prisoner.

Hodgins, Q C., contra.

Mr. Stephens.] [Oct. 24

SAWYER V. SHORT.

Notice of trial—Replication unnecessary—Rule 494.

Where a cause in the Court of Chancery was, on the 22nd of August last, at that stage when notice of motion for a decree or replication could have been served or filed, and no such notice or replication had up to that time been served or filed, the cause should thereafter proceed under the Judicature Act, and notice of trial may be given and the case set down without a replication being filed.

Hoyles, for the motion.

H. Cassels, contra.

Osler, J.] [Oct. 25.

IN RE TURNER & THE IMPERIAL BANK.

Division Courts Act 1880*—Interpleader—Appeal.*

There is no right of appeal from the decision of the Judge in an interpleader suit in a Division Court, even when the amount in dispute exceeds $100.

Shepley, for defendant.

Haverson, for plaintiff.

Boyd, C.] [Oct. 31.

RE PETER FLEURY: FLEURY V. FLEURY.

Partition—Motion for distribution—Costs and disbursements on—G. O. 640.

Proceedings had been taken for the partition and administration of the estate of Peter Fleury, deceased.

This was a motion for distribution under the report of the Master at Lindsay.

Crickmore, for plaintiff, asked that a lump sum be allowed him for the costs and disbursements of the motion.

Watson, for executors, objected that such costs were included in the commission allowed under G. O. 640, and that the disbursements should have been included in those allowed on the fixing of the commission, and no charges of any kind could under the practice be allowed as a separate sum on this application.

BOYD, C., made the usual order and declined

to allow any sum for costs and disbursements over and above the amounts found in the report.

Boyd, C.] [Oct. 31.

HUGHES V. REES.

Jurisdiction—Officers of Court—Rule 426—Appeals—Practice.

An application for a commission to examine a witness in New York.

The motion came before the Official Referee, who, at the request of one of the parties, referred the matter to a Judge in Chambers.

Morphy, for the application.

Kingsford, for defendant, J. Rees.

J. Hoskin, Q. C., for infant defendants.

Donovan, for defendant, Mrs. Rees.

BOYD, C., declined to entertain the application, holding that matters coming within the jurisdiction of any officer of the Court should be disposed of by him in the usual way, and the parties might then appeal if they saw fit. He would hear any case under Rule 426, on the production of a certificate of the officer in question stating that in his opinion the case was a proper one to be heard before a Judge in Chambers.

Osler, J.] [Nov. 1.

REGINA V. DUQUETTE.

Liquor License Act—Dickinson's Island—Indian land—Sale of liquor.

Defendant was convicted before the police magistrate of the town of Cornwall for selling liquor without a license on Dickinson's Island, in Lake St. Francis.

Held, on an application for a *certiorari*, that that island was part of the county of Glengarry, and therefore within the jurisdiction of the police magistrate.

Held, that the Liquor License Act applies to Indian land under lease from the Crown to a private individual.

Held, that only the holder of a license can be prosecuted under section 43 of the above Act for selling liquor on prohibited days.

Aylesworth, for the application.

Osler, J.] [Nov. 1.

RE GAUTHREAUX'S BAIL.

Bail—Estreal—Recitals in recognizance.

A recognizance of bail put in on behalf of a prisoner recited that he had been indicted at the Court of General Sessions of the Peace for two separate offences, and the condition was that he should appear at the next sittings of said court and plead to such indictment as might be found against him by the Grand Jury. At the next of said sittings the accused did not appear and no new indictment was found against him.

Held, that the recitals sufficiently explained that the intention was that the accused should appear and answer the indictments already found, and that an order estreating the recognizance was properly made.

Murphy, for applicant.

Boyd, C.] [Nov. 1.

RE JAMES.

Lunatic—Contract of—Liability.

One McNally sold a buggy to one James, an infant. James gave a pro. note for the purchase money, endorsed by his father, who was of unsound mind, and unable to understand what he was doing. No consideration passed to the father for his endorsation.

McNally was not aware of the father's condition.

Held, on appeal from the Master at Woodstock, affirming his decision, that the father's estate was not liable.

W. Roaf, for the appeal.

Boyd, C.] [Nov. 1.

LEESON V. LEMON.

Interpleader issue—Jury notice—Omission to serve—Effect of.

An order directed the trial of an issue in an interpleader matter.

The plaintiff served the issue, but did not serve with it a jury notice required by sec. 4, cap. 54, R. S. O.

He subsequently served a jury notice with the notice of trial.

The defendant did not appear at the trial, and a verdict was entered for the plaintiff, who afterwards obtained (on notice) from the Official Referee an order for costs.

Held, on appeal affirming this order, that the verdict obtained on the trial by jury was not a nullity, but only irregular, and not being moved against promptly should stand.

Hodgins, Q.C., for appeal.

Reeve, contra.

REPORTS.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared from the various Reports by A. H. F. LEFROY, ESQ.)*

ATTORNEY-GENERAL v. BIRMINGHAM, TAME AND REA DRAINAGE BOARD.

Action in nature of supplemental suit—Action to enforce judgment against successors in title—Nuisance—Injunction.

A decree was made in 1875 against the corporation of B., as the sanitary authority of B., granting a perpetual injunction to restrain them from allowing sewage to flow into a river so as to be injurious to health, or a nuisance to the plaintiffs; but the injunction was suspended for five years, to give the corporation an opportunity to execute certain works. After the expiration of this period the plaintiffs desired to enforce the injunction, but in the meantime the B. T. & R. District Board had been constituted by Act as the sanitary authority of the district, in place of the Corporation of B.

The plaintiffs brought an action against the B. T. & R. Board, claiming a declaration that they were entitled to the same benefit of the decree as against the defendants in the present action, as if they had been defendants in the former suit. The defendants demurred, on the ground that the statement of claim shewed no cause of action against them.

Held (reversing Bacon, V. C.), that the demurrer must be allowed.

[May 18. C of A.—L. R. 17 Ch. D. 685.

The above head note sufficiently shows the facts. On the appeal, counsel for appellant met an expression of the M. R. in *Attorney-General v. Birmingham*, L. R. 15 Ch. D., 425, where he says :—"If it becomes necessary to enforce that judgment against persons who have acquired a title after it is made, an action must be brought for that purpose :"—on which the V. C. in the court below had relied,—by observing that he (the M. R.) did not say that could be done without fresh wrong being committed.

JESSEL, M. R., after remarking, *arguendo*, that under the old practice a supplemental bill, or an original bill in the nature of a supplemental bill, always alleged a fresh injury or the continuance of the old one—and after stating the facts, and observing that the action was clearly one of first impression—said :

"The first observation to be made is that this is an injunction to restrain the continuance of a tort. It is an injunction merely against the council, their workmen, and agents, and cannot be said to run with the land. If they have sold the property to somebody else, there is no injunction against the new owner, and nobody ever heard, in such a case, of the new owner or purchaser of land being liable to the former decree. If he continues the nuisance, or commits a fresh nuisance, you can bring an action against him, and that is all; he has nothing to do with the former proceedings, and I cannot see any ground whatever for supposing that he can be bound by that decree; nor, I believe, was such a thing ever heard of before. That being so, what is the case made by the present respondents? It is said, although the action would not lie in an ordinary case, yet, as this is a public body which has taken over a portion of the property of the former public body, and to a certain extent succeeded to it, this new body is bound by Act of Parliament by the former decree. Of course an Act of Parliament can do a great many things, and it can certainly make the new body bound by the old decree. There fore, the only question remaining to be examined is, has it done so?"

This question he decides in the negative.

JAMES, L. J. agreed that the action was entirely a novel one. He had never seen such a declaratory action before. It was either wrong or unnecessary. If the defendants were liable, they were liable, and the plaintiffs did not want an action. If they were liable the plaintiff should have applied for a sequestration. The declaration of liability makes no difference. It appeared to him to be quite clear they were not liable, because there was no liability under the decree which in any way attached to the present defendants.

LUSH, L. J., held that the statement of claim was defective in two essential particulars, either of which would be fatal :—

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* It is the purpose of the compiler of the above collection to give to the readers of this Journal a *complete* series of all the English decisions on pleading and practice which illustrate the present procedure of our Supreme Court of Judicature, reported subsequently to the annotated editions of the Judicature Act, that is to say, subsequently to June, 1881.

(1) It did not show any facts which would amount to a breach of the injunction, even supposing the defendants were liable.

(2) It showed no privity whatever between the defendants and the Council, against whom the injunction was awarded.

NOBEL'S EXPLOSIVES CO. V. JONES, ET AL.

Imp. O. 27, *r.* 6—*Ont. O.* 23, *r.* 7 (*No.* 184) *Amendment at hearing.*

[April 13-29—L. R. 17 Ch. D. 721.

This was an action for alleged infringement of a patent by the importation into British waters of a material manufactured abroad according to the patent process, for the purpose of having it transhipped for exportation. Evidence was given at the trial that the defendants had acted as Custom House Agents for the foreign manufacturing firm, in getting the goods landed and stored in this country.

Upon this the plaintiffs' counsel asked for leave to amend the statement of claim.

Counsel for plaintiffs cited *Budding* v. *Murdock*, 1 Ch. D. 42; *King* v. *Corke*, 1 Ch. D. 57.

BACON, V. C., allowed the amendment.

When the action came on again for hearing, on April 20, the plaintiffs, (who were suing as assignees of the British Dynamite Co., the prior holders of the patent), observed that they alleged several breaches prior to the date of the assignment to themselves; and they asked that, if it should be contended that the right of the *British Dynamite Co.* to sue did not pass to them, they should have leave to amend by making the liquidator of the British Dynamite Co. a party.

BACON, V. C.—I think the plaintiffs must confine their case to the alleged breaches since the assignment. It is now too late to amend in the way they seek.

[NOTE.—*The headnote in the L. R. refers to Imp. O.* 27, *r.* 2, (*Ont. r.* 179) *as the one under which the amendment was, in the first instance above, allowed—but as the amendment was at the trial, this seems clearly a printer's error, for Imp. O.* 27, *r.* 6, *is virtually identical with Ont. O.* 23, *r.* 7, *No.* 184].

EMDEN V. CARTE.

Imp. O. 16, *r.* 13. *Ont. O.* 11, *r.* 15 (*No.* 103).

[May 25—L. R. 17 Ch. D. 768.

In this case the plaintiff, who was an architect, sued for remuneration in respect of employment under a contract made in 1877, and for damages for an alleged wrongful dismissal from such employment in 1880. The plaintiff was adjudicated bankrupt in 1878, and had never obtained his discharge.

Held (affirming FRY, J.), that the cause of action for remuneration and damages passed to the trustee, and that the proper course was to add him as co-plaintiff in the action, and give him the conduct of the action.

[NOTE.—*The judgment concerns the point of bankruptcy law as to whether the remuneration sued for passed thereunder to the trustee. The case is noticed here merely as illustrating the adding of plaintiffs under the general order. The Imperial and Ontario Orders are virtually identical. There appears to be a clerical error in Ont. O.* 11 *r.* 15 (*c*) *in omitting the words* "*summons or*" *before* "*notice*" *in the second line thereof.*]

IN RE BRUERE.

Lunacy—Appointment of Committee out of jurisdiction—General direction to Master.

Though satisfied of expediency of appointing a proposed committee, reported by Master as not approved of *because resident out of jurisdiction*, the Court declined to appoint him until Master had certified that he would have approved *if said proposed committee had been resident within jurisdiction.*.

[June 25—C. of A., 17 Ch. D. 775.

In this case the Master, by report dated June 14th, 1881, reported that B. V. M., one of three proposed committees of a lunatic, being resident out of the jurisdiction, he was unable to approve of him.

B. V. M. and the other two proposed committees then petitioned, after stating facts, that B. V. M. and another should be appointed committees "and that all matters arising in the said report and the previous reports in this matter, and the appointment of the petitioners as committees, may be referred to the Master in Lunacy for the purpose of having effect given thereto."

BAGGALLAY, L. J., after remarking that the prayer last cited was "very vague and general," said :—

"I think that the general direction should be confined to matters arising on the report of June 14th, 1881. If before the order is drawn up, it is found that there are matters provided for by the previous reports which have still to be attended to, the petition can be amended for the purpose of specifying them, but they ought not to be dealt with by mere general words."

As regards the appointment of B. V. M. the evidence of his fitness appears quite satisfactory, but it would be a departure from the usual practice, and it would be setting a bad precedent to appoint a committee who had not been approved by the Master. Here the Master does not say that he only forbears to approve of B. V. M. because he resides out of the jurisdiction, but says that he cannot approve of him, because he resides out of the jurisdiction. The Master will no doubt be ready to amend his report by saying that he should have approved of B. V. M. if he had resided in England, and upon that being done the order appointing him may be drawn up as of to-day.

LUSH, L. J., concurred.

IN RE GOWAN: GOWAN V. GOWAN.

Husband and wife—Settlement, Order for—Form of settlement approved by Court.

[Dec. 6, 1880—17 Ch. D. 778. M.R.]

In this case a testatrix bequeathed a fund to the plaintiff "until he is married, the said sum then to be settled on his wife and children." This was a friendly suit brought to settle a question which had arisen as to how the sum bequeathed to the plaintiff should be settled, he having married.

JESSEL, M. R., after observing that what Fry, J., is reported to have said in *Oliver* v. *Oliver*, 10 Ch. D. 765, appeared to him to be contrary to the opinion expressed by Baggallay, L. J., in the case of *Cogan* v. *Duffield*, 2 Ch. D. 44, 49, quoted the said opinion, and *mut. mut.* (the fortune not being *the wife's* in this case) acted upon it.

The opinion of Baggallay, L. J., as quoted by the M. R., is as follows:—

"The mode of settling a wife's fortune which is approved by the Court is to give her the first life interest for her separate use, then a life interest to the husband, then, subject to powers given to the husband and wife of appointing the fund among the issue of the marriage, it is given equally to such of the children as being sons attain 21, or being daughters attain that age or marry, or else to the children equally, with gifts over in favour of the others, if any of them being sons die under 21, or being daughters die under that age and unmarried."

[*The form of the judgment is given in extenso in the Law Reports.*]

BROOKE V. BROOKE.

Evidence—Notarial document—Imp. Chy. Proc. Act (15 *and* 16 *Vict. c.* 86) *s.* 22.

A deed, the execution of which has been duly attested by a colonial notary, although there may be no evidence that the attestation was for the purpose of using the deed in Court, is nevertheless a document "to be used in Court" within the above Imp statute, and the Court will take judicial notice of the notary's seal and signature.

[May 3—L. R. 17 Ch. D. 833.

The deed which was tendered in evidence in the above case had been executed in Canada, and was signed by and attested by the seal of a notary public.

FRY, J.—A document is tendered to me which bears a notarial seal, being a deed of release. The only objection to that evidence is that the person appearing to act as a notary is not proved to be a notary.

The section under which it is sought to put the document in is the 22nd sec. of the Chan. Proc. Act, 1852. Now, the words of that section are somewhat peculiar. It provides that the Court shall take judicial notice of the seal and signature of a notary public in Her Majesty's Colonies attesting certain pleadings, affidavits . . . . "and all other documents to be used in the Court."

In my judgment the only true construction of the section is that it includes all documents to be used in the Court, and this is a document to be used in the Court. I shall therefore admit the document.

[NOTE.—*Sec.* 38 *of our Evidence Act, R.S.O c.* 62, *may be compared with Imp.* 15 16 *Vict. c.* 86. *s.* 22*: and especially the words in it,—"for the purposes of . . . any cause, matter,*

or thing, depending, or in anywise concerning any of the proceedings to be had in the said Courts."]

BEWICKE V. GRAHAM.

Imp. O. 31. *r.* 11—*Ont. O.* 27. *r.* 3. (*No.* 221.) —*Discovery and inspection—Affidavit of documents—Privilege.*

[March 16. C. of A.—L. R. 17 Ch. D. 400.

In this case the defendants, in an affidavit of documents made pursuant to an order for discovery, stated as follows :—

"We have in our possession or power certain documents numbered 101 to 110 inclusive, which are tied up in a bundle marked with the letter A., and initialed by the deponent 'C. G;' the said documents relate solely to the case of the defendants and not to the case of the plaintiff, nor do they tend to support it, and they do not, to the best of our knowledge, information, and belief, contain anything impeaching the case of the said defendants, wherefore we object to produce the same, and say they are privileged from production."

On appeal from the decision of a Judge at Chambers, the Divisional Court refused to order, under Imp. O. 31, r. 11, the production of the documents which the defendants so objected to produce.

Counsel for the plaintiff argued that the affidavit must show the nature of the documents so that the Court may judge whether the objection to produce them is reasonable, and cited *Felkin* v. *Lord Herbert*, 30 L. J. (Ch.) 798; *Taylor* v. *Batten*. 4 Q. B. D. 85; *Bustros* v. *White*, 1 Q. B. D. 423. If it is admitted, as here, that the documents are material, they must be produced; *Goodall* v. *Little*, 20 L. J. (Ch.) 132; *Jenkins* v. *Bushby*, 35 L. J. (Ch.), 400; *Adams* v. *Lloyd*, 3 H. & N. 351, per Pollock, C. B. There is a material distinction between title deeds and other documents.

Counsel for defendants argued the defendants were entitled to rely on the affidavit, which is conclusive: *Jones* v. *Monte Video Gas Co.*, 5 Q. B. D. 556; *Minet* v. *Morgan*, L. R. 8 Ch. 361. The rules of the Court of Chancery as to production of documents, still apply, notwithstanding the Judicature Acts: *Bustros* v. *White* supra; *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644. The affidavit is in conformity with *Taylor* v. *Batten*, 4 Q. B. D. 85; *Minet* v. *Morgan*, supra.

The judgments of the Divisional Court are too lengthy to give verbatim. WATKIN WILLIAMS, J., differed from the other Judges, holding the documents should be produced. He said a distinction should be drawn between an application for a further affidavit of discovery, and for an order to produce for inspection relevant documents, known to be in the defendants' possession, which was the present case. *Jones* v. *Monte Video Gas Co.*, (supra), was a case of the former kind, and was decided on the principle that it is obviously beyond the power of any Court to order any party to swear to particular facts when he determined to swear the contrary; and so it is no authority on the question before the Court. There have been cases in which a Judge, having refused to order a further affidavit of discovery on this ground, has nevertheless ordered the production of the controverted document, being satisfied that it was relevant to the case. In the present case the defendants, he considered, had failed to show that the documents (the possession and relevancy of which they admitted) came within any class of documents privileged from inspection. They content themselves with a wide, genera and vague statement that the documents relate exclusively to the case of the defendants, and not to that of the plaintiff, and do not sufficiently enable the Court to test substantially the grounds of the claim of privilege upon sworn testimony which, if untrue, would have subjected the defendants to an indictment for perjury, whereas this was done in *Bustros* v. *White* (supra). Therefore the order for inspection ought to have been made.

POLLOCK, C.B., was of a contrary opinion, holding the order of the Judge in Chambers to be right. He observed that in construing the present rules of practice it is impossible to forget that they were drawn from the practice of the Courts of Equity; and that the only case in which documents for which protection was claimed on the ground of privilege were ordered to be produced, was where the person declining to produce them had waived his privilege, by referring to them in pleadings or affidavits so as to disclose the contents; and cited Wigram on Disc. Ed. 2, p. 299, and *Herbert* v. *Dean and*

Chapter of Westminster, 1 Y. & C. Ch. 103. He also referred to *Jones* v. *Monte Video Gas Co.* supra, and observed that the only distinction between that case and the present is that in the former the ground on which production was declined was that the documents were said to be not material or relevant to the action. Here the defendants said the documents relate solely to their case. But the practice indicates no distinction on this ground.

DENMAN, J., observed that in the absence of authority he would have favoured the view of Williams, J., but that the cases in Equity since the Judicature Act prevented the Court saying the judgment of the Judge in Chambers was wrong. He cited *Taylor* v. *Batten*, 4 Q. B. D. 85; Seton on Decrees, 4th ed. pp. 162, 163; *Jenkins* v. *Bushby*, 35 L. J. (Ch.) 400, as to meaning of word "title" and *Jones* v. *Monte Video Gas Co.*, supra, as to which case he said he could not agree with Williams, J., that it did not bear on the subject, but it is evident from the judgment that the Court laid down the principle that the party asking for discovery or inspection is bound by the oath of the opposite party, and, that oath being taken at his peril, the matter is concluded by it, not only as ts discovery, but so far as the consequences are concerned, viz., inspection.

The plaintiff appealed, and on the above date the case came before the Court of Appeal, all three judges agreeing in dismissing the appeal.

LORD COLERIDGE, C. J., in the course of his judgment said:—"I think our decision may be put on O. 31, rule 11 itself, which gives power to order the production of such documents 'as the Court or Judge shall think right,' and that we may say that we do not think it right to order the production of any of the documents sought to be inspected, and that the discretion of the Judge and of the Court below was rightly exercised. That would be sufficient to dispose of this matter, but I am inclined to go further and to say that it is concluded by what is laid down in *Jones* v. *M. V. Gas Co.*, supra, and *Taylor* v. *Batten*, supra. Now, as I understand these cases, the principle is this, that on an application for discovery or inspection, which, I apprehend, are substantially the same thing, the applicant is bound by the affidavit made in answer to the application, if the documents referred to in it are sufficiently identified, to enable the Court to order their production, should the Court think right to do so. Here the documents are sufficiently identified, for the affidavit in this respect is almost in the very words which were used, and held to be sufficient, in the affidavit in *Taylor* v. *Batten*. . . . If the affidavit sufficiently describes the documents for the purpose of identification the other party can go no farther, whether he seeks discovery or inspection."

BAGGALLY, L. J., and BRAMWELL, L. J., concurred on similar grounds.

Appeal dismissed.

[*Imp. O.* 31, *rule* 11 *and Ont. O.* 27, *r.* 3 *are virtually identical.*]

MCLAREN V. HOME.

Imp. 31-32 *Vict. c.* 125 *and Rule* 5.—*Ont.* 37 *Vict. c.* 10, *sec.* 53. *C. and General Rule* 33.

Election Petition — Witnesses — Expenses — Taxation.

[May 3.—L. R. 7, Q. B. 477; 50 L. J. R. 658.

Although the amount of the reasonable expenses to be paid to any witness in an election petition may, under the above Imp. Act and Rule (r. 5. additional General Rules, 1875), be ascertained and certified by the registrar, his certificate is not conclusive of the amount as between the petitioner and respondent, but it is, as part of the general costs of the petition subject, under sec. 41, to taxation by a master who must exercise his discretion on the expenses certified.

[NOTE.—*Imp.* 31-32 *Vict. c.* 135, *sec.* 34 *appears to be virtually identical with the Dominion Controverted Elections Act*, 1874 (37 *Vict. c.* 10 *C.*) *sec.* 53: *while our General Rule* 5, *made under the latter act, provides as follows: "The reasonable costs of any witness shall be ascertained by the Registrar of the Court, and the certificate allowing them shall be under his hand." Sec.* 41 *of the Imp. Act is virtually identical with sec.* 60 *of the Dom. Act. It does not appear necessary to do more than note the decision here.*]

NORMAN V. STRAINS.

Compromise of probate proceedings before writ issued—Effect of compromise an infant and married woman.

[Nov. 30, C. of Prob.—45 L. T. 191.

In this case the President of the Court of

Probate was asked to confirm an arrangement which had been entered into between the parties, prior to the issuing of the writ, and in such manner as to bind a married woman and five infants. He, however, refused to do so, and gave the following as his reasons :—

"At present no action has been commenced in this division, and no issue, therefore, is pending. There has been a proceeding by caveat and warning it is true, but no writ has been issued, and under the Judicature Act the only mode of commencing an action is by issuing a writ. There is not, therefore, any litigation before the Court, and no sufficient ground upon which the Court can proceed. Moreover, in addition to this, I cannot see, if I rightly appreciate this case, any circumstances under which I should be justified in binding irrevocably infants to the consequences of any compromise into which the parties may think fit to enter, in a probate suit before me, and I am extremely unwilling to do so. I am not furnished with any materials upon which to form a judgment as to the wisdom and forethought of any compromise which the parties may have agreed upon. It is my function to determine whether a particular will is or is not the will of the deceased person. To enable me, however, to appreciate the reasons upon which counsel have arrived at the conclusion that it is prudent to effect a compromise by arrangement, it would be necessary that I should be informed, not merely of the contents of their briefs, but also of the effect created by the evidence upon those persons who have seen and examined any witnesses up to this point in the case."

Motion refused.

CORRESPONDENCE.

Local Legislatiures—Jurisdiction—Naturalization.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—I observe in your issue for Oct. 15, some remarks in regard to the sec. 4 of the Dominion Act of last Session respecting Naturalization and Aliens, which introduces a new principle into the law, as hitherto administered in Canada.

In commenting on this subject, in my work on Parliamentary Government in the Colonies (p. 218) I had pointed out the fact that, previous to the passing of this Act, while the Dominion Parliament was exclusively empowered, under our new Constitution, to legislate upon "naturalization and aliens," yet that the Legislatures of Ontario and of Manitoba had severally assumed that they were exclusively competent to authorize aliens to hold and transmit real estate. These legislatures had accordingly passed laws for this purpose. None of the other legislatures, to my knowledge, have passed similar laws. But by the omission of any provisions of this nature in previous Dominion Statutes concerning aliens, it might be inferred that the Dominion Parliament had advisedly relinquished to the local legislatures the discretion and authority of such legislation, as affecting "property and civil rights."

Now, by the 4th section of the recent Dominion Act, the Parliament of Canada steps in and proceeds to legislate on this very question, by providing that aliens may hold, convey, and transmit property of any kind, in all respects as natural-born British subjects, subject to certain restrictions therein stated.

The point might be raised, whether this new provision in the Dominion law was at variance with Provincial rights of legislation. But no difficulty on this score presents itself to my mind. Before reading your observations upon it I had appended a manuscript note to page 218, in these words, "it being understood that the concurrent rights of legislation in the several provinces are not thereby infringed." This distinction was fully brought out in the Debates on the statute of 1881, as a reference to pp. 1342 and 1369 of the Debates of last Session will show.

The question of "exclusive" jurisdiction, by either the Dominion Parliament, or any Provincial Legislature, under the B. N. A. Act is sometimes difficult and uncertain. But thanks to the careful attention bestowed upon the rightful interpretation of the Imperial Statute by our Courts of law, and to the luminous decisions of some of our leading judges, it is gradually becoming easy of administration.

So far as concerns what may be termed "concurrent" rights of legislation, by both bodies, and particularly the competency of the Dominion Parliament itself to provide for the

holding of property by aliens—it may be worth while to call attention to the following extract from my note-book of recent cases on this head:—

"By a decision of the Privy Council (in the case of *Cushing* v. *Dupuy*) it is declared to be a necessary implication that the Imperial Parliament, in assigning to the Dominion Parliament the subjects of Bankruptcy and Insolvency, intended to confer on it legislative power to interfere with 'property, civil rights and procedure' within the provinces, so far as a general law relating to those subjects might affect them. Such legislation, upon any subject within the prescribed powers of the Dominion Parliament, would not infringe the exclusive power given to the provincial legislatures. On the other hand, upon the same principle—but in confirmation of the just exercise of provincial powers, in a matter of civil rights—it has been held by a judgment in appeal by the Court of Queen's Bench in Montreal, that the Quebec Pharmacy Act of 1875 was not *ultra vires* of the Local Legislature although it trenched incidentally upon the subject of 'trade and commerce' exclusively assigned to the Dominion Parliament."

Thus—and particularly within the past two years—general principles of the first importance in the interpretation of the British North America Act of 1867 are being evolved out of the various cases in litigation before our Courts.

ALPHEUS TODD.

Ottawa, Oct. 24, 1881.

County Court practice under the Judicature Act.

To the Editor of the CANADA LAW JOURNAL:

SIR,—The question has arisen in our County Court as to whether the Chancery or Common Law practice should prevail in obtaining an examination of parties; whether it can be done only after cause at issue, or so soon as statement of defence filed or time for filing it has expired.

There can be no doubt as to the Chancery practice being the better way under the present mode of pleading, for the plaintiff ought in all cases to have the right to examine the defendant before being compelled to reply, and further the plaintiff can now be delayed three weeks without joining issue, before the cause is at issue without a joinder being filed.

The whole tenor of the Judicature Act is to make one rule govern both as to Law and practice, and where Law and Equity differ Equity is to govern. And does not this apply to practice and procedure as well as to the Law?

Section 12 of the Judicature Act provides that when the practice and procedure is not provided for by the act and rules or orders, the old practice and procedure shall in the Court of Appeal and High Court of Justice be exercised in the same manner as the same might have been exercised by the old Courts, but it does not provide that the Common Law divisions shall follow the old Common Law practice and the Chancery Division the old Chancery practice.

Section 17, sub-sec. 10, provides for the rules of Equity governing when a conflict between them and Common Law rules exists. In *Grant* v. *Holland*, *Ross* v. *Grant*, L. R. 3 C. P. D. 180, it was held that in changing solicitors the rules of Equity as to practice must prevail, so that the words "Rules of Equity" will apply to practice and procedure as well as to the law. And should not therefore the old Chancery practice be followed in this matter? Mr Holmested in his Manual says not. What say you?

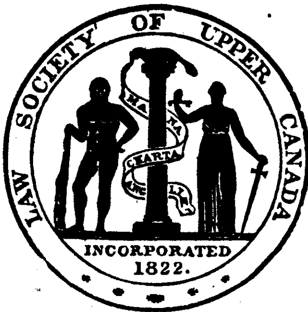
Yours etc.,

W. B.

[See editorial comments, ante, p. 419 EDS. C. L. J.]

FLOTSAM & JETSAM.

A WESTERN constable held an execution against a farmer, and when he called for a settlement, the agriculturist took him out into a big pasture and pointed out a wild steer as the particular piece of property that could be levied upon. The constable chased the steer around for a while and then sat down, and taking out his book began to write. "What are you doing there?" asked the granger. "Charging mileage," replied the constable, without looking up. "Do I have it all to pay?" gasped the rancher. "You bet." "Then take this tame heifer here. I can't stand any such game as that."



Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 45TH VICT.

During this Term the following gentlemen were called to the degree of Barrister-at-Law. The names are placed in the order of merit:—

CALLED WITH HONOURS.

John Henry Mayne Campbell.

CALLED.

George Anthony Watson, John Sanders Macbeth, Horace Edgar Crawford, George Gordon Mills, Jeffrey Agar McCarthy, Charles Miller, Allan McNab, James Scott, Conrad Bitzer, William Elliott Macara, Samuel George McKay, James Brock O'Brian, Frederick Herbert Thompson, Frederick William Kittermaster, Alexander Ford, James Walter Curry, Edward Norman Lewis, Frederick Case, Abraham Nelles Duncombe, William Franklin Morphy.

The following gentlemen who passed their examination in Easter Term, 1881, were also called to the Bar this Term:—

Frederick Faber Harper, Solomon George McGill.

The following gentlemen were admitted into the Society as Students-at-Law, namely:—

GRADUATES.

Hugh St. Quentin Cayley, William Durie Gwynne, Thomas Chalmers Milligan, Alpin Morrison Walton, Douglas Armour, Thomas B. Bunting, Walter Laidlaw, Thomas Joseph Blain, George Washington Field, Samuel Clement Smoke, Henry Herbert Collier, Frederick W. Hill, Charles William Lasby, John Bell Jackson, James Metcalf McCallum, Thomas Edward Williams, George Morton, Frederick Ernest Nellis, Alexander Cameron Rutherford, Frank Henry Keefer, Lucius Quincy Coleman, Henry Thomas Thibley, Joseph Wesley St. John, John Douglas.

MATRICULANTS OF UNIVERSITIES.

Edward W. Hume Blake, Herbert Carlton Parks, Edward Charles Higgins, William H. Holmes, R. S. Smith, John Wesley White, John Paul Eastwood.

JUNIOR CLASS.

William Murray Douglas, George Marshall Bourinot, Thomas Urquhart, Alexander William Marquis, John Bell Dalzell, Osric L. Lewis, Frederick Stone, Alexander David Hardy, Donald James Thomson, Joseph Coulson Judd, Parker Ellis, John O'Hearn, Francis McPhillips, Henry Clay, Robert Casimir Dickson, Arthur Clement Camp, John Carson, Douglas Harington Cole, Thomas Steele, Andrew Charles Halter, Matthew Joseph McCarron, Robert G. Fisher, Charles Meek, W. H. F. Holmes, Paul Kingston, Harry George Tucker, Richard Vanstone.

And the Preliminary Examination for Articled Clerks was passed by William Mansfield Sinclair.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

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

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

Students-at-Law

CLASSICS.

1881.
- Xenophon, nabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero in Catilinam, II., III., IV.
- Ovid, Fasti, B. I., vv. 1-300.
- Virgil, Æneid, B. I., vv. 1-304.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, (B. G. B. IV. c. 0-36, B. V., c. 8-23.)
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles V XIII.

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

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

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