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TABLE OF CANADIAN CASES

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TABLE OF CASES.

Canada Law Journal.

VOL. XVIII. JANUARY 1, 1882. NO. 1.

DIARY FOR JANUARY.

1. Sun...*New Year's Day.* 1st *Sunday after Christmas.*
2. Mon..County Court Term and Heir and Dev. Sitt. begin. [Municipal Elections held.
4. Wed..Toronto Assizes.
6. Frid..*Epiphany.* Christmas Vacation ends.
7. Sat...County Court Term ends.
8. Sun..1*st Sunday after Epiphany.*
9. Mon..Chancery Division sittings begin.
10. Tues..Court of Appeal sittings begin. Hamilton Assizes. [Chrisrmas Vacation in Supreme Court ends.
12. Thurs..Sir Charles Bagot, Governor-General, 1842.
15. Sun..2*nd Sunday after Epiphany.*
16. Mon..First meeting Mun. Council (except County Council).
17. Tues...Second Intermediate Examination. Heir and Dev. [sitt. end.
18. Wed..Second Intermediate Examination.
19. Thurs..First Intermediate Examination.
20. Frid..First Intermediate Examination.
22. Sun..3*rd Sunday after Epiphany.* First English Parliament, 1256.
24. Tues..First meeting of County Council. Primary Examination.
25. Wed...Sir F. B. Head, Lieut.-Governor U.C., 1836. Primary Examination.
29. Sun...4*th Sunday after Epiphany.*
31. Tues..Earl of Elgin, Governor-General, 1847.

TORONTO, JAN. 1, 1882.

SIR ROBERT LUSH, one of the Lord Justices of Appeal in England, died last week, in his seventy-fourth year, and Sir James Fitzjames Stephens is to succeed him.

A NEW Patent Bill is shortly to be laid before the Imperial Parliament under the patronage of the Society of Arts, which seems to comprise some features of interest. It apparently proceeds on the principle that it is better that every patent should pass through a preliminary examination before it is granted, rather than to allow a man to take out a patent at his peril and to run the risk of its being an infringement. It also aims at taking the administration of patents out of the legal domain and establishing a new tribunal, which shall consist of commissioners—say a lawyer, an engineer, and a chemist—who are not only to examine applications, but also to try actions singly, the right of appeal to the full body being reserved to the litigants. This latter feature of the scheme certainly seems open to the objections advanced by Mr. Justice Stephen, at a meeting of the society, at which the project was advanced, viz., that there is no branch of law which contains so many and such interesting principles as the law of patents; and a chemist and an engineer could not be expected to understand the application of them; while judges on the other hand are specially trained in the art of acquiring information from others, and in applying legal principles to that information.

A MEETING of the bar took place in the Convocation room at Osgoode Hall, on the morning of the 30th ult., Dr. L. W. Smith being in the chair. The object was to select a committee of six members of the bar to cooperate with an equal number of benchers in making arrangements for an entertainment, at Osgoode Hall, on the occasion of the opening of the new building. The following gentlemen were elected to serve on the committee: Messrs. W. T. Boyd, S. J. Vankoughnet, F. J. Joseph, J. Campbell, A. H. F. Lefroy, and T. Ridout. A report of a meeting of barristers previously held was read by the chairman, from which it appears that the entertainment contemplated by the benchers is a conversazione, opening with a speech from the treasurer. Members of the glee clubs of the Universities are to be invited to attend, and we presume it will be within the province of the joint committees to provide more definitely for the form the entertainment is to take. As to another suggested feature of the entertainment, the argument may no doubt be advanced that in the good

old days Queen Elizabeth trod a measure with her Chancellor in the Hall of the Middle Temple. However, we cannot have Queen Elizabeth, no matter how willing the Chancellor might be, and it is perhaps a question whether the dances of this end of the 19th century are quite as much in harmony with the *genius loci* as the stately measures of the great Queen Bess.

WE see that at length the prisoner Guiteau is in the prisoner's dock, a position he has well earned for himself. A more scandalous burlesque than the trial in this case from first to last is not on record in this century. It is quite true, as the *Albany Law Journal*, says of the "repulsive reptile Guiteau," that "every word he has spoken has helped to damn him, and it may be that the wisdom of Judge Cox's course in letting him say his say and go his length is now more than ever obvious, and that if he is given enough rope he will probably hang himself;" but there is a limit to all things and we cannot help thinking it is high time that the good sense of the people should rise superior to their love of sensation and put a stop to scenes which have brought the administration of justice into contempt and ridicule.

THE *Central Law Journal* for Dec. 16th publishes an article on the right of a prisoner to be present at his trial, suggested naturally enough by the conduct of Guiteau, and his constant and outrageous interruptions during the proceedings in Court. The writer points out that it has been a rule of the common law that a prisoner on trial for a felony has the privilege of being present in person during his trial, confronting the witnesses, and hearing the evidence; and that if he be absent at any time, the proceedings would be void. In several of the States there are statutory enactments to the same effect. It has been held, however, in some of the American Courts that this right to be present may be waived, and the writer expresses his opinion that such would probably be the case, if the prisoner acted in such a violent manner that it would be necessary to remove him and place him in sequestration. But since none of the cases have decided how far the case of misbehaviour in Court would apply to a person found to be *non compos mentis*, the forbearance of the Court in allowing Guiteau to remain rather than run the chance of giving ground for a new trial seems easily explicable.

THE severe sentences passed upon the persons convicted of bribery at the recent elections in England has excited much comment there. Three of them were solicitors in good standing; two of these were sentenced to nine months', and one to six months' imprisonment. Great pressure was brought to bear for a remission of the sentences, but the Government remained firm in their intention to stamp out bribery, if possible, by severity of punishment. We agree, however, with the English *Law Journal*, that the severity of the sentences (three of the culprits being publicans and sentenced to three months' imprisonment) "is not always in the ratio of the time given to each. The punishment of nine months for a solicitor and three months for a publican is not represented in the arithmetical proportion of nine to three."

IT is indeed good news that some endeavour is to be made to make the atmosphere of the library a trifle better than that of a coal mine immediately after an explosion. Patent systems of ventilation are not indeed always remarkable for their

success. But hope springs eternal in the human breast, and we shall look forward to ultimately breathing air at the Hall as pure as the administration of justice that goes on within its walls. In the meanwhile an immense deal would be gained by religiously opening the two small windows that do exist in the library, every evening, and leaving them open all night. Inasmuch as these windows open outward at a slant, there can be no risk of any rain entering which could do any appreciable damage.

COSTS WHEN DEFENDANTS SEVER.

The question of costs, when defendents sever in their defence, is one of much importance to the practitioner.

At Common Law there is usually no difficulty. For, speaking in general terms, if the alleged breach of contract or tort be a joint one they cannot sever, and if the contract be not joint, as in the case of an action against the maker and endorser of a promissory note, they may sever, and if successful, each be entitled to full costs of defence.

In Chancery, on the other hand, it is somewhat difficult at all times to say when defendant may or may not sever under the risk of losing costs, if successful. All parties connected with or interested in a single transaction must, in the same suit, be brought before the Court, or it will be defective for want of parties, but it is far from saying that they must be represented by the same solicitor, as their interests may be and often are diametrically opposite.

Possibly it may be assumed that the new procedure may affect this question, but practically it will not. It is true, under Order 50, judges may decline to allow costs or deal with them otherwise than they usually do. The effect of Order 50 is to give judges in all actions control over costs; a power which has always been inherent in the judges of the Court of Chancery.

Such a discretion has been and will be rarely exercised, and in cases where the defendant really has no merits or his conduct has been inequitable, and possibly in cases of hardship, or where the suit has been totally unnecessary.

It may also be here pointed out that the ordinary retainer of two or more defendants only enables the solicitors to claim from each his proper share of the costs incurred, and such a retainer is not a joint and several contract. It is the several contract of each client to pay his share only of costs incurred for the benefit of two or more defendants.

Any variation from this must be strictly proven: *Re Colquhoun*, 5 De G. Mac. & G. 35. The taxing Master certified to the Court in this case the practice of the taxing Masters of the Court of Chancery upon this point. See also *Harmon* v. *Harris*, 1 Russ. 155, 157. This may seem a hardship, but it would, on the other hand, be an undoubted hardship for the defendant to be liable for all costs incurred in all cases, and the solicitor has it always in his power to decline to proceed unless his costs are paid, or he be furnished with proper funds as the case progresses. It may be stated in general terms, that defendants representing the same interest must join in defending, and be represented by the same solicitor upon terms of being allowed but one set of costs, if successful; and that defendants who have identical but separate interests need not join.

Trustees and *cestuis que trust* should not sever: *Farr* v. *Sheriffe*, 4 Hare, 528. In *Wiles* v. *Cooper*, 9 Beav., 294, residence of trustees in different parts of the country justified them in severing, but this would not now be followed. See former case, where this case was not followed.

So mortgagors and mortgagees should not sever, and if they do, the mortgagee or assignee of a fund will be entitled to full costs

to the exclusion of the mortgagor or assignor, on the ground that the mortgagee or assignee is bound to protect the debt and estate of the mortgagor or assignor and to stand in their place: *Greedy* v. *Lavender*, 11 Beav., 417.

If two trustees sever, one imputing misconduct to the other, and this clearly appears by evidence, the innocent trustee is entitled to his full costs to the exclusion of his co-trustee. If the evidence be not clear, only one set of costs will be allowed, and an allegation by a trustee that his co-trustee has kept the books and accounts, and that he knows nothing in respect to them, will not entitle such trustees to separate costs: *Attorney-General* v *Wyville*, 28 Beav., 464; *Hodson* v. *Cash*, 1 Jur. N. S., 864.

An innocent trustee ought, if requested, to join in a suit to recover proceeds from a defaulting trustee: *Hughes* v. *Key*, 20 Beav., 395. But, if he is not applied to and is made a defendant, the plaintiff, even if successful, must pay his costs: *Reads* v. *Sparks*, 1 Moll., 8.

Parties attending in the Master's office must appear by the same solicitor, and but one solicitor will be allowed to represent a class. The principle is that suits should not be burthened with unnecessary costs of many parties. The same rule would no doubt apply in solicitor and client costs, unless the solicitor took express care to point out to his client that the effect of his not appearing with a co-defendant in the same interest may disentitle him to costs altogether, if unsuccessful.

LAW SCHOOL LECTURES—CONSTITUTIONAL LAW.

On Dec. 13th ult., Mr. Thomas Hodgins, Q.C., Chairman of the Law School, commenced a course of lectures on the above subject, as one of the lecturers in the now re-established Law School. By his kindness we are enabled to place before our readers some notes of the contents of these lectures, and of the line taken by the lecturer.

Mr. Hodgins commenced by pointing out that the Constitution of Canada differs from that of Great Britain on the one hand, and from that of the United States on the other, in that it is in part a written and in part an unwritten Constitution; unwritten, in so far as it is defined by the B. N. A. Act to be "similar in principle to that of the United Kingdom," (Preamble, B. N. A. Act); and written, in that the same instrument constitutes legislatures with enumerated and therefore limited powers. He also pointed out that while our Constitution derives its leading features of, political government from that of England, its legislative government embraces many of the distinctive characteristics of the Federal system of the United States. He then proceeded to mention some of the definitions given by writers of authority of certain terms of constitutional law, *e.g.*, "Constitution," "State," "Nation," "Sovereignty," "Government." As to the last, and the division of the powers comprised in it into legislative, executive, and judicial, Mr. Hodgins quotes from Cooley's Cons. Law 44, the somewhat striking observation that legislative power deals mainly with the future, and executive power with the present, while judicial power is retrospective, dealing only with acts done, or threatened, promises made, and injuries suffered. As the lecturer observed, "sovereignty" is the most important item to be explained in connection with the governmental and legislative powers of the Federal and Provincial authorities, and he remarked that besides the use of this word to signify supreme, absolute, uncontrolled power, it is often used in a far more limited sense to designate such political powers as, in the actual organization of the particular state or nation, are to be exclusively exercised by certain public functionaries without the control of any superior authority. In support of the argument that colonial legislatures or governments are "sovereignties" within the limits

of their territories, he cited Story on the Cons., sec. 171; *Phillips* v. *Eyre*, L. R. 6 Q.B. 20, per Willes, J.; *Reg.* v. *Burah*, L.R. 3 App. 889, per Lord Selborne. He then proceeded to consider the position of the Provinces of the Dominion of Canada, and the applicability of the statute and common law of England to these Provinces, taking as his text the rules reported by the M. R. on Aug. 9, 1722 (2 Peere Williams, 75), as having been determined by the Privy Council on appeal from the foreign plantations, viz.:

(1.) That if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go they carry their laws with them, and therefore such new found country is to be governed by the laws of England; though after such country is inhabited by the English, Acts of Parliament made in England without naming the foreign plantations will not bind them.

(2.) Where the King of England *conquers* a country, there the conqueror, by saving the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases.

(3.) Until such laws be given by the conquering prince, the laws and customs of the conquered country shall hold place, unless where these are contrary to our religion, or enact anything that is *malum in se*, or are silent, for in all such cases the laws of the conquering country shall prevail.

These propositions, Mr. Hodgins remarked, have been modified by the judgment of Lord Mansfield, C. J., in *Chapman* v. *Hall*, Cowp. Rep. 204, in which the principle of constitutional law was affirmed that after a proclamation providing for a legislative assembly in a conquered colony, the king's prerogative power of legislation was irrevocably gone. He then proceeded to point out that under the British system of constitutional government, when the name of the sovereign is mentioned it means the sovereign acting by and with the advice of his responsible ministers; and that similar constitutional rules apply to the Governor-General of the Dominion, and to the Lieutenant-Governors of the Provinces, as asserted by Mr. E. Blake and by Sir J. A. Macdonald, Canadian Ministers, in 1877 and 1879 respectively (S. P. Can. No. 89, 1877, p. 452; S. P. Imp. 1878-9, Can. p. 109); but at the same time he drew attention to a despatch of the Colonial Secretary in 1838, which pointed out that a colonial governor is an Imperial officer who derives his instructions from England (Mill's Col. Cons. 28). Perhaps we may be also permitted to refer here to 16 C. L. J. p. 317, seq.

The lecturer then entered upon a very interesting and detailed discussion as to whether it is or is not correct to say that, even where, under the modern colonial system, parliamentary government has been granted to the colonies, the Imperial Parliament still retains its "paramount authority" over such colonies in matters of legislation. Among assertors of the affirmative of this proposition he cites Clark (Colonial Law, p. 10), and Forsyth (Constit. Law, p. 21); Blackburne, J., in *Reg.* v. *Eyre*, in 1868, and Willes, J., in *Phillips* v. *Eyre*, *supra*, and we might add to those mentioned by Mr. Hodgins, the authority of Mr. Alpheus Todd (Parl. Govt. in British Colonies, p. 189). On the other hand, Mr. Hodgins cited the words of Lord Chancellor Hatherley, in 1870, in moving the second reading of the Naturalization Bill (now 33 Vict. c. 14, Imp.), in the House of Lords, viz., "The clause contains a proviso that it shall not confer any right to hold property situated out of the United Kingdom, for *we cannot govern the colonies having legislatures of their own*," (199 Hans. 1126) and to show that it is legitimate to cite this speech as a judicial authority, Mr. Hodgins quotes the opinions of the Lords Justices in *Reg.* v. *Bishop of Oxford*, L. R. 4. Q. B. D. 525. Mr. Hodgins then proceeded to reason this question out to its logi-

cal conclusion. He asks, if the Crown's authority to legislate for the colony is divested by the establishment of a local Parliamentary Government in the case of a Crown grant, on what logical ground can it be argued that, after the establishment of local Parliamentary Government by an Imperial Statute, legislative power within the colony is retained by the Imperial Parliament, and is a "paramount authority" therein, in the case of a Parliamentary grant? And if so retained, then to what extent? He argued in the first place that to exercise an unlimited "paramount authority," as contended for in Clark's Col. Law, p. 10, would be tantamount to saying that the Imperial Parliament may at its pleasure, by legislative acts, to which the Colonial subjects of the Crown are no parties and against their consent, deprive the colonies of their Parliamentay constitutions, and may wholly or in part abrogate and repeal one or all of their local and mucipal laws. Such an exercise of Imperial legislative power, the lecturer contended, would be an invasion of the established order of local government, and a destruction of the constitutional compact between the Empire and its colonies, and would therefore be revolutionary, and that whatever is revolutionary is unconstitutional. He then proceeded to consider analogies, which may be furnished by supposing other great constitutional interests to be similarly dealt with. He especially cited the Act passed by the Imperial Parliament in 1778, (18 Geo. 3, c. 12) which contains, as he declared, a constitutional declaration of Imperial non-interference in colonial taxation, and was in effect a grant or surrender to the colonial legislatures of so much of the Imperial sovereignty as affected taxation in the colonies; and summed up his conclusions in the following words: "The Imperial statutes establishing local government and legislatures in the colonies belong to the same class of constitutional enactments. The power to make laws for the peace, order and good government of a community is equally an incident or attribute of sovereignty. The grant of that power by the Imperial Parliament to the local legislatures implies a full and complete grant, an actual giving of the power, not in any sense as to an agent or delegate, but as a sovereign power, and to the extent defined in the intrument granting it. Such a grant must be held to be governed by the rules of construction applicable to other grants, and must be construed as a grant of sovereignty; and means a divesting by the granting power of the thing or power granted."

Finally, he remarked that the considerations to which he had adverted might lead to a more accurate and thorough review of our constitutional system, and a better understanding of the limitations of Imperial Parliamentary control over colonies having legislatures like those of Canada.

RECENT DECISIONS.

We have still some cases to notice in L. R., 18 Chy. D., p. 1–299, which was partially reviewed in our last number.

WILLS—CONSTRUCTION.

Davidson v. *Kimpton*, p. 213, decides a rather peculiar question arising upon a will. A testator, after giving a life interest in a sum of £10,000 to his four daughters, with gifts over, in equal shares, to their issue respectively, provided that in case any one or more of the daughters should die without leaving issue her or them surviving, the share or shares of the stock so bequeathed to and intended for the issue (had there been such) should go "unto the survivors or survivor" of the four daughters, equally if more than one, and if but one, to that one, absolutely. Three of the daughters married, and died leaving children. The fourth, the petitioner, was the longest liver, and was a spinster of the age of fifty-four. Fry, J. observed that:—"Inasmuch as a person cannot be his or her

own survivor, it remains to inquire whether the real meaning of the word is not 'longest livers, or longest liver of the class of daughters.'" And he held such to be the true meaning of the words. "The petitioner," he said, "has not survived the class of daughters, but she is the longest liver of the class." He, therefore, held that the petitioner would be entitled to her own share of the £10,000 absolutely if she should die without leaving issue, and that by reason of her age it might be assumed that she will never have any children, and her share might be transferred to her then.

In re Chaston, *Chaston* v. *Seago*, p. 218, is also a will case. The testator in the will in question, after leaving certain legacies to his sons and daughters, provided, in certain events, for a gift over of the said legacies "or so much thereof as shall not have been paid to him, her, or them so dying;" which he afterwards described as "such part thereof as shall not have been received by them." It was contended that a gift over of so much of a share as shall not have been paid to or received by a legatee is void for uncertainty. Fry, J., however, after expressing disapproval of a recent decision of Malins, V. C., in *Bubb* v. *Padwick*, 13 Ch. D., 517, said: "I believe all the earlier cases proceed simply on this enquiry: Is the contingency expressed with definite certainty? If it be, we will give effect to it; if it be not, we will not give effect to it. . . . I think it needless to go through the earlier authorities, because, having considered them with some attention, it appears clear that that was the principle on which they all proceeded. . . . Independently of authority I should have thought it sufficiently distinct, but the cases to which I have referred shew, in my judgment, that the words in this will must have reference to the period appointed for distribution [not to the time of actual payment or receipt]. That is in no way uncertain, and therefore no difficulty exists."

FORECLOSURE ACTION—STATUTE OF LIMITATIONS.

Harlock v. *Ashberry*, p. 229, is a fresh authority for the view taken in former cases, that an action for simple forclosure is not an action to recover the sum of money secured by the mortgage, but is an action to recover land, the recovery of the money, if it occurs at all, resulting, not from the object of the action, but from the conditions which the Court imposes on the right of the plaintiff: and therefore it is within sects. 2 and 24 of Imp. 3 and 4 Will. 4. c. 27 (sects. 4 and 29 of R. S. O. c. 108), and not within sect. 40 (sect. 23, R. S. O. c. 108). It decides, moreover, that the right of the mortgagee to recover the land, will be kept alive under Imp. 7 Will. 4 and 1 Vict. c. 28 (R. S. O. c. 108 sect. 22) by a payment made "by the mortgagor, or by any agent of the mortgagor, or by any person who, as between the mortgagor and the mortgagee, is liable to make any payment to the mortgagee in satisfaction of the mortgage debt;" (per Fry, J. p. 234); for example, as in this case, the tenant whose land is mortgaged is a person who, as between the mortgagor and the mortgagee, is liable to make a payment to the mortgagee in satisfaction of the mortgage debt; and therefore his payment to the mortgagee will keep alive the mortgagee's right to foreclosure.

RENEWAL OF LEASE—COVENANTS—CONDITION PRECEDENT.

Bastin v. *Bidwell*, p. 238, was a case of a lease in which the lessor covenanted that the lessee should be entitled, on giving six months' notice before the end of the term, to have a further lease for twenty-one years "upon paying the rent and performing and observing the covenants" in his lease, and Kay, J., after reviewing many of the decisions as between covenants independent, and covenants forming conditions precedent, held that in this case the performance of the covenants was a condition precedent to the lessee's privilege of having a renewed lease, and the acts covenanted for not having been completed either when the six months' notice

was given or when it expired, the lessee was not entitled to a renewal of his lease.

MORTGAGE—STATUTE OF LIMITATIONS— EXPRESS TRUST.

In the next case of *Banner* v. *Berridge*, p. 254, two questions arose, which are of some interest: (1) the first was whether where the second mortgagee of a ship claimed an account against the first mortgagee, who had sold the vessel, upon the mortgagor becoming bankrupt, but where the amount of the surplus in the hands of the first mortgagee was not ascertained, there was such an express trust as would bar the Statute of Limitations. Kay, J., first discusses, in his judgment, what constitutes an express trust, and after reviewing the cases, arrives at the conclusion that, although to say an express trust is a trust expressly declared by deed, will, or some other written instrument, (as per Kindersley, V. C., in *Petre* v. *Petre*, 1 Drew, 371), may be correct as referring to express trusts of land only, which must be in writing, yet it is not an exhaustive definition of the general meaning of the term; for that there may be an express trust without any actual expression in words, where property or money wholly and solely belonging to a person who deposits, is deposited with another person for the benefit of the depositor. He then goes on to show by a series of decisions that even where the words of the mortgage express a trust in the most clear and emphatic manner, the Court is very loth to hold the mortgagee to be a trustee to all intents and purposes. Finally he sums up as to this point thus: "I take the true results of these decisions to be this, that in this particular case, where there was no trust expressed, either in writing or verbally, of the proceeds of the sale, no trust can possibly arise until it is shown there is a surplus, and then I should be disposed to hold there is sufficient fiduciary relation between the mortgagor and mortgagee to make the mortgagee constructively a trustee of the surplus, in case it is shown it is a surplus. But that seems to me to be a case not of express trust at all but of constructive trust, that is to say, a case of a trust which only arises on proof of the fact that there was a surplus in the hands of the mortgagee after paying himself. And, if that be so, the ordinary rule of a Court of Equity would apply that nobody would be allowed to enter into evidence to raise a case of constructive trust after the statutory period had expired."

(2) The second question in the case was whether there had been a sufficient acknowledgment since the receipt of the money to enable the plaintiff to avoid the bar of the statute. Kay, J., after reviewing the correspondence between the parties, held the result to be a clear admission, not only that there was a pending account which must be settled, in the sense of having the account properly taken and arranged and vouched, but also a clear promise, which I think is sufficiently expressed, that whatever is found due upon the taking of that account would be paid by the defendant. But, at p 274, after citing from Lord Mellish's judgment in *Mitchell's claim*, L. R. 6 Ch. D. 822, his opinion that if there was an admission that an account must be taken, and that there was a right to have it taken, it would be consistent with principle, and with the previously decided cases, that you must infer from that a promise to pay, proceeds to express his opinion to the some effect, viz., that it is reasonable to say that the admission that there was such a pending account is an admission from which you may infer a promise that when the account is settled the balance shall be paid. (3) Kay, J., also decided in this instructive case that he could not allow a mortgagee who had voluntarily sold the mortgaged property before the day upon which the interest becomes payable in advance, but has not received the money, to claim the interest payable in advance when he receives the balance of the money, more than enough to pay him, two days after the day for payment in advance of the interest; for that it would be in the last degree in-

equitable to allow him to have six months' interest for a period, during the whole of which, except two days, he would have the mortgage money in his own pocket. (4) Lastly, it may be observed that this case also illustrates the fact that an express trust bars the statute equally as to personalty and realty by force of the Imp. Judicature Act 1873, s. 25, subs. 2 (Ont. J. Act, s. 17, subs. 2).

SALE BY AUCTION—STATUTE OF FRAUDS.

In the case of *Shardlow* v. *Cotterell*, p. 280, the facts were as follows. An auctioneer signed the following memorandum at the foot of the conditions: "The property duly sold to A. S., butcher, Pinxton, and deposit paid at close of sale;" and he also signed this receipt: "Pinxton, March 29th, 1880. Received of A. S. the sum of £21 as deposit on property purchased at £420, at Sun Inn, Pinxton, on the above date. Mr. G. Cotterell, owner." The conditions contained no description of the property sold, but posters had been put up describing the property to be sold on the 29th of March at the Sun Inn. Kay, J., alluded to the latitude which has been given in construing the words of the Statute of Frauds, and said he was not disposed to carry the law on this subject one hair's breadth beyond the decided cases and after citing many cases summed up thus: "You must have on the face of the contract a sufficient definite description of the things sold to enable you to introduce parole evidence to show what the articles were to which that description refers, but a mere description of the things sold as 'property' is not, to my mind, sufficiently definite to enable any such parole evidence to be adduced."

The last case in this number of L. R. 18 Ch. D. is *Seagram* v. *Tuck*, p. 296, which decides (1) that money not accounted for and due from a receiver under the Court is, by his recognizance, made a debt of record, although the balance due has not been ascertained: (2) that the receiver is a trustee of such money for the persons entitled thereto, and cannot, as against them, avail himself of the Statute of Limitations, although his final accounts have been passed and the recognizances vacated.

Turning now to the recent issues of Canadian reports, we may observe that it is our intention in future only to notice such current Canadian cases as are either cases of first impression or otherwise very remarkable. This seems the better plan for two reasons. First, because they are systematically noted immediately after decision in our Notes of Cases; and, secondly, because the economy of space thus obtained will, we hope, enable us to include in our Reviews of recent decisions, not only those reported in the Law Reports, but also those reported in the *Law Journal* reports and the *Law Times* reports, which will, it is believed, add much to the value of this department of this *Journal*. There appears to be no case in the recent issues of Canadian reports,—5 S. C. no. 2,—29 Gr. nos. 2 and 3,—46 Q. B. nos. 4 and 5—to which we need specially call the attention of our readers.

NOTES OF CASES.

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QUEEN'S BENCH DIVISION.

Osler, J.] [Dec. 13.

REGINA v. SMITH.

Conviction—Summary jurisdiction — Distress.

A request to proceed summarily under the Summary Jurisdiction Act need not be in writing. A conviction awarding fine and costs, and, in default, imprisonment, was held good, and that a distress warrant to levy the fine need not have been first ordered to issue.

H. J. Scott, for the application.

A. Cassels, contra.

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

LONGHI v. SANSON.

Overholding Tenants' Act—Forfeiture of lease.

Defendant was lessee from plaintiff of the "refreshment room and apartments connected therewith," being portion of a certain railway station, covenanting that "no spirits of any kind should be sold in the refreshment room," and that on failure to observe the terms of the lease, the lessee should, on the requirement of the lessor, give up the premises, and the lease terminate. On a sale of spirits in the bar-room portion of the premises, the Judge of the County Court adjudged a forfeiture of the lease, and directed a writ to issue to put the landlord into possession.

Held, that the terms of the lease had been violated, and that the lessor was entitled to enter: and that the case was covered by the Overholding Tenants' Act.

Falconbridge, for landlord.

O'Sullivan, contra.

IN BANCO.—DEC. 24.

IN RE GALLERNO AND ROCHESTER.—GRANT v. MCALPINE.

There is no appeal from single Judge to Divisional Court.

H. J. Scott and *Holman*, for appeal.

McCarthy, Q.C., and *Aylesworth*, contra.

REGINA v. RICHARDSON.

Criminal law—Assault occasioning actual bodily harm—Evidence—Competency of defendant.

On an indictment for assault and battery occasioning bodily harm, *Held*, that the defendant is not a competent witness on his behalf.

Scott, Q.C., for Crown.

Osler, Q.C., contra.

BURKE v. TAYLOR.

Fixtures—Mortgagee.

S. gave mortgage of land, on which was erected a saw-mill, and on which there was also machinery, trade and other fixtures, to a bank. Subsequently he put up a drying kiln with iron pipes, and then released his equity of redemption in the land and deeded other property to the mortgagee, who sold to plaintiff the pipes, which were claimed by defendant.

Held, that the pipes were fixtures, and the mortgagees were entitled to them under either the mortgage or the deed.

CRATHERN v. BELL.

Guarantee—Default.

Defendant guaranteed G.'s payment of two notes for $751 each, limiting his responsibility to $751. When the first note came due, G. being unable to meet it in full defendant gave him his note for the amount required. This G. discounted and used the proceeds, unknown to plaintiff, or without specific appropriation, in payment of the note at a bank where the note was.

Held, that there was no default in payment of the note; that the advance to G. by the defendant, before default in paying plaintiff, was not payment in satisfaction of his liability under the guarantee.

REGINA v. GRAINGER.

Conviction—Certiorari—Quarter Sessions—Review of.

On application to quash a conviction, no facts not appearing in the conviction will be taken notice of by the Court for the purpose of impeaching it on any ground other than want of Jurisdiction.

The Court has no power to either review the Sessions in a matter within their jurisdiction or to compel them by mandamus to re-hear an appeal.

RE ST. CATHARINES AND LINCOLN.

Municipal Act, Secs. 42-6—Arbitrations.

In arbitration between a city and a county, under the Municipal Act the arbitrators have a large discretion; and, therefore, where arbitrators in estimating expenditures (under secs. 42, 44 5, 6), took population as a basis, and the previous five years criminal records as a basis for computing compensation for care and maintenance of prisoners, the Court refused on these grounds to interfere with their award.

CHANCERY DIVISION.

Boyd, C.] [Dec. 14.

IN RE ROSS.

Corroborative evidence—Statute of Limitations—Evidence Act, R. S. O. ch. 63—Executors, retainer by—Allowance of interest.

Where money is lent to be repaid when the borrower is able, his ability may be shown by a slight amount of evidence, such as is open to public observation, of a flourishing condition of his affairs, and it is not necessary to shew that the borrower is in a position to discharge the debt without inconvenience.

Where each item in an account against the estate of a deceased person is an independent transaction and stands upon its own merits, and would constitute a separate and independent cause of action, some material corroboration of the testimony of the party interested in enforcing the demand must be adduced as to each item in order to satisfy the tenth section of the Evidence Act, R. S. O. ch. 63.

Where the estate of a deceased person is insolvent, the provisions of the Act respecting trustees displace any right on the part of the executor to retain in full; and as against an executor claiming as creditor, any other creditor may set up the Statute of Limitations.

The circumstances under which interest on a claim ought to be allowed or refused in the Master's office, considered and acted on.

Boyd, C.] [Dec. 14.

NELLES v. SECOND MUT. INS. CO.

Mutual Insurance Co.—Default in payment on shares—Forfeiture of shares.

The plaintiff, on becoming a member of the defendant company, agreed to accept his shares subject to the rules of the company. Rule 6 was to the effect that in case of default of payment of dues for a year, the directors might forfeit any shares so in default. The plaintiff being in default for a year and upwards, the directors declared his shares forfeited, and this proceeding was afterwards confirmed at a meeting of the shareholders. The plaintiff thereupon instituted proceedings to have such forfeiture declared invalid on the grounds, (1) that notice of the intention to forfeit had not been given to him, (2) that notice of an intention to forfeit had not been served on him in order that he might appeal to the shareholders if so advised; (3) that the resolution did not expel the plaintiff from membership, (4) that the plaintiff's name was not set forth in full in such resolution; it did not specify the shares to be forfeited, and a number of other persons were included whose shares were jointly forfeited; (5) that no notice had been given of the holding of the annual meeting for the election of directors, so that the directorate was not legally constituted, (6) that one of the directors had become insolvent under the Act of 1875, although his shares continued to stand in his name in the books of the company; (7) that it was not shown that proper and sufficient notice had been given of the meeting of the directors at which such forfeiture had been declared; (8) that the plaintiff had capital at his credit in the company out of which the arrears might have been paid; and by a by-law of the company, "all fines and forfeitures should be charged to members liable, and, if not paid, deducted from capital at the credit of such member."

Held, that these objections could not prevail, and that as to the last, this was not such a forfeiture as was referred to in the rules.

O'Gara, Q.C., and *Gormully*, for plaintiff.

Lees, Q.C., for defendant.

Boyd, C.] [Dec. 14.

SLATER v. MOSGROVE.

Statute of Limitations—Payment on account.

A promissory note made by the purchaser, and indorsed by his son, was given as security for the payment of land sold to the defendant. A payment had been made by the indorser of the note.

Held, that such payment was properly applicable to reduce the amount remaining due upon the purchase money, and was sufficient to prevent the running of the statute.

Gormully and *Christie*, for plaintiff.

O'Gara, Q. C., for defendant.

Boyd, C.] [Dec. 14.

NATIONAL INSURANCE CO. v. EGLESON.

Partnership—Stock, Subscription for—Notice of calls.

The defendants, as partners, had been appointed agents of the plaintiffs, on the understanding and condition that they should acquire and continue the holders of 200 shares of the Capital stock of the Co. In pursuance of this arrangement, they were entered in the stock register of the Co. for that No. of shares, under the partnership name of "Egleson & Cluff;" and 200 shares of the original stock were allotted to them and the usual certificate sent. They did not, however, formally subscribe for the stock. A draft upon the firm for the prior call was accepted and paid, as arranged with the defendant C. Subsequently E. wrote the plaintiffs that he was about retiring from the firm, and desiring to be informed as to the position of the "stock subscribed for by them;" signing the letter "I. Egleson, senior partner," &c.

Held, in an action for calls, that the defendants were liable and could not be heard to say that they had not subscribed for the stock.

The notice of two calls, one payable on the 27th of July, the other on the 27th of August, was mailed on the 27th of June, addressed to the firm at Ottawa. which was received by C; there was not any affirmative evidence that it was not communicated by him to E.

Held, that such notice was insufficient, as "not less than 30 days notice" was required; and therefore the mailing of a notice on the 27th of June, requiring a call to be paid on the 27th of July, was not in time:—otherwise the notice was sufficiently established.

Boyd, C. J.] [Dec. 14.

MERCHANTS' BANK v. BELL.

Estate of married woman—Promissory note—Liability of estate of married woman—Notice of dishonour—Sufficiency of notice.

The rule of the Court is that it will not restrain a married woman from dealing with her separate estate pending suit; still if she die seized thereof, the Court will administer her estate for the satisfaction of her debts.

Held, therefore, that the estate of a married woman deceased in the hands of her infant heirs was liable to the payment of a note on which she was indorser

The indorser—a married woman—died intestate during the currency of the note, and notice of protest was sent to "James Beil, executor of the last will and testament of M. A. Bell Perth," and received by the husband, who resided with his children in the house which his decease wife had occupied. No letters of administration had been granted.

Held, that the notice was sufficient, and the interest of the husband as tenant by the courtesy was directed to be exhausted, before resorting to the estate of the children in remainder. The costs of the infant defendants were to be added to the plaintiffs' claim, and paid out of the estate if not realized against the husband.

Proudfoot, J.] [Dec. 21

HAWKINS v. MAHAFFY.

Riparian proprietor—Reservation in grant from the Crown—Easement.

The Crown, in granting a lot situate on the bank of a river, reserved free access thereto for all persons, vessels, &c. There was a quantity of stone on the lot, which the plaintiff desired to quarry, but was prevented by the penning back of the water of the river by the defendant, the owner of a mill thereon below the plaintiff's land.

Held, that the reservation by the Crown in the grant was merely an easement to the public, notwithstanding which the plaintiff was a riparian proprietor, and as such entitled to complain of the injury caused by the penning back of the water thereon.

The parties desired the assistance of scientific evidence as to the height of the defendant's dam and the effect of raising it. The Court (Proudfoot, J.) appointed an engineer to inspect and report thereon, reserving the costs until his report should be obtained.

Proudfoot, J.] [Dec. 21.

DALBY v. BELL.

Consent order—Mistake of parties—Costs.

A decree had been made on consent, referring to the Master the question whether or not the defendant had performed certain work for the plaintiff at a specified rate, who reported that he had not. On appeal, the Court (Proudfoot, J.) considering that this was a question that should have been disposed of by the Court, set aside the report and directed a trial to be had upon that issue, reserving the costs of the proceedings before the Master and of the appeal.

Held, that these costs having been incurred in a proceeding consented to under a common mistake of parties as to the proper tribunal to decide the question, each party should bear his own costs.

Proudfoot, J.] [Dec. 21.

HEAMAN v. SEALE.

Fraudulent preference—Defending one suit and withdrawing plea in another—R. S. O., ch. 118, s. 1.

The defendant, C., defended an action brought against him by the plaintffs, while in an action brought against him by the defendant, S., he entered an appearance, and filed a plea some days before the same were due, and on the day of filing the plea filed a *relicta verificatione*, whereupon judgment was signed and execution issued.

Held, that these proceedings did not offend against the provisions of the Act R. S. O. ch. 118, s. 1, following in this the decisions in *Young* v. *Christie*, 7 Gr. 312, *McKenna* v. *Smith*, 10 Gr. 40, *Labatt* v. *Birell*, 28 Gr. 593, and *Mackenzie* v. *Watt*, decided in appeal 28th Nov., 1881,—not yet reported.

Proudfoot, J.] [Dec. 21

DUMBLE v. DUMBLE.

Will, construction of—Devise to children—"In case of death," meaning of—Vested interest.

The testator, after having duly made his will, intending to modify it, wrote a letter to his wife, in which he said, "I wish my dear wife and our children to have all my property to be divided equally, my wife to have the use of the whole until the children are of age; in case of death of my children, my wife to have the use of the property for her lifetime, and then to go to my brothers and sisters." The testator left two children, who died during the lifetime of their mother, under age and unmarried.

Held, that the words "in case of death of my children" referred to death before the tes, tator, so that the children took vested interests which their mother took upon their death.

Bethune, Q. C., and *Watson*, for plaintiff; *Maclennan*, Q. C., for defendant.

CHAMBERS.

Boyd, C.] [Dec. 9.

DOMINION, &C., CO. v. STINSON.

Foreign commission—Evidence not used—Costs

The plaintiff obtained an order for the issue of a foreign commission to examine a witness. The order contained the usual direction that the costs be costs in the cause.

The evidence was taken, but neither the plaintiff who succeeded in his suit nor the defendant put it in at the trial.

The taxing officer disallowed the costs of the commission on the ground that the evidence was not used. On reference to him, Boyd, C., held that the direction in the order as to costs did not preclude the taxing officer from disallowing the costs to the plaintiff on the ground that the evidence had not been used.

Mr. Dalton.] [Dec. 2.

RE DUNSFORD.—DUNSFORD v. DUNSFORD.

Examination — Witness — Master's office — Chambers, Rule 285 O. J. A.

The usual administration decree had been made in the suit, and the defendants had filed their accounts in the office of the Master in Ordinary, but nothing further had been done.

The plaintiff's solicitors, learning that a witness whose evidence was said to be material, was about to leave the country, applied to and obtained *ex parte* from the Master in Chambers an order to examine this witness before a special examiner in Toronto, at which place he expected to stay a few days before leaving the country.

The defendant's solicitors were given the usual notice of the order and appointment to examine.

On a motion to discharge the order and set aside the appointment on the grounds that:

1. The Master in Chambers had no jurisdiction to grant an order to examine a witness whose evidence is required in the office of the Master in Ordinary, as the control of the latter over proceedings in his office is complete. G. O., (Chy.) 217-221-222, *Cottle* v. *Vansittart* 2 Chy. Cham. 396, *Hilderbroom* v. *McDonald*, 8 Pr. R. 389.

2. There was no issue upon which the evidence could be given, and the nature of what the evidence was to be was not disclosed.

3. The order should not have been made *ex parte*.

Held, that under Rule 285 O. J. A., the Master in Chambers has full power to direct evidence to be taken at any time and at any stage of the proceedings in a cause.

H. Cassels, for the motion, (the defendant.)

W. Read, contra.

Osler, J.] [December.

PARKHILL v. MCLEOD.

Costs—Guarantee by Solicitor—Execution.

The plaintiff had an order for costs against the defendant, which the defendant's solicitor guaranteed payment of. Taxation was delayed pending an intended appeal from the order. This guarantee was not accepted. There was some delay after the taxation. A Division Court suit had been stayed by the defendant pending the appeal. The defendants solicitors in answer to a demand for the costs and a threat of execution, guaranteed them payment if the plaintiff's solicitor would guarantee their return in case of a reversal of the order. Execution was issued without further notice, and was set aside by the Master in Chambers.

Held, on appeal reversing his order, that the parties had been placed at arms length by the conditional offer of the defendant's solicitor to pay the costs, and in strictness the execution was regularly issued.

Mr. Dalton.] [December.

SACKVILLE v. PACEY.

Counterclaim—Hypothetical case.

Held, that a defendant is not entitled to set up in his counterclaim a hypothetical case for relief against a third party.

Mr. Dalton.] [December.

BYRNE v. BOX.

Division Court bailiff—Interpleader—Costs.

The defendant, a Division Court bailiff, seized goods of the plaintiff under two writs. H. & Co. claimed the books and book debts under an assignment from plaintiff. Debtor applied for an interpleader order, or that H. & Co., be made parties.

Held, that as upon the facts appearing the defendant was not liable, and the plaintiff must fail in the action, the proceedings should be set aside under R.S.O. cap. 73 sec. 8 and Rule 323.

Held, also, that there was no jurisdiction to provide for H. & Co.'s costs.

REPORTS.

ONTARIO.

MASTER'S OFFICE.

SWAINSON V. BARTLEY.

Master's office—Decree manifestly erroneous and unjust—Master's duty—Practice.

Where a decree is manifestly erroneous and unjust, it is the duty of the Master to stay his hand, until the decree is extended or amended in accordance with the true state of the facts.

[Whitby, Oct. 25.—Mr. Dartnell.

The bill was filed to enforce payment of certain legacies which it was alleged were charged equally upon certain lands, of which defendants were devisees, each of one-half, and an account was directed of such legacies, as well as against the whole land, as of one defendant against the other. The bill was *pro confesso*, the solicitors for the defendants being under the impression that their defence could be raised in the Master's office.

On bringing in the decree, the testator's will showed that half the legacies were charged against the land of one defendant and half against the other.

THE MASTER AT WHITBY.—I do not feel I should proceed with this reference. Swainson's will is now produced. From it, it appears that it has been incorrectly set out in the plaintiff's bill. If it had been truly set out no such decree as has been made would have been made. The bill alleges the legacies are charged upon all the lands, whereas one-half only are chargeable against the lands of each devisee. Under this aspect, clause 8 of the decree is manifestly incorrect and unjust. The decree generally makes one defendant liable for the default of the other. The defendant, Swainson, alleges he has fully paid the half of the legacies charged upon his lands, and contends he is not liable for his co-defendant's default, no matter whether he be in default or not. Defendant's solicitors say they did not move against the decree because they thought this defence could be raised before me. As the decree is framed I do not think it can. The decree should be vacated or amended, and one pronounced in accordance with the facts as they now appear. I may add that the Master in Ordinary concurs in those views.

Both parties are in fault; the plaintiff in incorrectly setting out the contents of the bill, and the defendant in not answering, and so letting the clause issue in its present form. I think it is for the defendants to move in rectification, and therefore grant my warrant to proceed with the reference at the expiration of fourteen days, in order to enable them to have the true controversy between the parties properly brought before me.

DIVISION COURTS.

IN RE BELL AND CODLING.

Fence-Viewers' Act—Ditches and water-courses—Duties of fence-viewers—Want of outlet to drain—Jurisdiction—Insufficient description of premises.

[London - Oct. 20

This was an appeal from the award of the Fence-viewers of the Township of Plympton heard at the sittings of the Division Court at Wyoming, on 20th Oct. last. The award was as follows:

"We, the Fence-viewers of the Township of Plympton, County of Lambton, having been duly nominated to view and arbitrate between Mrs. M. Codling (owner of west half of Lot 27, Con. 15), and Mr. James Bell (owner of east half of Lot 26, Con. 15), upon a ditch required on the property of Mr. James Bell, which ditch is to be made and maintained on said property and having examined the premises and duly acted according to the Act respecting ditching water-courses, do award as follows: A ditch shall be made and maintained by the said parties, commencing at station O., at the boundary line of west half of Lot 27, Con. 15, and the east half of Lot 26, Con. 15, Mrs. M. Codling to commence at station 'O' on former award, and make ten rods of ditch west on lot east half of 26, Con. 15, size of ditch to be two and a half feet deep, and two feet bottom, and one to one foot slope. Mr. James Bell to commence at the end of the above named ten rods, and make a ditch the same size and continue it in a northwesterly direction to strike the old drain already made and continue in the old ditch to

the boundary line between east and west half of Lot 26, Con. 15; the ditch when made to be maintained by James Bell, the ditch to be completed on or before the fifteenth day of October, 1880, cost of digging not to exceed seventy five cents per rod, Fence-viewers' fees to be paid by Mr. James Bell, $6."

A plan of the promises was put in, and Mr. J. H. Jones, Civil Engineer, who made the plan, was examined as a witness for the appellant. Mr. Jones explained that the red line on plan represented the ditch on Bell's lot referred to in the award as "the old ditch already made," and which was to be the outlet for the "new ditch" directed to be made, and which was indicated on the plan by the dotted red line. Mr. Jones further swore that the old ditch was sufficient to drain appellant's land, but was not sufficient to take off the additional water that the new ditch, if made, would bring down into it. This old ditch has an outlet on the highway between Plympton and Bosanquet, but only sufficient under present circumstances and not at all sufficient for the additional water that would be discharged into it by the new ditch. He stated further that the proposed drain would be a damage to Bell and would overflow his land; that the run of the water was to the northwest; that it would be impossible to deepen Bell's drain, and allow the outlet on the highway to remain as it is at present, The old ditch was only about one foot deep and the projected drain was to be two and a half feet deep. One of the Fence-viewers examined, stated "That it was the intention of the award to carry the ditch seven feet wide at the top to the line between Bell and Stonehouse. Bell wanted an engineer, but I thought it unnecessary. I did not go on the Stonehouse property. I knew that the old ditch would have to be enlarged but did not think it necessary to look at the property."

Davis, Co. J.—Assuming that the Fence-viewers had jurisdiction in this matter (upon which point I shall refer hereafter) I think it was their duty to look very carefully at the property, and before directing any work to be done they should have satisfied themselves that there was a sufficient outlet, and if there was any doubt on this important point they should have obtained the assistance of an engineer (as was suggested by the appellant). It is quite clear from the evidence that the work directed by the award would be a positive damage to Bell, as well as to his neighbour on the west, if nothing further was done than this award directs; and not only so but Bell is required to make the ditch that will do this injury to himself and his neighbour, and pay besides the sum of six dollars Fence-viewers' fees for directing it to be done. I have no doubt that the Fence-viewers acted with the best intentions, but I think they entirely misunderstood the requirements of the Act of Parliament. They conceived it to be their duty to relieve the person complaining of too much water and take it to his neighbour and leave it there, and so on from one to another, a new award for each case. This is obvious from the fact that on the 10th of May last a like award was made directing the water to be brought down from Lot 28 to Lot 27 by a ditch of the same capacity, and by another award made by the same Fence-viewers on the 18th of the same month they direct another ditch to be made commencing at the termination of the last ditch, and directing it to be continued to the line between Mrs. Codling's property and the appellants'; and the present award (being the third of the series) directs this water to be carried on to the next man's farm—who is also expected in his turn to call in Fence-viewers to make another award directing the water to be taken to the next farm and there left. This is all wrong. Every official act on the part of the Fence-viewers should be thorough and complete; they should see that there is sufficient outlet in all cases, and if no such outlet can be obtained they should not interfere. If Fence-viewers have jurisdiction in a matter like the present I see no reason, if an outlet can be obtained at some point beyond the property in question, why the Fence-viewers should not insist that all the parties through whose property the ditch would have to be cut in getting to the outlet should be notified and made parties to the arbitration. This is the only way a complete award could be made. The other method would be almost impracticable and expensive, and would be an injury and a nuisance instead of a benefit as the Act requires. The award when registered operates as a "lien and charge" upon the lands, and the greatest caution should therefore be exercised in such an important proceeding.

Applying the rules which I hold should govern Fence-viewers in such matters, I must quash the award, which is also bad on the face of it for want of sufficient description as to the starting point and course of the projected drain—"commencing at station 'O' at the boundary line," when there is no plan or map and no further reference to designate the starting point, is not sufficient. The respondent is directed to commence her work at "station 'O' on former award." Nothing can be more uncertain and inaccurate than this. It is most important that everything should be set out very accurately in these awards. The description should be as complete and certain as possible, so that the commencement, the course and termination of the work could easily be ascertained from the award itself or the plans accompanying it.

Apart from the merits of this case, or the regularity of the proceedings, there is some doubt on my mind as to whether the Fence-viewers have any jurisdiction at all in such a case as the present.

By section 3 of R. S. O. cap. 199, (as amended by 43 Vict. cap. 30), secs. 3, 7, 8, 9 and 10, to justify such proceedings adjoining or adjacent lands must be benefitted by one or other of the three things therein specified, viz :

1. By making a ditch or drain.

2. By deepening or widening a ditch or drain already made in a natural water-course.

3. By making, deepening or widening a ditch or drain for the purpose of taking off surplus water from swamps or low miry lands to enable owners or occupiers to cultivate the same.

As to No. 1. Is the appellant benefitted in any way whatever, by having a drain continued across his farm, that was made to drain Lot 28, and not in any way for his benefit? The conclusion I came to at the hearing was what I have before stated. This finding excludes it from the first head. Secondly was the work ordered, "a deepening or widening a ditch or drain already made in a natural water-course." It certainly was not, and the case is thus excluded from the second head. Neither can it be contended that it comes under the third head. If it therefore cannot be classed as a work under either of the three specified heads, the Fence-viewers have no jurisdiction unless subsection four enlarges the meaning and operation of section three, which it appears to do when it declares that "if it appears that the owner or occupant of any tract of land is not sufficiently interested to make him liable to perform any part thereof, and that it is necessary for the other party that the ditch shall be continued across such tract, they may award the same to be done at the expense of such other party, and after such award such other party may do the work at his own expense without being a trespasser." This provision was enacted a couple of years after the passing of the law as it appears in section three (both being consolidated in the revised statutes as cap. 199), and probably was intended to include within the scope and operation of the first Act a class of cases otherwise excepted. This point, however, has not been argued before me, and I express no opinion concerning it, as it is not necessary in deciding this appeal that I should do so.

It is much to be regretted in view of what has already been done under the other two awards, and the heavy expenses incurred in the present proceedings, that the Act gives me no power to correct and amend the award, and continue and modify the proceedings *to the extent required* to make everything legal and attain the ultimate object in view in commencing these arbitrations. I must set aside the award and direct the payment by the respondent to the appellant of such costs herein as I may hereafter tax and certify in due course.

Award set aside.

RECENT ENGLISH PRACTICE CASES

(Collected and prepared by A. H. F. Lefroy, Esq.*)

Werdermann v. Societe Generale d'Electricite.

Imp. O. 16, *r.* 13. *O.* 28, *r.* 1—*Ont. O.* 12, *r.* 15 (*No.* 103). *O.* 24, *r.* 1. (*No.* 189).

Demurrer for want of Parties.

Since the Judicature Acts there is no such thing a a demurrer for want of parties. The proper course is to take out a summons under O. 16, r. 13 (Ont. O. No. 103), to have the necessary party or parties added.

Nov. 11, C. of A., 30 W. R. 33.

Appeal from the decision of Bacon, V.C. I was argued for the demurrer that to demur for want of parties could be done before the Acts : *Deni* v. *Turpin*, 9 W. R. 548, and that as the rules do not say it shall not be done in future, the old practice holds good.

Jessel, M. R.—As the old practice is preserved where unaffected by the Act or Rules, it is important to consider what are the provisions with regard to demurrer under the new practice [His Lordship read Imp. O. 28, r. 1 (Ont. O. No. 189)]. In that rule, it is true, there is no specific power given of demurring for want of parties. The subject, however, was not forgotten, for a different remedy is given elsewhere in the event of necessary parties not being joined. Imp. O. 16, r. 13 (Ont. O. No. 103), lays down what is to be done if it is desired that such parties should be added. The effect of that rule is that a person who would formerly have demurred for want of parties has had nothing to do but to take out a summons under the rule. The practice of proceeding by demurrer, is, therefore, no longer available.

Lush, L. J.—I am entirely of the same opinion. Imp. Ord. 28, r. 1 (Ont. O. No. 189), defines a demurrer, and shows it is a mode of challenging the pleadings of the opposite party on some point of substance. The points there mentioned are the only points which can be now taken on the demurrer. It can only raise a point of substance on the ground that the opposite party does not show what he professes to show.

Lindley, L. J., concurred.

Appeal dismissed.

[*Imp. O.* 16, *r.* 13, *and Ont. O. No.* 103, *are virtually identical; and Imp. O.* 28, *r.* 1, *and Ont. O. No.* 189, *are identical.*]

Emden v. Carte.

Imp. O. 30. *Ont. O.* 26.

Payment into court by defendant, and defence o non-liability—Right of plaintiff to take money out.

Where a defendan denies liability, but pays money into Court, and pleads the sum paid in is enough to satisfy plaintiff's claim, were his contention right, the plaintiff may obtain payment out under Imp. O. 30, r. 3 (Ont. O. No. 217), and may either under rule 4 (Ont. No. 218) accept it in satisfaction of his claim, and tax his costs and sign judgment for the costs so taxed, or may go on with his action for the purpose of recovering more ; and whether the plaintiff succeeds or not in recovering more, or even fails altogether in establishing that the defendant is under any liability, he will be entitled to retain the money so taken out of Court.

[Nov. 3, C. of A.—45 L. T. 328.

Jessel, M. R., in the course of his judgment said with reference to this point of practice :—

"The first question to be considered is, what is the real character of money as regards property when it has been paid into Court in an action by a defendant, who at the same time denies entirely his liability to the plaintiff? Of course it is obviously inconsistent to say, on the one hand, 'I admit I am liable to you for so many hundreds of pounds;' and on the other to say, 'I deny my liability altogether.' But, though inconsistent, that is a mode of pleading which is now permissible under the Judicature Act, and as has been pointed out by the late lamented Thesiger, L. J., in *Berdan* v. *Greenwood*, L. R. 3, Ex. Div., 251, it is quite intelligible that a man may say, 'I am under no liability to you, but I am willing to pay you a sum of money if you abandon your claim.' And that mode of pleading enables a defendant so to say. But, when he pays it, the legal consequences, as gathered from the judgment of Thesiger, L. J., are exactly the same as if the defendant's pleading had contained nothing but an unqualified admission of liability. The plaintiff has a right to take the money out

*It is the desire of the compiler to make the above collection of cases a complete series of all current English decisions, illustrative of our new pleading and practice, under the Supreme Court of Judicature Act.

of Court and keep it, whether it is paid in as a simple admission of liability (in which case of course he would be entitled to keep it), or paid in in the nature of a payment of, as it is sometimes called, 'blackmail,' to get rid of the trouble or nuisance in some way. It is paid in and the plaintiff has a right to take it out of Court, and to keep it as his own."

BAGGALLAY, L. J., said:—

"The case of *Berdan* v. *Greenwood*, which was followed in *Hawkesley* v. *Bradshaw*, L.R. 5 Q. B. D 302, not only decided that such a form of pleading was correct and proper, or might be had recourse to under the new rules of pleading, but also indicated what the effect of such pleading would be. After the money was so paid in, it was open to the plaintiff to take the money out of Court, solely and entirely at his own option and discretion, either in full satisfaction of the demand made by him in the action (in which case he would tax his costs and sign judgment in the usual way) or to take the money out of Court, and with it go on with the action for the purpose of seeing whether he would be entitled to a larger sum than the amount paid into Court; and then in the event of his so taking the money out of Court, and of eventually there being a judgment in the defendant's favour, either arising out of there being no liability, or arising out of the fact of the money paid into Court being in excess of the amount the plaintiff was entitled to, in either view of the case the plaintiff's right to retain the money would have been clear."

BRETT, L. J., said:—

"The case of *Berdan* v. *Greenwood* appears to judicially decide that such an alternative and inconsistent mode of pleading is now to be allowed, and that so much of that pleading as concerned the payment into Court is to be considered as having precisely the same effect as a payment into Court had before the Judicature Act; that is to say, that, if a defendant will pay money into Court, although at the same time he denies his liability, nevertheless the plaintiff is entitled to take that money out of Court; and, if the defendant afterwards succeeds upon the question of liability, nevertheless the plaintiff is entitled to retain the money so taken out of Court. As Thesiger, L. J., in the judgment delivered by him in *Berdan* v. *Greenwood*, (the judgment of the whole Court, although delivered by him), says: 'The record . . . only shows that the plaintiff has obtained, through the timidity of the defendants, something which he had no right to obtain;' that is to say, that, by the exertion of the plaintiff's solicitor in bringing the action, and the timidity of the defendant in submitting to it, the money is 'recovered or preserved' by the exertion of the solicitor."

LINDLEY, L. J., said:—

"The practical result of paying money into Court in the alternative way in which the money was paid in here will be found worked out in the judgment of Thesiger, L. J., in *Berdan* v. *Greenwood*, and, as I understand it, it comes to to this, that the plaintiff can get the money so paid in. He can take it in one of two ways. He can either take it in satisfaction and tax his costs, which course puts an end to the action; or he can, if he likes, take the money out of Court and go on and try and get more. If he goes on and tries to get more he must prove two things, namely, the defendant's liability, and that the money paid in is not sufficient. I he chooses to do that he can, but if he fails, then, as I understand it, he is still entitled to retain what he has got already by taking out of Court the money paid in, the defendant having risked his chance of what might happen if he paid it in in that particular way."

[*The rules under Imp. O.* 30 *and those under Ont. O.* 26 *are virtually identical. It may be mentioned that the C. of A. held, further, in this case, that the money paid into Court had been "recovered or preserved" through the instrumentality of the solicitor within the meaning of sec.* 28 *of the Imp. Solicitors' Act* 1860, (23-24 *Vict. c.* 127) *which enables Courts of Justice to charge property recovered or preserved with payment of costs. No similar clause occurs in our Act respecting Attorneys-at-law, R. S. O. c.* 140].

JENNINGS V. JORDAN.

Imp. O. 16, *r.* 7—*Ont. O.* 12, *r.* 7, (*No.* 95)

Parties—Trustees.

Held, that under above order, trustees of an equity of redemption sufficiently represent their *cestuis que trust* in a redemption suit, no direction to the contrary having been made by the Court.

[Aug. 3. H. of L.—L. R. 6 App. c. 698.

This was an action to redeem a mortgage. It was objected that the *cestuis que trust* of

Price, one of the respondents, who represented n the suit the equity of redemption in a great part of the mortgaged property, ought to have been brought before the Court. The main point for decision in the case was whether the purchaser of an equity of redemption could be affected by a second mortgage, to the same mortgagee, created after the purchase, on another property, or whether he was entitled to redeem the first mortgage without redeeming the second.

Lord Selborne said, p. 710, that he thought Price sufficiently represented his *cestuis que* trust for the purpose of this suit, no direction having been given by the Court to the contrary.

[NOTE.—*The Imp. and Ont. orders are identical.*]

THE QUEEN v. WHITCHURCH.

Imp. J. Act, 1873, *sec.* 47—*cf. Ont. O.* 58, *r.* 1 (*No.* 484)—*Criminal cause or matter.*

Held, an order of Justices under Imp. Public Health Act, 1875, secs. 94, 96 was an order made in a "criminal cause or matter" within meaning of above section of Imp. Act,

[May 20, C. of A.—L. R. 7, Q. B. D 534.

In the above case an order had been made by Justices under the Imp. Public Health Act 1875, directing the defendant to fill up an ash-pit, so as to be no longer a nuisance. Under the provisions of the said Act the Justices might have inflicted a fine, which would have been enforceable as a penalty.

Counsel for defendant in objecting that the order of the Justices was made in a "criminal cause or matter," relied on *Mellor* v. *Denham*, L. R. 5 Q. B. D. 467 as a decisive authority in their favour.

BRAMWELL, L. J. in the course of his judgment said:

"I think that the case before us is governed by *Mellor* v. *Denham*, and that we are bound by that decision. . . . The provisions of the Public Health Act, 1875, have been enacted as a general law for the good of the public . . . Why is not this proceeding under the Public Health Act, 1875, 'a criminal cause or matter,' within the meaning of Jud. Act, 1873, sect. 47? It is certainly not a civil proceeding, and it may perhaps be said that every proceeding is either civil or criminal. Therefore, independently of authority, I am disposed to hold that this is a 'criminal cause or matter.' The difficulty arising in this case exists in others independently of the statute; an indictment for the want of repair of a highway against a person bound to repair it *ratione tenuræ* is a criminal matter; and if the person indicted is convicted, he may be fined by the Court. . . . Again, many of the offences mentioned in s. 91 of the Public Health Act, 1875, are nuisances at common law; some are not. Suppose that a man is charged with one of those offences which are nuisances at common law, proceedings against him may be taken at common law, then he is assuredly a criminal; but proceedings may be taken under the statute, and in that case he is equally a criminal. The same rule must apply as to all offences against the Public Health Act, 1875, sect. 91, whether they are or are not nuisances at common law, and the nature of the proceedings must in all cases be the same. Upon general principles of law, and upon the authority of *Mellor* v. *Denham*, I am of opinion that the case before us relates to a 'criminal cause or matter.'"

BRETT, L. J., said:—

"The legislature has decreed that a penalty should be imposed upon a person offending against the provisions of the Public Health Act, 1875; and it has been decided in *Mellor* v. *Denham*, that to treat the matter in that manner is to treat it as a criminal matter. . . . It is alleged that the power to impose a penalty does not turn the wrongful act into a crime, because an alternative remedy is given, namely, an order to abate or prohibit the recurrence; but I cannot think that an alternative remedy alters the nature of the offence. I think that the present case is decided by *Mellor* v. *Denham*."

COTTON, L. J., agreed that the case was governed by *Mellor* v. *Denham*, and that the alternative mode of proceeding did not take it out of the authority of that decision. The offence was equally criminal, whatever was the form of order made by the Justices. The summons was a proceeding in a criminal matter.

[NOTE.—*Although we have no section in our Jud. Act corresponding to sec.* 47 *of Imp. Jud. Act*, 1873, *it seems right to note the above case as illustrating our order No.* 484, *which though not identical, is similar to Imp. O.* 62, *and which declares that the new rules are not to affect "the practice or procedure in criminal proceedings."*

REVIEWS.

PRINCIPLES OF THE ENGLISH LAW OF CONTRACTS, by Sir William R. Anson, Bart., M.A., B.C.L., of the Inner Temple, Barrister-at-law, Vinerian Reader of English Law, Fellow of All Souls' College, Oxford: Clarendon Press, Oxford, 1879. American Edition: Edited and annotated with American Notes, by O. W. Aldrich, Ph. D., LL.D., Professor of Law in Illinois Wesleyan University: Chicago, Callaghan and Company, 1880.

Mr. Justice Markby, in the introduction to his Elements of Law, remarks upon the revived demand, observable of late, for a higher standard of legal knowledge, and for a systematic education in law, apart from professional training, and also upon the active steps which have been taken by the Universities of Oxford and Cambridge to do their part towards satisfying this demand. He adds, however, that the only preparation and grounding which a University is either able, or would be desirous to give, is in law considered as a science; or at least, if that is not yet possible, in law considered as a collection of principles capable of being syste, matically arranged, and resting not on bare authority, but on sound, logical deduction; all departures from which, in the existing system must be marked and explained.

One of the latest contributions in this field is the work on thePrinciples of the English Law of Contracts, by Sir W. Anson, Vinerian Reader of English Law at Oxford, the merit of which has been already widely recognized, and which we are heartily glad to see has been recently placed among the text books for use in the Intermediate examinations. It is to be feared, however, that the student who approaches it without some previous acquaintance with the principles of the law of contracts will find it a terribly hard book to master. The very elaborateness of the analysis, combined with the conciseness of the style—qualities which are otherwise its highest commendation—will make it difficult to beginners; and Smith on Contracts, might, we venture to think, have been well retained for the First Intermediate. In places, indeed, the latter writer displays a minuteness of analysis and conciseness of language almost worthy of Aristotle himself, as for example, in the chapter on Discharge by Breach. This we should say was probably the best part of the book, but just in proportion to its excellence would be its difficulty to those who approached it without some previous acquaintance with the subject.

The author observes in his introduction that his main object has been to delineate the general principles which govern the contractual relation from its beginning to its end. He commences by considering the relation of contract to other legal conceptions, and observes that it is a combination of the two ideas of agreement and obligation. Closely following Savigny's analysis, he ultimately defines an agreement as "the expression by two or more persons of a common intention to affect the legal relations of those persons;" and a contract as "an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or both to acts or forbearances on the part of the other."

Having ascertained the particular features of contract as a juristic conception, the author proceeds to treat of the Formation of Contracts. This he does by analysing a contract into its elements, which he then discusses one by one, dividing and subdividing each subject with the greatest thoroughness and perspicuity. These elements are as follows: (1) Proposal and Acceptance; (2) Form and Consideration, *i.e.*, the possession of one or other of those marks which the law requires in order that an agreement may affect the legal relations of the parties; (3) Capacity of the parties to make a valid contract; (4) Genuineness of the consent expressed in Proposal and Acceptance; (5) Legality of the objects which the contract proposes to effect.

After disposing of the subject of the Formation of Contract, the author passes to that of the Operation of Contract, which includes that of the Assignment of Rights. Next comes the Interpretation of Contract, where he deals in a most methodical and lucid manner with the admission of extrinsic evidence in the case of written documents (1) as to the existence of the ocument; (2) that the document is a contractd (3) as to its terms. Finally there remains the Discharge of Contract, while as appendices are two short treatises on Contract and Quasi-contract, and on Agency.

This short summary will give an idea of the plan and contents of the book. Throughout the lucidity, conciseness and minuteness of analysis are remarkable. So also is the originality of view frequently displayed, as for example in the discussion (Part II. Chap. 2. Sec. 4) of the commonly received doctrine that a past consideration will support a subsequent promise, if the consideration was given at the request of the promisor, for which *Lampleigh* v. *Braithwait*, 1 Sm.L.C. 67, is regarded as the leading authority. After examining the cases Sir.R. Anson arrives at the conclusion that unless the *request* is virtually an offer of a promise, the precise extent of which is hereafter to be ascertained, or is so clearly made in contemplation of a promise to be given by the maker of the request that a subsequent promise may be regarded as a part of the same transaction, the rule in *Lampleigh* v. *Braithwait* has no application, and that in spite of the cases decided between 1568 and and 1635, of the continuous stream of dicta in text-books, and of the decision in *Bradford* v. *Roulston*, 8 Ir. C. L. 468, the rule cannot be received in such a sense as to form a real exception to the principle that a promise to be binding must be made in contemplation of a present or future benefit to the promisor.

Again, a few pages later, he criticises another so-called exception to the last mentioned principle, viz., the supposed rule that "where the plaintiff *voluntarily* does that whereunto the defendant was legally compellable, and the defendant afterwards, in consideration, expressly promises," he will be bound by such a promise. After examining the cases he concludes that, though it may not be safe to say the rule as habitually laid down is non-existent, yet the cases cited in support of it seem to fail on examination to bear it out.

It is also worth while to call special attention to the clearness which the author imports into the involved subject of fraud and misrepresentation, with its manifold distinctions and confused terminology. He distinguishes between (1) fraud, properly so-called; which consists in representations known to be false, or made in such reckless ignorance of their truth or falsehood as to entitle the injured party to the action *ex delicto*, the action of deceit, (2) misrepresentation, properly so-called; which is an innocent misstatement of facts, made prior to the formation of a contract, but not constituting a term in the contract, which never gives rise for an action of deceit, and which only affects the validity of the contract in certain special cases, viz., contracts of marine and fire insurance, contracts for the sale of land, and contracts for the purchase of shares in companies. (3). epresentations form ing a term or integral part of a contract, which do not affect the validity of the contract, but which, if they turn out to be false, entitle the party to whom they were made, either to rescind the contract and be discharged from it, or to bring an action for a breach of one of its terms; and having so distinguished, he proceeds, in his usual way, to illustrate each subject by full reference to a few carefully selected cases.

Before concluding we would also call attention to the historical sketch of the gradual development of the idea of consideration in English law, contained in part II. chap. 2. Sir R. Anson points out that the only contracts which English law originally recognized were the formal contract under seal, and the informal contract, in which consideration was executed upon one side. Gradually, however, consideration came to be regarded as the important element in contract, and even the solemnity of a deed came to be represented as making a contract binding, not by virtue of the form, but because it "imports consideration." And, moreover, validity began to be given to executory contracts, though informal, *i. e.*, not under seal, provided consideration, the universal test, was present. But the doctrine that consideration was the universal requisite of contracts not under seal, was hardly recognized by English Judges in all its breadth until after the time of Lord Mansfield.

As to the American edition of the book we have been reviewing, we are disposed to say that its best point is that it is printed in larger type and better form, than the English original, and that its worst point is that it tampers to some extent with the author's text, a thing, as it seems to us, neither politic, nor in any way justifiable. It is fair, however, to add that a considerable number of American cases are cited, but with what care and judgment we are quite unable to say.

LAW STUDENTS' DEPARTMENT

We publish elsewhere a summary of the first lecture delivered by Mr. Hodgins, chairman of the Law hool under the new *regime*. It will be very interesting to our young friends.