Canada Law Journal.

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DIARY FOR JUNE.

17. Sat.. Burton and Patterson, J.J. Ct. of Appeal, sworn in, 1874, County Ct. Term for York ends.
18. Sun... *2nd Sunday after Trinity.* Earl Dalhousie, Gov. General, 1820. Battle of Waterloo, 1815.
20. Tue .. Toronto Oyer and Terminer. Accession of Queen Victoria, 1837.
21. Wed.. Galt, J., sworn in C.P., 1869. Longest day.
23. Fri.... Hudson Bay Co. Territory transferred to Dom., 1870.
25. Sun... *3rd Sunday after Trinity.*
28. Wed.. Queen Victoria crowned, 1837.
30. Fri.... Hon. J. B. Robinson, Lieut-Governor of Ontario. P. E. Irvine, Prest. of P. of Canada.

TORONTO, JUNE 15, 1882.

MR. JUSTICE FITZGERALD, of the Queen's Bench Division in Ireland, has been appointed a Lord of Appeal in Ordinary in England.

THE Divisional Court of the Chancery Division have disposed of the list of cases set down, at the rate, so far, of a little over two cases a day. Four or five cases still remain for the supplementary list commencing on June 20th. Judgment in most of the cases is reserved. Few points of very special importance appear yet to have come up. In *Ley* v. *Kidd*, however, an important point of pleading waits decision as to the degree of particularity with which a party has, under the Judicature Act, to indicate on his pleadings the nature of the title to land which he intends to set up. In this case also, the question of the proper construction of sect. 2 of R. S. O., c. 109, the Vendors and Purchasers Act is again before the Court. In *Sanders* v. *Malsburg*, as noted *supra* p. 206, the learned Chancellor expressed an opinion that this section was retrospective. In *Ley* v. *Kidd*, Mr. Maclennan, in an elaborate argument, contended that this could not have been intended by the Legislature. At the time of writing the hearing of this case is not concluded, but the Court have expressed an opinion that the current of decision on the point is so strong the other way that the Court of Appeal alone could over-rule them. At the same time the Court expressed themselves as much impressed by the force of Mr. Maclennan's argument, which, perhaps, placed the question in a stronger light than it had been placed in the former cases.

RECENT ENGLISH DECISIONS.

Of the April numbers of the *Law Reports* there still remain for review, 8 Q.B.D. pp. 317-444; and 7 P.D., pp. 5-20; while the May numbers, which have now arrived, comprise 8 Q.B.D. pp. 445-586; 7 P.D. pp. 21-60; and 19 Ch. D. pp. 516-649.

Of the cases in 8 Q. B. D. pp. 317-444, *Roberts* v. *Death*, and *Hornby* v. *Cardwell*, are cases on points of practice, and have already been noticed among the Recent English Practice Cases, *supra*, p. 101, and p. 136 respectively; and the first case requiring notice here is *Wigsell* v. *The School for the Indigent Blind*, p. 357.

MEASURE OF DAMAGES—BREACH OF CONTRACT.

In this case the owner of certain lands sold them to the defendants, who covenanted in the deed of grant that the land "shall be, and be kept enclosed on all sides abutting to the land belonging to W. (the grantor), with a brick wall or iron railing seven feet high." The Court held the plaintiff entitled to judgment against the defendants for breach of this covenant, and the question now before them was what was the proper measure of damages. The plaintiff contended that the measure of such damages was the sum it

would cost to erect the wall or fence. The Court held it was not so. They say, p. 360 of the judgment:—"the effect of bringing an action for damages" (instead of claiming specific performance of the covenant) "is to convert the right to the performance of the contract into a right to have compensation in money, and the rule in such a case, stated in its most general terms, is that the plaintiff is entitled to have his damages assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed." And they held that to assess this difference on the cost of the wall or fence is inadmissible on principle because the element of the cost to the defendants might vary according to the material of which the wall or railing was composed, and therefore it could not be the measure of the difference to the plaintiff, "which is one thing—it represents in no sense that difference." Furthermore, reviewing the cases, they held that, notwithstanding that *Pell* v. *Shearman*, 10 Ex. 766, at first sight has the air of supporting the plaintiff's contention, yet this contention was not supported by authority. And they distinguished, p. 367, the cases in which, in actions upon covenants against incumbrances or to pay off specific incumbrances, it has been held that the damages are the diminution of the value of the estate by reason of the existence of the incumbrances, and if the contract is to pay off a specific incumbrance the owner may recover the whole amonnt although no claim has been made or damages proved. "In those cases there is a specific covenant to pay a specific pecuniary compensation. The right is to have that pecuniary amount, and there can be no question therefore but that the pecuniary compensation is the very thing to be recovered."

MINUTES OF PROCEEDINGS.

Of the next case *Reg.* v. *Justices of Cumberland*, p. 369, it may be worth while to mention that where a statute required justices, when they should refuse an application for a license to sell beer, to specify in writing to the applicant the grounds of their decision, and where a minute of the decision with the grounds of it was made and read out by the chairman in Court, in the presence of the applicant, but no copy was delivered to him, the Court held that, in the absence of any request by the applicant for a writing showing the reasons for the decision of the Justices, the notice was a sufficient compliance with the statute.

CLUB—"SALE BY RETAIL"—LICENSING ACTS.

In the next case, *Graff* v. *Evans*, p. 373, the question before the Court was whether, where a *bona fide* club, properly constituted, supplied liquor to members, at fixed prices, *but at a profit above cost price*, the money produced thereby going to the general funds of the club,—this was a sale by retail within the meaning of the Imp. Licensing Act, 1872, (cf. R.S.O., c. 181, sect 39). The Court held that it was not. Field, J., says:—"I am unable to follow the reasoning of the learned magistrate in saying that the question depends upon whether or not a profit was made upon the sale of the liquors. It appears to me immaterial whether the sum a member pays is equal to more or less than the cost price. The transaction does not become the more or the less a sale on that account. . . The question here is, did Graff, the manager (sc. of the club), who supplied the liquors to Foster, (one of the members), effect a 'sale' by retail? I think not; I think Foster was an owner of the property together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff with respect to the goods. . . I cannot conceive it possible that Graff could have sued him for the price of goods sold and delivered. There was no contract between two persons, because Foster

was vendor as well as buyer. Taking the transaction to be a purchase by Foster of all the other members' shares in the goods, Foster was as much a co-owner as the vendor. I think it was a transfer of a special property in the goods to Foster, which was not a sale within the meaning of the section."

COVENANT IN LEASE—ALTERNATIVE REMEDIES FOR BREACH.

In *Weston* v. *Metropolitan Asylum District*, p. 387, the reddendum of a lease provided for the payment of £30 rent, and a like rent of £25 "in case any of the trades, occupations or things hereinafter covenanted not to be carried on or done upon the premises, shall be carried on or done." The lessee covenanted not to carry on the said trades, etc., and the lease contained a condition of re-entry if the said rent of £30, or the said further rent of £25, in case the same should become payable, were in arrears, or in case of a breach of covenant. A breach of the above covenant having occurred, the plaintiff sued to recover the premises as upon a forfeiture of the lease. It was contended that, looking to the reddendum, the effect of the provisions of the lease was that of an agreement that the lessees might carry on the trades, or do the acts specified, on payment of a certain additional rent, not that of an undertaking by the lessees not to carry on the trades, or do the acts in question; and that on the true construction of the lease there was no forfeiture. The Court, however, held, in the words of Mathew, J., that "the additional rent must be treated as a penal rent, but not as shewing that the carrying on of the trades in question is not a breach of covenant;" or in the words of Cave, J., that "the lease gives the lessor two remedies; not that both can be exercised together, because, if the forfeiture is insisted on, thereafter no increased rent can accrue, and, if the increased rent is received, any existing form of forfeiture is waived. They are alternative remedies in my opinion."

This is the last case in this number requiring notice here, *Haywood* v. *The Brunswick Benefit Building Society*, p. 403, having already ben noticed, *supra* p. 175, as reported in 51 L. J. N. S. (Q. B.) 73. Proceeding to the last of the April numbers, viz. 7 P. D. pp. 5–20, *Watson* v. *Watson*, p. 10, is a case of a peculiarly worded will.

WILL—GIFT OVER IN CASE OF DEATH.

The testatrix left property to her sisters Ann and Jane, and said in "case of the demise of either I hereby bequeath all and every portion of the said properto to the survivor for her sole use and benefit during her or their natural lifetime." The President pointed out that the use of the concluding words of the will, "during her or their natural lifetime," took this will out of the general rule as to cases where a bequest is made to a person with a gift over in case of his death (Jarman on Wills, Ed. 4, vol. ii. p. 732). And he held—"The words "during her or their lifetime" cannot be rejected, nor can they by any reasonable transposition, if that were allowable, be limited in their effect, though they are not strictly grammatical, of indicating that the estate must be taken by these persons for life only, and that there is an intestacy as to the reversion."

ADMINISTRATOR—INSOLVENT ESTATE—R. S. O. C. 46, S. 54.

In *in the goods of Wensley*, p. 13, the President, under an Imperial enactment, corresponding to the above Ontario enactment, granted administration of the estate of a deceased wife, to the creditors of the deceased husband, in order to enable them to obtain the deceased wife's share of the residuary estate of a third person, to which her estate had become entitled, in satisfaction of their debt.

This completes the review of the April numbers of the Law Reports. Turning now to the May numbers of the Law Reports, they are found to comprise 8 Q. B. D. pp. 445–586: 7 P. D. pp. 21 60; and 19 Ch. D. pp. 519–649.

CONSTRUCTION OF STATUTES—"OR" FOR "AND."

Of the first case in the above number of the

Q. B. D., *Metropolitan Board of Works* v. *Steed*, it is only necessary to say that it is a case on the construction of a statute in which the Court held "or" to mean "and," taking the rest of the sentence in which the word "or" occurred, the object and intention being prohibition, and the two things prohibited being coupled by the word "or."

REMOTENESS OF DAMAGE - LOSS OF RESALE.

The decision in *Thol* v. *Henderson*, p. 457, is best shown by the following extract from the judgment (Grove, J.) "The question is, on what principle damages are to be assessed in this case, and whether the plaintiff is entitled to damages for loss of profit on a sub-contract which he had made for the sale of the goods. This sub-contract was not known to the seller at the time of the sale, but it was known that the plaintiff had purchased the goods for the purpose of resale. On these facts I think the damages ought not to be so assessed as to include loss of profit on the sub-sale. . . In the present case, all that was known by the defendant was that the goods were purchased with a general intention to re-sell them. If that knowledge is to be taken as the test of the seller's liability, I do not see why in any case he should not be liable, however speculative the resale may be. I do not think such knowledge brings the case within *Hadley* v. *Baxendale*, 9 Ex. 341." And he distinguishes the case of *Barries* v. *Hutchinson*, 18 C. B. (N. S.) 445, on the ground that there "the existence of the sub-contract was known to the seller at the time of the sale, or at all events, the fact was known to the seller that the goods were purchased for a specific purpose." It may be added that the head-note in this case appears incorrect in saying that "it was shewn that the goods were not procurable in the market."

PUBLIC MEETING—POLL.

The case of *Reg.* v. *Wimbledon Local Board*, p. 459, proceeds on the principle that a right to demand a poll is an attribute at common law of all public meetings, that any qualified person may demand a poll, and the meeting may be enlarged so that all persons duly qualified may come in and take part in the decision."

COSTS—ARBITRATION—"IN ANY ACTION."

In *Fergusson* v. *Davison*, p. 470, the question was whether, when the matters in difference in an action had been referred by consent to an arbitration, who had found a certain sum due to the plaintiff, this could be said to be a sum recovered in an action, so as to come within the meaning of Imp. 30 31 Vic. c. 142, sec. 5, which says that "if in any action" the plaintiff shall recover a sum "not exceeding a certain amount, he is not to have the costs of the action (cf. R. S. O. c. 50, secs. 343, 345). The Court held that it did; Brett, L. J., taking occasion to add that their decision did not apply to the case in which an arbitrator has made an award under a reference where no action has been commenced.

LIBEL—EVIDENCE—CHARACTER—RUMOURS.

Scott v. *Sampson*, p. 491, arose out of an action which probably most readers will remember. The action was for a libel published by the defendant of the plaintiff alleging that the latter had extorted a sum of £500 from Admiral Carr Glyn, by threatening to publish defamatory matter of Miss Neilson, an actress, then lately dead. It was tried before the L. C. J. and a special jury when the defence set up was that the alleged libel was true. The jury returned a verdict for the plaintiff. In the case now before the Court the defendant claimed a new trial on the ground that the L. C. J. misdirected the jury in rejecting (i) evidence of the plaintiff's general bad character, (ii) evidence that rumours to the same effect as the libel complained of were in general circulation before the publication of the libel. The principal judgment is that of Cave, J., who reviews *seriatim* the authorities on the subject, which consist of decisions relating to the admissibility of (i) evidence of reputation; (ii) evi-

dence of rumours and suspicions to the same effect as the defamatory matter complained of; (iii) evidence of particular facts tending to show the character and disposition of the plaintiff. He then expresses his conclusions: "From this review of the authorities it will be seen that there is a considerable conflict of opinion, and before discussing them further it seems desirable to consider the principles underlying them. (i) Speaking generally the law recognizes in every man a right to have the estimation in which he stands in the opinion of others, unaffected by false statements to his discredit; and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action. The damage, however, which he has sustained must depend almost entirely on the estimain which he was previously held. He complains of an injury to his reputation, and seeks to recover damages for that injury; and it seems most material that the jury who have to award those damages should know if the fact is so that he is a man of no reputation." He then observes that the objection of hardship to the plaintiff is removed under the present system of pleading, which requires that all material facts shall be pleaded, for a plaintiff who has notice that general evidence of bad character will be adduced against him, can have no difficulty whatever, if he is a man of good character, in coming prepared with friends, who have known him, to prove that his reputation has been good. "On principle, therefore, it would seem that general evidence of reputation should be admitted, and on turning to the authorities previously cited, it will be found that it has been admitted in a great majority of those cases, and that its admission has been approved by a great majority of the judges who have expressed an opinion on the subject. (ii) As to the second head or evidence of rumours and suspicions to the same effect as the defamatory matter complained of, it would seem that on principle such evidence is not admissible, as only indirectly tending to affect the plaintiff's reputation. . . Upon the whole, both the weight of authority and principle seems against the admission of such evidence. (iii) As to the third head or evidence of facts and circumstances tending to shew the disposition of the plaintiff, both principle and authority seems equally against its admission. At the most it tends to prove not that the plaintiff has not, but that he ought not to have a good reputation, and to admit evidence of this kind is in effect, as was said in *Jones* v. *Stevens*, 11 Price, 235, to throw upon the plaintiff the difficulty of shewing an uniform propriety of conduct during his whole life. . Among all the cases which have been received there is not one which can be cited in support of the admisibility of this evidence."

DISCOVERY—SHORT-HAND NOTES—PRIVILEGE.

In the next case, *Norden* v. *Defries*, p. 508, the point in question was as follows. In an action of *Norden* v. *Norden*, an issue had directed to determine whether the present plaintiff had or had not executed a certain agreement. While the suit of *Norden* v. *Norden* was pending, the plaintiff commenced the present action, charging the defendants with a conspiracy to defraud the plaintiff, and to utter the agreement as binding upon him, knowing it to be a forgery. The plaintiff now resisted, on the ground of privilege, production for the inspection of the defendants of a print of the shorthand notes of the evidence, which had been taken for the plaintiff upon the hearing of a case of *Norden* v. *Norden*. The Court upheld the plaintiff. They say:—"We think that it does appear that the document came into existence with a view to and in contemplation of the present action, and in order to assist the plaintiff, who is a solicitor, in its conduct and prosecution. If the plaintiff has a cause of action against the defendants, it is manifest that it would be most important for the plaintiff to be enabled to submit to his counsel a full and precise statement of the evidence given by the defendants and their witnesses at the former trial. We

are, therefore disposed to give credit to the suggestion that the notes were intended to form materials for the guidance of the plaintiff and his counsel in the prosecution of the present action."

JUSTICE OF PEACE—DISQUALIFICATION FROM BIAS.

The case of *Reg.* v. *The Justices of Great Yarmouth*, p. 525, arose on a rule for a *certiorari* to bring up and quash certain orders made by certain Justices. It appeared that at a special session for appeals against a poor rate, the chairman of the municipalities, who was himself appellant in one of the cases for hearing, took part in the decision of all the cases except his own. When his own case was called on he left the bench and went to the body of the Court and conducted the case himself. In quashing the orders thus made on these appeals, by which a reduction was made in the valuation, Field, J., makes the following remarks: "The administration of Justice ought not only to be pure in itself, and capable of being demonstrated to be so, but nothing should be done by those who are administering it to throw on it a substantial doubt. It is not enough that the conclusion arrived at was right, and that it has been arrived at on right principles, for every person having a personal interest in any litigation, or having a direct or indirect motive for desiring a particular decision to be come to, should abstain from putting himself in such a position as that, unconsciously to himself, a bias adverse to the due administration of justice might take possession of his mind. This principle is acted on in a case of less importance than that of the administration of justice, namely, the relation of principal and agent. Nothing is clearer than that where an agent takes a reward from the other side, or puts himself in a position of having a personal benefit out of the matter in which he is acting for his employer, it is not necessary to show any damage resulting, nor any bias in point of fact, it is enough to show that he has put himself in a position that is inconsistent with the fair and unbiased discharge of his duties. The reason for this is plain, for it is impossible to measure the effect, great or little, that such a bias may produce. In the case of *Harrington* v. *Victoria Dock Co.*, 3 Q.B.D., 549, (where under such circumstances, the Court held that the plaintiff, an agent, could not maintain an action for his commission, on the ground that the consideration for the contract was corrupt), this was established conclusively."

PRIZE FIGHT—AIDING AND ABETTING.

Of *Reg.* v. *Coney*, p. 434 a case reserved by the chairman of quarter sessions it seems only necessary to say that, whereas the whole Court held that a prize fight is illegal, and that all persons aiding and abetting therein are guilty of assault, and that the consent of the persons actually engaged in fighting to the interchange of blows does not afford any answer to the criminal charge of assault, yet the majority of the Judges held mere voluntary presence at a fight does not as a matter of law necessarily render persons so present guilty of an assault as aiding and abetting in such fight.

WILL—"ISSUE AND THEIR HEIRS."

Proceeding to *Morgan* v. *Thomas*, p. 575, this case involved the construction of the following will: "I give, devise and bequeath to my eldest son L. all my freehold property whatsoever and wheresoever situate, during his natural life, and after his decease to his lawful issue and their heirs for ever if any; if he should die without leaving any children born in wedlock, I give the said freehold property to my son E. and his heirs for ever." The question in dispute was whether the eldest son L. took an estate for life or an estate tale. Cave, J., held that the eldest son took an estate for life, followed by a remainder in fee to his issue as purchasers, if he had children born in wedlock, and a remainder in fee to his brother E. if he had no such children. He cited "the very important case" of *Montgomery* v. *Montgomery*, 3 Jones & Lat.

47, in which Lord St. Leonards lays it down as clearly settled that a devise to A. for life, with remainder to his issue, with superadded words of limitation in a manner inconsistent with a descent from A. will give to the word "issue" the operation of a word of purchase, adding that where there are superadded words of limitation, and the issue can take the fee and there is only a limitation over in a contingent event, the issue will take as purchasers, according to *Lees* v. *Mosley*, 1 Y. & C. 589, following previous authorities. Cave, J., said that the case before him seemed exactly to meet this description.

IMPERATIVE STATUTE—EXECUTED CONTRACT.

The last case in this number of the Q. B. D. is *Young* v. *Leamington*, p. 579, which requires a brief notice. An Imperial enactment, decided to be not merely directory but imperative, required every contract made by an urban sanitary authority, over a certain amount, to be not only in writing but sealed with the common seal of such authority. The defendants, an urban sanitary authority, employed the plaintiffs to do certain work under a contract, in writing but not under the common seal. The plaintiff executed the work, and the defendants had the benefit of it. It was contended that under these circumstances the defendants were at all events liable to pay for the work at a fair price, and cases were cited to shew that corporations are liable at common law, *quasi ex contractu*, to pay for work ordered by their agents and done under their authority. The Court of Appeal, however, unanimously held these cases not in point, for that they had then to construe and apply an Act of Parliament, and if they were to hold the defendants liable to pay for what had been done under the contract, they would in effect be repealing the Act, and depriving the ratepayers of that protection Parliament intended to secure for them. Lindley, L. J., observes, p. 585: "It is not for this or any other Court to decline to give effect to a clearly expressed statute, because it may lead to apparent hardship."

The cases in the April number of the Probate Division, 7 P. D. pp. 21–60, are all of them either ecclesiastical or maritime cases, and do not appear to contain anything requiring notice here.

A. H. F. L.

THE bill for the admission of lawyers from Ontario to practice in Manitoba has now passed the legislature of that province, so that there will, probably, soon be a renewed exodus of members of the profession to that somewhat uninviting promised land. For our own part we would prefer to look on at a respectful distance. Still, as the latest advices from Winnipeg report everyone happy and prosperous, many more enterprising spirits will probably accept the invitation tendered by the legislature. There should be no difficulty in getting the City Solicitorship of Orbbyn City or the City of Manchester to begin with at any rate; although probably Winnipeg has more lawyers to the square acre than any other place on the face of the earth.

REPORTS

RECENT ENGLISH PRACTICE CASES.

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

JACKSON V. LITCHFIELD.

Imp. O. 9, r. 6; O. 42, r. 8—Ont. Rules 40, 346 Judgment against partnership—Canon of construction of Judicature rules.

In an action against a partnership firm, judgment cannot be entered against an individual member of the firm who has made default in appearing.

[April 3, C. of A.—L. R. 8 Q. B. D. 474.

In this action the writ was issued against a partnership firm in the name of the firm, and was served in accordance with the rule and order on one of the partners. All the partners entered an appearance except one, against whom the plaintiff moved to sign judgment separately for want of appearance.

The Divisional Court refused to allow this, and the Court of Appeal now upheld their decision.

BRETT, L. J.—For the solution of this question one must look at the Judicature Orders and Rules, since a proceeding against a firm by the firm's name was not known at common law; and it is a new proceeding. . . In all cases at common law, which are not provided for by the Judicature Acts, the proceedings are to be as they were before the Acts, and in all cases within the Judicature Acts, where no special steps in proceedings are provided, the proceedings are to be as nearly like as they can be to analogous proceedings before these Acts. . . There is no rule or order as to how judgment is to be entered where the writ is against the firm, therefore the way in which it is to be entered must be determined according to the canon rules of construction which I have enunciated. The rule at common law is that the judgment must follow or accord with the writ. Under the Judicature Act and its orders, the writ may be against the firm. Therefore, by analogy, the judgment must be against the firm. . . The only mode of putting such judgment into execution is by proceeding under Imp. O. 42, rule 8 (Ont. Rule 346). That rule provides that execution may issue "against any person who has been served as a partner with a writ of summons and has failed to appear." It is not necessary to determine now whether such service must be personal, though I still incline to think it must be. . . In my opinion the judgment in this action must follow the writ and be against the firm, and then execution may issue against the firm, and against every individual member of it, either without or after leave given to do so.

[NOTE.—*Imp. O. 9. r. 6, and Ont. Rule 40 are virtually identical; and Imp. O. 42, r. 8, and Ont. Rule 346 are identical.*]

SCOTT V. SAMPSON.

Imp. O. 19, r. 4—Ont. Rule 128—Pleadings—Facts not stated.

If in an action of libel a defendant desires to give evidence of general reputation, or any other material facts, he must shew upon his statement of defence that it is his intention to offer such evidence and to rely on such material facts.

[March 20.—L. R. 8 Q. B. D. 491.

The action was for a libel published by the defendant of the plaintiff, alleging that the latter had extorted a sum of £500 from Admiral Carr Glyn, by threatening to publish defamatory matter of Miss Neilson, an actress, then lately dead.

The case was tried before the L. C. J. and a special jury, and the defence set up was that the alleged libel was true. The jury returned a verdict for the plaintiff.

The defendant now claimed a new trial on the ground that the L. C. J. misdirected the jury in rejecting (i) evidence of the plaintiff's general bad character; (ii) evidence that rumours to the same effect as the libel complained of were in general circulation before the publication of the of the libel.

MATHEW, J.—Under our new procedure, a statement of the material facts upon which the defendant intended to reply ought to have appeared in his pleadings. But there had been no notice upon the statement of defence in this case that evidence would be offered at the trial of the matters with respect to which the ruling of the L. C. J. is complained of, and on this ground I am of opinion that the evidence was properly rejected.

CAVE, J.—The defendant proposed to prove certain facts which he alleged were material, but these facts were not stated or referred to in the pleadings, as required by Imp. O. 19, rule 4 (Ont. Rule 128), and it appears to me that on that ground their rejection might have been supported, had they been material, which, however, I have said I think they were not.

[NOTE.—*The Imp. and Ont. Rules are virtually identical. The legal point which arose in this case regarding the admissibility of certain evidence, apart from the question of pleadings, is noted among the Recent English Decisions.*

SANDERS V. SANDERS.

Imp. O. 58, r. 5—R.S.O., c. 38, sect. 22. Further evidence in Court of Appeal.

That, upon a case heard on admissions, those who advised one of the parties put a construction upon the admissions, which they have since found is not a right construction, is not a sufficient ground on which to apply for leave to adduce further evidence, on appeal, under the above section.

[Nov. 29, C. of A.—51 L.J.N.S. (Ch. D.) 276.

This was an appeal from a decision of Malins, V.C. The case was tried upon admissions. The question at issue was whether the plaintiff's

claim as tenant in common to certain property had been barred by the Statute of Limitation.

Higgins, Q.C., for appellant:—It must be assumed on the admissions that from 1833 to 1864 one tenant in common was in possession of the entirety without accounting. If the admitted subsequent payment for fifteen and a half years would raise a presumption of continuing payment, we ask for leave to adduce further evidence to prove that in fact for 20 years previously to 1865 there was no payment of a half of the rents.

BAGGALLAY, L.J.:—Mr. Higgins has applied for leave to produce additional evidence to show that these admissions do not give a correct view of the actual case, basing his application on Imp. O. 58, r. 5, (R.S.O. c. 38, sect. 22). The order gives the Court power to allow such evidence to be admitted, but only when there are special grounds, and not without special leave. What special grounds are there for the present application? That those who advised the defendant put a construction upon the admissions which they now find is not the right construction, and now want to turn round—but that is not a sufficient ground for this application.

JESSEL, M.R., and LUSH, L.J., concurred.

[NOTE.—*Imp. O. 58, r. 5, and R.S.O. c. 38, sect. 22, are, as regards the portion of them to which this case relates, virtually identical.*]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

From Quebec.]

BERGERON v. LASCELLE.

Mandamus—41 Vict., cap. 3, sec. 63 (Q.)—42-43 Vict., cap. 3, sec. 11 (Q.)—14 Geo. III., cap. 85, sec. 5 (Imp.) still in force—"City."

In May, 1880, B. applied to L., a license inspector, to obtain a license to keep an inn in the City of Three Rivers, producing to L. the necessary certificate, and tendering him one dollar under 41 Vict., cap. 3, sec. 63, and was refused a license. By the latter Act it was provided that, in addition to the fee of $1, a fee of $200 should be paid in the Cities of Montreal and Quebec, a fee of $80 in other cities; and a fee of $70 in all incorporated towns. This was repealed by 42-43 Vict., cap. 3, and no provision was made for other cities than Montreal and Quebec. B. obtained a mandamus to compel the issue of a license.

Held, that 14 Geo. III. cap. 85, sec. 5 (Imp.), is still in force, and that B. was not entitled to a license without payment of the fee of £1 16s. prescribed thereby.

Held also, that under the above mentioned Provincial Acts, L. could not have granted a license for the City of Three Rivers, as they apply only to Montreal and Quebec, and the City of Three Rivers was not within the meaning of "all incorporated towns."

McDougall, for the appellant.

Germi, for the respondent.

BARSALOU v. DARLING.

Trade mark—Infringement.

The appellants manufactured and sold cakes of soap, having stamped thereon a registered trade mark, described as follows:—A horse's head, above which were the words "The Imperial;" the words "Trade Mark," one on each side thereof; and underneath it the words "Laundry Bar." "J. Barsalou & Co., Montreal," was stamped on the obverse side. The respondents manufactured cakes of soap similar in shape and general appearance to the appellants', having stamped thereon an imperfect unicorn's head, being a horse's head with a stroke on the forehead to represent a horn. The words "Very Best" were stamped one on each side of the head, and the words "A. Bonni, 115 St. Dominique St.," and "Laundry" over and under the head. At the trial the evidence was contradictory, but it was shown that the appellants' soap was known, asked for and purchased by a great number of illiterate persons as the "horse's head soap."

Held, (HENRY, J., dissenting), reversing the judgment of the Queen's Bench (appeal side) and restoring the judgment of the Superior Court, that there was such an imitation of the appellants' trade mark as to mislead the public, and that the appellants were entitled to an injunction to restrain the defendants from using the device adopted by them, and that the appel-

lants were entitled to damages which were assessed at $100.

Beigue and *Geoffrion*, for the appellants.

Pagnuelo, Q.C., and *Cruickshank*, for the respondents.

From New Brunswick.]

MCSORLEY V. MAYOR OF ST. JOHN AND LANDALL.

Action of arrest by virtue of an execution issued for assesment under 41 Vict., ch. 9—Plaintiff did not own lands on account of which the assessment was made—Execution issued by Receiver of Taxes for City of St. John—Liability of receiver and corporation.

The 41 Vict., ch. 9, intituled "An Act to widen and extend certain public streets in the City of St. John," authorized commissioners appointed by the Governor-in-Council to assess the owners of the land who would be benefitted by the widening of the streets, and in their report on the extension and widening of Canterbury street the commissioners so appointed assessed the benefit to a certain lot at $419.46, and put in their report the name of the appellant, McS., as the owner. The amount so assessed was to be paid to the corporation of the city, if not, it was the duty of the Receiver of Taxes appointed by the city to issue execution and levy the same. Appellant, although assessed, was not the owner of the land. After notice to pay, S., the Receiver of Taxes, on default issued an execution, and for want of goods the appellant was arrested and imprisoned until he paid the amount at the Chamberlain's office in the City of St. John. The action was for false imprisonment, and for money had and received. The jury found a verdict for appellant on the first count against both defendants.

Held, (reversing the judgment of the Supreme Court of New Brunswick), That the writ of execution having been executed by S., a servant of the corporation under their control, without any legal authority to justify its issue, and the corporation having adopted the act of their officer as their own by receiving and retaining the money paid, and authorizing McS.'s discharge from custody only after such payment, the verdict in favour of the appellant for $635.36, against both respondents on the first count should stand.

Weldon, Q.C., for appellant.

Dr. Tuck, Q.C., for respondents.

From Nova Scotia.]

CONFEDERATION LIFE ASSURANCE CO. V. O'DONNELL.

Policy, delivery of—Policy not counter-signed, effect of—Premium—Proof of payment of—Delivery of policy insufficient—Escrow.

On an action on a policy the appellant's company claimed that the policy was never delivered, and that the premium had never been paid, and that it was not a perfected contract between the parties. The policy was sent from Toronto to Halifax, to the agent at Halifax, to receive the premium and countersign the policy, and deliver it to the party entitled. The agent never countersigned the policy, and on one side of the policy the following memo. was printed:—"This policy is not valid unless countersigned by——agent at——, countersigned this——day of——, ——agent." The agent, in his evidence, said he delivered the policy to W. O'D., the party assuring, not countersigned in order that he might read the conditions, and swore the premium had not been paid. The policy was found among W. O'D.'s papers after his death not countersigned. The policy was dated 1st October, 1872, and the first premium would have covered up the year to the 1st October, 1874. W. O'D. died the 10th July, 1873. The case was tried before McDonald, J., with a jury, and he gave judgment in favour of respondent for the $3,000, and this judgment was confirmed by the Supreme Court of Nova Scotia. On appeal to the Supreme Court of Canada it was held as follows:—

Held, (FOURNIER and HENRY, J.J., dissenting), that the evidence established the fact that the policy had not been delivered to the assured as a completed instrument, and therefore appeal should be allowed.

Per GWYNNE, J.:—That the instrument was delivered as an *escrow* to the agent, not to be delivered as a binding policy to W. O'D. until the premium should be paid, and until the agent should, in testimony thereof, countersign the policy, and that their was no suffieient evidence to divest the instrument of its original character of an *escrow*, and to hold the defendants were bound by the instrument as one completely executed and delivered as their deed.

Beatty, Q.C., and *Lees*, Q.C., for appellants.

Thompson, Q.C., for respondent.

McDONALD V. LANE ET AL.

Replevin—Possession as against wrong doer—Chattels, title to—Co-mingling of logs.

This was an action of replevin for 1,440 logs cut on a lot of land known as the Johnston lot, in Horton Township, N.S. L. *et al* claimed title to the land in question under a paper title, and claimed that they had been cutting logs on the lot in question since 1875, and had built a barn on the lot, and also a camp. In 1877 the plaintiffs cut some 900 logs from the Johnston lot, and put them on the ice within a boom from an island from the main land. McD. claimed title under S. P. B. In 1873, at a town meeting it was resolved, without any authority, that certain persons appointed by the meeting be empowered to sell and give a warranty deed of lands called vacant lands, and under that authority sold to S. P. B. a certain tract of land. The deed of sale was accompanied by a power of attorney empowering S. P. B. *et al.* to ask, demand and receive compensation and damages from all persons liable for trespasses committed on the lot described in the deed. In 1877, McD., claiming under S. P. B., cut on this tract of land upwards of 2,000 trees, 500 of which were cut on the Johnston lot, which he also put on the ice outside and inside L. *et al.'s* boom, and then claimed the whole as his own, and resisted attempts of L. to remove them, thereupon L. took out a writ of replevin, under which, being unable to distinguish them all, they took all they could identify, and enough to make up the number cut on the Johnston lot and by themselves elsewhere.

Held, That McD. had shown no title in S.P.B. to the Johnston lot, and that acting under him he was a wrong doer; and that L. *et al* being in actual possession of the Johnston lot, the title to the logs cut by them as well as by McD. rested as soon as cut in L. *et al*, who were therefore entitled to cover the whole of the logs in this action of replevin.

Per STRONG, J.:—That all the party, whose logs are intermingled, can require is that he should be permitted to take from the whole an equivalent in number and quality for those which he originally possessed.

Per HENRY, J.:—That where the goods of two persons are so intermingled that they cannot be distinguished, the law gives the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed.

Rigby, Q C., for appellant.

COMMON PLEAS DIVISION.

EASTER SITTINGS.

THE QUEEN V. O'ROURKE.

Criminal Law—Selection of jurors—Demurrer—Case reserved—Writ of error.

To an indictment for murder the prisoner pleaded a plea challenging the array of the panel, which plea was demurred to and judgment given is favor of the Crown by the learned judge holding the Court of Oyer and Terminer, who, at the request of the prisoner, reserved a case for the consultation of the Common Pleas Division.

Held, that this was not a matter to be reserved under C. S. U. C. ch. 112, and the case was therefore directed to be quashed.

Semble, per WILSON, C.J.:—That a Writ of Error was the proper remedy, and that it would lie to either the Queen's Bench Division or Common Pleas Division, and not to the Court of Appeal.

By the Dominion Act, 32-33 Vict., ch. 29, sect. 44, the relation of jurors in criminal cases is authorized to be in accordance with the Provincial laws, whether passed before or after the coming into force of the B. N. A. Act, subject, however, to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with the B. N. A. Act.

By the Provincial Acts, 42 Vict., ch. 14, and 44 Vict., ch. 6, the mode of selecting jurors in criminal cases as provided for by 26 Vict., ch. 44, the Act in force before and at the time of Confederation was changed by excluding the Clerk of the Peace as one of the selectors, and requiring the selection to be made only from those qualified to serve as jurors whose surnames began with certain alphabetical letters, instead of from the whole body of those competent to serve as previously required. The jury in question were selected under these Provincial Acts.

Semble, that the 31-32 Vict., ch 29, D., was not *ultra vires* of the Dominion Parliament,

and that the selection made in accordance with the Provincial Acts was valid.

Irving, Q.C., for the Crown.

Murphy, for the prisoner.

HEWSON V. MACDONALD.

Release of action—Notice of trial, after—Setting aside appeal to Divisional Court—O. J. Act Rule 414.

In an action for work done and materials provided, etc., to which the defendant pleaded never indebted and payment. On the cause coming on for trial, a settlement was effected by the defendant paying the plaintiff $2,500, and receiving a release from the plaintiff, expressed in the most general terms, to be in full of all demands. Subsequently the plaintiff—without having repaid the $2,500, and having refused to do so on the defendant's offering to give up the relsase if he would repay the money, contending that the said money payment was not the whole consideration for the release, but that the plaintiff, in addition, was to receive an appointment in the Civil Service worth $2,000 a year—gave notice of trial for the next assizes. The defendant thereupon applied to the Master in Chambers to set aside such notice, and stay all proceedings on the ground of the release being in settlement of all demands, or to let in the defendant to plead the said release; and the Master made an order setting aside the notice. The plaintiff appealed to Mr. Justice Armour, in Chambers, who, on the 11th April, made an order setting aside the Master's order, and permitting the defendant, but on that day, to plead the release, with leave to the plaintiff to reply, and directing the case to be entered for trial at the Assizes, on 17th April following. This order was taken out by the defendant and the release pleaded, and the case subsequently entered for trial and afterwards withdrawn. In Easter term following the defendant moved by way of appeal, against Mr. Justice Armour's order.

Held, that under the O. J. Act, rule 414, it was not essential that the appeal should be made within eight days from the making of the order on the time calendar.

Held also, that the defendant, by taking out Mr. Justice Armour's order and taking a benefit under it, would, according to the general rule and practice, be precluded from moving against it.

Held, however, that he could do so in this case because it was quite unnecessary to make it, as the plaintiff refused the defendant's offer to repay the money and get back the release, and it was not supportable in law, because the plaintiff, not having paid back the money, was not in a position to repudiate the release, and at the trial would be stopped from doing so; and also that the additional consideration set up being illegal, and the plaintiff being *particeps criminis*, he could not avail himself of it to defeat the release.

Held also, that the evidence showed that the defendant never agreed to any such alleged promise.

McMichael, Q.C., and *Ogden*, for the plaintiff.

McCarthy, Q.C., and *Marsh*, for the defendant.

CHANCERY DIVISION.

Proudfoot, J.] [June 6.

LAVIN V. LAVIN.

Conveyance by husband to wife.

The conveyance by a husband to his wife, even of all his property, has never been deemed to infringe any rule of public policy unless where it offends against the Statutes of Elizabeth, or the bankruptcy or insolvency laws. Post-nuptial settlements, like all other voluntary transactions, are valid and binding, so far as the parties are concerned, and can only be impeached as fraudulent as against others. Nor can such a settlement be less efficacious because the wife is to hold for the benefit of herself and the children. That is only another mode of carrying out the husband's duty to maintain and provide.

W. Cassels, for the plaintiff.

Bethune, Q.C., for the defendant.

Proudfoot, J.] [June 6.

MARTIN V. MCALPINE.

Fraudulent preference—Pressure—R.S.O. c. 118.

The bill in this case was by one execution creditor impeaching a judgment obtained upon a cognovit given by the defendant Farrell to the defendant McAlpine, another execution creditor, as offending against the act respecting the fraudulent preference of creditors, R.S.O. c. 118.

Held, inasmuch as the cognovit was not voluntarily given, but was the result of clear pressure

on the part of the defendant, the transaction was protected. *Brayley* v. *Ellis*, 1 Ont. R. 19, followed.

Moss, Q.C., (*Hopkins* with him). for plaintiff.
Blake, Q.C., for defendant McAlpine.

Ferguson, J.] [June 12.

Mortgage—Interest—Forfeiture.

DOWNEY v. PARNELL.

A mortgage, on which suit was brought, contained following proviso :—"Provided this mortgage to be void on payment of $2,500 of lawful money of Canada, with interest at 10% per annum, as follows : at the end of five years from the date hereof, with interest at the rate aforesaid to be paid half yearly ; but should default be made in payment of the principal money or interest, or any part thereof, respectively, then the amount so overdue and unpaid to bear interest at the rate of 10% per annum until paid."

Held, the above contract in regard to an increased rate of interest is not invalid, the matter being one of contract simply, and the contract not being in violation of any existing law ; nor is it relievable against on the ground of forfeiture.

Hoyles, for the mortgagee.
Hoskin, Q.C., contra.

Boyd, C.] [May 31.

DAVIS v. WICKSON.

Fraudulent preference—Remedy—13 Eliz., c. 5—R. S. O., c. 118—R.. S. O., c. 119.

In this action the plaintiff, who had obtained judgment and issued execution thereon against the defendant Foster, claimed to have certain securities and a certain judgment obtained by the defendant Wickson, declared to be fraudulent and void on the ground of undue preferencce, and to have them set aside. He further sought to make Wickson account for the proceeds of the said securities received by him. Wickson obtained the securities and recovered the judgment as treasurer of certain trust funds of a certain public body to which Foster was indebted. It was admitted that the *corpus* of the property had passed beyond Wickson's control, and it was proved that before litigation he had paid over the money to his principals, who were not before the Court.

Held, the right of the plaintiff in these cases is to have any impediment removed or declared invalid which intercepts the action of his writs of execution. So long as the property of his execution debtor remains distinguishable, and so long as no purchaser for value, without notice, intervenes, so long may the Court award him relief against that property in the hands of fraudulent or voluntary holders. But when, as here, the first holder sells the property obtained from the debtor, and receives the proceeds in such a shape as that they cannot be ear-marked, then there is no jurisdiction to go beyond the further remedy which the Statute of Elizabeth prescribes, namely, that all parties to fraudulent conveyances, aliening or assigning thereunder, shall forfeit a year's value of the lands and the whole of the goods, whereof half shall go to the Crown and half to the party aggrieved, to be recovered by action of debt as mentioned in sect. 2 of the Act.

The omission of the word "him" at the conclusion of the affidavit of *bona fides* registered with a chattel mortgage has the effect of destroying the security as against an execution creditor who has seized while the goods remained in *statu quo*, but does not impair the instrument as between the parties.

W. Francis, (*Wardrop*, with him,) for the plaintiff.

Blake, Q.C., (*Thomson*, with him,) for the defendant Wickson.

W. A. Reeve, for the defendant Boustead.

CHAMBERS.

Boyd, C.] [May 8.

GROOM v. DARLINGTON.

Administration—Cases within G. O. ch. 638, 639—Practice.

Motion for the administration of the estate of Wm. D. Darlington by plaintiff, Henry Groom, who claimed to be a creditor of the estate, by reason of the support and maintenance by him of the testator's wife (in England), who had died shortly before the testator.

The testator, by his will, left $1,500 to the wife of the plaintiff, which had been paid to her.

The defendants (the executors) filed affidavits alleging:—1st. That the plaintiff should be put to proof of his alleged claim, inasmuch as he had not shewn that testator's wife had not separated from her husband, under circumstances which would disentitle her to support and maintenance. 2nd. That the legacy of $1,500 was intended in full satisfaction of any claim of plaintiff or his wife, if any such existed.

Held, that the questions raised were substantially such as would be raised in an action for alimony, and that such a claim as plaintiff's must be supported by *viva voce* evidence, and not merely by affidavit.

Motion dismissed, and an action directed to be brought to prove the claim, and for the administration of the estate. Costs of the application to be costs in the cause, and to abide the event of plaintiff proving claim or otherwise. Proceedings to be commenced within one month, or the motion to be finally dismissed with costs.

Winchester for plaintiff.

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

R. Caddick, solicitor, for defendants (the executors).

Mr. Dalton, Q.C.] [May 26.

HOOD v. MARTIN.

Agreement to sell land—Special endorsement of writ—Rule 80, O. J. A.

A motion for judgment under Rule 80, O. J. A. The writ was endorsed for the price of land which the plaintiff had agreed to sell to the defendant. The defendant refused to carry out the contract of sale, alleging that he had made a mistake as to the land which he had agreed to purchase, in that he supposed he was purchasing another lot. He did not allege that the plaintiff was in any way accountable for the mistake. The plaintff moved for judgment under Rule 80, O. J. A., on the ground that there was no defence to the action.

MR. DALTON, Q.C.—I think the claim here cannot be effectively specially endorsed on the summons. A claim for the price of land *sold* and *conveyed* might be so endorsed, but it must be on an executed and performed consideration. Here no property passed—the plaintiff still owns the land. There is no debt, and what the plaintiff is entitled to is damages against the defendant for not carrying out the contract.

Motion dismissed with costs.

J. H. Macdonald for the motion.

Meek, contra.

Proudfoot, J.] [June 6.

RE ALLEN; PEACOCK v. ALLEN.

Administration—Practice—G.O. Chy. 638, et seq.

An administration suit under G. O. Chy. 638. The defendant was the agent for the plaintiff in selling a patented invention, and the testator, by instrument under seal, became surety for him and then died, appointing by his will the plaintiff and defendant his executors.

The plaintiff claiming to be a creditor of the estate, under the agreement of suretyship, obtained from the Master at Woodstock an administration order, which also directed that if any debt was found due to the plaintiff it should be paid by the said defendant. Letters from the defendant in June 1872, admitting a debt of $260, were put in on appeal.

PROUDFOOT, J, thought the case a simple one and within the terms of G. O. Chy. 638, *et seq.*, that the letters admitting the debt of $260 established a *prima facie* case in the plaintiff's favor, that the case was one peculiarly of equitable cognizance, being between a principal debtor and his surety. Before the recent changes in the law the defendant would have had no right to trial by jury, and he thought the recent legislation did not extend that right. As there did not appear to be any assets he did not think that the plaintiff could have paid himself, but independently of the question of assets the proceedings in this case were regular, and similiar to that found in *Re Greaves, Gray* v. *Tofield*, 18 Ch. D., 551. Neither did the Statute of Limitations operate as a bar; the agreement, dated 1871, being under seal, there could be no limitation under 20 years. He declined to order the reference elsewhere than to Woodstock on the ground that the Master had prejudged the case, as it did not appear that the Master was under any disability from professional or fiduciary relations with any of the parties, and it could not be as-

sumed that the Master would not properly discharge his duties.

Appeal dismissed with costs.

Meredith, (London), for appeal.

H. Cassels, contra.

Proudfoot, J.] [June 6.

NORVALL v. CANADA SOUTHERN RY. CO.

Costs—Defence—Time of raising—Defence.

This case is reported on page 98.

Cattanach now moved to set aside the order making the decision in the Court of Appeal an order of the Court of Chancery, in so far as it directed the defendants to pay the costs of the appeal.

H. Cassels, contra.

PROUDFOOT, J.—The cases to which I was referred, of *Clark* v. *Smith*, 9 Cl. & F. 143; *McKenny* v. *Ramsay*, *Ib.* 818; *Attorney-General* v. *Cox*, 3 H. L. C. 278, were instances of where the costs of the proceedings were disposed of by the House of Lords, and are no criterion as to the right to costs where the appellate Court is silent on the matter. The case of *Sams* v. *Johnston*, L. R. 6 C. P. 451, was also referred to as being in favour of the defendants; but on consideration it seems to me to be in favour of the plaintiff.

The Supreme Court, by making a disposition of these, must be assumed to have intended to allow the disposition of them by the Court below to remain.

Motion refused with costs.

Proudfoot, J.] [June 6.

WIGLE v. HARRIS

Statement of claim, Enlargement of time for delivery of—Notices—Rule 42.

The Master at Chatham made an *ex parte* order allowing the plaintiff two months further time to file his statement of claim.

On appeal. PROUDFOOT, J.—I think such an order ought only to be made on notice; and as any person affected by an order of the local Master may appeal to the Judge in Chambers under Rule 428, it was not necessary to apply to the local Master to rescind his order.

Appeal allowed with costs.

Proudfoot, J.] [June 6.

CAMERON v. LEROUX.

Partition—Commission—G. O. Chy. 643.

This was a partition suit. The Master at London allowed $300 for commission, apportioning the same as follows:—The plaintiffs' solicitors, $235; guardian of infants, $25; widow, $40; and certifying that the greater part of the work and responsibility of the conduct of the case was upon the plaintiff; that he had carefully considered the amount which the guardian could tax, if taxed costs were allowed, and specified the work done by the guardian in his office.

The charges of the agents of the guardian amounted to $25.

PROUDFOOT, J.—I do not think that the sum allotted to the guardian should be measured only by the work done in the Master's office, he has to acquaint himself with all the facts of the case besides, which his clients cannot give by reason of their infancy, and which have to be gathered from relations and in many cases from other more impartial sources. He has not, as in the ordinary cases of a solicitor for an adult, merely to carry out his client's wishes, but he has to inform himself of what is best for them and to decide for them.

The guardian expressed his willingness, without prejudice, to accept $50 for his share of commission, and without considering whether he might not be entitled to a larger sum, I think this is a reasonable offer and ought to be accepted.

The report will be varied accordingly.

Proudfoot, J.] [June 6.

MARTIN v. LAFFERTY.

Service out of jurisdiction—When order to proceed necessary—Rule 45, O. J. A.

Held, (affirming the Master in Chambers), that an order to proceed is unnecessary where the writ of summons and statement of claim have been served out of the jurisdiction, except in cases under paragraph (*e.*) of Rule 45, O.J.A.

LAW STUDENTS' DEPARTMENT

SCHOLARSHIPS.

Whilst there will be differences of opinion on the subject brought forward in the following letter, there is much sound sense in what our correspondent advances, and a healthy "ring" about his remarks which must commend them to all.

To the Editor of THE LAW JOURNAL.

Now that the examinations are just over, it is, perhaps, a seasonable time for considering the most desirable manner of conducting them that the best possible results may accrue.

The advisability of offering scholarships has, for a number of years past, been engaging the attention not only of University Senates but of students generally, and it is getting more and more to be the opinion of educational men of modern thought that this practice does not conduce to any great permanent good.

Scholarships and rewards of such nature are intended as a stimulus to students to be proficient in their work. No one would for a moment pretend to say that there ought not to be an incentive to encourage candidates to exert themselves, but the most laudable, and at the same time most profitable for the student is the real satisfaction of being successful for his profession's sake—*i. e.*, for the position which his legal knowledge, together with his natural talents, will give him in that profession and consequently benefit it thereby; but the student who requires an encouragement, so mercenary, so prone to small mindedness as the former, to spur him on to exertion and to success might better, both for himself and the profession, have finished its study with his primary examinations and directed his attention to pursuits in which personal emolument is the principal object, the chief good.

This motive of "reading for a scholarship" is, unquestionable a selfish and unworthy one, but I think I am stating the fact when I say, that with the large percentage of scholarship winners that (if not the still less worthy one of surpassing some individual man) was their direct aim and sole immediate ambition; but how often do we find their genius (?) ending with the "capture" of it!

It is a notorious fact that, as a rule, brilliant "examination men" are soon outstripped in actual practice by their less fortunate, (if it be a misfortune), comrades who comprise the class from which, as a general thing, spring those who attain the highest professional distinction. The fact of their taking a scholarship is by no means a criterion of any extraordinary inborn talent, when we consider that the majority of these men months before abandoned their office duties entirely, and settled down to a systematic course of mechanical "plugging," while seemingly less proficient candidates, taking their examinations regularly as they become due, remained at their post almost to the very hour of examination and thus acquired practice which, although it scores but little on their papers, is none the less necessary to their legal education, none the less necessary to their proficiency as students of the law, and experience, (which is, perhaps, more beneficial to them than the extra "cramming") in after years in the active practice of their profession. With this class of candidates, moreover, their knowledge is too apt to be superficial, and I believe it is no exaggeration to say that the greater number of scholarship men rely more upon their memories than upon any keen perception into the intricacies of legal study, and that which they are unable to fathom by patient reasoning they commit by rote, and is transmitted to the examination paper as mechanically as a phonograph talks.

The tendency of this practice is:—

1.—To create among studeuts a rivalry which has its origin in the smallest and most selfish desires.

2.—To beget a false and unmanly ambition.

3.—To generate petty and ignoble aspirations.

4.—To foster anything but correct ideas as to ability and excellence in the minds of those who are shortly to take their places in the ranks of a profession whose improvement should be the highest aim of every man who has the privilege of being a member of it.

Yours, etc.,

PROFESSIONAL.

Hamilton, May 23rd, 1882.

CORRESPONDENCE.

Administration of Justice in British Columbia.

To the Editor of the LAW JOURNAL.

SIR,—Mr. Alpheus Todd's article in your number of May 1st, "on the Supreme Court of British Columbia," referring to the judgment of that Court on the constitutional questions raised in the *Thrasher Case*—commands attention from the respect that is due to the writer's name. It is important, therefore, to see whether he has examined the case with the care and consideration due to his standing as an authority on constitutional subjects—bearing in mind, however, this marked distinction, which must pervade every question involving the construction of the "B. N. A. Act, 1867," namely—that the Constitution of the Dominion is based not only upon the rights and privileges which as part of our Common Law inheritance, arise from long usage and practice as British subjects and colonists, as well as in the case of Canada from Treaties, we are entitled to and possess, but also upon the written compact which of our own accord we

have adopted, and which at our own request has been sanctioned and embodied by the highest authority known to British subjects, in an Act of the Imperial Parliament.

It is not incompatible that on the first branch of such a constitution an author may be of the very highest authority, as involving the exercise of research, erudition, unwearied industry, vast historical knowledge, and accurate powers of deduction; while on the second, which more properly is limited to an analysis of a written instrument—the construction of a statute—his views, from the want of long years' of legal training, may not be equally correct. The first has probably given to his mind, a broader range it may be, but coupled with it a tendency to look at expediency or policy; the latter involves a mental process of reasoning under fixed legal rules leading to the necessary logical sequence.

The distinction will be seen at once by reference to that part of Mr. Todd's letter, at page 182, asserting the competency of the Local Legislature to regulate procedure in the Supreme Court of British Columbia, which assumes, that because the Imperial Parliament in 1870 and 1875 claimed this power, and because the Australian Colonies exercised it in their legislation with reference to their courts when they so desired, therefore "a similar power must be admitted to exist in all Colonial Legislatures that have been authorized to regulate the administration of justice in the particular Colony or Province." The "omnipotence of Parliament" may well apply in both those instances. The Imperial Parliament is under no restraint save that its judgment dictates.

The Australian Colonies, as to their internal legislation, are autonomous save so far that it may not conflict with Imperial Legislation or sovereignty. They have entered into no compact by which, as between each other, and subject to a general union their powers are limited, there is no agreement ratified by the highest authority by which they have severally relinquished rights they otherwise possessed. The very use by Mr. Todd of the expression "that have been authorized" shows the inapplicability of his illustration, because the term itself indicates a concession and limitation of authority which must be sought for in the instrument that concedes it. Thus such legislation by the Imperial Parliament, or by the Australian colonies, is no argument that similar legislation would consequently be legal in the Local Legislatures of the Dominion; nor is a similar deduction necessarily to be drawn from the fact that the Legislature of Ontario has exercised such a power. The statutes of that Legislature are entitled to the greatest respect on account of the many able and distinguished men who form it, but it does not necessarily follow, nor can it be conclusively assumed, that their legislation in that direction is nowhere in the Dominion to be questioned. The validity of their acts in that line can only be determined when the point is raisd in the Courts of Ontario, and disposed of either by those courts or the Supreme Court of Canada.

Nor is it clearly perceptible what the Imperial "Colonial Laws Validity Act," referred to by Mr. Todd, has to do with the question. That statute was passed in 1865, previous to Confederation, and had reference to Colonies acting independently of each other, in direct communication with the Imperial Government, and subject to its immediate supervision, not to the subordinate sub-divisions of a colony acting under powers specifically detailed in a subsequent Imperial Statute, and subject to the control of an intervening authority between themselves and the Imperial Government, the powers and duties of which intervening authority are again specified and detailed in the same subsequent Imperial Statute. However much that Colonial Laws Validity Act may apply to the general Government of Canada and the Legislation of the Dominion Parliament, it can have no possible bearing upon the Legislation of the separate Provinces since Confederation. What they do not find in the British North America Act, 1867, they need not look for in that. Coming from a lesser authority than Mr. Todd, to a legal mind, such a reference would seem like a blind—the semblance of learning without its substance.

It will not be necessary to follow the writer through his article. It is obvious that he has given to the several judgments but a very cursory reading, and with a preconceived opinion in the opposite direction. He asserts but does not reason, and entirely ignoring the fact that there had been no previous decision by any Court on the immediate point raised, boldly assumes that *Valin* v. *Langlois* disposed of it, though in that able judgment the point was not even under advisement: I doubt, indeed, if the distinguished Chief Justice of Canada who presided in that case would himself have treated the question in so lofty and summary a way. Whether right or wrong the judgments delivered by the several judges in the *Thrasher Case* are sufficiently explicit. If they cannot be sustained by what is therein contained, those judges must be manifestly in error. The legal estimate of the Courts and Bars of the several Provinces and the final opinion of the Supreme Court of Canada must ultimately decide.

Though Mr. Todd has not deemed it necessary to quote any authority, there really is one to which he might have referred as apparently leading to a conclusion different from that of the B. C. Judges, not in the immediate adjudication itself, but in the line of reasoning urged by the Court; I mean *The Citizens Insurance Co.* v. *Parsons*, L. R. 7 App. cases, which judgment was delivered in November last, but only lately received in this Province. I have said "apparently leading" because I think it capable of explanation. In delivering judgment Sir Montague Smith referring to the distribution of

powers between the Dominion Parliament and the Local Legislatures, at page 107, says :—

"The scheme of this Legislation, as expressed in the first branch of section 91, is to give to the Dominion Parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the Provincial Legislatures. If the 91st section had stopped here, and if the classes of subjects enumerated in section 92 had been altogether district and different from those in section 91, no conflict of legislative authority could have arisen. The Provincial Legislatures would have had exclusive legislative power over the sixteen classes of subjects assigned to them, and the Dominion Parliament exclusive power over all other matters relating to the good government of Canada. But it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the Provincial Legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in section 91 ; hence an endeavour appears to have been made to provide for cases of apparent conflict, and it would seem that with this object it was declared in the second branch of the 91st section 'for greater certainty but not so as to restrict the generality of the foregoing terms of this section,' that, notwithstanding anything in the Act, the exclusive legislative authority of the Parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section. With the same object, apparently, the paragraph at the end of section 91 was introduced, though it may be observed that this paragraph applies, in its grammatical construction, only to No. 16 of section 92.

"Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, it is obvious that in some cases when this apparent conflict exists, the Legislature could not have intended that the powers exclusively assigned to the Provincial Legislature should be absorbed in those given to the Dominion Parliament. Take as one instance the subject of 'marriage and divorce' contained in the enumeration of subjects in section 91 : it is evident that solemnization of marriage would come within this general description. Yet 'solemnization of marriage in the Province' is enumerated among the classes of subjects in 92, and no one can doubt, notwithstanding the general language of section 91, that this subject is still within the exclusive authority of the Legislatures of the Province."

Probably the learned Judge could not have selected out of the classes and powers enumerated in sections 91 and 92 any one class or power of more apparent comprehension within and identity towards each other, or seemingly more likely to create a conflict of legislation. Yet which, when read by the light of the causes that led to the division and separate assignments of the power of legislation thereon, exclusively to the general Parliament on one branch and to the Local Legislature on the other, could more conclusively have proved not only the reason but the wisdom of the distribution, and that, by "this sharp and definite distinction," conflict of legislation would be avoided ; and that there is not the slightest occasion for torturing the Act to reconcile its, at first view, apparently different parts. The assignment on the first branch arose from a determination in the framers of the constitution that on this important subject of the *contract* of marriage and its dissolution or divorce there should be throughout the whole Dominion unity of legislation. That there should not be polygamy or Mormonism in one Province, and in another incidents attached to the contract or facilities for its dissolution inconsistent with a healthy moral tone or the regulations of well organized society. This power, therefore, was limited *exclusively* to the Parliament of the whole, but the mode or ceremony by which you might enter into the contract was entirely a different matter. Throughout the different Provinces, on that subject, the sentiments were essentially different. In some it was regarded by the main body of the people, in Quebec for instance, as of a religious character ; in others by large numbers as of a civil characted ; and in all the right was claimed to have the ceremony celebrated as they themselves determined. Yet the time had been in those Provinces when the law only permitted that ceremony to be performed by the ministers of the Church of England or of the Roman Catholic Church. Years of successive legislation had given to the ministers of other Churches and other denominations the power, and in some instances, to such extent was it carried, that individual ministers of newly formed and previously unknown and unrecognized congregations were authorized by name, by personal legislation, so to do. Sir Wm. Ritchie, C.J., can recall the legislation of this nature in the Provinces of Nova Scotia and New Brunswick to which reference is now made.

This was a power, therefore, the separate Provinces did not choose to forego or place in any other hands whatever ; each Province was to speak for itself, and legislate for itself *exclusively* as to the solemnization of marriage. Thus it is impossible there can be any conflict and reversing the words of Sir Montague Smith, it was "foreseen that this sharp and definite distinction had been and could be attained, and that none of the classes of subjects assigned to the Provincial Legislatures unavoidably ran into or were embraced by some of the enumerated classes of subjects in section 91." A similar analysis will show that with reference to every other class of subjects and assignment of powers in the two sections, the same rule will apply. The word "exclusively" was intended to prevent conflict, and was intentionally used. It was, moreover, intended to give to the general Parliament the great preponderance of power. Whether that was wise or not, or whether the

popular feeling of to-day may run in a different direction, is not the question. At the time of the Quebec Convention, in 1864, it was believed that much of the difficulty in the United States arose from the weakness of the general Government, and to obviate the occurrence of such a difficulty in the Dominion it was proposed to strengthen ours. It was therefore that the word "exclusive" is so repeatedly used in sections 91 and 92 in defining the separate powers.

But now it is sought to be inferred that the framers of the Constitution did not know the meaning of the word, in fact, that the word "exclusive" does not mean exclusive. As a matter of history the men who constituted the Conventions are well known. They came not from one Province but from all, and were considered by their several Provinces as men sufficiently competent to be entrusted with the onerous duty they were sent to discharge; but, perhaps, as a matter of history, it may not be known that these two sections, 91 and 92, claim an origin even antecedent to that Convention. In 1839 or 1840 Lord Durham had contemplated the union of Upper and Lower Canada with the Maritime Provinces, and the outlines of a measure had at that time been prepared under his direction, I think by the Hon. Henry Sherwood, Attorney or Solicitor-General. This measure had the benefit of the ability and consideration both of Lord Durham and his able Secretary, Charles Butler, then well known both in Canada and in England. That portion of the draft embracing these two sections was laid before the Quebec Convention in 1864, by Sir John Macdonald as Mr. Sherwood's draft—was fully examined and discussed, and was substantially, if not almost entirely, adopted. In its present form it was for three years under the consideration of the Legislatures of the several Provinces and the Imperial Parliament until its final enactment in 1867. For forty years, from Lord Durham's time down to the present, it has been under the consideration of every leading man in Canada, and of the most distinguished statesmen in England, and it has been at last discovered that not one of them knew the meaning of the word "exclusive."

It may be desirable that this word should be obliterated or modified, but while it lasts let us treat it honestly like an English word. It is this word, in its English sense, which apparently has governed the opinions of the learned judges in British Columbia on the constitutional questions raised in the *Thrasher Case*.

On the reasons assigned in those judgments they must rest. It is to be hoped that in the public interests those reasons may be gravely considered, and that Mr. Todd himself will not too hastily lend the weight of his name to sanction a conclusion which, after more reflection, he may perhaps find he has erroneously formed.

Your obedient servant,

AN EXILE.

Victoria, B.C., May 16th, 1882.

SUPREME COURT TARIFF.

Some changes have recently been made in the Rules of the Supreme Court as to the tariff, to which it is desirable to call attention. By the item amended by Rule 81, parties were, it is said, frequently paid for work not actually done, or at least paid too much. The work will now be paid for only when necessarily done, and at a reasonable rate. Rule 82 will probably make more general among the profession in Provinces not accustomed to conducting work on the agency plan, the employment of agents. There was an unwillingness on the part of solicitors to employ an agent when no special item in the tariff apparently covered the disbursement they would be put to by so doing. They will now have no excuse for not conducting all their business in the Registrar's office through agents; and solicitors, in rendering bills to clients, will not require to make so many explanations.

These rules are as follows:

RULE 81.—It is hereby ordered that Schedule D. annexed to the Rules of the Supreme Court of Canada be amended as follows:—Instead of the item, "Printed case, per folio of 100 words, including correcting, superintending, printing and all necessary attendances, 30c," the following allowances shall be taxed by the Registrar: For engrossing for printer copy of case as settled, when such engrossed copy necessarily and properly required, per folio of 100 words, 10c.; for correcting and superintending printing, per folio of 100 words, 5c.

RULE 82.—It is hereby ordered that an allowance shall be taxed by the Registrar to the duly entered agent in any appeal, in the discretion of the Registrar, to $20.00.

These Rules bear date June 3, 1882.

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 1882.

The following is the *resume* of the proceedings of the Benchers during Easter Term, published by authority :—

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

George S. Lynch Staunton, with Honours, awarded a Silver Medal; Arthur O'Heir, Thomas Henry Guscombe, James Leaycroft Geddes, David Henderson, John Williams, Thomas Alpheus Snider, Dennis J. Donahue, John Francis Lewis, William Steers, Alexander Aird Adair, Andrew Taylor G. McVeity, Alexander Howden, George William Meyer, William Alexander Macdonald, John Dickinson, Hugh Boulton Morphy, John Vashon May.

The following gentlemen received Certificates of Fitness, namely :—

William Burgess, jr., Thomas Henry Guscombe, George William Meyer, John Arthur Mowat, Alfred Beverly Cox, Charles Rankin Gould, David Henderson, Frank Russell Waddell, W. H. Hastings, Alexander Aird Adair, Alexander John Snow, Dennis J. Donahue, John Vashon May, Henry Joseph Dexter, Andrew Taylor G. McVeity, John Barry Scholefield, William Aird Adair, Henry Bogart Dean, Thomas Ambrose Gorham, Christopher William Thompson, Thomas H. Stinson, Thomas Edward Moberly, Charles Edward Jones, John Wood, Alexander Howden, Robert Taylor, Albert John Wedd McMichael.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

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

Articled Clerks.

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

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

Students-at-Law.

CLASSICS.

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

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

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

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

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A paper on English Grammar.
Composition.
Critical Analysis of a selected Poem :—

1882—The Deserted Village.
The Task, B. III.
1883—Marmion, with special reference to Cantos V. and VI.
1884—Elegy in a Conntry Churchyard.
The Traveller.
1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inculsive. Roman History, from the commencement of the Second Punic War to the Death of Augustus.