Canada Law Journal.

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DIARY FOR SEPTEMBER.

1. Sun... *17th Sunday after Trinity.*
2. Mon.. Co. Ct. Term (ex. York) begins. Co. Ct. sitt. without jury (ex. York) begin.
3. Tue... First edition English Bible printed, 1535.
7. Sat. .. County Court Term (except York) ends.
8. Sun... *18th Sunday after Trinity.* Harrison, C.J., sworn in, 1875.
9. Mon.. County Court Term for York begins.
11. Wed.. Guy Carleton, Governor of Canada, 1774.
12. Thurs. Lord Lyndhurst died, 1863.
13. Fri.... Battle of Queenston, 1812.
15. Sun... *19th Sunday after Trinity.*

TORONTO, OCT. 1, 1882.

WE are gratified to see that the article on "Sunday Laws—Works of Necessity," published in these columns on May 15th, has been reprinted in full, both by the *Irish Law Times* and by the *Central Law Journal*. Another article from the same valued contributor appeared in our last number, on the "Value of Children." Though the name of the writer is not subscribed to these two articles, probably our readers in Ontario will have little difficulty in conjecturing who he is.

WE learn from the *Times* that the French Chambers, in their last session, passed a short Act to abolish religious oaths in Courts of Justice. It appears that this was done directly in the teeth of judicial opinion; and it seems even a more dangerous experiment in France than it would be with us, inasmuch as French law has never allowed a witness to be silent on the ground that his answers might criminate him, and therefore it is all the more necessary that moral pressure should be brought to bear on deponents. It is to be hoped for their own sake that French witnesses will remember that though religious oaths have been abolished, the very stringent penalties which their law imposes on perjury still exist. Articles 361-366 of sect. 7, on Crimes of the Code Napoleon decree that perjury in an Assize Court is to be punished by penal servitude for not less than five years; but if a witness by committing perjury, has caused an innocent man to be convicted, he shall suffer whatever punishment the convict had been sentenced to undergo False swearing in a Correctional Court is punished by a *minimum* of two years imprisonment, and in a Police Court by a *minimum* of one year, with fines in both cases—deprivation of civil and political rights, and police surveillance at the discretion of the judges. These enactments remain in force to this day, except as regards the death penalty, which was eliminated in 1857, when capital offences were reduced to two—murder and arson. But perjury may still be punished in France by penal servitude for life.

WE publish to-day a well-written, temperate, and sensible letter from a correspondent, signing himself "Professional," on the subject of the present Law Course. It is undeniable that some practitioners—while they enforce, in a very exacting way, the duty on the part of those students who are articled to them to serve them faithfully during the period of these articles—forget to a large extent the reciprocal duty which exists on their part to teach and instruct the said students in the practice and profession of the law. At the same time we think our correspondent is a little unjust on this point, for it is not our experience that students find their masters-in-the-law unwilling to explain knotty points to them; and in one large office, to our certain

knowledge, the principals have, from time to time, spent considerable time and labour in delivering courses of lectures to those under articles to them. But the main point of our correspondent's letter remains unaffected. That the first year or two of the five year's course is at present, in a great degree, a pernicious waste of time, and in some degree compulsorily so, can scarcely be denied; and we cordially support our correspondent's contention that it would be more advantageous in every way that these two years should be devoted to going through a regular legal course at some legal college, where not only the elements of law and jurisprudence should be taught, but also such practical subjects as book-keeping, shorthand, etc. The Incorporated Law Society of London, to which we alluded in our last number, to some extent supplies such a want in England; but the establishment of a regular legal college, of much the same kind as our correspondent advocates, has, we believe, been for a long time a favourite scheme of Lord Selborne and other reformers. In our country, moreover, where general education ceases at a very early age, and men enter on the work of practical life much sooner than in the mother country, such an institution would be especially beneficial.

PROMISE TO MAKE A WILL—ROBERTS V. HALL.

THE judgment of the Divisional Court of the Chancery Division, or rather of the learned Chancellor, who delivered the principal judgment, is interesting among other things from its reference to a surprising *dictum* of the English Court of Appeal in the case of *Alderson* v. *Maddison*, L.R. 7 Q.B.D. 181, where Baggallay, L.J., delivering the judgment of the Court, says:—"It appears to us that to give the same effect to a man's promise and agreement to make a will as to a will made by him in pursuance of such promise or agreement, would be in direct contravention of the provisions of the statute."—(sc. of Wills.) In *Roberts* v. *Hall*, in the Court of first instance, Ferguson, J., referred in his judgment (*supra* 177) to this *dictum*, without expressing either approval or disapproval of it, as, indeed, it was unnecessary to do, inasmuch as, in his view of the case, the only agreement which he considered proved was contrary to public policy and illegal, and the Court, therefore, could not under any circumstance recognize it. In the Divisional Court, however, Boyd, C., in the judgment noted in our last number, says:—"The current of authorities enabling the Court to give effect in a proper case to an agreement to dispose of by will, or to leave a man's property at his death, is too well established to justify giving effect to the *dictum* to the contrary in *Alderson* v. *Maddison*, L.R. 7 Q.B.D. 181."

In *Roberts* v. *Hall*, the parents of the plaintiff, in 1846, entered into a written agreement with one Hall and his wife, whose representatives the plaintiffs were, by which they agreed to give their daughter, the plaintiff, then six years old, to Hall and his wife, who were to adopt her as their own child, and to make her sole heir to their property. The evidence showed that the adoption took place, and the plaintiff thenceforward and always discharged all the duties devolving upon her in the new family to the entire satisfaction of the deceased; that all that a child could do for a parent was fulfilled by the plaintiff down to the death of both Hall and his wife. Thus all that was engaged to be done on the part of the plaintiff and her own proper parents had been done. It also appeared that the adoption agreed upon between the parents of the plaintiff and the Halls, was unquestionably calculated to advance the interests of the plaintiff. Under these circumstances the Divisional Court held the agreement was not illegal as against public policy, and being executed, so far as the plaintiff was concerned, the Court could decree the performance of the rest of it *in specie*, although it could not

have decreed specific performance while the agreement was executory on both sides. They therefore declared the plaintiff entitled to a declaration that the property, real and personal, of which the Halls died possessed, was impressed with a trust in the plaintiff's favour.

In *Alderson* v. *Maddison*, in the Court of first instance, L. R. 5 Ex. D. 293, (1880), the judgment of Stephens, J., amounts to a sort of treatise on the subject of representations and promises as to making a will. In that case the finding of the jury at the Assizes had been that the defendant was induced to serve the father of the plaintiff, who claimed as heir-at-law, as his house-keeper without wages for many years, and to give up other prospects of establishment in life by a promise made by him to her to make a will leaving her a life estate in a certain farm if and when it became his property. Stephens, J., held that a contract to leave the plaintiff the life estate was established, and that there had been sufficient part performance on the part of the defendant to bar the Statute of Frauds, and gave judgment accordingly. The Court of Appeal (L.R. 7 Q.B.D. 174; S.C. 30 L.J.N.S. 466,) reversed this judgment on the ground that there had not been such a part performance as excluded the Statute, but it did not, except as regards the *dictum* referred to in *Roberts* v. *Hall* express dissent from the general principles of law laid down by Stephens, J., in the Court below, in respect to representations and promises to make a will in a certain way.

Stephens, J., says that the law on the subject is clear and consistent when "all the decisions" are considered, and is to this effect. A mere representation which is not a term in a contract, nor yet an estoppel, is not binding. He says, "There is a class of representations which have no legal effect. There are cases in which a person excites expectations which he does not fulfil, as, for instance, where a person leads another to believe that he intends to make him his heir, and then leaves his property away from him. Though such conduct may inflict greater loss on the sufferer than almost any breach of contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences unless the person making the representation not only excites an expectation that it will be fulfilled but legally binds himself to fulfil it; in which case he must, as it seems to me, contract to fulfil it." Thus, after reviewing such cases as *Jorden* v. *Money*, 5 H.L.C. 185; *Maunsell* v. *Hedges*, 4 H.L.C. 1039; *Caton* v. *Caton*, L.R. 2 H.L. 127; and *Dashwood* v. *Jermyn*, L.R. 12 Ch. D. 776, in which representations, whether as to wills or other disposition of property, have been held not to be binding, he says:—"All of these are cases in which the language used was considered to amount to nothing more than a declaration of what the parties influenced by it knew, or ought to have known, to be no more than a present revocable intention. Such declarations, no doubt, in many cases raised natural expectations which induced the parties to whom they were made to take irrevocable steps; but in such case the decision turned on the question whether the declaration made was intended to form part of a contract or only to announce a present revocable intention, or (which is the same thing) to make a promise for which there was no consideration." On the other hand, after reviewing such well known cases as *Hammersley* v. *De Biel*, 12 Cl. and F. 45; *Prole* v. *Soady*, 2 Giff. 1; *Loffus* v. *Maw*, 3 Giff. 592; *Coverdale* v. *Eastwood*, L.R. 15 Eq. 121, he says that the result he draws from them is that whenever representations have been held to be binding the circumstances were such as to show that all the conditions of a valid contract had been fulfilled, and that in all the cases in which representations have been held not to be binding, one or more of these conditions were absent.

In our own Courts the cases on the subject of representations as to intentions of giving, devising or bequeathing, are entirely in accordance with the view of the law thus set out

by Stephen, J., in *Alderson* v. *Maddison*. Thus in *McKay* v. *McKay*, 15 Gr. 371, (1868), where the plaintiff rested his case on a verbal promise to give land to him, Mowat, V.C., says, p. 372:—"A mere intention, though expressed, as to a future disposition of a man's property, creates no legal obligation upon him to carry out that intention; and until the intended gift is made he may change his mind respecting it. But it is contended that there was more than an intention; that there was an agreement, and an agreement followed by possession." Again in *Fitzgerald* v. *Fitzgerald*, 20 Gr. 410, (1873), in which Spragge, C., discusses *Hammersley* v. *De Biel*, *Jordan* v. *Money*, *Loffus* v. *Maw*, and *Maunsell* v. *Hedges*, he says:—"It cannot, I think, be held to be the law of this Court that it will aid a party only in cases where the representation is in regard to existing facts; though that seems to have been the opinion of the majority of the Law Lords in *Jordan* v. *Money*. The case seems to have gone off upon another point . . . On the other hand there may be a mere representation of intention. If such a representation be acted upon, it is acted upon in the expectation only of the continued good will of the party expressing such intention." He then quotes with approval, as does Stephens, J., in *Alderson* v. *Maddison*, the words of Lord Cranworth in *Maunsell* v. *Hedges*, where he says:—"A representation may be so made as to constitute the ground of a contract. But is it so here? Where a person makes a representation of what he says he has done, or of some independent fact, and makes that representation under circumstances which he must know will be laid before other persons who are to act on the faith of his representations being true, and who do act upon it, equity will bind him by such representation, treating it as a contract." And adds Spragge, C.:—"This I take to be the law of this Court. If a party engages to do a thing upon the faith of which another to whom it is communicated acts, it is treated as a contract, and is in fact a contract binding upon the party making it." And referring to the case before him, he says:—"The question then in this case I take to be, whether there was on the part of M. F., the father, an inducement held out to his son, T., amounting to an engagement, that if he would leave Brampton, where he was then residing, and remove with his family to the place where he, the father, was living, he would, by his will, leave to him the north halves of the lots." So in *Orr* v. *Orr*, 21 Gr., at p. 445. Blake, V.C., after referring to *Jordan* v. *Money*, *Maunsell* v. *White*, *Hammersley* v. *De Biel*, *Bold* v. *Hutchinson*, 3 Sm. and G. 407, and *Kay* v. *Crook*, 5 De. G. M. and G. 558, says:—"The deduction from these cases seems to be that where the representation is not of an existing fact, but of a mere intention, or where a promissor will not bind himself by a contract, but gives the other party to understand that he must rely solely on his honour for the fulfilment of his promise, the Court will not enforce the performance of the representation or promise. A representation which amounts to a mere expression of intention must be distinguished from a representation which amounts to an engagement." In accordance with this is also *Black* v. *Black*, 2 Er. and A. 419.

In such cases, therefore, the question would appear to be (1) whether there has been such an expression of intention as amounts to a contract; (2) whether, if so, and if the intention expressed relates to a future gift or devise of land, there has been such a part performance, or such a memorandum in writing as takes the case out of the Statute of Frauds. What amounts to such a part performance as will take a case of this kind out of the Statute of Frauds, opens too wide a subject to be entered on here, but it may be observed that it is the main question which was dealt with by the Court of Appeal in *Alderson* v. *Maddison*, when that case comes before it. As contended by counsel for the plaintiff in *Roberts* v. *Hall*, before the Divisional Court, there is nothing more con-

trary to the spirit of the Wills Act in an agreement to make a will, than there is contrary to the Acts relating to conveyances in an agreement to make a deed.

RECENT ENGLISH DECISIONS.

Continuing with the June number of L. R. 20 Ch. D., the next case which it appears expedient to notice is *Re Haven Gold Mining Co.*, p. 151.

COMPANY—WINDING UP—ONT. 41 VICT. C. 5, S. 4, SUBS. 5.

The Imp. Companies Act, 1862, s. 79, subs. 5, corresponds with our 41 Vict., c. 5, s. 4, subs. 5, and under both these enactments a Joint Stock Company may be wound up by the Court, "Whenever the Court is of opinion that it is just and equitable that the company should be wound up;" and the question was whether under the circumstances of this case, which the M. R. said was altogether novel in some of its salient features, the Court would order a winding up. The company in question had been formed, in the words of the prospectus, "for the purpose of acquiring and developing the property called the Haven Claim," in New Zealand; the mineral rights in which, the company had agreed to purchase from one Hance; but the memorandum of association contained general words enabling the company to purchase and work other mines in New Zealand. Some months after the registration of the company it was discovered that Hance had no good title to the claim. An extraordinary meeting of the company was then called by the directors, and the circumstances laid before it, but the shareholders, by a large majority, declined to wind up the company. The present petition for a winding up was then presented by two shareholders, on the grounds that the company had no title to the property mentioned in the memorandum and prospectus; that it was promoted solely for the interests of the promoters, and could not be carried on to the advantage or profit of the shareholders; and that many statements in the prospectus were untrue and misleading, and that the company was a mere bubble and sham. After the presenting of this petition the directors issued a circular to the shareholders stating their opinion that it was hopeless to go on with the undertaking, and advising a voluntary winding up; and at the same time they summoned an extraordinary meeting, at which, however, an overwhelming majority of the shareholders agreed that there was no necessity for a winding up, and expressed a wish that the Court of Chancery would dismiss the petition. Bacon, V.C., in the Court below, dismissed the petition, (i.) because the charges of fraud had not been made out, and "it is a well-established rule in this Court that if a man alleges a fraud practised by his opponent, and fails to prove it, his petition or application must be dismissed"; and (ii.) because of the resolution of the majority of the shareholders that the matter should go on, and that the directors should contiuue to accomplish, if they could, the objects of the company. "Upon the result of that meeting," he says, "in my opinion, every question of merits was wholly and completely concluded. The cases that have been referred to established, as the law of the Court, that when it is not impossible to carry on the project, when it is not absolutely clear that no good can ever come of the proceedings to accomplish the project, the Court will not interfere." The Court of Appeal, however, now over-ruled this decision, and made the usual winding up order. Jessel, M.R., says, p. 161:—"No doubt—and I have not forgotten it—there are general words in the memorandum and articles of association extending the right to work mineral property generally; but the object of the company, or the special object in the memorandum of association, is to work this gold mine; and the point which I have to consider is whether there is any mine at all as to which the company has a title or a contract which may eventuate in title." Having considered this question, he concludes thus:—"There is evi-

dence which is not only satisfactory to us, but was quite satisfactory to the directors—the very same evidence on which they advised the shareholders to act, but the shareholders, in general meeting, over-ruled their directors, and in December last refused to act upon it, and insisted upon going on with the company. Then is not this exactly the case pointed out by Lord Cairns in *Re Suburban Hotel Co.*, L.R. 2 Ch. 737,—'Where it is impossible to carry on the business for which the company was formed.' It seems to me it is exactly that case." Brett, L.J., in concurring, says:—"I think, therefore, the proposition is made out that there was a total absence of possession or right of possession by the company of the subject-matter which they were formed to work, and that there is no reasonable prospect of the company obtaining possession of such subject-matter. Under those circumstances it seems to me that the opinion of the majority of the shareholders is an unfounded opinion, and having come to that conclusion of fact, I think the opinion of that majority ought not to bind the minority." Lindley, L.J., says:—"It appears to me in substance to come to this, that it is proved by evidence upon which we must act, that the minority have established such a case as entitled them to say to the majority, 'The undertaking in which we all embarked is proved to be impossible to carry out; we decline to enter into any further speculation, or to join you in trying to get this property from other people and upon other terms." But as to the other ground of his judgment, the M.R. and Brett, L.J., agree with Bacon, V.C., the former saying:—"I agree that the mere fact of there being a fraudulent representation, or fraudulent representations, in the prospectus, is not sufficient. A company may, if they think fit, waive the fraud and complete the bargain and go on, or they may vary the bargain on the ground of fraud, and complete it with variations. As to that, the majority of the company in general meeting assembled are the best judges, but where the whole thing is gone the majority cannot bind the minority to enter into an entirely new speculation, and it never has been so held."

PROXIES—DEMANDING A POLL.

Before leaving this case a *dictum* of Bacon, V.C., at p. 157, as to the powers conferred by proxy papers, may be mentioned. He says:—"I found they, the proxies, authorize the persons to whom they are addressed, to go to the meeting and there to vote for the person granting the proxies. Can I read in that an authority to take so important a step as to demand a poll? Costs would attend such a proceeding. The proxy-maker would be astonished some day to be served with a bill of costs, and to be told he must pay it because he made somebody a proxy to vote for him."

MEMORANDUM OF ASSOCIATION—GENERAL WORDS.

Of the next case, *Re German Date Coffee Co.*, p. 169, it seems only necessary to say, after the above long review of the last case, that it is a case of a similar kind, decided on the same principle. In the Court of first instance, Kay, J., after reviewing the *Haven Gold Mining Co.* case, says:—"'Therefore the law so far is established thus, that if the whole substratum of the company is gone, it is within sect. 79, 'just and equitable' that the company should be wound up." He then refers to the case of the *Langham Skating Rink Co.*, L.R. 5, Ch. D. 669, as showing where the line is to be drawn, and says:—"I think that shows very plainly where the line is to be drawn, and I take the line to be this, that where on the face of the memorandum you see there is a distinct purpose which is the foundation of the company, then, although the memorandum may contain other general words which include the doing of other objects, those general words must be read as being auxillary to that which the memorandum shows to be the main purpose, and if the main purpose fails and fails altogether, then, within the language of Lord Cairns in the *Suburban Hotel Co.* case, and within the de-

cision in *Baring* v. *Dix*, 1 Cox 213, the substratum of the association fails." The Court of Appeal in short judgments affirming the decision of Kay, J., Baggallay, L.J., and Lindley, L.J., echo his words as to general words in a memorandum of associaton of a company; and the former says, also,—"It appears to me that the principle involved in the decision of *In Re Suburban Hotel Co.*, by Lord Cairns, amounts to this, that if you have proof of the impossibility of carrying on the business contemplated by the company at the time of its formation, that is a sufficient ground for winding up the company."

MORTGAGE—POWER OF SALE—UNDERVALUE.

The next case which it seems necessary to notice is *Warner* v. *Jacob*, p. 220, the purport of which is shown in the following passage of the judgment of Kay, J., when, after reviewing the cases, he says:—"The result seems to be that a mortgagee is, strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless, indeed, the price is so low as in itself to be evidence of fraud."

BILL OF EXCHANGE—ACCEPTED BUT NOT SIGNED BY DRAWER.

The next case, and the last in this number of the Chancery Division, raises, in the words of Kay, J., "a question of some novelty." The question was whether a bill of exchange accepted for valuable consideration, with the drawer's name left blank, might be accepted by the drawer's name being added after the death of the acceptor. Kay, J., decided that it could, following a decision of the Vice-Chancellor in Ireland, in *Dutch* v. *O'Leary*, 5 Ir. L. Rep. (Eq.) 62, where it was held that the drawer's name might be filled in after the death of the acceptor.

Proceeding now to the July number of the Law Reports, they are found to consist of 7 App. Cas. p. 219-333; 8 Q.B.D. p. 1-136; 7 P.D. p. 101-117; and 20 Ch. D. p. 229-441.

TRADE-MARKS.

The first of these begin with a case, *Johnston* v. *Orr-Ewing*, which contains and illustrates several propositions of law relating to trade-marks. The suit was to restrain an infringement of the plaintiff's trade-mark, affixed by them to turkey red yarns, which they were in the habit of exporting to Aden and India. The question, therefore, to be decided was a question of fact, viz., as Lord Blackburn puts it:—"How far the defendants' trade-mark bears such a resemblance to that of the plaintiffs' as to be calculated to mislead incautious purchasers. For," he adds, "the loss to the plaintiff's of the custom of an incautious purchaser is as great a damage as the loss of that of a cautious one. But in this case the plaintiff's judged it necessary to proceed without waiting till actual deceit was proved, and I think they judged rightly, for James, L.J., said, (13 Ch. D. 464), 'the very life of a trade-mark depends upon the promptitude with which it is vindicated;' and having done so they have to satisfy the Court that the similarity between the two tickets was such as to be calculated to mislead purchasers." And with reference to the trade-marks in this particular case Lord Selborne says:—"When this ticket (the defendants') and the plaintiff's are placed side by side the differences in detail between them are very apparent . . . But although the mere appearance of these two tickets could not lead any one to mistake one of them for the other, it might easily happen that they might both be taken by natives of Aden or of India unable to read and understand the English language, as equally symbolical of the plaintiff's goods. To such persons, or at least to many of them, even if they took notice of the differences be- the two labels, it might probably appear that these were only differences of ornamentation, posture, and other accessories, leaving the distinctive and characteristic symbol substan-

tially unchanged. Such variations might not unreasonably be supposed to have been made by the owners of the plaintiff's trade-mark themselves for reasons of their own." Later on he says:—"It is true that deception in fact, is not in this case proved; but there is a large body of trustworthy evidence to the effect that such deception would be liable and very likely to occur, at all events with the more ignorant class of consumers . . . Nor am I able to conceive any satisfactory explanation, under all the circumstances of this case, of the adoption by the defendants of that particular device . . . unless it was because they had a desire and intention to approach to the plaintiff's trade-mark as nearly as they possibly could. For such desire and intention no motive can be suggested except that of getting some part of the benefit of the goodwill and reputation of the plaintiff's trade." So, too, Lord Blackburn says, that as regards the defendants in this case their own conduct was evidence as against them, that the resemblance was calculated to deceive, for they were quite aware what the plaintiff's trademark was and the view taken of it by the Eastern buyers, and they were sending out yarns for the express purpose of competing with the plaintiff's. "I think," he adds, 'that the differences were so great that the defendants hoped that no Court would say that the use of the elephants (the principle feature in the trade-mark) could mislead." Lord Watson states the law in a general as follows:—"When a prominent and substantial part of a long and well known trademark, denoting the manufacture of a particular firm, appears as a prominent and substantial part of the new trade-mark of a rival, it seems reasonable to anticipate that the goods of the latter may be mistaken for, or sold as, the manufacture of the firm to which the older trade-mark belong . . . The reproduction of a prominent part of another merchant's trademark upon a new ticket does not *per se* establish that the latter was prepared by its owner with a view to deceive by himself selling, or by enabling others to sell, his goods as the manufacture of that other merchant. But no man, however honest his personal intentions, has a right to adopt and use so much of his rival's established trade-mark as will enable any dishonest trader, into whose hands his own goods may come, to sell them as the goods of his rival . . . I am of opinion that, having regard to what they knew about the trade and trade-mark of the respondents (plaintiffs), it was eminently the duty of the appellants (defendants) in adopting a ticket of their own to avoid every feature of the older trade-mark which could by any possibility create the risk of their yarns being sold by some interested and unscrupulous dealers, as the respondents." The result, therefore, was that the plaintiff obtained his injunction.

Before leaving this case, which it has appeared desirable to note at considerable length, there are some dicta of Lord Selborne and Lord Blackburn to be noticed. At p. 227 Lord Selborne says: "Your Lordships are not called upon to decide whether a ticket, which was a rightful and *bona fide* trade-mark of the trader using it, could be excluded by injunction from particular markets, though unimpeachable everywhere else, merely because in those markets it might be liable to be called by a name which the mark of another trader had already acquired there. To that proposition I should not myself, as at present advised, be prepared to assent." At p. 228 Lord Selborne says: "Trade-marks have sometimes been likened to letters patents and sometimes to copyrights, from both of which they differ in may respects. And I think, to borrow a phrase used by Lord Ellenborough in *Waring* v. *Cox*, 1 Camp. 369, with reference to a different branch of the law, "'Much confusion has arisen from similitudinary reasoning on the subject.'"

STATUTE OF LIMITATIONS—R. S. O. 108, SS. 4, 5.

The purport of the next case, *Pugh* v. *Heath*, p. 235, is best given in the following passage of Lord Cairn's judgment: "A legal mortgage of freehold land in 1856; no possession by

the mortgagee, and no payment of interest or principal to him, nor any acknowledgement of his title. Then in 1870—that is, after fourteen years—the mortgagee files a bill for foreclosure. He obtains a decree *nisi* in 1874, and a decree absolute in 1877. Then in 1878 he brings the present action, under that decree, to recover possession of the land. The appellants allege that the action is barred by the Statute of Limitations. Is this so? It was scarcely contended in the arguments of the appellants, and I do not think it could have been contended, that if instead of a legal mortgage the mortgagee had only an equitable mortgage or charge, and had within twenty years brought a suit of foreclosure and obtained a decree, he would not have been entitled to do so, and to hold and enforce that decree by every process which a Court of Equity could give. The Court is now not a Court of Law or a Court of Equity; it is a Court of complete jurisdiction; and if there were a variance between what, before the Judicature Act, a Court of Law and a Court of Equity would have done, the rule of the Court of Equity must now prevail. The argument of the appellant must therefore be that the possession of a legal mortgage, passing the legal estate as a pledge, put the mortgagee in a worse position than if he had not got it, and exposed him to the risk, as soon as twenty years from the date of the legal mortgage had expired, of forfeiture and losing the benefit of the suit and proceedings which he had in the meantime properly taken in the proper court to have himself adjudged, by reason of the mortgagor, the absolute owner of the land. This is an argument which appears to me to be as repugnant to reason as to justice; and I think, morover, that your Lordships could not admit it without acting in direct opposition to the spirit and principal of the case before Lord St. Leonards, of *Wrexon* v. *Vise*, 3 D. & War. 124, which has long been a governing authority on this subject. . . I must add, that if it were necessary I should have little doubt that the present action, being not an action of ejectment by a legal mortgagee to put himself in possession of land, which he is to hold as a pledge, subject to account and to all the infirmities of a mortgagee's title, but being an action by one who has become absolute owner of the land under a decree of the Court, is an action as to which the right to bring it must be taken to have accrued, within the meaning of sec. 2 of 3-4 Imp. Will. 4 c. 27 (R. S. O. c. 108, s. 4) of the date of that decree of the Court, and that sec. 3 (R. S. O. s. 5) of that Act, in defining when the right shall be deemed to have accrued, is not necessarily exhaustive or otherwise inconsistant with this view." Lords O'Hagan and Blackburn concurred, and thus the decision of the Court of Appeal (L. R. 6 Q. B. D. 345) was affirmed.

A. H. F. L.

REPORTS.

ONTARIO.

DIVISIONAL COURT—CHANCERY DIVISION.

(Reported for the LAW JOURNAL.)

McTIERNAN v. FRAZER.

Jurisdiction of Divisional Court—Appeal from order of Judge made in Court.

A Divisional Court has no jurisdiction to entertain an appeal from an order of a judge, made in Court on motion, except by consent. *Re Galerno*, 46 Q. B. 379, followed.

[Sept. 7, 1882.—The Chancellor and Ferguson, J.

This cause had been set down to be heard before the Divisional Court by way of appeal from the order of PROUDFOOT, J., made in Court, on an appeal from the Master's report.

J. Bethune, Q.C., moved to strike the cause out of the list on the ground that the Divisional Court had no jurisdiction to entertain such an appeal. He referred to *Alford* v. *Ingram* before PROUDFOOT, J., 17th Oct. 1881, not reported. That was an application for leave to set the cause down to be heard before the Divisional Court by way of appeal from an order of a Judge, made in Court, or on appeal from a

Master's report, and was refused on the ground that the Divisional Court had no jurisdiction. A similar decision had been arrived at by the Q.B. Division in *Re Galerno*, 46 U. C. Q. B.

Rule 471 defines the jurisdiction of a Divisional Court, and appeals of this kind are not included in its provisions unless all parties consent.

S. H. Blake, Q.C., for plaintiff.—The Judicature Act and Rules have not taken away the right of appeal in this case. He referred to Taylor & Ewart, pp. 23, 25, 26, 27, 68, 75, 76, 79, 99; J. A. s. 9, ss. 2, 3, and to sect. 12, 52, which expressly continue the former practice also. *Ib.* secs. 29, 33, 35, 36, 39, and Rule 471. Rule 523 applies to "any judgment," and therefore must be intended to include all judgments, however pronounced.

This, moreover, was a suit pending before the Judicature Act, and is therefore to be governed by the former practice.—Taylor & Ewart, p. 404, Rule 494. The Decree in the cause was pronounced 5th May, 1880.

Bethune, Q.C., in reply Rule 494 is confined to proceedure and does not affect the question of jurisdiction.—*Cur. adv. vult.*

Sept. 8, 1882.—THE CHANCELLOR.—I cannot successfully distinguish this case from *Re Galerno*, and I think that the case must be struck out as not being appealable to a Divisional Court, with costs of the motion to strike out. It is contrary to the whole course of decision to say the Act allows this appeal—*Alport* v. *Ingram; Re Galerno; Trude* v. *Phœnix Ins. Co.*, 18 C. L. J. 54 The policy of the Act is not to encourage these intermediate appeals. Rule 494 does not apply, for the case is not pending in the sense of that order. What was pending was the proceeding in the Master's office. If the plaintiff is too late to carry the case to the Court of Appeal a special application for leave to appeal, notwithstanding the lapse of time, must be made.

FERGUSON, J.—I concur.

Cause struck out.

RECENT ENGLISH PRACTICE CASES.

TURNER v. HANCOCK.

Imp. J. A., sec. 49; O. 55, r. 1—Ont. J. A. sec. 32, Rule 428.

Cost of trustee—Appeal as to costs.

A trustee's costs cannot be said to be within the discretion of the Court, and are excepted out of the above section and rule.

Re Hoskins, L. R. 6 Ch. D. 281, disapproved.

Quere as to costs of trustee upon proceedings taken under Trustee Relief Act.

March 24, C. A.—L. R. 20 Ch. D. 303.

This action was brought for the purpose of carrying into effect the trusts of a certain settlement. It was tried before Bacon, V. C., who ordered that the trusts should be carried into effect, but refused to allow the trustee his costs. The trustee appealed, and the question was whether the appeal was allowable.

JESSEL, M. R.—It is clear, in my opinion, that this a case in which an appeal as to costs is allowable. The only excuse for the objection to the appeal is the recent case of *In re Hoskins*, L. R. 6 Ch. D. 281. In *Cotterell* v. *Stratton*, L. R. 8 Ch. D. 295, the claim of trustees for costs is rightly put on the same footing as that of mortgagees. (Reads Lord Selborne's words in that case, at p. 302.) But it is said that *In re Hoskins*, L. R. 6 Ch. D. 281, is a different effect. In that case James, L. J., is reported to have said, "The present is not a case where the appellant is *ex debito justitiæ* entitled to costs; the costs of a trustee being subject to the discretion of the Court." If we have to choose between the authority of Lord Selborne and Lord Justice James, I should be inclined to follow Lord Selborne's decision. But I go further, for I think it was not in the power of the Court in *In re Hoskins* to overrule the previous authorities; therefore I must take the decision in that case to have been founded on a mistaken view of the law, and to be subject to review. That being so, we come to the words of O. 55 (Ont. Rule 428), which are as follows:" (Reads it.) "That does not include the costs of a mortgagee or trustee, which I have shewn to be not in the discretion of the Court. *Farrow* v. *Austin*, L. R. Ch. D. 58 (*supra* p. 454), is directly in point. I think, therefore, that this appeal must be allowed to proceed.

COTTON, L. J.—I am of the same opinion. . . There is no doubt the Court has power to deprive

a trustee of his costs, but it only does so if something has occurred to deprive the trustee of his right to take them out of the fund, which is part of the contract under which he undertakes the trust. It has been attempted to confine that right to costs which are not costs of litigation; but *Cotterell* v. *Stratton* directly applies on this point.

LINDLEY, L. J.—I am of the same opinion. . . I should certainly have held so on principle, but I confess I am puzzled by *In re Hoskins*. I cannot understand that case; but I think we are bound by the earlier authorities, and ought to follow them in the present case.

COTTON, L. J.—I am inclined to think that if a trustee is deprived of his costs upon proceedings taken under the Trustee Relief Act, an appeal might be brought.

JESSEL, M. R.—I think so too.

[NOTE.—*The Imp. and Ont. sections and rules are identical respectively.*]

CURTIS V. SHEFFIELD.

Imp. O. 50—Ont. O. 44.

Revivor—Discretion of Court.

Where a great lapse of time has occurred, the right to revive is not absolute, but is subject to the discretion of the Court.

[Feb. 28, FRY, J.—L. R. 20 Ch. Div. 398.

FRY, J., (after referring to the circumstances of the case).—The question which I have to determine regards the discretion of this Court as to allowing a revivor under the circumstances, because undoubtedly the law is this, that, after the long lapse of time which has occurred here, the right to revive is not absolute, but is subject to the discretion of the Court, and in cases of long delay, gross negligence, laches, or change of the situation of the parties in consequences of a decree, the Court has declined to allow a revivor.

[NOTE.—*The Imp. and Ont. Orders are identical so far as affects this case.*]

BIDDER V. MCLEAN.

Imp. O. 28, r. 42—Ont. Rule 190.

Pleading—General demurrer.

When the facts set out in a statement of claim are long and complicated, so that the equity is not apparent, a general demurrer may be sufficient.

[Feb. 25, C. A.—L. R. 20 Ch. D. 512.

Action seeking a declaration of trust in respect of some railway stock. The statement of defence was long, the equity, if any, having to be collected from a complicated state of facts. The defendant had put in the following demurrer: "The defendant, F. McLean, demurs to the plaintiff's statement of claim, and says that the same is bad in law, on the ground that the facts alleged therein do not show any cause of action to which effect can be given by the Court as against the defendant, F. McLean, and on other grounds sufficient in law to sustain this demurrer."

The plaintiff moved on summons that the demurrer be set aside, "on the ground that it does not state specifically whether it is to the whole or to a part, and to what part, of the statement of claim, and that it does not state any ground in law for the demurrer, or only a frivolous ground of demurrer is stated."

Kay, J., refused the application. The plaintiff now appealed, and the question was whether the above general demurrer for want of equity, without stating any particular ground of demurrer, was sufficient in the face of Imp. O. 28, r. 2 (Ont. Rule 190).

JESSEL, M. R.—This is a case in which I must say that the plaintiff had some reason to expect a general demurrer for want of equity. . . I have not heard a suggestion in what better form the demurrer could have been put in such a case at the present. It is urged that if we hold this demurrer good in form, the direction of Imp. O. 28, r. 2 (Ont. Rule 190) will be nugatory; but that is not so. I do not think that it was intended to make it impossible to demur in a case where the statement of claim is so framed that the only way of meeting it is by the simple allegation that it shows no cause of action. In many cases a general demurrer like this would be improper, but I think it is not so in the present case.

BAGGALLAY, L. J.—In my opinion a general demurrer may be sufficient under the order, and I think that it is so in the present case. I do not mean to say that it generally is so.

LINDLEY, L. J.—Each case must be determined with reference to the form of the statement of claim. I think that in this cause a general demurrer is sufficient, though I do not say that it would be so generally.

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

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Ferguson, J.] [Sept. 15.

RUMOHR v. MARK.

Execution—Mortgage of real estate—R. S. O. c. 66, ss. 27 and 28—Costs.

Where A. held, by assignment, a mortgage of the plaintiff B.'s on real estate, as collateral security for the payment of two promissory notes made to him by B., the assignment containing a provision that on due payment of the notes the mortgage should be re-assigned *to the plaintiff*, and where A. also held by assignment a judgment obtained by a third person against B., and under writs of *fi. fa.* against goods and lands, the sheriff, by A.'s connivance, seized the said mortgage and certain title deeds of the land as the property of B.; and A., though requested by B. so to do, refused to re-assign the said mortgage to a third person named by the plaintiff, unless the amount of the judgment was paid, as well as the amount due on the notes; and B. thereupon brought this suit, claiming re-assignment on payment of the notes.

Held, A. must re-assign to the plaintiff on payment of the notes, for the mortgage was not a mortgage "belonging to the person against whose effects the writ of *fi. fa.* has issued," under sec. 28 of R. S. O. c. 66, for B. had assigned it, and the sheriff, therefore, could not seize it and make its value, over and above the notes, available by sale or otherwise for the satisfaction of the writs.

When the legislature authorized the seizure of securities as chattels, it pointed out the mode in which the sheriff should realize upon them, namely, by suing on them, and he is not obliged to bring such suit until he is indemnified, as stated in the Act. This excludes the idea of the sheriff selling such securities as he would a chattel of the ordinary kind seized by him. Therefore it cannot be effectively argued that the mortgage in this case was made a chattel by virtue of sec. 28, so that B.'s interest in it could be seized and sold under sec. 27, *Smith* v. *Baring*, 10 U. C. C. P. 247 nowithstanding.

The plaintiff B. had required the defendant to assign the mortgage to a third party. The defendant at the trial said, "The sole reason why I refused to assign the mortgage was because they would not pay me the amount of the judgment."

Held, therefore, as to costs, the plaintiff by not making a proper tender and demand, and by asking the execution by the defendant of an assignment, such as the latter was not obliged to execute, forfeited his right to costs up to the time of filing the statement of defence; but looking at the reason given by the defendant as the sole reason why he did not comply with what the plaintiff required, and the way in which the action had been defended, the defendant should pay the plaintiff's costs incurred after the filing and delivery of the statement of defence.

Wilson for the plaintiff.

Douglas for the defendant.

Ferguson, J.] [Sept. 15.

MCCAUSLAND v. MCCALLUM.

Fixtures—Part of the freehold.

Certain counters were nailed to a scantling, which was placed in the wall of a drug store. The bottom or ledge of the counters was made fast to the floor of the store, and the end connected to the frame-work of the windows in such a way that the wainscotting at the bottom of the windows would be materially injured by taking them (the counters) out, and the floor of the building also would be considerably damaged.

Held, the counters were part of the freehold, and not chattel property.

Holland v. *Hodgson*, L. R. 7 C. P. 328, and *Keefer* v. *Merrill*, 6 Ont. App. 121, approved of.

Farley (with him *Doherty*) for the plaintiff.

Frazer for the defendant Selby.

Ferguson, J.] [Sept. 15.

PLUMB v. STEINHOFF.

Compensation for improvements—Unskilful survey—R. S. O. c. 51, ss. 29 and 30.

Damages may be assessed under the above section for improvements made by any defendant on land not his own in consequence of an unskilful survey, and that though the survey in question was made by a P. L. S., whom the defendant, merely as a private individual, employed to make it, and it is not a condition precedent to

the application of the section that the line or limit should have been established according to the Act respecting surveyors and the surveys of lands, R. S. O. 146.

Doe d. Gallagher v. *McConnell*, 6 O. S., 347, and *Mozur* v. *Keegan*, 13 U. C. C. P. 547, followed.

Moss, Q. C., (*Nesbitt* with him) for the plaintiff.

Atkinson for the defendant.

Ferguson, J.] [Sept. 15.

O'BRIEN v. O'BRIEN.

Gift from husband to wife, during coverture, of deposit certificate.

One James O'Brien, and Bridget O'Brien his wife, were the holders of a certain deposit certificate of the Bank of B. N. A. to the following purport: "Received from James O'B. and Bridget O'B. the sum of $2,800, for which we are accountable to either, with interest at current rate, etc." Three or four days before his death, James O'B. called his wife to his bedside, and in presence of another witness took the certificate and gave it her, saying she was to keep it for her own use, and unequivocally expressing an intention to make an absolute gift of the money to her.

Held, the husband having died, Bridget O'B. was entitled to obtain the money from the bank.

Donovan for the plaintiff.

S. H. Blake, Q.C., for the defendant Bridget O'Brien.

Ferguson, J.] [Sept. 15.

KLEIN v. THE UNION.

Insurance—Mortgage—Subrogation—Statutory Conditions—Company—Power of Manager to compromise claim.

The plaintiffs, who were in business as millers at Tavistock, under firm name of Klein, Kalbfleisch & Co., on February 21, 1879, gave a mortgage to the Union Loan Co. on their mill property. In this they covenanted to insure; and did insure in the Royal Insurance Co. by policy dated March 19, 1879, expiring March 1, 1880. On March 10, 1879, Klein retired from the business, conveying his interest to the other partners, subject to the above mortgage. The Union Loan having a standing arrangement to effect what policies they could with the Union Fire Insurance Co., and having on March 1, 1880, received no renewal receipt of the above policy, effected a policy with the Union Fire Insurance Co., in the name of the plaintiffs, on the said property. By paper attached, by way of indorsement to this latter policy, the loss, if any, was payable to the Union Loan Co., and the insurance as to the interest of the mortgagee, the Union Loan Co., was not to be invalidated by any act of the mortgagor. Then followed a subrogation clause. This endorsement was signed by the manager only. There was no written application to the Union Fire Insurance Co. for this policy; the policy in the Royal Insurance Co. was simply handed to them, and from this they drew their policy, which had the statutory conditions with variations. No representations were made to them in any other way. The premium on this policy in the Union Fire Insurance Co. was paid by the Union Loan Co., who collected it from the plaintiffs, but the plaintiffs took no part in effecting this policy. On March 14, 1881, the Union Loan Co. wrote a letter to the plaintiffs in which they represented this policy as being indisputable.

A fire occurred on the insured premises on April 22, 1881, and the Union Fire Insurance Co. paid the Union Loan Co. the amount of loss, who assigned the mortgage to the former. The evidence showed that at the time of effecting this policy there was a certain insurance on the property, and also certain mortgages of which the Union Fire Insurance Co. were not informed, and to which they never assented.

The plaintiffs in the present action, which was on this policy, claimed to have the mortgage discharged, and the balance of the insurance money paid to them; the Union Fire Insurance Co. counter-claimed for the amount due on the mortgage.

Held.—Plaintiffs could not recover as against the Union Fire Insurance Co., nor had they any remedy against the Union Loan Co.; and the Union Loan Co. were entitled to the usual judgment in mortgages cases on the counter-claim, and there should be no costs except the usual costs of an undefended mortgage case to the defendants, the Union Fire Insurance Co.

For (i.) Statutory Condition No. 1 was broken, inasmuch as the Union Fire Insurance Co. were

not notified that Klein had retired from the business, and that he had no insnrable interest in the property to be insured, and this was a fact material to the risk.

(ii.) Statutory Condition No. 1 was also broken by the existence of prior mortgages not mentioned to or assented to by the Union Fire Insurance Co.

(iii.) Statutory Condition No. 8 was broken since there was a prior insurance unnotified and unassented to, of which there was no evidence to show the Union Fire Insurance Co. had any notice till after the fire.

(iv.) By suing on the policy the plaintiffs adopted the act of the Loan Co. in obtaining it, and must recover on it as it was or not at all.

(v.) The fact that there was no written application could not affect the policy or the conditions.

(vi.) It was not proved that when the Union Loan Co. effected the policy they were themselves aware of the retirement of Klein.

(vii.) The letter of March 14, 1881, from the Union Loan Co. to the plaintiffs, saying that the policy was indisputable, was written long after the policy had been effected, and there was no evidence plaintiffs did, or abstained from doing, any act in consequence thereof.

(viii.) The agreement endorsed on the policy, and to be read in conjunction therewith, brought the case within the meaning of *Springfield Fire and Marine Ins. Co.* v. *Allen*, 43 N.Y. 389, and as there so here, the mortgage must be held to be a valid security in the hands of the insurers, the Union Fire Insurance Co.

The manager of the Union Fire Insurance Co. had, before the hearing of this cause, made an offer of compromise to the plaintiffs, which the latter duly accepted.

Held, this did not bind the Union Fire Insurance Co.; for it could not be assumed that the offer was made pursuant to authority from the directors. The plaintiffs were bound to prove such authority, and they had not done so.

S. H. Blake, Q.C., (*Wood* with him,) for the plaintiffs.

Bethune, Q.C., (*Hodgins* with him,) for the Insurance Co.

Rose, Q.C., (*McDonald* with him,) for the Loan Co.

Ferguson, J.] [Sept. 15.

SMITH v. RALEIGH.

Municipal corporation—Drainage by-law—R. S. S.O. c. 174, sec. 529—ultra vires—Mandatory injunction—Parties.

On a petition of a proper majority of the land-owning ratepayers interested therein, a by-law was passed on Sept. 25th, 1880, by the defendants, the corporation of the Township of Raleigh, for the construction of a certain drain, known as the Bachus drain. The by-law provided for the assessment of the land to be benefitted by the drain, the plaintiff being the owner of part thereof. The plaintiff now complained that the drain had not been completed, though a sufficient time had elapsed; that the defendants employed a certain portion of the moneys assessed on the plaintiff's land in the construction of another drain not mentioned in the petition, report of the P. L. S. made pursuant to the Act, or the by-law aforesaid, and of no value to the plaintiff or the other petitioners for the construction of the Bachus drain; and he claimed an order compelling the defendants to complete the Bachus drain in accordance with the by-law and to pay the damages sustained by him, and an injunction against further misapplication of the moneys by the defendants, and an account of moneys assessed and raised by the defendants for the construction of the drain.

Held, the facts alleged as aforesaid by the plaintiff being proved, the plaintiff was entitled to all the relief asked. Although the statute limits no time in which the work should be done, it must be completed within a reasonable time.

The plaintiff was entitled to maintain the suit, and it was not necessary for the Attorney-General to be the plaintiff, on a like principle to that involved in *Wilkie* v. *Corporation of Clinton*, 18 Gr. 557.

The defendants, by virtue of the assessment under the by-law, became possessed of moneys which they were bound to expend in a certain way, and no other, for the benefit and advantage of certain land-owners and ratepayers, of which the plaintiff was one; in other words, a trust had been created, but it had been violated and not executed.

The defendants justified the diversion of part of the money raised in the following way. When the petition was signed, certain of the petitioners assessed, whose lands lay south of a certain

railway embankment, were promised that a certain drain then already constructed, and running from their lands across the railway to the Bachus drain, should be cleared out and repaired so as to carry the waters on their lands into the Bachus drain, without which the latter would be no benefit to them. These ratepayers signed the petition for the Bachus drain, and submitted to the assessment on the faith of this promise, in fulfilment of which the defendants passed a resolution in Council that the said other drain should be cleared out and repaired up to the point of junction with the Bachus drain, and the money diverted as aforesaid, which was only a small amount, was expended in carrying out the said resolution.

Held, the resolution, however well and justly and honestly intended, offered no justification whatever for diverting the moneys or any part of it from the intended Bachus drain.

Held, further, this was not a case for arbitration, or at all events, not a case in which the plaintiff was bound to proceed by arbitration.

C. Moss, Q.C., for the plaintiff.

Pegler for the defendants.

Ferguson, J.] [Sept. 15.

WHITNEY v. TOBY.

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

A., acting on his own behalf and as agent for the other creditors of L., a trader in insolvent circumstances, obtained a transfer of certain securities for money, and also of some leather, to himself, which transfer it was now sought to set aside on the ground of undue preference. About Dec. 9, 1880, the bank which had been in the habit of discounting customer's notes for L., refused to do so any more. Thereupon L. went to A. and wanted him to procure discounts for him and give him the full proceeds. A. said he would not do this, but that he would procure discounts provided L. would allow him to apply a portion upon the indebtedness represented by himself. This L. agreed to, and the securities in question were transferred to A. on these terms, he paying a certain amount for them. As to the leather, L. asked A. to purchase it from him. This A. refused to do, but he said he would take it and sell it for him, and apply the proceeds on the accounts represented by him, which L. agreed to. A. was aware at the time of L.'s pecuniary embarrassment, and that he could not long continue business; he also knew the bank had refused any further discounts.

Held, nevertheless, after a review of the authorities, that inasmuch as it was A. who proposed to sell the leather, and apply the proceeds in the way in which they were applied; and inasmuch as the securities were brought to A. pursuant to a mode or scheme devised and proposed by him, and were dealt with according to that scheme; inasmuch as, that is, the idea of the preference originated with A., and L. did not seem to be the originator of any scheme or design to prefer A. or any of the other creditors for whom A. was acting, the transfers were not made "voluntarily," and "with a view of giving such creditors preference over other creditors," within the meaning of the statute, and could not be set aside; and although L. did that, the necessary and obvious effect of which was to prefer A. and those for whom A. was acting, yet the authorities forbade imputing, on these grounds, the *intent* to him, reasonable though it would appear to do so.

S. H. Blake, Q. C. (*Thompson* with him) for the plaintiff.

Maclennan, Q. C., for defendant Alexander.

McCarthy, Q. C., (*Foster* with him) for the other defendants.

Ferguson, J.] [Sept. 15.

WITHROW v. MALCOLM.

Patent Act, 1872, s. 19—Re-issue—Evidence—Imp. 14-15, Vict. c. 99.

A re-issued patent must be for the same invention as was the patent surrendered upon the re-issue taking place; the re-issue can include no new invention, that is, no invention not comprehended in the surrendered patent whose place it takes. The "claim" cannot be enlarged upon the re-issue of a patent if, by enlarging the claim or extending it, the invention is enlarged, if, that is, something new is imported into the re-issued patent, some invention not contained or comprehended in the surrendered one; but the "claim" may be enlarged on the re-issue provided the identity of the subject matter of the original patent is preserved.

Authorities elaborately reviewed and collated and on the principles therein laid down,

Held, in the present case—which was brought

to restrain alleged infringements of a certain re-issued patent, and in which the defendants disputed the validity of the re-issue—that the invention claimed in the re-issue was the same as that in the original surrendered patent, nothing in the nature of a substantially new invention being introduced; that the patentee honestly made a mistake in not claiming the whole of his invention at the time he obtained the original patent; that no excessive delay had elapsed between the issuing of the original and the application for the re-issue, and that, therefore, the re-issued patent was good if the original surrendered patent was not bad for want of novelty.

Section 19 of our Patent Act of 1872 is similar in terms to section 4916 of the American Patent Law, and therefore the American decisions respecting the re-issue of patent afford a guide as to the proper interpretation of the section of our Act.

Certified copies of some United States patents were offered in evidence for the purpose of showing that the inventions in the plaintiff's patents had been patented in a foreign country more than twelve months prior to the application for a patent here.

Semble, the copies could be read in evidence under the provisions of Imp. 14-15 Vict. c. 99, sects. 11 and 7.

McDougall, (*Shepley* with him.) for the plaintiffs.

W. Cassels, for the defendants.

Ferguson, J.] [Sept. 15.

KEITH v. FENELON FALLS.

Principal and surety—Municipal corporation—School board—Construction of bond—Mistake.

One D., being appointed secretary-treasurer of the Public School Board of a certain Union school-section, executed a bond with sureties for the due performance of the duties of his office. The bond recited that, "Whereas the above bounden D. has been appointed and now is the secretary-treasurer of the said Public School Board, and it is required that security should be given for the due and faithful performance of any and all the duties pertaining to such office;" and the condition in the bond was, "Do correctly and safely keep any and all moneys and papers belonging to the said School Board . . and do faithfully and honestly account for the receiving and disbursing by him of school moneys collected by school rate, rate bill, subscription or otherwise from the inhabitants or ratepayers of the said school section, or other parties, and do faithfully and honestly disburse any and all moneys as he may legally be required so to do by the said Public School Board. . . and do faithfully and honestly deliver up, account for and pay over any and all books, papers. . . chattels, moneys or valuable securities which at any time hereafter may come into his hands and possession as such secretary-treasurer."

Held (following *Parker* v. *Wise*, 6 M. & S. 247), if there was any difference in breadth of meaning between the words of the recital and those of the condition, the latter was subject to being explained and restrained by the former; and, applying this principle to the above bond, moneys received by D. outside of the duties pertaining to his said office were not within the scope of the surety's engagements under the above bond, and therefore a surety was not liable to make good any default of D. in respect to such moneys.

The village of Fenelon Falls was included in the Union school section in question, and in 1876 the municipal council, pursuant to by-law, raised on debenture $2,500 to pay for a school house in the school section, it being provided that a special rate should be levied to raise $450 annually, to pay the interest on and create a sinking fund for the said $2,500. In 1877, 1878, 1879 add 1880, on the requisition of the School Board the said municipal corporation paid over the $450 annually to D., and a large part of his defalcation was in respect of these moneys.

Held, the debentures were the debentures of the Municipal Corporation, and the moneys raised by the special rate were the moneys of the Municipal Corporation, and should have been received and taken care of by the Municipal Corporation, and not by D.; and the sureties under the above bond were not liable to make good D.'s default in respect of these moneys.

The plaintiff, one of the sureties to the above bond, being present at a meeting of the School Board, was told by the chairman that D. was in default $1,444, which he, the plaintiff, would have to make good. Whereupon the plaintiff assented to give, and did give, a mortgage to a trustee for the Board for this amount. No statement of D.'s

transactions as secretary-treasurer was ever shown the plaintiff; nor had he, till a short time before the commencement of this suit, any notice or knowledge that any part of D.'s defalcations was in respect of the moneys received as aforesaid from the Municipal Corporation.

Held, the plaintiff should be let in to redeem the said mortgage on payment of D.'s defalcations, less the amount of the moneys of the Municipal Corporation so received as aforesaid.

Semble.—If the money had been paid by the plaintiff under the above mistake of fact, it could be recovered back.

Maclennan, Q.C., (*Riordan* with him,) for the plaintiff.

S. H. Blake, Q.C., (*Barron* with him,) for the School Trustees, and the trustee of the mortgage

COMMON PLEAS DIVISION.

RE NORTH YORK ELECTION CASE.

PATTERSON v. MULOCK.

Elections—Petition against return of member—Jurisdiction of C. P. Division—Preliminary objection.

Held, by CAMERON, J., that the Common Pleas Division of the High Court of Justice has no jurisdiction to entertain a petition under the Dominion Controverted Election Act of 1874 and amending acts, against the return election of a member for the Parliament of Canada; but that the Courts of Queen's Bench, Common Pleas and Chancery are existing Courts, as well as the Court of Appeal, for the trial of such petitions; and that an objection to the jurisdiction was properly raised by preliminary objection.

McCarthy, Q.C., and *Osler*, Q.C., for the petitioners.

Robinson, Q.C., and *Moss*, Q.C., for the respondents.

CORRESPONDENCE.

The present Law Course.

To the Editor of the LAW JOURNAL.

SIR,—The recent abolition of the Law School and the consequent leaving of the student to his own resources for his legal education, suggest a few ideas with regard to the present law course.

With the large number of students throughout the country generally it seems to be the case, that the first year of their clerkship is simply a wasted twelvemonth. In the small town offices the student spends this year of his course in almost abject idleness. Any diligent young man of ordinary ability can get up his first intermediate work with one year's careful study; he knows this, and, therefore, does not bother himself about text-books and legal reading during this period, and his time, consequently, is devoted to dress-clothes and parties, or to other things which have a far worse tendency.

In larger offices his duties comprise post-office and bank errands, &c., with a little simple mechanical copying, over which his mind is not exercised ior a moment, and, consequently, without adding anything material to his legal knowledge or professional training.

The student, moreover, is all this time under expense without any chance of lightening this burden by any exertions he might be capable of making if an inducement, such as the saving of time under articles, were offered, and without any benefit, such as instruction, for his faithful clerkship. This first year, then, is but a blank in the young man's legal life. He had better be at college with his English, a subject in which the great majority of the "learned men" of our country are wofully deficient; and it is sometimes heart-rending to hear in our courts, and from those too whom we are to regard as our models of professional perfection, Her Majesty's English mutilated and distorted out of all semblance to a modern tongue or language. I say it would be infinitely better to teach the student only English and penmanship this first year, and I am sure the profession thereby would be immeasurably benefitted.

Four years is ample for our curriculum, which is a fairly high standard, and if the barristers to whom students articled did their duty—their bounden duty in this case—there would be no need for the change which I am about to pro-

pose. But what clerk would think of making a practice of asking his barrister to explain "knotty points" in his reading, even though the latter had the time to devote to his student for that purpose? Or what barrister ever thinks of giving any instruction (beyond what is barely necessary to ensure the satisfactory—for his own purposes—execution of the work entrusted to the clerk) in the strict acceptation of the term, to his clerk upon legal practice, &c.? and the student gets no complete insight into this until four or five years of his own practice as a solicitor.

With these facts, and they are palpably solid facts, before us, would it not be better to have a more "instructive" course, a course more (than it is at present) for the educational benefits of the student, and, consequently, the ultimate improvement of the profession in general.

A student is not supposed to receive any pecuniary remuneration for his services in an office, but his solicitor in his articles of clerkship, covenants with him "that he will, by the best ways and means he may or can, and to the *utmost of his skill or knowledge, teach and instruct* or cause to be taught and instructed the said student in the said practice or profession of an Attorney-at Law and Solicitor in Chancery, which he, the said barrister, now doth or shall at any time hereafter during the said term use or practice." How many barristers are there who know that they ever made such an agreement? How few who ever dream of the performance of it! This proviso, therefore, for the benefit of the student, is a dead-letter. So the clerk now-a days gets little or no instruction, but is left entirely to himself to acquire as best he can practice and knowledge of the most difficult and complex of all the learned professions.

The following course would, I think, meet every want:

Let there be a Law College; let the matriculation be the same as that of the University of Toronto; and let the collegiate course be two years, divided into the usual college terms. Let the college be situated in Toronto, which is the legal centre of the country, and in which is concentrated the best talent of the profession which might be available from time to time for lectures, &c. Let the instructions be purely legal and thoroughly practical as far as possible, and be dispensed by a paid staff of competent practitioners. Let the professional practice of the Law College correspond to the commercial training of a modern Business College, and comprise the practice of Courts, conveyancing, &c. Let there be two examinations in the college course; the First Intermediate in Michaelmas Term of the first year, and the Second Intermediate in the corresponding term of the second year, after which the student would enter an office to complete, in actual practice, the remaining two years of his course.

Such a course as this would give the student a thorough legal foundation for the higher studies of his profession; would give him, in a solicitor's office, all the practical work now obtainable in the present course, and would supply barristers with a class of clerks who would be "up" in the practice, and, consequently, much more useful to them; while, at the same time, the profession on the whole would be much more worthily represented.

Yours truly,

Hamilton, Sept. 9th, 1882. PROFESSIONAL.

BOOKS RECEIVED.

LAW LECTURES. Subjects: Torts and Negligence, delivered before the law students of Toronto, at Osgoode Hall, by Joseph E. McDougall, Esq., Barrister-at-Law, Examiner of the Law Society on Criminal Law and Torts. Reported and published by J. P. Mabee, Esq., Student-at-law. Toronto: Rowsell & Hutchison, 1882.

THE ONTARIO LAW LIST and Solicitors' Agency Book (including also the Province of Manitoba) for 1882-83. 9th Ed. Toronto: J. Rordans & Co.

A MANUAL OF THE LAW applicable to Corporations generally; including, also, general rules of law peculiar to banks, railroads, religious societies, municipal bodies and voluntary associations, as determined by the leading courts of England and the United States. By Charles T. Boone, LL.B. San Francisco: Sumner, Whitney & Co., 1882.

A PRACTICAL EXPOSITION OF THE PRINCIPLES OF EQUITY, illustrated by the leading decisions thereon. For students and practitioners. By H. Arthur Smith (Lond.) London: Stevens & Sons, 119 Chancery Lane, Law Publishers and Booksellers, 1882.

BLACKSTONE'S COMMENTARIES. For the use of students-at-law and the general reader; obsotete and unimportant matter being eliminated. By Marshall D. Ewell, LL.D., Professor of the Union College of Law, Chicago, etc. Boston: Soule & Bagbee, 1882.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

BILLS AND NOTES:—

A Treatise on Bills of Exchange, Promissory Notes, Coupon Bonds, and other negotiable instruments. By Isaac Edwards. 2 vols. 3rd edition, revised and enlarged by Dudley, Dennison & Dudley, New York, 1882.

CORPORATIONS:—

The American Corporation Cases; embracing the decisions of the Supreme Court of the United States and the Courts of Last Resort in the several States, since January 1, 1868, of questions peculiar to the Law of Corporations. Edited by Thomas F. Withrow. Vol. 1, Private Corporations, 1872; vol. 2, Municipal Corporations, 1874; vol. 3, Private Corporations. E. B. Meyers & Co., Chicago, 1880.

DIGESTS:—

United States Digest. Vol. 12. Being the Annual Digest for 1881; Boston, 1882. A Digest of all reported cases not contained in the Law Reports, decided in the various English Courts, together with a full selection of cases of importance from the Irish and Scotch Reports, and references to the American Reports of Standing, and a complete index to every reported case for the year 1881. By Alfred Emden, London, 1882. See also under "Insurance," *infra*.

ELEMENTS OF LAW:—

Elements of the Laws, or Outlines of the System of the Civil and Criminal Laws in force in the United States and in the several States of the Union. Designed as a text book and for general use, and to enable anyone to acquire a competent knowledge of his legal rights and privileges, in all the most important political and business relations of the citizens of the country, with the principles upon which they are founded, and the means of asserting and maintaining them in civil and criminal cases. By Thomas L. Smith. New and revised edition. Baker, Vorhis & Co., Philadelphia, 1882.

EMINENT DOMAIN:—

A treatise upon the law of Eminent Domain. By E. Mills. Little, Brown & Co., St. Louis, 1876.

INFANCY AND COVERTURE:—

Commentaries on the law of infancy, including guardianship and custody of infants, and the law of coverture, embracing dower, marriage and divorce, and the statutory policy of the several States in respect to husband and wife. By Ranson H. Tyler. 2nd Edition. Little, Brown & Co., Albany, 1882.

INSURANCE:—

New Digest of Insurance decisions, Fire and Marine, together with an abstract of the law on each important point in fire and marine insurance. The whole being intended as a complete handbook of the law, as established by the most recent adjudications in this country and Great Britain. By C. C. Hine and W. S. Nicholls. Baker, Vorhis & Co., New York, 1882.

LANDLORD AND TENANT:—

A practical treatise on the law of Landlord and Tenant in the State of Pennsylvania; with a complete discussion of Ejectment and Replevin. By Tatlow Jackson and Joseph P. Cross, Philadelphia, 1882.

NEGOTIABLE INSTRUMENTS:—

A treatise on the law of Negotiable Instruments, including bills of exchange, promissory notes, negotiable bonds, and coupons, checks, bank notes, certificates of deposit, certificates of stock, bills of credit, bills of lading, guarantees, letters of credit, and circular notes. By John W. Daniel. 2 vols. 3rd Edition. Baker, Vorhis & Co., New York, 1882.

PROCEEDINGS IN REM:—

A treatise on proceedings in Rem. By Rufus Waples. Callaghan & Co., Chicago, 1882.

REAL PROPERTY:—

A treatise on the American law of Real Property. By Emory Washburn. 3 vols. 4th Edition. Little, Brown & Co., Boston, 1876.

THE REPORTERS:—

The Reporters arranged and characterized with incidental remarks. By John W. Wallace. 4th Edition, revised and enlarged. Published under the superintendence of Franklin Fiske Heard, Boston, 1882.

REPORTS:—

38 American; 48 Connecticut; 53 Wisconsin; 33 New York; report of cases decided in Court of Appeal of State of New York, from Oct. 4th, 1881, to Nov. 22nd, 1881; with notes, references and index. By H. E. Sickles. Vol. 41 Albany, 1882. 131 Massachusetts; 101 Illinois; 10 Missouri; 73 Maine; 56 and 57 Maryland, C. of A.; 2 Nova Scotia; reports of cases decided in High Court of Chancery of Maryland. By T. Bland. 3 vols, 1836–1841. Reports of cases adjudged in the District Court for Eastern District of Pennsylvania, Philadelphia, 1857; reports of cases determined in the Surrogate Courts of New York. Vol. 3, 1879. 30 English (Moak).

LAW OF PERSONAL PROPERTY:—

Treatise on the law of sale of Personal Property; with references to the American decisions and to the French code and civil law. By J. P. Benjamin. 3rd American Edition, by Edmund H. Bennett, Boston, 1881.

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 1882.

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

George S. Lynch Staunton, with Honours, awarded Silver Medal; Arthur O'Heir, Thomas Henry Luscombe, James Leaycroft Geddes, David Henderson, John Williams, Thomas Alpheus Snider, Dennis J. Donahue, John Travers 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 Luscombe, 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, and Charles Edward Irvine, who passed his examination in Michaelmas Term, 1881.

And the following gentlemen matriculated as students and articled clerks, namely :—

Graduates—Archibald Gilchrist Campbell, Alex. W. A. Finlay, and James Redmond O'Reilly. Matriculants of Universities—James Michael Lahey, Hugh Hartshorne, Edward M. Young, and John Clarke. Junior Class—Richard Henry Collins, Leopold Wm. Fitz Hardinge Berkeley, John Lindsay Sneddon, Charles E. Weeks, Alexander James McKenzie, P. Henry Allin, Herbert James Dawson, Angus Wm. Fraser, Albert Edward Taylor, Thomas Sherk, David Gordon Marshall, Henry Edward Ridley, Abner Jas. Arnold, James Herbert Kew, Ralph Herbert Dignan, William, John McDonald, Shirley B. Ball, Alfred Wm. Lane, Orville Montrose Arnold, Horace Bruce Smith, Jas. Archibald Macdonald, Theodore Augustus McGillivray, Geo. Wellington Green, James Alfred Mills, Ernest Morphy, J. Frederick Cryer, Robert Chappelle, Alexander Sanders, James Francis R. O'Rielly. Articled Clerks—E. Considine, D. A. Cameron.

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.

From 1882 to 1885.
- 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.