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TABLE

OF REFERENCE TO CASES NOTED AND REPORTED IN THIS VOLUME WHICH ILLUSTRATE

THE

PRACTICE UNDER THE ONTARIO JUDICATURE ACT.

This table furnishes an easy means of reference to the English and Canadian cases bearing on the present practice of our Courts, which have been noted and reported in the "Notes of Cases" and "English Practice Cases" in the LAW JOURNAL in this volume. The first column indicates the number of the section or rule which is illustrated by a particular case (the rules being designated throughout by their marginal numbers), and the second column indicates the page in which the case in question is to be found.

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DIARY FOR JANUARY.

1. Mon.. New Year's Day. County Court Term and Heir and Dev. Sitt begin. Municipal Elections held.
3. Wed.. Assizes, Hamilton, and Civil Suits, Toronto.
6. Sat . County Court Term ends. Christmas vacation ends.
7. Sun.. *1st Sunday after Epiphany.*
9. Tue .. Court of Appeal Sittings begin. Christmas Vacation in Supreme Court ends.
11. Thur.. Sir Charles Bagot, Governor-General, 1842.
14. Sun... *2nd Sunday after Epiphany.*

TORONTO, JAN. 1, 1883.

THE new Law Courts in London were duly opened by the Queen in person on the 4th December last. The ceremony was an interesting one, and we hope to find room for some account of the proceedings in our next number.

FOLLOWING the appointment of Mr. Wallbridge to the Chief-Justiceship of Manitoba, comes the resignation of Mr. Justice Miller. We are sorry for this, as these descents from the Bench are becoming all too common, and are far from edifying. We trust in this case it was not, as rumoured, because he had been promised the place rendered vacant by the death of the late Chief-Justice. There is now a befitting opportunity for the appointment of a puisne from the ranks of the Chancery Bar, in accordance with the wish expressed by the Winnipeg profession, and we should not be surprised if a new Master in Chancery in our own Province would be next in order. Our loss would be the gain of both lawyers and litigants in Manitoba.

A LARCENY case, recently tried at the Winnipeg Assizes, as reported in the local papers, presents some rather unusual, if not amusing features. For several months, the residents of Portage La Prairie had been losing their cows. At first it was supposed that they might have strayed away into the prairies; but as wandering bovines not unfrequently return home another solution of the difficulty was thought desirable, and it was determined to make search for them, whether stolen or strayed, and a number of persons subscribed a sum of money to pay the necessary expenses. Amongst the subscribers to the fund was a man named Fant, who carried on, with other things, the business of a butcher. None of the missing cows were found, and the mystery became more mysterious. After some time circumstances arose which cast suspicion upon the said Fant, and a search warrant being issued, a number of hides were found in his possession, some of which bore marks which compelled the unhappy owners to believe that they had, unknown to themselves, been feasting on their own cattle, butchered by the enterprising Fant. Some time before this a horse had been stolen from the sheriff of the district, and the latter, whilst looking for his missing steed and before he had an opportunity of purchasing another one, frequently secured Fant's services to drive him into the country, either in search of the stolen animal or on other business. The sheriff, on one occasion, as he contemplated the animal in front of him, was much struck with its appearance, and remarked to Fant that it would make an excellent mate for his own lost one, should he be so fortunate as to find it, and he resolved in such case to try and make a "dicker" with Fant, and thus secure a well matched team. After the matter of the hides had been investigated, and Fant had been arrested and committed for trial a sudden inspiration seized the sheriff, and he paid a visit

with a friend to Fant's stable. They went, and after a close examination of the horse, soap and hot water were brought into requisition, and a plentiful application resulted in obliterating some neatly painted spots, and in the discovery that the sheriff had been hiring and driving behind his own long lost, long lamented bucephalus. The man Fant had in fact been supplying his customers with their own beef, which he had used a stolen horse to deliver. It was not known how many cows had been stolen, but about ten hides amongst those found (and supposed to be a small balance of the stock) were identified, and nearly as many indictments preferred against Fant. He was acquitted in the two first that were tried, and it was feared that he would escape punishment altogether from want of direct evidence of the stealing; but the jurymen, as it is supposed, began to think that if they had to try all the cases such a verdict would become monotonous, and, fortunately for his late neighbours, found him guilty on the third indictment, when the remaining ones were abandoned. He is now eating, when he can get it, penitentiary beef, but from what appears in late Winnipeg papers he has already become disgusted with his quarters, and made an unsuccessful dash for liberty.

DISALLOWANCE.

WE publish elsewhere a letter from a valued correspondent at Winnipeg, referring to some remarks on this subject which appear in a recent issue of this journal, and to which he appears to take exception, but upon what grounds we confess we cannot very clearly see from his communication.

As it is outside of the province of a legal journal to discuss any matter in its political aspect we forbear any further comment upon that part of our correspondent's letter where he suggests the substitution of the word "politician" for "lawyer" except to remark that he seems to contradict his own affirmation immediately after having made it.

We do not quite understand what our correspondent means by asking if we hold that "the Parliament of Canada contracted with the railway, that the Governor-General's prerogative should be exercised *in a particular manner*." We should prefer before giving an answer to understand distinctly what is meant by "in a particular manner." The contention, generally, is that the Governor-General in Council has the constitutional (which we presume means also the legal) right to disallow any Act of a Local Legislature which is considered to contravene the general policy upon which the Dominion as a whole is governed. The contract with the railway is a national one, and provides, in what is known as the "twenty years clause," against the construction of certain competing lines for that period of time. The natural deduction, apart from technicalities, would be that it is the duty of the Governor-General in council to disallow any local Act incorporating a railway, the construction of which would contravene this provision of the C. P. R. contract. But further than this, the Governor in Council has the power, under the B. N. A Act, to disallow any Act on general principles; the policy of doing so being, however, a question entirely apart from that of its constitutionality. The right of veto does not seem to be limited to Provincial Acts passed in excess of the powers conferred by the constitution.

In reference to the legislative powers of the Province of Manitoba to charter railways which "do not extend to the increased limits" or *added territory*, we do not find anything in the C. P. R. contract requiring the Governor-General in Council to veto such charters, and we must assume that he would not be advised to do so unless under circumstances of great gravity affecting the interests of the Dominion. If, however, the contention that the veto power is absolute is once admitted, then the question put by our correspondent is irrelevant to our former remarks

which produced his letter. We need hardly say that an argument on behalf of the general principle of disallowance is that the interests of the Dominion as a whole are paramount to those of any particular province, and that where they clash, or appear to clash, it is necessary that the latter should give way to the former. Any powers given to the central authority by the Constitution, as authorized or covered by the British North America Act, were so given by the Imperial authorities with the consent of all parties interested, and were no doubt such as were considered necessary for the good government of the Dominion. How far these powers extend in certain cases, may of course be a matter for discussion and a question for some Court of competent jurisdiction, or for Imperial legislative interference.

We may remark here, in connection with the discussion of these matters, that the Dominion Government should not be looked upon as though composed of foreigners imbued with a desire to tyrannise over the provincial autonomies. The Ministers at Ottawa are our servants as much as those who rule in the provinces; they are elected by the same people, and responsible to the same public opinion to be constitutionally expressed.

WHO SHOULD PAY THE DOCTOR?

If Smith says to Brown, a medical man, "Attend upon Robinson, and if he does not pay you I will," that being a promise to answer for a debt of Robinson's, for which he is also liable, the guarantee is only a collateral undertaking, and, under the Statute of Frauds, must be in writing and signed by Smith, or some other person thereunto by him lawfully authorised, in order to be binding upon him. But if Smith says to Dr. Brown, absolutely and unqualifiedly, "Attend upon Robinson, and charge your bill to me," or "I will pay you for your attendance upon Robinson," then the whole credit being given to Smith, no written agreement is necessary to enable the doctor to recover the amount of his account from him, since it is absolutely the debt of Smith: (Smith on Contracts, 85.)

Where a person calls at the office of a physician, and, he being absent, the visitor leaves his business card with these words written on it, "Call on Mrs. Jones, at No. 769 High Street," handing it to the clerk in attendance, with the request that he would give it to the doctor, and tell him to go as soon as possible. This caller becomes liable to pay the doctor's bill for attendance upon Mrs. Jones in pursuance of such message. Yet Mrs. Jones, if a widow, may also be be liable; for one who acquiesces in the employment of a physician, and implies, by his or her conduct, that the doctor is attending at his or her request, is responsible for the value of his services. If Mrs. Jones is living with her husband, or, without her fault, away from him, the doctor has still another string to his bow, and may recover the amount of his bill from Mr. Jones; for the rule is, that a husband must pay his wife's doctors' bills. Of course the doctor cannot make all three pay: (*Bradley* v. *Dodge*, 45 How., N.Y., Pr. 57; *Crane* v. *Bandoine*, 65 Barb., N.Y., 261; *Harrison* v. *Grady*, 13 L. T., N. S., 369; *Spaun* v. *Mercer*, 8 Neb., 537.)

Long since, Park, J., was clearly of the opinion that if a mere stranger directed a surgeon to attend a poor man, such person was clearly liable to pay the surgeon: (*Watling* v. *Walters*, 1 C. & P. 132). Yet, in some cases in the United States, it has been held that the man who merely calls the doctor is not bound to pay him. When, for instance, in Pennsylvania, a son of full age, when living with his father, fell sick, and the father went for the doctor, urging him to visit his son. Afterwards the physician sued the parent. The Court said this was wrong, that he should have sued the son, as the father went as a messenger only, that the son, who had the benefit of the services, was the responsible person; and remarked that it was clear that had the defendant been a stranger, however

urgent he may have been, and whatever opinions the physician may have formed as to his liability, he would not have been chargeable without an express promise to pay, as, for instance, in the case of an inn-keeper, or any other individual whose guest may receive the aid of medical service. A different principle, the Court considered, would be very pernicious, as but very few would be willing to run the risk of calling in the aid of a physician where the patient was a stranger or of doubtful ability to pay. This was in 1835: (*Boyd* v. *Sappington*, 6 Watts, 247.) And, in Vermont, one brother took another, who was insane, to a private lunatic asylum and asked that he (the insane one) might be taken in and cared for. This was done. In course of time the doctor sued the sane one for his bill, but the Court would not aid him in the matter, saying, "He is not liable unless he promised to pay:" (*Smith* v. *Watson*, 14 Vt. 332.)

In the case of Mr. Dodge, above referred to, the Court said, "He might very readily have screened himself from all liability, by simply writing the memorandum on a blank card, or by adding to that which he wrote on his own card something that would have apprised the doctor of the fact that he acted in the matter for Mrs. Jones, as her agent."

The reporter did not approve of this decision, and so appended the following graphic note: "Let us see how this thing works. We will take as an illustration an almost every-day occurrence arising in the country. A. B. is taken suddenly and seriously ill in the night time, and sends to his neighbour, C. D., living in the next house to his, to have him go after the doctor as soon as he can, for he is in great pain and distress. C. D. jumps out of bed without hesitation, and hastily dresses himself, and goes out to his barn and takes a horse from the stable, and not waiting to put on a saddle or bridle, jumps on to the horse with the halter only, puts him at full speed for the doctor's office, some two or three miles distant. On arriving there he finds the doctor absent from home, but his clerk is there, and C. D. at once says, "Tell the doctor to call on A. B., who has been taken suddenly sick; tell him to come as soon as possible." In accordance with this message the doctor calls upon A. B., and prescribes for and attends him professionally for several days. After a reasonable time the doctor sends in his bill to A. B., and it not being paid as soon as the doctor desires, he calls on C. D. and requests him to pay the bill. C. D., with perfect astonishment, asks why he is to pay. The doctor informs him that he made himself liable to pay the bill because, when he delivered the message, he did not tell the clerk that he came for the doctor by the request of A. B., nor that he acted as agent of A. B. in delivering his message. Well, says C. D., the fact was I did go at the request of A. B., and merely acted as his agent in delivering the message, and I will swear to these facts if necessary. The doctor insists that it will do him no good if he should give such testimony, for the law is settled on that point, as just such a case has recently been decided in New York under just such a state of facts, where the jury, in the Justice Court, found a verdict for the doctor for the amount of his bill; and, on appeal by the defendant to the general term of the New York Common Pleas, that Court unanimously sustained the verdict of the jury, and affirmed the judgment of the Court below. Well, says C. D., 'If that is the law I think I will wait awhile before I go after a doctor again as an act of neighbourly kindness.'" This case was decided as late as March, 1873.

A wife has implied authority to bind her husband for reasonable expense incurred in obtaining medicines and medical attendance during illness; but this implied authority is put an end to if she commits adultery while living apart from her husband, and there has been no subsequent condonation; or, if she leaves her husband's home of her own accord, and without sufficient reason, and the fact

has become notorious, or the husband has given sufficient notice that he will no longer be responsible for any debts that she may incur: (*Harrison* v. *Grady*, 13 L. T., N. S. 369; *Cooper* v. *Lloyd*, 6 C. B., N. S. 519; Roper on Husband and Wife, 2nd ed. v.ii. p. 114). If a husband turn an innocent wife out of doors without the means of obtaining necessaries, it is a presumption of law which cannot be rebutted by evidence, that she was turned out with the authority of her husband to pledge his credit for necessaries, and in such a case medical attendance will be considered as one of the most primary necessaries: (*Harrison* v. *Grady*, supra; *Thorpe* v. *Shapleigh*, 67 Me. 235.) A married woman's misconduct does not exonerate the husband from paying a doctor whom he requests to attend her: (*Webber* v. *Spaunpake*, 2 Redf., N.Y., 258.)

Although the law requires the husband to furnish the wife with all necessaries suitable to his condition in life, including medical attendance in case of sickness, still it gives him the right to procure these necessaries himself and to decide from whom and from what place they are to come. If a physician attends a wife whom he knows to be living separate and apart from her husband, he ought to enquire whether she has good cause for so doing; for if she has not he cannot make the husband pay the bill; and it has been held that it devolves upon the doctor to show that there was sufficient cause for the wife's separation: (*Berier* v. *Galloway*, 71 Ill. 517; *Hartmann* v. *Tegart*, 12 Kan. 177.) The employment of a physician by a husband to attend his sick wife presumably continues throughout the illness; and the mere fact that the wife is removed, with the husband's consent, from his home to her father's, will not enable him to resist payment of the doctor's bill for visits paid to her at the father's: (*Potter* v. *Virgil*, 67 Barb. N.Y., 578.)

Notwithstanding the law's desire not to favor any particular school—a quack's bill was thrown out in a case where the services were rendered without the husband's assent. This was done in a case where a doctor was in the habit of putting a woman into a mesmeric sleep, who thereupon became a clairvoyant, and prescribed the medicines which the doctor furnished, and for these he sued. The judge said:—"The law does not recognize the dreams, visions or revelations of a woman in mesmeric sleep as necessaries for a wife for which the husband, without his consent, can be made to pay. These are fancy articles which those who have money of their own to dispose of may purchase if they think proper, but they are not necessaries known to the law for which the wife can pledge the credit of the absent husband:" (*Wood* v. *O'Kelley*, 8 Cush. 406.

In England it is considered that a parents' duty to furnish necessaries for an infant child is a moral and not a legal one, so that he is not liable to pay for medicines or medical aid furnished to his child without some proof of a contract on his part either expressed or implied. The rule of law varies in the different States of the Union. In most of them in which the question has come before the Courts the legal liability of the parent for necessaries furnished to the infant is asserted, unless they are otherwise supplied by the father; and it is put upon the ground that the moral obligation is a legal one, and some of the Courts have declared this quite strongly. In other States the English rule has been held to be law, and agency and authority has been declared to be the only ground of such liability. The authority of the infant to bind the parent for medical aid supplied him will be inferred from very slight evidence: (Parsons on Contracts, vol. I. p. 302–303; *Blackburn* v. *Mackey*, 1 C. & P. 1.) But a contract to pay will not be implied when the infant has been allowed a sufficiently reasonable sum for his expenses: (*Cranz* v. *Gill*, 2 Esp. 471). Where the services have been rendered with the parent's knowledge and consent, he will generally have to pay for them. A boy left home against his father's

will, and refused to return at his parent's command. Being seized with a mortal illness he did at last come back. His father went with him to a physician to obtain medical advice, and the doctor afterwards visited him professionally at his father's house. No express promise to pay was proved, nor had the father said he would not pay. The Court held the father liable to pay the doctor's bill: (*Rogers* v. *Turner*, 59 Mo. 116; *Deane* v. *Annis*, 14 Me. 26; *Swain* v. *Tyler*, 26 Vt. 1.) And in an English case where a father had several of his children living at a distance from his own house, under the protection of servants, it was held that if an accident happened to one of the children he was liable to pay for the medical attendance on such child, although he might not know the surgeon called in, and although the accident might have been received through the carelessness of a servant: (*Cooper* v. *Phillips*, 4 C. & P. 581.)

Medicines and medical aid are necessaries for which an infant may legally contract, and for which he can render himself liable. In Massachusetts it was held that he would not be liable merely because his father was poor and unable to pay: (*Blackburn* v. *Mackey*, 1 C. & P. 1; *Hoyt* v. *Casey*, 14 Mass. 397.)

A master is not bound to provide medical assistance for his servant, but the obligation, if it exists at all, must arise from contract; nor will such a contract be implied simply because the servant is living under the master's roof, nor because the illness of the servant has arisen from an accident met with in the masters service: (*Wennall* v. *Adney*, 3 B. & P. 24; *Sellen* v. *Norman*, 4 C. & P. 80.) But where a servant left in charge of her master's children was made ill by suckling one of the children, and called in a medical man to attend her, with the knowledge and without the disapprobation of her mistress, it was decided that the doctor could make the father and master pay: (*Cooper* v. *Phillips*, 4 C. & P. 581.) And a master is bound to provide an apprentice with proper medicines and medical attendance: (*R.* v. *Smith*, 8 C. & P. 153.)

In England when a pauper meets with an accident, the parish where it occurs is usually liable for the surgeon's bill. If, however, the illness of the pauper arises from any other cause than accident or sudden calamity, the parish in which he is settled is under legal liability to supply him with medical aid, although he may be residing in another parish. But all these questions with regard to paupers are determined according to the poor laws of the different countries. (Glenn's Law of Medical Men, pp. 197-199.)

It has frequently happened that when a railway passenger or employee has been injured by a collision or accident, and some railway official has called in a doctor, the company has afterwards refused to pay the bill; and the courts have declined to make them do so, unless it be shown that the agent or servant who summoned the medical man had authority to do so. It has been held that neither a guard, nor the superintendent of a station, nor the engineer of the train in which the accident happened, had any implied authority as incidental to their positions to render their companies liable for medical services so rendered: (*Cox* v. *Midland Counties Railway*, 3 Ex. 268; *Cooper* v. *N. Y. C.* 13 N. Y. Sup. Ct. 276.) The Court of Exchequer said, "It is not to be supposed that the result of their decision will be prejudicial to railway travellers who may happen to be injured. It will rarely occur that the surgeon will not have a remedy against his patient, who, if he be rich, must at all events pay; and if poor, the sufferer will be entitled to a compensation from the company, if they by their servants have been guilty of a breach of duty, out of which he will be able to pay, for the surgeon's bill is always allowed for in damages. There will, therefore be little mischief to the interests of the passengers, little to the benevolent surgeons who give their services." But in England it has been decided that the general manager of a railway company has, as incidental to his employment, authority to bind his company

for medical services bestowed upon one injured on his railway. In Illinois a similar decision was given as to a general superintendent, although in New York judgment was given the other way: (*Walker* v. *Great Western Railway*, 2 L. R. Ex. 228; *Cairo, &c., Railroad Company* v. *Mahoney*, 82 Ill. 73; *Stephenson* v. *N. Y. & H. R. R. Co.* 2 Duer. 341.)

If an accident happen to a stage coach by which a passenger's leg is broken, or his human form divine is otherwise injured, the coachman has no authority to bind his master by a contract with a surgeon to attend to the injury; nor if a lamp-lighter, by neglect, burn any person, has he, or any officers of the gas company, power to bind the company by a contract for the cure of the injured person: (Per Parke, B., and Rolfe, B., in *Cox* v. *Mid. Co. Railway*, *supra.*) If ordinary employees had such authority, then every servant who by his negligence or misconduct had caused injury to an individual, would have an implied authority to employ, on behalf and at the expense of his employer, any person he thought fit to remedy the mischief.

SELECTIONS.

PROCESSIONS IN THE STREETS.

The case of *Beatty* v. *Gillbanks* deals with the interesting and important questions of law raised by the mode of proceeding adopted by the religious revivalists, styling themselves the "Salvation Army." As is well known, opinions have widely differed on this subject. Last October the Home Secretary was called upon to give his advice in the matter by the magistrates of Stamford. He suggested that if riotous proceeding were apprehended, an information should be sworn to that effect; notices should be issued forbidding the procession; and, in the last resort, the procession should forcibly be prevented from forming. The soundness of this advice in point of law is negatived in *Beatty* v. *Gillbanks*, by the judgment of Mr. Justice Field and Mr. Justice Cave. Their judgment amounts to a decision that a procession in the streets is a lawful proceeding, and that those who take part in it cannot be bound over to keep the peace, notwithstanding that the procession may reasonably be expected to raise a tumult. In form the case only decides that a person charged with creating an unlawful assembly cannot be bound over to keep the peace because he is taking part in a procession which is, without his so intending it, likely to lead to a breach of the peace; but, in effect, the judges decide the larger proposition, that by no form of proceeding can this kind of procession be prevented. This is clear from the fact that *Beatty* v. *Gillbanks* has, since its decision, been considered conclusive in the case of a member of a similar procession convicted of assaulting a police constable who had proceeded to lay hands upon him to stop the procession. The conviction was quashed, with costs against the justices, as in the case of *Beatty* v. *Gillbanks*. There is grave doubt whether there is power to give costs against the justices upon a case stated; and some surprise has been caused by the Court taking this course when the justices acted under the suggestion of the Home Secretary, and when the point involved does not appear to be so clear as the judges seem to consider it.

The decision of the Court on the question upon which they considered the whole matter to turn—viz., whether those who took part in the procession were guilty of an unlawful assembly—may be accepted more easily than its application to all the questions involved. Even on this point, however, the admission of Mr. Justice Field suggests that there is much to be said. The learned judge concedes that "every one must be taken to intend the natural consequences of his acts; and, therefore, if this disturbance of the peace was the necessary consequence of the acts of the appellants, they would be liable and the justices would have been right in binding them over." But what does "natural consequence" mean? It does not refer merely to physical necessity. If a man carrying a red umbrella walks into a field where there is a savage bull, the natural consequence is that the bull attacks him. If on the day of an election the most unpopular candidate parades the streets conspicuously wearing his colours, the natural consequence is that rotten eggs, if at hand, are thrown at him. It could not, however, be said that the candidate in question could be convicted on an indictment of creating a riot or unlawful assembly. The present decision goes fur-

ther, and assumes that he could not be lawfully taken under shelter against his will, still less prevented from leaving his house. We do not think that this is so clear as the judges appear to consider it. No doubt English law has the highest respect for private judgment and individual rights, and generally forbids no act which is not unlawful in itself. But there are some cases in which the principle has been made subservient to the rights of the public. For instance, it is in itself a lawful act for a shopkeeper to make his shop window as attractive as he can, and yet a shopkeeper who attracts a crowd outside his window can be convicted of causing an obstruction (*Rex* v. *Carlile*, 6 C. & P. 637). In these cases the intention is immaterial, as decided in *Hall's* case (1 Ventris, 169), in which the exhibition of acrobats, apparently in private ground at Charing Cross, was pronounced illegal, as it drew a disorderly crowd. Some forty years ago, a confectioner in Regent Street had a pretty daughter, and crowds collected outside the shop to see her, creating so great an obstruction that the girl's father was obliged to take her out of the shop. It would seem strange to indict a man for having a pretty daughter; but if the effect of putting her in a shop in public view is to cause a block in the street, it is quite in accordance with sound principles of public duty to make those who place her there amenable to the law. Before Northumberland House gave place to the present Avenue, two men, by way of bringing a bet to the test, stood gazing at the lion, which used to stand over the front of the house. The consequence was that an immense crowd collected in Trafalgar Square, and, in all possibility, an indictable offence was commltted. In deference to the same principle the figures of Gog and Magog, which use to appear and strike the hours in front of a clockmaker's shop in Cheapside, have been silenced.

The class of cases, of which these are instances, are tolerably familiar. Whether or not the principle of them applies to processions in the street likely to arouse opposition, requires, we think, at least grave consideration. If an act, innocent in itself, becomes illegal because its natural consequence is to obstruct the public street, is it legal to do an act having a riot as its natural consequence? If the freedom from obstruction of the streets is an object which may be attained at the expense of forbidding an innocent act, is not the maintenance of the public peace, *a fortiori*, such an object? It may be answered that the law never has been applied in this way; but the question remains whether the principles of the law does not necessarily include this application. There is a further question whether processions are in themselves a lawful use of the streets. If they are not, those who take part in them may lawfully be prevented from so doing. It is clear that the object of the defendant in *Beatty* v. *Gillbanks* was purely and simply to take part in a demonstration. It was not even a procession from one place to another. The "Army" with band of music, flags, and banners, started from their hall and returned again to the hall. The object was to beat up recruits. Whether this is a lawful use of the streets deserves discussion. It is true that the Army did not stand still in the street. If it had done so, doubtless an unlawful act would have been committed. If it walked in procession from one place of meeting to another, probably the streets would be lawfully used notwithstanding the flags and the band of music. But is it a lawful use of the streets to march through the principle thoroughfares of a town, and march back again to the same place? Do the objects with which the streets are dedicated to the public include this use? These are questions, amongst others, which appear involved in the present discussion; but which have hardly as yet received adequate treatment in the Courts. The decision, it is true, is in the healthy direction of individual liberty; but traditional principles of English law are apt sometimes to be pedantically applied, and to place the general rights of the public out of their true perspective.—*Law Journal.*

REPORTS.

ONTARIO.

(Reported for the LAW JOURNAL.)

CHANCERY DIVISION—DIVISIONAL COURT.

BEATY V. BRYCE.

Appeal to Court of Appeal—Leave to appeal—O. J. A. ss. 33, 34.

When the amount involved in an interpleader issue was under $500, but it was alleged that the decision of the Divisional Court desired to be appealed from, affected the right to other property amounting to $2,000,

Held, that this was not a sufficient ground for granting leave to appeal.

[BOYD, C., PROUDFOOT and FERGUSON, JJ.—Dec. 7.

This was an interpleader issue tried before GALT, J., who found in favour of the plaintiff, but upon motion to the Divisional Court his finding had been reversed, and the issue found in favour of the defendants. The amount involved in this issue was under $500.

W. Cassels, with him *Allan Cassels*, for the plaintiff, now moved for leave to appeal from the decision of the Divisional Court to the Court of Appeal, on the ground that the decision affected the right to other property of the value of $2,000.

Wardrope, for the defendant, opposed the application.

The CHANCELLOR.—We are all of opinion that there is no sufficient ground shown for granting the leave which is asked. The restriction which the Judicature Act has imposed on the right of appeal is not to be lightly removed. The decision in this matter is not conclusive as to the right to the other property which has been referred to. If any contention arise as to that, the question may then be carried to the Court of Appeal.

Motion refused with costs.

O'DONOHOE V. WHITTY.

Appeal to Court of Appeal—Construction of statute—Leave to appeal—When granted—O. J. A. ss. 33, 34.

When the construction of a statute is involved in a judgment sought to be appealed from,

Held, leave to appeal to the Court of Appeal should be granted, although the amount involved be less than $200.

[BOYD, C., PROUDFOOT and FERGUSON, JJ.—Dec. 7.

In this case the plaintiff had appealed from the ruling of the taxing officer, allowing certain costs upon a taxation as between solicitor and client. The ruling of the taxing officer had been reversed by Proudfoot, J., who held that the costs could not be recovered, because the solicitors had been guilty of negligence, and in dealing with the matter he had pronounced an opinion as to the proper construction of the statutory form of power of sale in short form mortgages. From this decision an appeal was had to the Divisional Court, which held there had been no negligence, and reversed the order of PROUDFOOT, J.

O'Donohoe, Q.C., the plaintiff in person, now applied for leave to appeal to the Court of Appeal from the decision of the Divisional Court. He was stopped by the Court.

Hoyles, for the solicitors whose costs were the subject of taxation, opposed the application. He referred to *Ko Khine* v. *Snadden*, L. R. 2 P. C. 50; *Brown* v. *McLaughan*, L. R. 3 P. C. 458; *Johnston* v. *St. Andrews*, L. R. 3 App. Ca. 159; Judicature Act, ss. 33, 34.

The amount involved is less than $200. The question of the construction of the statute R. S. O. c. 104, is of no importance. Even if notice of sale be not given upon exercising a power of sale, it is now only a question of damages. Here the real ground of the decision was that there was no negligence on the part of the solicitors, *even* if they were mistaken in their construction of the Act.

The CHANCELLOR.—Notwithstanding all that has been argued by Mr. Hoyles, we think this is a proper case in which to grant leave to appeal. The construction which has been placed on clause 14 of the form appended to the "Act respecting short forms of Mortgages," (R. S. O. c. 104) by the judgment sought to be appealed from is a matter of general interest, and affecting solicitors at large and other cases and other

parties besides the parties to this litigation. Although under the recent statute, 42 Vict. (O.) c. 20, s. 4, the omission to give notice no longer invalidates a sale, but is a mere ground for claiming damages, still the construction which has been placed upon the R. S. O. c. 104, may seriously affect the question of damages. The leave asked, however, is an indulgence, and can only be granted on payment of the costs of the motion, and on the undertaking to set the cause down at the next regular sittings of the Court of Appeal.

Leave to appeal granted on payment of costs.

RUMOHR V. MARX.

Appeal to Divisional Court—Leave to appeal to Divisional Court after time elapsed—Mistake of solicitor's clerk—Rule 522—Time for setting down.

Where a defendant's solicitor had notified the plaintiff's solicitor of his intention to appeal from a judgment to the Divisional Court, and gave instructions to his clerk to set the cause down; but the clerk, by mistake, supposing that the seven days mentioned in Rule 522 were not clear days, suffered the last day to pass without setting the cause down, and on applying the following day to set the cause down found he was too late.

Held, that this was no ground for granting leave to set the cause down after the time had elapsed.

Held also, that the seven days mentioned in Rule 522 are "clear days."

[BOYD, C., PROUDFOOT and FERGUSON, JJ.—Dec. 7.

G. D. Boulton, Q.C., for defendant, moved for leave to set this cause down to be heard before the Divisional Court. He read affidavits showing that the defendant's solicitor had informed the plaintiff's solicitor of his intention to appeal; and that the defendant's solicitor had, within proper time, given his clerk instructions to set the cause down to be heard before the Divisional Court, but that the latter, thinking that the seven days mentioned in Rule 522 were not clear days, had suffered the last day for setting the cause down to pass without doing so, and on applying to the Clerk of Records and Writs on the following day, that official had refused to set the cause down, on the ground that the preceding day was the last day causes could be set down. He contended that the proper construction of Rule 522 did not require the cause to be set down seven "clear days" before the commencement of the Sittings. He referred to Rule 600 of the Court of Appeal, and argued that without such a Rule "at least seven days" does not necessarily mean "clear days."

The CHANCELLOR.—That Rule merely affirms what was previously the judicial construction of the words "at least," as determined in *Beard* v. *Gray* and other cases.

Boulton.—Even if the time had elapsed the Court may, under Rule 462, extend the time.

E. D. Armour, for plaintiff.—The plaintiff has acquired a vested interest in the judgment The mistake of the defendant's solicitor's clerk is no ground for depriving the plaintiff of this right He referred to *Mitchell* v. *Forbes*, 9 Dowl. 527; *The Queen* v. *Justices of Shropshire*, 8 Ad. & E. 173; *Beard* v. *Gray*, 3 Chy. Ch. R. 104; *Hayes* v. *Hayes*, 18 C. L. J. 157; *Borden* v. *Birmingham*, 7 C. D. 24; *Re Ambrose L. T. & C. Co.* 8 C. D. 643.

The CHANCELLOR.—We are all of opinion that no sufficient ground is shown for granting the leave which is asked. We are also of opinion that the proper construction of Rule 522 is that the words "at least seven days" mean clear days. The motion is therefore refused with costs, but without prejudice to any application the defendant may be advised to make for leave to appeal to the Court of Appeal.

Motion refused with costs.

Referred to Hughes v. Boyle, 5 Ont. 395.

HUGHES V. HUGHES.

Appeal—Discontinuance—Costs—Appeal bond—Forfeiture—R. S. O. c. 38, s. 41.

Where an appellant gave notice of discontinuance, and the respondent thereupon, without taking out any order dismissing the appeal, proceeded and taxed his costs, and then applied for and obtained an order for the delivery out of the appeal bond for suit.

Held, that the order for the delivery out of the bond was regular.

Semble also, that no order for the payment of the respondent's costs was necessary as a condition precedent to suing on the bond.

[BOYD, C., PROUDFOOT and FERGUSON, JJ.—Dec. 7.

Donovan, for the plaintiff and his surety in an appeal bond, appealed from the order of Ferguson, J., directing that the appeal bond be delivered out for suit. The plaintiff had given notice of discontinuance of the appeal; the defendants had thereupon, without obtaining any order for costs, procured their costs to be taxed,

and had then applied to get the appeal bond out for suit, which application had been granted. He contended that the taxation was a nullity until an order had been obtained, and that the bond ought not to have been ordered to be given out until the costs had been regularly taxed.

C. Millar and *Morson*, who appeared for the defendents, were not called on.

The CHANCELLOR.—We are of opinion that the bond being for the due prosecution of the appeal, the condition of the bond was forfeited the moment the notice of discontinuance was served, and the taxation of costs was merely a question affecting the damages recoverable under it, even if any order were necessary as contended; but we are of opinion that no order was necessary, and that the statute (R. S. O. c. 88, s. 41) gives the respondents the costs.

Motion refused with costs.

IN THE MARITIME COURT OF ONTARIO.

(Reported for the LAW JOURNAL.)

IN RE CARGO EX "ERIE STEWART."

There is no maritime lien for freight.

[Kingston.—Nov. 11.—Price, Sur. J.

The petition in this case was filed at the City of Kingston, 25th October, 1882. It set out a contract to carry 15,999 bushels of wheat from Port Dover to Kingston for a certain freight, to wit, $571.14, to be there delivered to the Montreal Transportation Co. It alleged the carriage of the wheat, its delivery to the company, the payment of $496.67, and that the grain was then *en route* to Montreal on the company's barge *Star*. It claimed a balance of $74.47 due for freight, and a lien on the grain for that amount. A warrant issued, and the barge and her cargo were arrested at Dickinson's Landing.

The Montreal Transportation Co. intervened, and demurred to the petition.

Whiting, for demurrer:—There is no maritime lien for freight, but only a common law possessory lien: Foard on Shipping, p. 542, note 6 A; MacLachlan, 236, 465; Coote's Admiralty Practice, p. 16; *Mors-le-Blanch* v. *Wilson*, L. R. 8, P.D. 236. The common law lien is gone here because there has been an unqualified delivery of the goods: MacLachlan, 236–238. The Maritime Court connot enforce a common law lien unless it arises incidentally in a suit over which the Court has jurisdiction: Coote, p. 16.

Smythe, contra:—There is a martime lien for freight: Rules 26 and 74; Abbott on Shipping, p. 237.

PRICE, Surrogate Judge:—The schooner *Erie Stewart*, under bills of lading, carried a cargo of wheat from Port Dover to Kingston, and delivered the cargo to the Montreal Transportation Co.

The cargo, at the time of filing the petition herein, was "on board the barge *Star*, *en route* for Montreal." The petitioner, the owner of the schooner *Erie Stewart*, by his petition, seeks to arrest the barge *Star* and cargo for a balance of freight due him for carrying said grain.

The Montreal Transportation Co. demur in law to the petition on the ground that the action is for freight, and there is no lien on the barge and cargo.

There is a lien for freight at common law, a possessory lien which terminates with the delivery of the goods. Is there such a lien as a Maritime lien, which enables the carrier to follow the goods, such as the petitioner seeks to to enforce here.

I can find no authority for holding that the common law right for recovery of freight has been extended by the Admiralty or Vice Admiralty Act. The common law gave to the carrier full, and what was no doubt considered sufficient, remedy. "Before recovering the goods the carrier is entitled to demand reasonable charges for their carriage, and if not paid the carrier may refuse to carry. But where the goods have been carried without freight being paid the carrier has not only his right to retain the goods in his possession until paid, but may resort to an action at law to recover:" Brown on Carriers, 353, etc.

"In order that a ship owner may enforce his lien on the goods it is necessary that they should be legally in his possession, unless it has been reserved by express agreement:" Kay on Shipmasters, p. 328, etc. If the master parts voluntarily with the possession of the goods, he loses his lien on them: Kay 335.

If the master delivers the goods to the consignee, or to any one who represents him, so that they have become at his risk, the lien is

gone: *Mors-le-Blanch* v. *Wilson*, L.R. 8 C.P.D., 227.

No obligation to pay the freight arises in point of law from the receipt of the goods, under the bill of lading, but such receipt by the endorsee of the bill of lading is reasonable evidence, from which a jury may infer a contract to pay it, the consideration for the contract being that the captain has given up his lien on the cargo, *Muller* v. *Young*, (in error), 25 L.J., Q.B., 94-96.

"Whether the ship-owner and his agent, the master, in cases where they are obliged to tranship the goods into another vessel, can at same time transfer the lien, which they would have had for freight had they conveyed the goods to their destination is not decided."—Kay 326.

The reading of the cases leads to the conclusion that it never has been considered that the common law right had been extended. The Vice-Admiralty Act (Imp.) 26 Vict., c. 24, sec. 10, defines the matter in which the Courts shall have jurisdiction, but does not include the case of freight.

The petitioner referred to General Rule 26 of the Admiralty Court of Ontario. I think the purpose and effect of this rule, when read with rule 74 is quite clear. They apply to cases where the freight carried, alone or with the cargo, is liable. "The cargo may not only be arrested, *eo nomine*, but also in respect of freight which is due to the owner of the ship which has carried it. For if freight has been earned, the cargo is held to represent it so long as it remains unpaid by its consignors; and the same remark applies to what is analogous to freight, viz.: where the cargo belongs to the owner of the ship, and there will be a profit realized on its sale."—Coote's Admiralty Practice, page 29.

Demurrer allowed with costs.

DIVISION COURT—COUNTY OF LINCOLN.

REED ET AL. V. SMITH.

Promissory note—Statute of Limitations—

Action by plaintiffs, payees of two promissory notes dated 24th November, 1875, payable ten months after date, one made by the defendant and endorsed by E.; and the other made by E. and endorsed by defendant. Both notes were duly protested for non payment on the third day of grace (27th September, 1876,) and notice of dishonour marked on that day.

Held, that an action brought on 27th September, 1881, was not barred by the Statute of Limitations.

[St. Catharines, Dec. 12.—SENKLER, Co. J

The facts and authorities are fully set out in the judgment.

Pattison for the plaintiff.

Miller, Q. C., for the defendant.

SENKLER, Co. J.--The plaintiffs bring this action to recover the sum of $200, part of the amount of two promissory notes, both dated 24th November, 1875, payable ten months after date to the plaintiffs or order, at the Quebec Bank, St. Catharines, with interest at six per cent.; one being for $102.25, made by the defendant and endorsed by the plaintiffs in their individual names "without recourse," by Albert England and then by the plaintiffs again; the other being for $121.50, made by Albert England and endorsed by the plaintiffs (in the same manner as the other), by the defendant and then by the plaintiffs again. The plaintiffs, by their statement of claim, abandon any excess above $200.

It appears from the evidence of the plaintiff Reed that on the 24th November, 1875, the plaintiffs had a sale. Defendant bought at it, and gave the note made by himself for the goods purchased by him. England endorsed this note as surety. England also bought goods, and gave the other note for the price, which note defendant endorsed as surety. The plaintiff sold the notes to one Thompson, who held them until they were within a few days of being barred by the statute. Plaintiffs then took them up. I presume that plaintiffs wrote the endorsement of their names below the name of defendant (or England) on the notes before they gave them to Thompson, as the protests attached to the notes show that notice of dishonor was sent to them. The endorsements without recourse were, however, made after the notes were handed to plaintiffs' solicitors for suit. The protests shew that the notes were duly presented at the Quebec Bank, St. Catharines, for payment on the day they became due (27th September, 1876), and that notices of dishonor were mailed on the same day. This action was commenced on the 27th September, 1882.

The defendant's counsel objected that the plaintiffs' claim was barred by the Statute of Limitations, and that the endorsement without

recourse made by the plaintiffs after they got the notes back from Thompson was an alteration of the notes, and was made too late. He also, in a written argument handed in since the hearing, objected that the facts proved did not bring the case within the authority of *Moffatt* v. *Rees*, 15 U. C. R. 527, and *Gunn* v. *McPherson*, 18 U. C. R. 244.

I will deal with the second and third objections first.

I do not see how the endorsement before suit can be said to alter the legal effect of the notes. It was only carrying out the original intention of the parties, and the case of *Peck et al.* v. *Phippon*, 9 U. C. R. 73, is an authority that such endorsement might be made even after action brought. I think the evidence shows that the defendant and England endorsed each other's notes as sureties for each other, and were taken as sureties by the plaintiffs. The plaintiffs' counsel applied, after the hearing, to be allowed to furnish additional evidence on this point, but I did not think any doubt existed upon it. This objection only applies to the note endorsed by defendant.

The question of the Statute of Limitations remains to be considered.

The notes having been presented for payment, and notices of dishonour mailed on the day they fell due, this case is brought within the authority of *Sinclair* v. *Robson*, 16 U. C. R. 211, and I must hold that the plaintiffs' cause of action accrued on that day after this was done, that is, some time in the afternoon of the 27th September, 1876, the result being that if that day is to be reckoned as the first day of the six years of limitation, the six years expired on the 26th September, 1882, and this suit (which was brought on the 27th) was brought too late.

In the recent case of *Edgar* v. *Magee*, 1 Ont. R. 287, the bill sued on had not been presented for payment on the day it fell due, and on this ground that case was distinguished by Armour, J., from *Sinclair* v. *Robson*. Cameron, J., held that the six years commenced on the last day of grace, and that the action was brought too late. Hagarty, C. J., held that whether the cause of action accrued on the last day of grace or not, the statute did not begin to run until the following day. He says, "It seems to me that the day on which an event happens giving a cause of action is not to be reckoned; in other words, that the 2nd December was the first day to be reckoned in the six years of limitation." The bill in that case matured on the 1st December.

The learned Chief Justice refers to several judgments of Parke, B., in support of the view taken by him. Mr. Justice Armour says in his judgment in the same case of *Edgar* v. *Magee*, that he is not to be understood as holding that even if the holder of a bill or note is enabled by law to put himself in a position to sue on the last day of grace, and does not put himself in that position, the Statute of Limitations will begin to run on that day; and he refers to *Blackman* v. *Nearing*, 43 Conn. 56, when it was held that the statute did not begin to run until the following day. In Angell on Limitations (6 Edn.) chap. 6, the question whether the day on which a cause of action accrues is to be included or excluded in the computation of the period of limitation, is considered at length, and a number of the older decisions, in which the first day was included, are referred to. Extracts are given from the judgment in *Lester* v. *Garland*, 15 Vesey, 248, in which case the Master of the Rolls, although not laying down any general rule, says: "Upon technical reasoning I rather think it would be more easy to maintain that the day of an act done or an event happening ought in all cases to be excluded rather than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of individual point, so that any act done in the compass of it is no more referable to any one than to any other portion ofit, and therefore the act cannot properly be said to be passed until the day is passed." In this case the Master of the Rolls excluded the first day, but he seems to have distinguished the earlier cases which he reviews rather than to have over-ruled them, and to have observed that the act done from which the computation is made *inclusive of the day* is *an act to which the party against whom the time runs is privy*; and it is remarked in Mr. Angell's book, that as he unquestionably has the benefit of some portion of the day there is less hardship in constructively reckoning the whole of it as a part of the time to be allowed him.

In the cases of *Pellew* v. *Hundred of Wonford*, 9 B. & C. 134, and *Hardy* v. *Ryles*, Ib. 603, the day was excluded, and in both cases the sugges-

tion last referred to was mentioned and partly made the ground of decision.

If this principle be sound law and is to be adopted in the present case, the plaintiff cannot succeed, as the protesting of the note (which is the act giving the cause of action on the third day of grace) was clearly an act to which they were privy.

I cannot find, however, any more recent cases in which this distinction has been followed or approved of; it is alluded to by Parke, B., in *Young* v. *Higgon*, 6 M. & W. 49 (one of the cases cited by the Chief Justice in *Edgar* v. *Magee*,), but without approbation, and he points out that although in *Hardy* v. *Ryles* one of the reasons given by Bayley, J., for the judgment of the Court was that the act creating the cause of action was one to which the plaintiffs could not be considered privy, it would be difficult to support the judgment on that ground, as a man must surely be privy to the act of his own imprisonment, and that the case rests more legitimately on the general ground that the first day is to be excluded from the computation.

Young v. *Higgon* decided that neither the day on which a notice of action against a magistrate is served nor the day of issuing the writ is to be computed as part of the month, over-ruling the case of *Castle* v. *Burdett*, 3 T. R. 623, and ignoring the distinction in *Lester* v. *Garland*, where a notice of action is spoken of as a matter to which the defendant must be considered privy, as he necessarily knows the time at which he is served with the notice, and may immediately begin to consider the propriety of preventing the action by tendering amends.

In *Isaacs* v. *Royal Ins. Co.* L. R. 5 Ex. at p. 300, Kelly, C. B., refers to several cases on the computation of time, and says: "All these authorities illustrate the principle that in general the day on which the engagement is entered into is excluded, and the last day of the time is included." The case itself is not in point.

The rule adopted in *Young* v. *Higgon* and the other judgments of Parke, B., mentioned in *Edgar* v. *Magee*, having been approved and followed in the latter case by the Chief Justice, I consider I am bound by it and must apply it to the present case.

I think it is a fairer and more equitable way to hold that the third day of grace is excluded than included. No doubt fractions of a day are but seldom regarded in our law, still it is clear that the holder of a note or bill has but little benefit from his cause of action accruing on the last day of grace. It does not accrue until late in the day, too late for him to procure the issue of a writ within office hours, and to treat this as the first day of the period of limitation is practically to deprive him of one day.

The argument that this construction gives him seven 27th Septembers in which to sue is technically rather than practically true.

I give judgment for the plaintiffs for $200 and costs, to be paid in fifteen days.

I am glad that it is in the defendant's power to appeal, and thus have the point authoritatively settled; although the exact question in dispute is one not likely to arise often, the principle involved in it is of frequent application.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

IN BANCO, DECEMBER 9, 1882.

REGINA V. O'ROURKE.

Criminal law Selection of jurors—32-33 Vict. ch. 29, sec. 44 (D.)—Writ of error—Challenge to the array.

By 32-33 Vict. ch. 29, sec. 44 (D.) every person qualified and summoned to serve as a juror in criminal cases according to the law in any Province, is declared to be qualified to serve in such Province, whether such laws were passed before the B. N. A. Act or after it, subject to and in so far as such laws are not inconsistent with any Act of the Parliament of Canada.

By 42 Vict. ch. 14 (O.) and 44 Vict. ch. 6 (O.), the mode of selecting jurors in all cases, formerly regulated by 26 Vict. ch. 44, was changed.

The jury was selected according to the Ontario Act, and the prisoner challenged the array, to which the Crown demurred, and judgment was given for the Crown. The prisoner was found guilty and sentenced, and he then brought error.

Held, per HAGARTY, C. J., that the Dominion Statute was not *ultra vires* by reason of its adopting and applying the laws of Ontario as to jurors to criminal procedure.

Semble, that under sec. 139, C. S. U. C. ch. 31, where no unindifference or fraudulent dealing of the sheriff is shewn, any irregularities are not assignable for error.

Per ARMOUR and CAMERON, JJ.—The objection raised by the prisoner was not a good ground of challenge to the array.

Quære, whether when such a question has been reserved by a Judge at the trial, it can afterwards be made the subject of a writ of error.

Irving, Q.C., for the Crown.

Murphy, contra.

REGINA v. BISSELL.

Neglect to support wife—Conviction—Evidence of wife.

The wife is an inadmissible witness on the prosecution of the husband for neglect to support her.

REGINA v. NELSON.

Witness absent from Canada—Deposition—Admissibility.

The admissibility of the deposition of an absent witness, on a charge of forgery, was held to be in the discretion of the judge at the trial.

Osler, Q.C., for prisoner.

Scott, Q.C., contra.

OMNIUM SECURITIES CO. v. CAN. F. & M. INS. CO.

Fire insurance—Mortgagor and mortgagee—Subrogation—Mortgagor's fraud in getting policy.

A mortgagor of realty to plaintiffs afterwards insured the buildings with defendants, loss, if any, payable to plaintiffs. On a printed paper annexed to policy was contained an agreement that the insurance, as to mortgagee's interest only, should not be voided by any act or neglect of mortgagor or owner of property insured, nor by occupation of the premises for purposes more hazardous than permitted by policy. On a loss occurring defendants resisted payment, and on a reference to arbitration an award was made in plaintiff's favour, the arbitration rejecting evidence in defendant's behalf of the fraudulent procurement of the policy.

Held, that the above agreement related only to future acts, that there was no guaranty of the policy as indisputable, and that defendants were not prevented from showing fraud in obtaining policy. The case was therefore remitted to admit the rejected evidence.

REGINA v. REEVES.

Cab driver—License.

Cap. 174, sec. 415, R. S. O., does not authorize a license fee being imposed on cab drivers, nor does 42 Vict. ch. 31, sect. 21, extend the power of the Board of Police Commissioners over per sons not within its jurisdiction, so as to legalize such a fee.

Osler, J.]

GILES v. MORROW.

Dower—Absence of husband—Presumption of death.

The presumption of death, from the absence of defendant's husband for more than seven years, sufficient to support action of dower.

Cameron, J.] [Dec. 12, 1882.

RE INGERSOLL v. CARROLL.

By-law to take gravel for street repairs—Award.

A by-law should define the granting of gravel required to be taken from a party's land for road repairing, and an award made in pursuance thereof should fix value of the granting required as well as amount payable for right of entry to take the gravel.

Read, for applicant.

Wells, contra.

COMMON PLEAS DIVISION.

THE CITIZENS INSURANCE CO. v. PARSONS ET AL.

Money paid into Court as security on appeal—Dismissal of appeal by Court of Appeal and Supreme Court—Payment out of money on judge's order—Allowance of appeal by Privy Council.

On appeal to the Court of Appeal from the judgment of the Court of Queen's Bench in favour of one P. against the Citizens Insurance Company, the company paid into Court a sum of money as security for the amount of this judgment as well as for interest and costs, and also for the costs of the appeal. The appeal was dismissed with costs, and the company then appealed to the Supreme Court, and paid a further sum into Court as security for the costs of such appeal. The Supreme Court dismissed the appeal with costs. A judge's order was then obtained, under which the moneys were paid out of Court to G. and M., to whom P. had assigned them. The Company afterwards appealed to the Privy Council, when the judgment appeal was allowed and the judgment of the Supreme Court reversed. On an action brought therefor,

Held, by HAGARTY, C.J., that the company were entitled to recover back the moneys so paid out of Court on the judge's order for principal and interest, with interest thereon from that payment at six per cent.; and also all sums paid for costs, but without interest.

J. F. Smith, for the plaintiff.

McCarthy, Q.C., for the defendants G. and W.

J. Reeve, for the defendant P.

RE HALL.

Court of Appeal—Court equally divided—Judgment of res judicata—Habeas Corpus improvidently issued.

On an appeal to the Court of Appeal from the judgment of the Chancery Division, refusing a motion for the discharge of one W. H., detained in custody for the purposes of extradition to the United States under the warrant of the County Judge, and brought up under a writ of *Habeas Corpus*, and remanding him to such custody, the Court of Appeal were equally divided, but by the certificate of this Court it appeared that it was ordered and adjudged that the appeal should be dismissed, and the judgment of the said Chancery Division affirmed. A writ of *Habeas Corpus* having been subsequently issued, under which the said W H. was brought before the Common Pleas Division and his discharge moved for,

Held, that the order of the Court of Appeal was a judgment of that Court, so that the matter was *res judicata*, and that the writ was therefore improvidently issued and must be quashed.

Murphy, for the applicant.

Fenton, contra.

SPEARS v. MILLER.

Estate for life—"Demise and let."

Held, by ARMOUR, J., that the word "demise" is an effective word to convey an estate of freehold, and is of like import and equivalent to the word "grant" in the conveyance of an estate in fee.

An estate for life was therefore held to be validly created by the words "demise and let."

ANDERSON v. WOOLERS ET AL.

Church Temporalities Act — Free church — Churchwardens liability as corporation.

Held, by CAMERON, J., that under sects. 3 and 5 of the Church Temporalities Act, 3 Vict. ch. 74, a vestry capable of electing churchwardens forming or constituting a corporation under the Act, so as to vest in them the right as such of suing or being sued, must be composed of persons holding pews in the church by purchase or lease, or of persons holding sittings therein by lease from the churchwardens; and is therefore inapplicable to a church where the sittings are wholly free.

An action, therefore, against the successors of the former churchwardens of such free church, on a contract made by them, was held not to be maintainable.

Delamere for the plaintiff.

Worrell, for the defendant.

CHANCERY DIVISION.

Boyd, C.] [Nov. 22.

NORTHWOOD v. TOWNSHIP OF RALEIGH.

Drainage — Negligence — Municipality — Damages—36 Vict. c. 48, s. 373.

A municipality, in the prosecution of a scheme of drainage, widened and deepened a drain, whereby the waters brought down thereby into a natural stream flowing through the plaintiff's land, were in excess of the capacity of such stream, and in consequence, at seasons, the plaintiff's land was flooded.

Held, that the municipality was bound to provide a proper outlet for the increased volume of water brought down by the drain so enlarged.

Held also, that the flooding so caused amounted in effect to an expropriation of the land flooded, and it appearing that the benefit the plaintiff derived from the drainage system, as a whole, was in excess of the injury caused by the flooding, by an equitable application of the rule laid down by 36 Vict. c. 48, s. 373, (O.) the municipality was not liable for the damage caused by the flooding.

W. Douglas, for plaintiff.

Maclennan, Q.C., and *Pegley*, for defendants.

Boyd, C.] [Dec. 23.

CLARKSON v. WHITE.

Insolvency—43 Vict. c. 1 (D.)—Personal earnings of insolvent pending insolvency and before discharge—Assignee in insolvency—Costs.

An assignee in insolvency is entitled to all the earnings of an insolvent which are earned after the attachment or assignment in insolvency, and before his discharge, which are not necessary for the reasonable maintenance of the insolvent and his family.

Where an insolvent applied part of his earnings in the purchase of land for the benefit of his wife,

Held, that to the extent of earnings so applied the assignee was entitled to a lien on the land.

Held also, that the repeal of the Insolvent Act before claim made by the assignee to such lien, was no bar to the claim.

Where the original plaintiffs in an action were not entitled to any relief but by amendment, a party was added to whom relief was granted.

Held, the defendants were entitled to the costs of the action up to the close of the amendment.

Moss, Q.C., and *Gibbons*, for plaintiffs.

MacKelcan, Q.C., for defendant White.

Kingsford, for defendants, the Freehold Building Society.

Boyd, C.] [Dec. 23.

PARK v. ST. GEORGE.

Chattel mortgage — Consideration — Assignment for benefit of creditors—Creditor—R. S. O. c. 119, ss. 1, 2, 6.

Q. and A. being indebted to the defendant for $1,600, executed a chattel mortgage covering all their stock in trade as a security for $2,400, there being a contemporaneous verbal agreement that the defendant would make further advances to the mortgagors to the extent of $800.

The mortgagors having subsequently made an assignment for the benefit of creditors, the assignee, on 3rd March, 1882, took possession of the mortgaged property. On 11th March, 1882, the defendant seized the property in the hands of the assignee, under his mortgage, and by arrangement between him and some of the creditors of the mortgagor, the goods were sold and the proceeds were held by the defendant's solicitor to abide the result of litigation as to the validity of the mortgage.

The plaintiff, a simple contract creditor of Q. and A., whose debt existed at the date of the mortgage, claimed to have the mortgage declared void, and to have the proceeds paid to the assignee.

Held, the mortgage was void for not stating on its face the true consideration *Robinson* v. *Patterson*, 18 U. C. R. 55 followed.

Held also, that neither the making of the assignment for the benefit of creditors, nor the sale of the goods under the arrangement to hold the proceeds, intercepted the right of the plaintiff to impeach the mortgage, and that he was entitled to the relief claimed.

W. Cassels, for plaintiff.

J. Bethune, Q.C., for defendant.

Boyd, C.] [Dec. 23.

BARKER v. WESTOVER.

Married woman—Tort—Judgment—R. S. O. c. 125, ss. 6, 20.

The plaintiff obtained a judgment directing an account to be taken of rents and profits of plaintiff's lands wrongfully received by a married woman and her husband. The Master reported a sum of $205 to have been received by them.

Held, that the claim being founded on a tort of the married woman, the plaintiff was entitled to judgment against her personally for the amount found due, without reference to her separate estate.

Held also, that the married woman could not be presumed to have acted under the compulsion of her husband, that if such were in fact the case it should have been set up as a defence.

Held also, that in an action against a married woman founded on tort, it is unnecessary to allege that she has separate estate.

J. Bain, for petitioner.

Langton, for respondent.

PRACTICE CASES.

Mr. Dalton, Q.C.] [Nov.

HENDRIE v. NEELON.

Examination before trial—Witness.

An order for the examination of a witness before trial will not be made under rule 285, O. J. A., on the ground of discovery alone; some other *special* ground must be shown.

Eddis, for the application, cited *Turner* v. *Kyle*, 18 C. L. J. 402.

Order refused.

Mr. Dalton, Q.C.] [Nov. 7.

LLOYD v. WALLACE.

Garnishment—Equitable debt.

The plaintiff recovered a judgment in ejectment against the defendant on 20th November, 1880, and taxed her costs at $107.04.

Writs of *fi. fa.* issued and remained in the sheriff's hands unsatisfied.

The defendant's father, by his will, vested certain property in sureties, and directed them "to pay my son, Archibald Wallace, (the defendant) the interest of the sum of $800, annually, during the term of his natural life." The trustees, as directed by the will, invested the $800, and interest on the sum becoming due in January, 1883.

On 14th October, 1882, *Black*, for plaintiff, obtained a summons calling upon trustees to show cause why the moneys in their hands should not be attached to answer the plaintiff's claim.

The Master in Chambers, following *Re Cowans*, L. R. 4 Chy. D. 638, approved of in *Leaming* v. *Woon*, 7 O. A. R. 42, made an order directing the trustees to pay the interest, from time to time accruing due, in satisfaction of the judgment debt.

Mallory, for trustees.

Gould, for defendant.

Mr. Dalton, Q.C.] [Dec. 13.

LAWSON v. CANADA FARMERS' M. INS. CO.

Writs of Fi. Fa., renewal of

Writs of execution were issued on the 12th December, 1881, and forwarded, with instructions, to sheriff.

On the 9th December, 1882, the plaintiff wrote the sheriff to forward the writs for renewal, and on the 11th December telegraphed him to the like effect, and he replied that he had just mailed them. On the same day the plaintiff filed a *præcipe* requiring this renewal.

The writs were received on 12th December.

Symons, for plaintiff, moved for an order for leave to renew *nunc pro tunc*.

THE MASTER IN CHAMBERS:—I do not see that this is the fault of the sheriff or other officers of the Court. It is rather, I should suppose, that the application for the return, for the purpose of renewal, was delayed a little too long. It seems a case where there is no power to make the amendment. See *Clarke* v. *Smith*, 2 H. & N. 753; *Nayer* v. *Wade*, 1 B. & S. 728; L. R. 3 Q. B. D. 7.

Mr. Dalton, Q.C.] [Dec. 13

BEATY v. BRYCE.

Costs—Interpleader.

The plaintiff in a suit of *Bryce* v. *Scarboro' Hotel Co.*, brought in the Chancery Division, recovered judgment for an amount entitling him to costs on the higher scale. Proceedings were

taken by Bryce, by garnishee process, to recover from one Hughes the garnishee, a sum amounting, with costs of the motion, to $101. Execution issued, for the above amount, against Hughes, and certain goods were seized as those of Hughes', which were claimed by the plaintiff Beaty herein. An interpleader issue was directed, in which Bryce was plaintiff and Beaty was defendant, and Beaty failed to establish his claim to the goods.

On an application under the Interpleader Act, R. S. O. cap. 54, as to costs, the Master in Chambers held that the plaintiff Bryce was entitled to costs on the higher scale, as the sheriff could not, before the equity jurisdiction of the County Court was abolished in 1868, have gone to the County Court to interplead. He considered that it was his duty to decide as to the right to costs only, and that the taxing officer, when the matter came before him, was the proper person to decide as to the scale on which such costs should be taxed.

Allan Cassels, for defendant Beaty, cited R. S. O. cap. 54; *Gibb* v. *Gibb*, 6 W. R. 104; Morgan & Davy, Chy. Costs; Rules 428, 445, 511, 512. *Wardrope*, contra.

[This decision has been reversed by the Chancellor on appeal—ED. C. L. J.]

Mr. Dalton, Q.C.] [June 6.

LUCAS V. FRASER.

Service—Costs—Rule 324.

A motion for judgment under Rule 324, O.J.A. It appeared that a person of the same name as defendant had been served, by mistake, for the defendant, and that he had so informed the bailiff who served him.

Held, that it was proper that the party so served should appear on this motion, on the principle that he feared an order might be made against him, and his costs were allowed at $800.

Aylesworth, for the motion.

Langton, contra.

Cameron, J.] [Sept. 18.

TAYLOR V. BRADFORD.

Consolidation of actions—Rule 395, O. J. A.

A motion to have this action consolidated with an action brought by the defendant, in the Chancery Division, against the plaintiffs, in which they had set up, by way of counter-claim, the same cause of action substantially as was set forth in their statement of claim in this action, or to have the action stayed till the other should be determined.

CAMERON, J., *held*, that though, on the facts presented, the case was not technically one within the terms of Rule 395, O. J. A., because the plaintiffs had not brought two actions, etc., yet there was an inherent right in the Court to prevent an undue use of its process.

Order made to stay proceedings, costs reserved.

Allan Cassels, for the motion.

J. B. Clarke, contra.

Mr. Dalton, Q.C.] [Dec. 16.

IMPERIAL BANK OF CANADA V. BRITTON.

Endorsement—Judgment—Rule 80, O. J. A.

A motion for judgment under Rule 80.

The endorsement on the writ was as follows:—The plaintiff's claim, $2,000, being the amount of the defendant's over drawn account with the plaintiff's bank on the 18th September, 1882.

Held, sufficient.

Shepley, for the motion.

Howells, (O'Donohoe, Q.C.) contra.

Boyd, C.] [Dec. 18.

RE ROBERTSON AND DAGANEAU.

Vendor and purchaser—R. S. O. cap. 109.

This was an application, under R. S. O. cap. 109, by a vendor asking the opinion of the Court on certain objections taken by the purchaser to the vendor's title to the land in question.

The purchaser filed affidavits disputing the validity of his contract to purchase.

BOYD, C., declined to follow *Re Henderson* and *Spencer*, 8 P. R. 402, holding that the Act (R. S. O. cap. 109) was intended to provide for a simple case where there was no dispute as to the validity of the contract, but the parties wished the opinion of the Court on a question affecting the title, and the Court ought not to decide on the validity of the title until it was decided that the contract was binding.

Small, for the vendor.

Atkinson and *H. Cassels*, contra.

Followed Mallon v. Middlemore, 10 Pr. 228.

LAW STUDENTS' DEPARTMENT.

A correspondent asks—

"How can the will of a man who died in the Province of Quebec be registered in Ontario if the will was executed in French before a notary public in the Province of Quebec?"

Some of our young friends had better send us answers.

EXAMINATION PAPERS.

CERTIFICATE OF FITNESS.

Real Property and Wills.

1. "*Technical* words and expressions must be taken in their *technical* sense, unless a clear intention can be collected to use them in another sense, and that other can be ascertained." A devise is made to A for life, and after his decease to the heirs of his body, share and share alike. Apply the above rule to the construction of this devise, and show what estate A takes.

2. A, who manufactures salt, owns two sets of salt works, which are worked independently of each other. He makes a will, whereby he devises "All my salt works to B." Afterwards he acquires a third set of salt works, which are in no way connected with the other two. He dies without having altered his will. Do the lastly acquired salt works pass?

CORRESPONDENCE.

Disallowance.

To the Editor of the LAW JOURNAL.

SIR,—In your issue of 1st December, you say: "To a lawyer it seems almost impossible to see more than one side of the question." The word "politician" should have been used instead of "lawyer," inasmuch as it does seem possible that a lawyer, for I presume the writer of the article to be a member of the profession, holds the opinion that the C. P. R. contract requires the Governor-General in Council to veto railway charters, granted by the Legislative Assembly of Manitoba, when such charters do not extend to the increased limits of the province. Does he pretend that the Parliament of Canada contracted with the railway that the Governor-General's prerogative should be exercised in a particular manner? If so, let him quote the clause of the contract upon which he bases his contention. Let him show, too, wherein Sir John A. Macdonald was in error, when, in answering the Opposition cry of monopoly, he argued that the contract did not require interference with Ontario or Manitoba legislation: "We cannot check Ontario; we cannot check Manitoba."

Yours, etc.,

JOHN S. EWART.

Winnipeg, 13th Dec., 1882.

[See editorial comments, *ante* p. 2.—EDS. L. J.]

Unprofessional Letters.

To the Editor of the LAW JOURNAL.

SIR,—Please give the following circular letter the benefit of an insertion in your journal:

"Commercial Bureau for Collections. Instituted to protect the interests of the Merchants and Business Men of the United States and Canada.

(Place and date.) Mr.———.

The claim of———for $——still remains unpaid. If this account is not settled in five days from above date we shall enforce the rules of the Bureau, and publish your name and account in our bi-monthly reports, which are issued to the Merchants and Business Men who are members of the Bureau, which will deprive you of all credit thereafter. We give you this last opportunity to adjust this claim.

Yours truly, The Commercial Bureau. Please settle with———, Attorney for the Bureau."

You have often attacked our "invaders"—men who take away the business of our profession; here is one, however, who is taking away its reputation. This Bureau looks like a blind to frighten people. Yours, etc.,

SUBSCRIBER.

[WE know nothing as to the existence of this "Bureau." It sounds, however, very alarming of course, and this "dictionary" word is skilfully adapted to scare the uninitiated. But it would, in our opinion, be much more in accordance with the traditions of the cloth if the solicitor had written an ordinary professional letter, instead of endeavouring to get the money by threats.—EDS. L. J.]

The following corrections should be made in our last volume. At p. 423, for "national justice" read "natural justice," and for "liberty to appeal," read "liberty to apply;" at p. 424, for "several testatum clauses" read "usual testatum clause."