// Canada Law Journal.

VOL. XIX. APRIL 15, 1883. No. 8.

DIARY FOR APRIL.

15. Sun.... *Third Sunday after Easter.*
22. Sun.... *Fourth Sunday after Easter.*
23. Mon... St. George's Day.
24. Tues... Earl Cathcart, Gov.-General, 1840.
25. Wed... Spragge, C., appointed Chief-Justice of Ont., 1881.
29. Sun.... *Rogation Sunday.*

TORONTO, APRIL 15, 1883.

THE vacancy on the County Court Bench caused by the death of Judge Mackenzie has been filled by the promotion of the junior Judge, John Boyd, Esquire, to one of the most important judicial positions in the province. His place has been filled by the appointment of Joseph Easton McDougall. The appointment is an excellent one. Mr. McDougall has frequently been called upon to preside in the Division Court on emergencies. and has already shown his capacity in that position. We echo the sentiments expressed in the following address presented to the new Judge on the 10th inst., at a large meeting of the Bar:—

"The Bar of Toronto desire to avail themselves of the occasion of your appointment as Junior Judge of the metropolitan county of York, and local judge of the High Court of Justice for Ontario, to congratulate you upon the honour which they think has been so deservedly conferred. In addition to our expression of satisfaction at your appointment, we must be allowed to concongratulate also the members of the profession, and the suitors in the Court, that the choice of Her Majesty's advisers has fallen upon one so eminently qualified in every way to discharge the responsible and arduous duties of this high office.

We feel quite sure that the ability, energy and industry which have enabled you to win the position you have held at the Bar will also dignify the Bench, and we earnestly hope that as you have been called to this honour in the prime of your life, you may be spared for many years to enjoy the position you have so well deserved. Signed on behalf of the Bar,

CHARLES MOSS."

Mr. McDougall was called to the Bar in Easter Term, 1870.

ONE scarcely hopes to find in a Blue Book a literary treasure, and it could hardly have been anticipated that a glance at one recently received, would have been rewarded by the discovery of the gem which we take the liberty of reproducing, albeit it is not altogether in the line of a legal journal; however, it may be a sufficient excuse that it appears in the Report of the Minister of Justice as to Penitentiaries. The Dorchester Penitentiary, like other institutions of a similar character, boasts of a Protestant and of a Roman Catholic chaplain. First is given the report of the former, in which he alludes to the spiritual work devolving upon him. This is followed by the report of his coadjutor of the other faith, who thus alludes to an event which evidently filled him with some surprise:—

"A fact worth mentioning was the transit of one convict from the Catholic to the Protestant faith. Exactly one week after having been prepared for death, and received the last rites of the Roman Catholic Church, he made a declaration to the warden that he wanted to be a Protestant. His application was sent to Ottawa, and his request was granted. The reason ot this change, in my opinion, was heart disease caused by epileptic fits."

It is gratifying to know that the request ot the poor convict, to be allowed to make a "transit" from one faith to another, was granted by the authorities at Ottawa. Such an exhibition of impartiality must forever put

to silence those who would insinuate that the influence of the Roman Catholic hierarchy in that quarter is used to the prejudice of the Protestant faith. The last sentence makes one think of the charitable simplicity of the good old bishop in *Les Miserables*, or a keen sally of Sydney Smith.

An able cotemporary in the United States come down in this sledge hammer fashion on the Appellate Courts of that country:—

"Can nothing be done to shorten the opinions delivered by our appellate courts? Do our judges realize that every superfluous sentence, every verbose expression, is a tax upon the time and patience of a thousand busy lawyers, not to speak of the useless increase of expense required to embalm the results of such lucubrations in the immortality of printer's ink and paper? It is a tax not like other taxes levied and paid once for all, but an ever recurring burden? What is the real secret reason for these endless, rambling discussions of inconsequential trifles, when the pith and marrow of the controversy might be disposed of in a few pointed sentences? The legitimate fields of the jurist and the legal essayist are, and should be kept separate and distinct. Is it that our judges are, after all, only half educated in the principles of legal science, or is it that they are actuated by a paltry, selfish vanity, which forgets the interest of the public and of their brethren at the bar in the gratification of an idle dream of judicial eminence? Or can it be (as we have heard it whispered), that this waste of time and ink is, after all, but a sort of pandering on the part of the judges to the supposed expectations of the lawyers engaged in the cause that it should be "exhaustively considered" by the court, *i.e.*, that every idle doubt, or question as to perfectly well established principles of law, which the racked imagination of the brief maker can suggest, shall be resolved and minutely discussed by the court.

Whatever may be the secret of this practice, it cannot be otherwise than discreditable to the bench, whether it proceeds from mental confusion, indolence, vanity, or a demagogical desire to stand well with influential members of the profession. That it is wholly unnecessary, is evidenced by the fact that the best considered and most quoted opinions, not only in the past, but even in certain rare instances of to-day, are briefly and tersely expressed. Of course there are cases which call for a full elaboration, but they are exceedingly rare, as will be found from an examination of the decisions of great jurists like Mansfield, Story, Marshall and Kent, and in later days, Cooley, Gray, and Chief Justice Waite. We believe that as to the State Supreme Courts, the rule will be found to hold good that the best courts, and those most quoted and respected beyond their own State's limits, are those in which the opinions are shortest on an average. It seems to us that, while nobody can assume to dictate to the judges, still, inasmuch as they are not, and in the nature of things can not be, above legitimate and respectful criticism, it would be both proper and advisable for the respective State bar association, in those States where the grievance exists, to discuss the matter with a view of calling the attention of their courts, in a proper and respectful manner, to the necessity of a reform in that direction."

These criticisms are not apparently aimed at the United States Supreme Court, but at the Appellate Courts in the different States. Another cotemporary alluding to the "mental confusion," etc., spoken of above, comes to the rescue in these words:—

"Thoughtful lawyers know this imputation has no warrant outside the mental confusion of him who wrote it. Our appellate judges, State and Federal, are almost all of them overworked. *The have no time to be brief.* To prepare a closely reasoned, clear, compact opinion requires time for rewriting, recasting and pruning down the first rough draft which embodies the conclusions of the court. From Horace till to-day writers and scholars have recognized this truth. The greatest blunderer who ever sat on the Supreme Bench of Missouri, boasted, they say, that he could 'write two opinions before breakfast." They were certainly short and usually wrong. Ignorant judges tend to verbosity; but what appellate judges most need is relief from the enormous pressure under which they work; then they will have time to be brief, clear and pointed, without omitting the limitations and qualifications of statement so necessary for accuracy. Then their decisions will not only be

oftener true to correct principles, but will convince readers of their propriety and soundness of doctrine."

VENDOR AND PURCHASER—INSURANCE.

Castellain v. *Preston*, 8 Q. B. D. 613, 46 L. T. 569, we see, has been reversed by the English Court of Appeal. The case arose out of *Rayner* v. *Preston*, 18 Ch. D. 1, 44 L. T. 787, where it was held that a vendee was not entitled to the benefit of an insurance effected by the vendor on the property sold, where the buildings thereon had been destroyed by fire between the making of the contract and the time fixed for completion—the insurance company having in that case paid the insurance money to the vendor in ignorance of the contract of sale. It was, however, suggested by the Court of Appeal in that case, that the insurance company might recover the money from the vendor; and in pursuance of that suggestion the action of *Castellain* v. *Preston* appears to have been brought. The action was dismissed by Chitty J., but his decision has now been reversed, on the ground that the contract of fire insurance is strictly one of indemnity. The result of the two decisions would appear to point to the conclusion that the contract of sale on payment of the consideration, puts an end to an insurance effected by a vendor—for *Rayner* v. *Preston* decides that the vendee is not entitled to the benefit of it, and *Castellain* v. *Preston* now establishes that the vendor is not entitled either. In order that a purchaser may get the benefit of insurance existing on the purchased property at the time of sale, he must obtain an actual transfer thereof. Failing that, the property is at his risk, and he must insure for himself.

In sales by the Court it has been held that the risk of loss by fire does not devolve on the purchaser until the report on sale is confirmed. In other words, losses by fire occurring before the confirmation of the report, must be borne by the vendor: (*Stephenson* v. *Bain*, 8 P. R. 258). In such cases, however, it would seem from the decision in *Castellain* v. *Preston* that the vendor's right under existing insurances would not be affected until after the confirmation of the report on sale, and possibly not until payment of the consideration.

In *Russell* v. *Robertson*, 1 Chy. Ch. R. 72, and *White* v. *Brown*, 2 Cush. 412, it was held that a mortgagee insuring the mortgaged property with his own funds and not charging the premiums to the mortgagor, and not so insuring in pursuance of any covenant in that behalf in the mortgage, in the event of loss is not bound as against the mortgagor to credit the insurance moneys received by him in reduction of the mortgage debt. *Castellain* v. *Preston*, however, would seem to indicate that if the mortgagee recover his mortgage debt from the mortgagor, the insurer would not be bound to pay the insurance, or would be entitled to reclaim it if it had been paid.

RECENT ENGLISH DECISIONS.

The March numbers of the *Law Reports* consist of 10 Q. B. D. 161-241, and 22 Ch. D. 283-483.

In the first of these, the first case, *Bolckow & Co.* v. *Fisher*, is one on the subject of discovery, and the principle illustrated by it may be pointed out by quoting the following passage from the judgment of Lindley, L. J.: "It seems to me that where a party is interrogated as to matters done, or omitted to be done, by his agents and servants in the course of their employment, he does not sufficiently answer, by saying that he does not know, and that he has no information on the subject. He is bound to go further, and obtain information from such agents or servants of his,

or he must show some sufficient reason for not doing so." He also adds: "I do not see that there is any difference in principle between setting out the facts in an affidavit of documents, and in answering interrogatories." To this passage from Lindley, L. J., may be added the qualifying remarks of Brett, L.J.:—"I think, however, a party would not be bound to answer as to that which was only known to his servants or agents accidentally and not in the ordinary course of business. And although the acts might be such as would be known to his servants or agents in the ordinary course of business, I think he would sufficiently answer by saying that whether such acts were or were not done was not personally known to himself, and that the person who was the servant or agent at the time at which they were supposed to have been done was no longer his servant or agent, or under his control, or in such a position that it would not be reasonable to force him to communicate with him."

CONTRACT—INCORPORATION OF CONDITIONS—PRESUMED ASSENT.

The next case requiring notice is *Watkins* v. *Rymill*, p. 178, which contains an elaborate judgment by Stephen, J., on the above subject. The plaintiff had deposited a carriage with the defendant for sale on commission, and thereupon received a receipt for the same, which purported to be "subject to the conditions as exhibited on the premises." The plaintiff swore he did not read the receipt, but put it in his pocket without noticing it, and the question was whether he was, nevertheless, bound by the conditions exhibited on the premises. The authorities are reviewed at great length, and in conclusion, the principles to be deduced from them are tabulated in the usual manner of the learned judge. He says, p. 188:—"Thrown into a general form, the result of the authorities considered, appears to be as follows. A great number of contracts are, in the present state of society, made by delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered, this person is as a general rule bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not. To this general rule, however, there are a variety of exceptions:—(i) In the first place, the nature of the transaction may be such that the person accepting the document may suppose, not unreasonably, that the document contains no terms at all, but is a mere acknowledgement of an agreement not intended to be varied by special terms. . . . (ii) A second exception would be the case of fraud, as, if the conditions were printed in such a manner as to mislead the person accepting the document. (iii) A third exception occurs, if, without being fraudulent, the document is misleading, and does actually mislead the person who has taken it. The case of *Henderson* v. *Stevenson*, L. R. 2 H. L., Sc. 470. (iv) An exception has been suggested of conditions unreasonable in themselves, or irrelevant to the main purpose of the contract." And proceeding to apply these principles to the case before him, he arrives at the conclusion that it comes under none of those exceptions, but under the general rule. It may be worth while also to call attention to the proposition of Stephen, J., at p. 190, that "a question of fact, to which, by law, one answer only can be given, is the same thing as a question of law."

COSTS—DUTY OF SOLICITOR IN INFORMING CLIENT.

Passing by a case of *Attorney-General* v. *Emerson*, which will be found noted among our Recent English Practice Cases, we reach *In Re Blyth* v. *Fanshawe*, p. 207, and the principle which that case illustrates is thus stated by Baggallay, L.J.:—"I take it to be the general rule of law, and an important rule which is to be observed in almost all cases—

that if an unusual expense is about to be incurred in the course of an action, it is the duty of the solicitor to inform his client fully of it, and not to be satisfied simply by taking his authority to incur the additional expense, but to point out to him that such expense will or may not be allowed on taxation between party and party, whatever may be the result of the trial."

This concludes the cases requiring notice in the March number of the Q. B. D.

FORECLOSURE OF EQUITABLE MORTGAGES.

In the March number of the Chancery Division, 22 Ch. D. 283-483, the first case, *Lees* v. *Fisher*, p. 283, relates to the form of decree for foreclosure of an equitable mortgage. The L. C., in whose judgment the other Judges of Appeal concurred, says:—"We think that in the future foreclosure decrees in cases of equitable mortgages ought to contain the word 'foreclose.' They ought to contain directions that upon default of payment by the specified time the mortgagor will be foreclosed, that the mortgaged hereditaments will be discharged from all equity of redemption, and that a conveyance from the mortgagor to the mortgagee must be executed.

TRUST FOR SALE—PARTITION.

In *Biggs* v. *Peacock*, p. 284, a testator directed the trustees of his will, at such times and in such manner as they should think fit, to sell his copyhold estate, and to hold the proceeds in trust for his wife for life, and after his death for his children. All the children were of full age, and had attained vested interests, and the question was, whether the Court had jurisdiction under the Partition Act to direct a partition against the will of some of the children. The Court of Appeal held it had not, for the will contained a trust for sale; it was not like a power given by a will. The M. R. said:—"Any one of the *cestuis que trust* has a right to insist on the trust being carried out. It is a mistake to say that it is like a power given by a will. In such a case the property in the estate is in the devisee. But here the estate is converted into personalty, and the *cestuis que trust* are only entitled to shares of the proceeds. Although, no doubt, if all are of age and *sui juris*, they could call upon the trustee to convey the estate to them; yet none of them has a right, in opposition to the others, to insist upon partition being made of it, which would be dealing with it as if it were real estate."

RIGHT TO INSIST ON EVIDENCE BEING HEARD—APPELLATE COURT.

The next case requiring notice is *Ex parte Jacobson, in re Pangoffs*, p. 312, is authority on the following point, viz., that if a judge of first instance is prepared to decide in favour of a defendant or respondent without hearing his evidence, his counsel is entitled to insist that the evidence shall be heard before the decision is given; if, however, the counsel does not exercise that right, but accepts the decision in his favour on his opponent's evidence, the Court of Appeal has still power to allow the evidence to be taken before reversing the decision.

STAYING PROCEEDINGS—TWO ACTIONS IN DIFFERENT COUNTRIES.

Passing by three cases which do not appear to have any application in this country, the next case to be noticed is *McHenry* v. *Lewis*, p. 397. This case is an authority on a point which arose among others in the recent case of *Hughes* v. *Rees*, before Ferguson, J., noted *supra*, p. 113. In *Hughes* v. *Rees*, it is laid down that the fact that a suit for the same matter is pending in Quebec, cannot be urged as a plea in bar to a suit for the same purpose in this country. In *McHenry* v. *Lewis* the question was whether or not when an action is brought by a man in this country against a defendant, and the same plaintiff brings an action in a foreign country against the same defendant for the same cause of action, this Court has jurisdiction in a proper case to stay the action in this country on the ground that the defendant is doubly vexed by

reason of the action being brought also in the foreign country. The Court of Appeal decided that the Court had jurisdiction, but at the same time there was no presumption that the multiplicity of actions was vexatious, and a special case must be made out to induce the Court to interfere. The late Master of the Rolls says, p. 400:—"It appears to me that very different considerations arise when both actions are brought in this country, and where one of them is brought in a foreign country. In this country, where the two actions are by the same man in courts governed by the same procedure, and where the judgments are followed by the same remedies, it is *prima facie* vexatious to bring two actions where one will do. . . . The same principle applies, it appears to me, wherever the judgment can be enforced, and for that reason I think the case of *Lord Dillon* v. *Alvares*, 4 Ves. 357, can no longer be relied on. . . . *It is possible that the same observation might be made as regards the Queen's Courts in any other part of the world, but that of course may be subject to exception as regards the nature of the remedy.* But where it is in a foreign country, it certainly appears to me that we cannot draw the same inference. Not only is the procedure different, but the remedy is different. Take the case of an Englishman suing abroad a foreigner resident abroad, and the foreigner coming to this country, as in *Cox* v. *Mitchell*, 7 Q. B. (N.S.) 55, the plaintiff might have totally different remedies. . . . He might have a personal remedy in one country, and a remedy only against the goods in another. . . . It is by no means to be assumed in the absence of evidence that the mere fact of suing in a foreign country, as well as in this country, is vexatious. It seems to me you must make out a special case, and there is, therefore, that distinction between the case of the two actions being brought in the Queen's Courts, and one action being brought in the Queen's Court, and the other in the Court of a foreign sovereign." According to *Hughes* v. *Rees*, although the Provinces of Quebec and Ontario are both in the Queen's Dominions, the pendency of the one action cannot be pleaded in bar of the other. Yet this would seem in accordance with the principles of the law as above enunciated, by reason of the different remedies a plaintiff might have in the one, as compared with those he might have in the other. It would seem, too, from *McHenry* v. *Lewis*, that in the case of a suit for the same matter pending in a foreign country, the Court would be more willing to interfere, under its general jurisdiction, to restrain vexatious and oppressive legislation, after a decree has been made in one of the actions, than before."

WRIT OF EJECTMENT—RE-ENTRY OF LANDLORD.

The next case, *Ex parte Sir W. Hart Dyke*, p. 410, is mainly concerned with points of bankruptcy law, and therefore does not require notice further than to say that in it the question is raised whether, since the Imp. Common Law Procedure Act of 1852, and the Judicature Acts, the issuing of a writ of ejectment, at all events after the appearance of the defendant, is equivalent to re-entry by the landlord. A decision on this point was not, however, necessary to the case, and there the Court refused to deal with it.

A. H. F. L.

SELECTIONS.

SIR GEORGE JESSEL.

The death of the Master of the Rolls will be received throughout the country, and particularly in the legal profession, as a national loss. The public were beginning to obtain a true estimate of Sir George Jessel's powers. but lawyers alone fully knew his greatness; The popular appreciation of judges is generally built up of facts which but little influence the lawyer. If the judge has been in Parliament, a reflex of his Parliamentary reputation follows him to the bench; but Sir George Jessel's Parliamentary career did not lay the foundation of a reputation. His genius was too purely intellectual, and contemptuous of

weaker minds, to commend itself to the average member of the House of Commons; and he was persuasive by the force of his reasoning only. This, however, is the power which makes a reputation among lawyers. The strength of his intellectual qualities was the more conspicuous because its recognition was conceded, in spite of many faults of manner. There are many whose memory of Sir George Jessel will be accompanied by some soreness. He did not spare any one who crossed swords with him in argument, whether his opponent was at the bar or on the bench. But his manner was due to no feeling but the desire to push home his conclusion. It was well known at the bar, that if a man had something to say worth hearing, and said it in a few words, Jessel would be sure to listen to him, particularly if he were a young man. He would take pains to show the disputant the error of his ways, and he never passed unnoticed any objection to his decision which had any weight whatever. Sir George Jessel never wrote a judgment while he was on the bench, and yet he seldom delivered one which did not deal with every point in the case; and sometimes, when he had clearly made up his mind as to some obscure legal topic or disputed Act of Parliament, he went out of his way to elucidate it. Within the last few days the Master of the Rolls seems to have been conscious of the defect in his judicial manner. "Don't think I am against you," he said; "counsel, in arguing, sometimes think that I am much more against them than I really am"—a confession which has now something pathetic in it.

The performance by Sir George Jessel of his daily work in the now deserted Rolls Court was an exhibition of power seldom witnessed. The lawyer hardly knew which most to admire—his minute knowledge of case-law, the breadth of his acquaintance with legal principles, or the amazing rapidity with which he took in the facts of his cases. Sir George Jessel seemed to devour an affidavit as soon as it was put into his hand. There was a superstition that nature had physically endowed him above other men with the capacity of acquiring knowledge, and that he could read one line with one eye and the next line with the other. It is certain that hardly any subject came to the surface in his Court without his displaying a knowledge of it which astonished experts. Large drafts were made on these gifts in patent cases, and the Master of the Rolls was equally at home in mechanical complications and in chemical mysteries. Something has necessarily been said of his fault of manner on the bench; but it lay merely in the manner. His mind was eminently judicial, and the most skilful advocate that practised before him probably never discovered that he had any prejudices. Least of all had he any favour for those of his own race, although he was the first of his blood who attained the English bench. On one occasion, when it appeared that a peculiarly hard bargain had been driven by a party in the case, the Master of the Rolls observed: "I fear this gentleman is of the Israelitish race." There was no section of the community which did not look to him for the most uncompromising justice. This was due to the belief, not only that he had a practical knowledge of most of the affairs of life, and was a learned lawyer, but that his mind was absolutely free from cant. His rapidity was so great, and his reputation so high, that the Rolls Court became during his reign the most important Court in the country. When the Judicature Acts came into operation, the universality of Sir George Jessel's legal knowledge stood him in good stead. Here, at least, was one judge who could decide off-hand upon the limitations of a crabbed settlement at one moment, and at another expound the obscurities of a bill of lading. Sir George Jessel's place in history will probably be connected with these Acts. The Common Law Procedure Acts failed to bring about a satisfactory compromise between law and equity. As Sir George Jessel was fond of pointing out, the common law judges had equitable powers given to them by those Acts which the Chancery judges did not possess. These powers, however, were ignored, and the Judicature Acts became necessary. The same influences were at work in the passing of the Judicature Acts, and at an early date they showed themselves ominously. Sir George Jessel set himself to the task of giving the most liberal operation to the principles of those Acts, and he effected far more for the fusion of law and equity than the Acts themselves. It is not too much to say that the success which the Judicature Acts have obtained would have been impossible without him.

Sir George Jessel was not free from the faults to which great minds like his are liable. He was so quick that occasionally he was hasty, but the mistakes he made were not half so many as those of other judges who

got through about a tenth of his work. He was also apt to be intellectually overbearing. He was fond of exposing the errors of others, but he never admitted a doubt of the correctness of his own opinion. His phrase, "Of course all judges believe that they are right," has passed into a byword; and Sir George Jessel was the mental antipodes of Lord Eldon, great lawyers as both were, and in some respects not unlike one another. History does not record that Sir George Jessel ever admitted that he was wrong. When his attention was called to the fact that the Court of Appeal had overruled his decision, he said: "That is strange; when I sit with them they always agree with me." This was generally true, as there were few judges whom the Master of the Rolls could not carry with him. Whoever sat with him, the Court was generally considered to consist of the Master of the Rolls. Some of his defects were perhaps due to his having, during most of his career at the bar, practised before a very mild judge in the same Court in which he afterwards sat on the bench. Many members of the bar will remember his first appearance in the Court of Queen's Bench after his appointment as Solicitor-General. It was to oppose a rule for a *mandamus* to the Commissioners of the Treasury to allow the county of Lancashire certain costs in criminal cases which had been disallowed. "The Court of Queen's Bench hasn't the power to do anything of the sort," said the Solicitor-General, in peremptory tones; "it can't do it." The colour was seen gradually to rise in the face of Chief-Justice Cockburn, and at last he spoke: "Whatever the Court of Queen's Bench can or cannot do, Mr. Solicitor, it is accustomed to be addressed with respect." The Solicitor waited until he had reached the end of the thread of argument which he had in hand, when he mentioned that he really did not mean to be disrespectful. After two years as law officer, he was eight years a judge of first instance, when the office which he filled was permanently added to the Court of Appeal. He died at the age of fifty-nine, and after little more than nine years' service on the bench; but he will undoubtedly take a very high rank among the judges of England. Some judges have established a reputation for knowledge of real property, others for knowledge of commercial law, others for knowledge of equity; but there was hardly a branch of law in which Sir George Jessel did not distinguish himself, and he was thus the fit judicial representative of the reforms introduced by the Judicature Acts.

The different courts that were sitting at the time of the death of Sir George Jessel were adjourned out of respect to the memory of the deceased, with appropriate remarks by the different Judges. The following is the report in one of the papers of what was said in Mr. Justice Chitty's Court:—

Mr. Justice Chitty, on taking his seat, was overcome with emotion, and was for some time unable to say anything. On recovering himself somewhat he addressed Mr. Waller, Q.C., as senior member of the Bar present, as follows:—"The sad and shocking news of the Master of the Rolls' death, is, I regret to say, too true. I can scarcely trust myself to speak of the sad event. In him I have lost, and many of those who practise in this court have lost a real friend. To the public his loss is almost irreparable. The extraordinary swiftness of his apprehension, his complete mastery over facts and law, his grasp of principles, and the marvellaus certainty of his judgment, mark him out as one of the most illustrious judges that ever sat on the English Bench, and will render him famous amongst his great predecessors in the high office that he bore. There was one quality for which he was not so generally known—I mean the true and genuine kindness of his disposition. I cannot trust myself to say more. The circumstances of this court are peculiar. Many of the Bar to whom I am addressing these few feeble words practised habitually in the court where he presided at the Rolls, and I am sensible that neither they nor I could properly conduct the business on the day of his death; and it is, therefore, out of respect for his memory, and grief for his loss, that I feel constrained to adjourn the court."

Mr. Waller, Q.C., replied on behalf of the Bar.

SIR SAMUEL MARTIN.

He was twenty-three years one of the now expiring race of barons of the Exchequer; and he possessed a character which would have been prominent in any station of life, and which, from his having so little of the conventional judge about him, made him a very marked figure on the bench. A large framed, carelessly dressed man, speaking plain common sense in homely language, and with a

brogue which he would have thought it affectation to conceal, he appeared before the world, whether at the bar or on the bench, just as he was. He had no pretention to the arts of advocacy at the bar, and he was a man of little learning; but the secret of his success, both as judge and advocate, was such as to make him a genius in his way. He had a marvellous instinct for what was the right thing to be done. This, added to his plain directness of speech and manner, little like the usual circumlocution of lawyers, was the cause of his success in commercial cases on the Northern Circuit, and of the value placed on his opinion when on the bench. Baron Martin may have been wrong in the way in which he did things; but he was seldom wrong in the result.

A railway company which pleaded to an action for the loss of cattle that "they were carried at owner's risk for less freight." "You had the man's money," he would say, "and you killed his beasts; why don't you pay for them like honest men?" This was, at the time, bad law, if sound morally; and it was not until December 19 last that the Court of Appeal decided, in *Brown* v. *The Manchester, Sheffield and Lincolnshire Railway Company*, 17 Law Journal Notes of Cases, 139 (December 23, 1882), that the offer of an alternative rate did not, *per se*, make the condition to exempt from liability reasonable.

Baron Martin's breadth of view verged sometimes on the grotesque when carried into the small details of practice. He not infrequently sat at judge's chambers, and on one occasion he was asked to make an order for interrogatories, which in those days was necessary. "How many are there?" asked the baron, without looking at them. "Twenty," was the reply. "I shan't make an order for a man to answer twenty interrogatories," rejoined the judge, "You may ask him half a dozen, and take which you please."

On one occasion, in a real property case, a very learned counsel referred to the laws of Howel Dha, "I don't believe there was such a man," said the baron. The story goes that on another occasion, on Circuit, his brother judge was detained in court beyond the dinner hour. Baron Martin found a Shakespeare which the other judge had left on the table, and took it up as he might the latest novel. His learned brother, coming in, exclaimed: "Why, Martin, I had no idea you were a student of Shakespeare!" "Well, no," replied the baron; "I never read him before, but I have been reading him for the last twenty minutes, and from what I have seen of him, I think him a very overrated man"—an expression of opinion which, if we do not mistake, has been attributed to others. So, again, at Winchester Assizes, he dined with the warden of Winchester. After the judge had gone the warden remarked to the guests left behind: "What an agreeable man Baron Martin is, but for a judge how ignorant! why, he had never heard of William of Wykeham!" Tradition, however, records that at that very moment the judge was having his revenge. On entering his carriage he said to his marshal: "I like that warden; but for an educated man, he was about the most ignorant man I ever met. He did not know where Danebury was, and had never heard of John Day's training stables."

Rumor indeed always has asserted—and in spite of the positive assurances of a contemporary, will continue to assert—that Mr. Martin was part owner, with the late Mr. Henry Hill, of some racehorses; that he consulted that gentleman as to the advisability of accepting a judgeship; and that the acceptance of the office involved the painful necessity of parting with them.

The only known attempt made to bribe the learned judge proceeded from a prisoner who must have had an inkling of his tastes. He was convicted, and on being called upon before sentence, he said: "I hope your lordship will not be hard upon me; and perhaps your lordship would accept a beautiful gamecock I have at home." The judge put his hand before his mouth to hide his laughter; and then passed a sentence which was not severe, adding: "Mind, my man, you must not send me that game-cock." He once, at a judges' dinner to the bar on Circuit, called across the table to his colleague: "Brother Willes, are pigs within the Wounding Act? Are they 'cattle?'" Mr. Justice Willes stroked his chin, and said: "I think brother, there is a passage in Justinian which seems to point in that direction." Kindness to animals Baron Martin shared with many other occupants of the bench.

If these stories are not more than enough, there is one which suggests the key to Sir Samuel Martin's whole character. He asked a young lawyer how he progressed in his law, and was told that its complications were puzzling. "Nonsense!" said Baron Martin; "bring your common sense to bear on it, man; that's what I always do; and I gener

ally find I am right." His ready wit sometimes extricated him in an unexpected way from the mazes of subtlety which were sometimes thrown around questions at the bar. Thus he was sitting in banco, with Baron Bramwell by his side, in the little room up many stairs, known as the second Vice-Chancellor's Court at Westminster, now happily among the courts abandoned, while a long-winded counsel was "distinguishing" the case before them from a decision of the House of Lords. After painfully enduring the operation for some time, the baron said: "You are very much mistaken, if you think that my brother Bramwell and I, sitting in this cock-loft, are going to overrule the House of Lords." His sentences on malefactors, like his judgments, were short: "You are a bad old man, and you'll just take ten years' penal servitude," was quite enough for the confirmed sinner convicted for the tenth time of felony. In a prolix age his brevity was refreshing; and if his mode of cutting knots instead of untying them prevented his elucidating the law, it at least tended to the despatch of business. In his total absence of affectation, sometimes approaching a want of dignity, he was free from another of the smaller vices of the day. On a summer Circuit, when the weather was very hot, Baron Martin not only took off his wig and robes, but finding the cushion of his chair too warm, ordered something cooler to be put on it, and sat on a soap-box. In his combination of tenderness and robustness, and in other ways, he was not unlike Dr. Johnson, but without the learning and rhetorical power of his great namesake. He inspired all who knew him with affection; and although not a great lawyer, he must be reckoned an admirable judge.—*Law Journal.*

FILTHY PERCOLATIONS.

It is said in an early case that where one has filthy deposits on his premises, he, whose dirt it is must keep it that it may not trespass.[1] If filthy matter from a privy or other place of deposit percolates through the soil of the adjacent premises, or breaks through into the neighbour's cellar, or finds its way into his well, it is a nuisance.[2] To suffer filthy water from a vault to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well and cellar, where it is done habitually and within the knowledge of the party who maintains the vault, whether it passes above ground or below it, is of itself actionable tort. Under such circumstances, the reasonable precaution which the law requires, is effectually to exclude the filth from the neighbour's land, and not to do so is of itself negligence.[3] It is only sudden and unavoidable accidents, that could not have been foreseen or guarded against by due care, that can excuse a party from liability. Injuries from extraordinary accidental circumstances, for which no one is at fault, must be left to be borne by those on whom they fall.[4] The soil of a man's estate may be rendered cold and unproductive, or the walls of his building weakened and made damp and unhealthy, and, in various other ways, his property injured for use or occupation by the percolation of water beneath the surface caused by some wrongful act of another. The wrongful act may, perhaps, be thawing water from one's roof so near the boundary line that it must escape upon adjacent premises.[5] And it makes no difference whether damage is occasioned by the overflow of, or the percolation through the natural bank, so long as the result is occasioned by an improper interference with the natural flow of the water.[6] The right of one to be secure against the undermining of his building by water, or the destruction of his crops or the poisoning of the air by stealthy attacks of an unforeseen element is as complete as his right to be protected against open personal assault or the more demonstrative but not more destructive trespass of animals.[7]

If one purchases land from another on which the vendor has erected or maintained a nuisance, while not liable for the erection of the nuisance, he is liable, after knowledge thereof, for all damages sustained by the other.[8] But if one gathers water into a reservoir where its escape would be injurious to others, he must, at his peril, make sure that the reservoir is sufficient to retain the water

1 *Tenant* v. *Goldwin*, 1 Salk. 360; S. C., 6 Mod. 311.

2 *Tenant* v. *Goldwin, supra; Ball* v. *Nye*, 99 Mass. 582; *Columbus Gas Co.* v. *Freeland*, 12 Ohio St. 392; *St. Helens Chemical Co.* v. *St. Helens*, L. R. 1 Exch. Div. 196; *Marshall* v. *Cohen*, 45 Ga. 579; S. C., 9 Am. Rep. 170; *Pottstown Gas Co.* v. *Murphy*, 39 Pa. St. 257; *Tate* v. *Parish*, 7 T. B. Mon. 325; *Green* v. *Nunnemacher*, 36 Wis. 50.

3 *Ball* v. *Nye, supra; Hodgkinson* v. *Ennor*, 4 B. & S. 229.

4 *Underwood* v. *Waldron*, 33 Mich. 232.

5 *Bellows* v. *Sackett*, 15 Barb 96.

6 *Prexley* v. *Clark*, 35 N. Y. 520.

7 *Broder* v. *Saillan*, 2 Ch. Div. 692.

8 *Hurdman* v. *Northeastern R. Co.* 6 Cent. L. J. 367.

which is gathered into it. If it be sufficiently constructed, the liability is only a question of negligence. The proprietor is not liable if the water escapes beyond the observance of due care proportioned to the danger of injury from the safety and mode of construction of the reservoir.[9]—*Central Law Journal.*

[9] *Grey* v. *Harris*, 107 Mass. 492; *New York* v. *Bailey*, 2 Denio, 433.

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

IN THE SIXTH DIVISION COURT, COUNTY OF ONTARIO.

FOLEY V. MURRAY.

Defence setting up reformation of a contract involving a sum beyond the jurisdiction—Practice.

Although a defence may be established which would, in a Court of competent jurisdiction, reform or rescind a contract, the amount of which is beyond the jurisdiction of the interior Court, the proper course is to find for the plaintiff, payable within such time as to enable the defendant to take such action in another Court as he may be advised, to establish his rights, either by the reformation or rescission of the contract, or to damages for its non-fulfilment.

[Whitby, March 31st, 1883.

DARTNELL, J.J.—The plaintiff sues for the first instalment of $160, upon an agreement in writing whereby he agrees to sell, and the defendant agrees to purchase, a lot in Mara for the sum of $1,800, a deed to be given and a mortgage taken when the first four instalments are paid. Nothing is said in this document about possession.

The defendant asserts and the plaintiff denies that there was any agreement about possession. I find the weight of evidence is overwhelmingly in favor of the defendant's contention that the plaintiff undertook to give him possession. It is submitted that this evidence is inadmissible, as varying or contradicting the written contract.

The defendant relies upon the verbal agreement. The plaintiff admits that there is a tenant upon the place under a lease which may or may not be a valid one. The real defence is that the plaintiff is estopped, or should be restrained, from enforcing his agreement, because he is nnable to carry out the true agreement between him and the defendant. He also contends that this Court has no jurisdiction, as the title to land is in question.

I overrule this latter objection. There is no dispute as to the title to the land. The defence rests entirely upon the other objection to the plaintiff's right to recover.

Where property is sold, and the price is payable by instalments, and nothing is said about possession, it would appear that the vendee is not entitled to possession until payment of the last instalment: Dart on V. & P. 581; *Kenney* v. *Wexham*, 6 Madd. 335. *Omerod* v. *Hardman*, 5 Vesey, 722, is an authority to show that an additional parol stipulation as to the time for delivery of possession is inadmissible: (Dart on V. & P. 953). But, assuming it to be admissible, in order to give it effect, I am asked, in conceding to the defendant's contention, to vary, or reform, or rescind a written agreement, the subject matter of which involves a sum far beyond the jurisdiction of the Division Courts. Under these circumstances, I think it is my duty to find for the plaintiff for such sum as he may be entitled to, payable in 40 days, in order to give the defendant an opportunity, should she be so advised, to commence an action against the plaintiff. In such action she could claim a reformation of the contract, so as to accord with the true agreement between the parties, or a rescission thereof, if it should be shown the plaintiff is not in a position to carry it out; and also such damages as she may be able to show she has sustained by reason of its non-fulfilment. In the same action, the Court above could restrain all proceedings in this Court until such time as these questions could be determined. Or the defendant may, under the 78th sect. of the Judicature Act, apply for an order "that the whole proceeding be transferred from this Court to the High Court, or any division thereof."

The plaintiff claims interest on the unpaid purchase money. This is inequitable, as the purchaser is not in possession, and the plaintiff has in fact received the rent. Under all the

circumstances, I feel it proper to find for the plaintiff for $160, leaving the defendant, within the time allotted, opportunity to invoke the aid of a Court of competent jurisdiction to give her such relief as it may think her entitled to.

POLICE COURT.

(Reported for the LAW JOURNAL by R. J. Wicksteed, Barrister-at-Law.)

METROPOLITAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS V. ANDERSON.

43 Vict. cap. 38, s. 2—Ill-treating, abusing, or torturing animals.

[OTTAWA, 2nd April, 1883.

In this case the defendant was charged with withholding food and water from two horses locked up in a stable for four days, and the complaint by the Society alleged that by so doing he did "ill-treat, abuse and torture" these animals, contrary to the statute in this case provided (43 Vict. c. 38, s. 2.)

The defendant pleaded guilty, but the Police Magistrate was doubtful whether the case came under this satute, being of opinion that the words "ill-treats, abuses or tortures," refer to acts of commission, and not to acts of omission, neglect, or inattention. The Magistrate required the legal advisers of the Society to furnish authorities in support of their contention to the contrary.

The point reserved was argued in Chambers. The Society showed that the Halifax and New Brunswick sister societies had obtained convictions under same Act for same offence. The Report of the Royal Society for the Prevention of Cruelty to Animals was also filed. It contained reports of many convictions for starving horses, brought under Imperial Act 12-13 Vict. c. 92, s. 2, using the same words as the Canadian Act. For the prosecution was also cited the case of *Everitt* v. *Lewis*, 38 Law Times, 360, where it was held that "the owner of a horse, who, knowing it to be incurably diseased and in pain, merely omits to have it slaughtered, cannot be convicted of cruelly ill-treating, abusing, or torturing such animal, by reason of such omission only. But, if he keeps the animals in such a manner as that it is inevitably put to intense pain in moving about a field in its efforts to graze in order to support its life, he thereby commits an act of cruelty, and an offence under the Act, and is guilty of 'torturing the animal, or causing him to be tortured,' as much as if he had actively tortured it with his own hand."

The case of *The Commonwealth* v. *Lufkin*, 7 Allen's U. S. Rep. 579, was also referred to. The complaint there was that the defendant "unlawfully and cruelly did beat and torture a certain horse," under General Statutes, United States, chap. 65, sec. 41. Judgment was rendered by Hoar, J. He says :—"Although the most common case to which the statute would apply is undoubtedly that in which an animal is cruelly beaten or is tortured for the gratification of a malignant or vindictive temper, yet other cases may be suggested where no such express purpose could be shown to exist, which would be within the intent as well as the letter of the law. Thus cruel beating or torture for the purpose of correcting an intractable animal ; pain inflicted in wanton or reckless disregard of the suffering it occasioned, and so excessive in degree as to be cruel ; torture inflicted by mere inattention and criminal indifference to the agony resulting from it, as in the case of an animal confined and left to perish from starvation, we can have no doubt would be punishable under the statute, even if it did not appear that the pain inflicted was the direct and principal object."

O'GARA, Q.C., Police Magistrate, held that the case came within the statute. As to the punishment to be inflicted, he said that had it not been for representations made by the complainant on behalf of the defendant, he would have inflicted a very severe penalty, but as the defendant had pleaded guilty, and the Society had succeeded in establishing a valuable precedent, he only inflicted a fine of $3, and $2 costs.

Wicksteed, Bishop & Greene, Legal Advisers to the Society.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

From C. P.] [March 24.

BASSWELL V SUTHERLAND.

Bond for delivery of chattels—Performance excused by destruction of property.

To an action on bond conditioned for the production of certain goods in default of payment by P. of certain moneys advanced by the plaintiff to him, and for securing which the plaintiff had obtained a chattel mortgage on the goods, the defendant pleaded that before the time for payment, and before the date specified in the bond for producing the goods, and before any breach of condition, the goods were accidentally destroyed by fire without any default of defendant, and the goods were not in existence when the plaintiff became entitled to their production.

Held, bad on demurrer for not negativing default on the part of P. as to the destruction by fire of the property.

Per SPRAGGE, C. J. O.—The accidental destruction of the goods without default of the defendant or his principal, would excuse the performance of the contract.

The judgment of the Court of Common Pleas overruled the demurrer on the assumption that the pleas had been amended by negativing default by P., but the appeal books not showing the amount to have been made the defence appearing thereon was considered bad on demurrer, and the appeal was allowed.

McCarthy, Q.C., and *Eddis*, for the appeal.

McPhillips, contra.

From C. P.] [March 24.

HOWARTH V. SUGAR MANUFACTURING CO.

Incorporated company—Hiring by the year—Improper dismissal.

The defendants, a foreign corporation, elected directors to whom was delegated power to appoint such subordinates as might be necessary to carry on the business of the company. By power of attorney under the corporate seal of the defendants they appointed one H. their general agent at Toronto, to take charge of the general management of their business there, and also giving him the management and control of the sub-agencies generally, and giving H. power to do everything necessary and requisite thereto for as fully, to all intents, as the company could do if present. H. appointed the plaintiff a sub-agent for one year, which was renewed for some years at the end of each year. The letter appointing the plaintiff stated that he was appointed for a year, to be paid weekly the sum of $15, together with certain commissions. During the currency of the years the plaintiff was summarily dismissed, and in an action for wages the defendants gave evidence to show that they were in the habit of engaging their agents and sub-agents at will only.

Held, affirming the judgment of the Court of Common Pleas, [SPRAGGE, C. J. O., dissenting], that the appointment from year to year was within the power of the directors which were delegated to H., their general agent, and that the plaintiff was entitled to rely upon such powers when he entered into the service of the company.

Per SPRAGGE, C.J.O.—Notwithstanding the knowledge of the defendants and their recognition, year after year, of the employment of the plaintiff, there was not any acquiescence in the terms of the engagement; and as it was shown that the practice of the defendants was to engage their employees at will only, the power of attorney, if it gave power to appoint sub-agents like the plaintiff, no power was given them to appoint for a year; and H. was not held out by the defendant company as having such authority.

Watson, for appellants.

C. Robinson, Q.C., contra.

QUEEN'S BENCH DIVISION.

[March 10.

MACDONALD ET AL. V. CROMBIE ET AL.

Interpleader—Judgment on non-appearance—Immediate execution—Irregularity—Referential Judgment—Sheriff's sale—Purchase by judgment creditor—R. S. O. ch. 118.

An execution issued on the same day that a judgment on default of appearance is signed, contrary to Order IX. Rule 4, is an irregularity only, and not a nullity.

M., a merchant, who was in insolvent circumstances, and had purchased largely from defendants, started an account with the defendants as for cash due, in which were included some acceptances maturing, which were then delivered up to him, he receiving a buyer's discount of five per cent. By an arrangement, the defendants recovered judgment by default of appearance, and under an execution issued on the same day plaintiff's stock in trade was sold by the sheriff, the defendants becoming purchasers. E., the defendant's agent, wrote to the defendants before suit, that he had arranged with M.'s consent to issue a writ for judgment, and take everything, and they would then let M. go on and reduce his stock, and see what the Spring trade would do. The plaintiffs, ten days after, obtained judgment and execution under Rule 324, and the defendants having subsequently purchased the goods under these and other executions, an interpleader was directed.

Held, ARMOUR, J., dissenting, reversing the judgment of Armour, J., at the trial, that the defendants' judgment, execution, and purchase at the sheriff's sale were not a gift conveyance, assignment, or transfer of M.'s goods within the meaning of R. S. O. ch. 118, sect. 2.

Per CAMERON, J.—The statute R. S. O. ch 118, should be construed strictly. It is in derogation of the common law, and does not operate to give all the creditors of a debtor a rateable share in his effects. Before setting aside the debtor's preference for a legislative preference not more honest, it should be clear that the debtor has done something which brings him within the enumerated acts which the statute prohibits.

HENEBERG v. TURNER.

Foreign judgment, action on—Rule 322—Motion for judgment—Evidence.

The defendant in an action on a judgment obtained in Iowa, U. S. A., pleaded, denying the recovery of the judgment. Upon a motion for judgment under Rule 322, upon the pleadings verified by affidavit, and the production of an exemplification of the judgment,

Held, affirming the opinion of the Master, that judgment could not be ordered on these materials under Rule 322, the defendant having put the judgment distinctly in issue.

In proceeding under this Rule 322, it is not sufficient to produce a document on which the plaintiff relies, without any proof to connect the defendant with it or support its genuineness.

SCRIBNER v. MCLAREN ET AL.

Stock-in-trade—Sale—Vendor employed as clerk—Immediate delivery—Change of possession—Chattel Mortgage Act—R. S. O. ch. 119.

M. carried on a retail business in a village store, on the premises known as the "Star House," from a design over the door, but there was nothing to indicate who was the proprietor. He sold the stock-in-trade to the plaintiff in August, and formally handed over to him the keys, at the same time telling M., his clerk, that he would not require him any longer. The plaintiff gave one key to M., telling him to open the store next morning, which he did, but the plaintiff next day quarrelled with M. and dismissed him, and he then employed M. until the 1st of October, to act as salesman, etc., the plaintiff being at the store a good part of the time. The change of business was advertised, and became well-known in the neighbourhood, and new books were opened by the plaintiff.

The stock was seized on the 2nd October, under execution against M. The transaction was found to have been in good faith and for valuable consideration.

Held, that the question of change of possession is one of fact to be determined on the circumstances of each case, and (reversing the decision of Osler, J.,) that there was here such an actual and continued change of possession as to dispense with the necessity for a bill of sale. Hagarty, C. J., dissenting.

Per HAGARTY, C. J.—The question being one of fact, and the learned Judge having found as a fact that the change of possession was not actual and continued, his finding should not be disturbed, as it could not be said to be clearly wrong.

HESSIN V. BAINE.

Married woman—Separate estate—Separate trader.

B. told the plaintiff that having failed he was unable to carry on business in his own name, and ordered goods to be shipped to the defendant, his wife, who was carrying on business as a

grocer, either on her or his order, the account to be opened in her name. Goods were shipped accordingly upon orders of the husband, and on one order of the defendant, and bills were drawn upon the defendant and accepted by her or in her name by her authority. She had separate estate.

Held, HAGARTY, C.J., dissenting, that the plaintiff was entitled to recover.

Per CAMERON, J.—The defendant was liable, being possessed of separate estate, whether the goods were bought by her or by her husband. In the latter case she would be surety for her husband as acceptor of bills drawn upon her for the price of the goods.

Per HAGARTY, C. J.—The goods were bought by the husband, and the liability was his and not the wife's, her name being used merely to shield him from his creditors, and the plaintiff being aware of this, and therefore the defendant was not liable to him.

WHITE V. CORPORATION OF GOSFIELD.

Municipal works—Drains—Non-repair—Action for damage—Mandamus.

The defendants in 1865 passed a by-law for the construction of a drain which passed through the plaintiff's land, and for assessing certain lands, including the plaintiff's, therefor. The drain was commenced in 1866 and completed. In 1873 they passed another by-law for widening and deepening this drain, which was accordingly done. In 1881, they constructed another drain running into the first below the plaintiff's land. The first drain having become out of repair and choked up, the plaintiff's lands were to some extent flooded in the spring and autumn, and the water lay longer than if the drain had been kept properly clear.

Held, affirming the judgment of Hagarty, C.J., (Cameron, J., dissenting), that the plaintiff was entitled to recover against the defendants for their breach of duty in not keeping the drain in repair under R. S. O., ch. 174, sec. 543, and that a *mandamus* should issue to compel the defendants to make the necessary repairs.

Per CAMERON, J.—An action is expressly given by sec. 342 for injury done by such neglect, where the drain serves two municipalities, but in a case like the present, though under sec. 543 the municipality may be compelled by *mandamus* to repair the drain at the expense of the lands benefitted, no action lies for injury caused by non-repair.

REGINA V. WALSH.

Canada Temperance Act, 1878—Conviction—Hard labour—Proof of Act being in force—Jurisdiction of magistrate — Certiorari — Several offences.

The defendant was convicted of selling intoxicating liquor contrary to the Canada Temperance Act, 1878, upon an information charging him with keeping, selling, and otherwise unlawfully disposing of and bartering liquor. He was adjudged to pay a fine of $50 and $5.20 costs, and in default of payment, and of sufficient distress, he was adjudged to be imprisoned in the common gaol at hard labour. A second record of the conviction, bearing the same date as the first, was filed, differing in some minor points from the first, and omitting the adjudication as to hard labour, and adjudging the payment of $5.27 costs. The proceedings having been removed by *certiorari*,

Held, that the first conviction was bad for want of jurisdiction to impose hard labour, which is not authorized by the Act; and that the second was bad in not following the actual adjudication as to costs, which were, as shown by the magistrate's minute, $5.20, and not $5.27.

The Canada Temperance Act does *per se* make the selling of intoxicating liquor an offence. It is only after the second part of the Act has been brought into force by the proceedings indicated for that purpose in the first part, which proceedings cannot be judicially noticed but must be proved, and in the absence of such proof the magistrate acts without jurisdiction.

Held, therefore, that the convictions were bad, for they did not allege that the Act was in force, nor was it proved otherwise, and, therefore, as the jurisdiction of the Magistrate did not appear, the writ of *certiorari* was not taken away by sec. 111 of the Act.

Quære, whether the convictions were not also open to objection on the ground that the information embraced more than one offence, and whether the Magistrate having in this respect disregarded the express directions of the Act 32 and 33 Vict., c. 51, sec. 25, made applicable by

the Canada Temperance Act, he might not be said to have acted without jurisdiction.

Quære, whether sec. 111 takes away the *certiorari* in all cases, or only in cases coming under sec. 110.

Fenton, for the Crown.

Tizard, contra.

Divisional Court.] [March 10.

HATELY V. MERCHANTS DESPATCH CO.

Carrier—Damage to goods carried—Action by consignor—Nonsuit—New trial—Joinder of cansignee as co-plaintiff — Constitutional question—Notice to Attorney-General.

The plaintiff consigned a quantity of butter to parties in England, and shipped it by the defendant, on bills of lading describing the goods as shipped by the plaintiff to be delivered to ——, or order, or his assigns, he or they paying freight. The plaintiff endorsed the bills of lading. The consignees paid the drafts drawn upon them for the price, and the butter having been seriously damaged in transit, they made claim upon the plaintiff for the loss. The plaintiff sued the defendants for the damage, and was non-suited on the ground that he had not sufficient interest or was not the proper person to sue.

The Court, without holding that the plaintiff had no right of action, or deciding as to the effect of R. S. O. cap. 116, sec. 5, set aside the non-suit and directed a new trial, with leave to the plaintiff to add as co-plaintiff any or all of the consignees or endorsers of the bills of lading; the evidence already given to stand with any additions the parties might desire, reserving all costs.

The validity of R. S. O. cap. 116, sec. 5, was challenged on the ground that it was *ultra vires* as interfering with trade and commerce, but the Court refused to decide the point now, without notice to the Attorney-General and Minister of Justice, under 46 Vict. cap. 7, sec. 6 (O), which would involve great delay, the course adopted being the speediest and least expensive.

Moss, Q.C., and *Lees*, for plaintiff.

Osler, Q.C.. *Kerr*, Q.C., *Cassels*, *Plumb*, and *Miller*, contra.

CHANCERY DIVISION.

Proudfoot, J.] [April 4.

RE MCCAUGHEY V. WALSH.

Striking solicitor off the rolls - Misconduct of partner.

To justify an order to strike a solicitor off the rolls there must be personal misconduct; it is not enough to show that his partner has been guilty of fraudulent conduct, from which a constructive liability to pay money may perhaps arise. The Court is not in the habit of exercising even the lesser jurisdiction of ordering payment in a summary manner against a solicitor to whom personally no blame is attributable, though he may be responsible for his partners' acts—much less will the Court exercise this penal power over a solicitor to whom no blame is ascribed. *St. Aubyn* v. *Smart*, L. R. 3 Ch. 646, distinguished.

J. H. Macdonald, for the motion.

Hoyles, contra.

Divisional Court.] [April 5.

WITHROW V. MALCOLM.

Re-issue of patent—Patent Act of 1872.

As to the plaintiff's first patent,

Held, [reversing FERGUSON, J.], there had been no infringement as regards the first and third claims; as regards the second claim, the patent was bad for want of novelty.

As to the sixth claim of the re-issued patent, there appeared to be an infringement, if the re-issued patent was valid. The defendants objected that the re-issued patent contained combinations not in the surrendered patent or application therefor, and that it was therefor invalid. It appeared that the sixth combination of this re-issued patent was displayed in the drawings described in the application, but not separated from the other parts of the description, and made the subject of a distinct claim so as to be protected by the first patent.

Held, per BOYD, C., the re-issued patent was nevertheless valid: per PROUDFOOT, J., *contra*.

Per BOYD, C.—The commissioner had jurisdiction to grant the re-issue, for the commissioner has power to re-issue and include therein a claim, which was described in the original, but, through inadvertence, accident or mistake, not

claimed or patented there, provided there has been no *laches*.

What could have been claimed as part of the invention under the specifications and descriptions accompanying the original patent, but was not, by reason of error, mistake or inadvertence, may be claimed on a re-issue if there has been no *laches*. Not what the patentee claims as his invention, but what is for the first time disclosed to the public on his application is the measure of his rights on a re-issue.

Under our Patent Act of 1872, which differs slightly from the analogous provision now in force in the United States, R. S. U. S. sect. 4916, a re-issue is permissible whenever the claim is, through inadvertence, accident, or mistake, *defective*, *i. e.*, by reason of the applicant not claiming all of his invention that might be claimed under the description.

Per PROUDFOOT, J.—A re-issued patent must be for the same invention as that embraced and secured in the original patent. It is a misconstruction of the Patent Act of 1872, to say it authorizes a re-issue "with broader and more comprehensive claims," if by that is meant that it authorizes a re-issue with a claim not in the original patent at all. Neither is it enough to entitle the inventor to a re-issue to allege that all the elements of his new claim may be found in the specification; what the 19th sect. of the Patent Act of 1872 provides is, that a re-issue may be had if the claim is so imperfectly described, through error or mistake, as not to cover the invention. Here the sixth claim in the re-issued patent did not remedy any defect in the original claim. It was an addition of an entirely new device or combination.

The earlier decisions in the United States on the subject of re-issues are more in conformity with the language and intention of our Patent Act, which is similar to that of the United States, than the later decisions, which seem to recognize the right in the re-issue to broaden the claims in a manner that does not appear to be in accordance with the law.

American decisions reviewed at length on the subject of re-issued patents.

S. H. Blake, Q. C., and *W. Cassels*, for the appellants.

J. Macdougall and *Shepley*, contra.

PRACTICE CASES.

Proudfoot, J.] [Feb. 19.

PURDY V. PARKS.

Mortgage—Costs—Reference.

In a mortgage suit it was referred to the Master to ascertain whether a sale or foreclosure was more beneficial, and to take an account, etc. On the reference the defendants claimed credit for certain payments endorsed on the mortgage in the handwriting of the deceased mortgagee, but for which they did not hold receipts.

On a revision of the taxation, the taxing officer at Toronto disallowed the costs of the reference, as the Master had found in favour of the defendants as to the payments.

On appeal, PROUDFOOT, J., allowed the plaintiffs the costs occasioned by the enquiry as to the sale or foreclosure, and the defendants the costs caused by the taking the account.

Foster, for the plaintiff.

Harcourt, contra.

Mr. Dalton.] [Feb. 26.

STEWART V. BRANTON.

Costs—Stay—Condition—Rule 428 O. J. A.

In an action against the bail, an order was obtained staying proceedings on the render of their principal upon payment of costs. These costs not being paid, execution issued, and a motion to set aside the execution was dismissed, the Master in Chambers holding that the words, "upon payment of costs," were words of agreement, and the costs not being paid, the execution should stand.

Motion dismissed with costs.

Clement, for the plaintiff.

G. H. Watson, for the defendants.

Mr. Dalton.] [March 7.

GUELPH V. WHITEHEAD.

Production.

Action to restrain the infringement of a patent.

The solicitor for the defendant procured from the United States patent office, copies of certain American patents, to be used on his behalf.

Held, that defendant was not bound to produce them.

H. Cassels, for plaintiff.

Hoyles, for defendant.

Osler, J.] [March 10.

RE BURDETT (A SOLICITOR).

Taxation—Bill of costs—Division Court.

A solicitor sued his client in the Division Court for the amount of a bill of costs, and judgment was reserved.

Held, that a taxation was properly ordered by the Master in Chambers, pending the delivery of the judgment.

Shepley, for defendant.

Aylesworth, for the plaintiff.

Boyd, C.] [March 12.

BANK BRITISH NORTH AMERICA V. EDDY.

Jury notice.

The cause of action was one of a purely common law character, and the pleadings presented issues of a merely equitable character. An order of a local Master striking out a jury notice was reversed on appeal.

W. Fitzgerald, for the plaintiff.

H. Cassels, for the defendant.

Osler, J.] [March 13.

AGNEW V. PLUNKETT.

Costs—Solicitor's letters to his agent.

The solicitors for both parties resided in Meaford, County of Grey.

Held, that necessary and proper letters in the action, written by the defendant's solicitor to his agent in the Town of Owen Sound (the county town of the County of Grey), should be allowed.

Holman, for the defendant.

Hagarty, C. J.
Mr. Winchester. } March 13.

McDONALD V. MURRAY.

Appeal—Stay of proceedings—New trial.

In this case the plaintiff was allowed to proceed with a new trial pending the defendant's appeal to the Court of Appeal, on the ground that he would be considerably inconvenienced by a delay of proceedings, and that an important witness was on his way from Winnipeg to give evidence at the trial.

Application for stay of proceedings refused.

J. K. Kerr, Q.C., and *Holman*, for plaintiff.

Ogden, contra, for the motion.

Boyd, C.] [March 13.

LAMBIER V. LAMBIER.

Administration — Partition — Consolidation of conflicting applications — Jurisdiction of Local Masters—G. O. Chy. 638-640—Rule 395 O. J. A.

A motion to a Judge in Chambers, under Rule 395 O. J. A., to consolidate conflicting applications for administration or partition, under G. O. Chy. 638-640, is improper, as that rule is not intended to apply to these summary applications.

The Local Masters are the proper officers to deal with such motions.

See *Re Draggon*, 8 P. R. 330.

Plumb, for the motion.

Bull, contra.

Mr. Winchester.] [April 10.

KITCHING V. HICKS ET AL.

Adding parties as defendants—Rule 103 O. J. A.

The plaintiff claimed a lien on certain goods and chattels of the defendant Hicks under an unregistered agreement in the nature of a chattel mortgage.

The defendant Clarkson took possession of the goods, as assignee of the defendant Hicks, for the benefit of his creditors.

Held, on motion to add Clarkson and the execution creditors as parties, defendants, in the action; that they had a substantial interest in the subject matter of the action, and should be added as parties, defendants, under Rule 103 O. J. A.

Akers, for the motion.

Hoyles, contra.

Hagarty, C.J.] [April 10.

SMITH V. SMITH.

Absconding debtor—Residence.

The husband of the plaintiff separated from her in 1878, and went to reside in the United States. Prior to his death in November last, in the State of Michigan, he sold a farm in Dakota. The defendant, a brother of the de- esiding in Dakota for the last four or

five years, while visiting his father in the County of Bruce, was arrested at the instance of the plaintiff, who had taken out letters of administration of her husband's estate, as an absconding debtor, the affidavits filed alleging that he had received the purchase money of the farm sold by his deceased brother.

HAGARTY, C.J.—I cannot put this plaintiff's rights higher (if they can be put so high) than those of the husband, if now living. A man returning to the country of his ordinary abode, where the debt was contracted, where his property is, and where his creditor also resided up to his death, cannot, I think, with propriety be charged as leaving Ontario with intent to defraud his creditors. The defendant must be discharged from custody, the bail bond delivered up to be cancelled, and no further proceedings taken on the *capias*. I leave the writ for the protection of the sheriff, costs to the defendant in any event.

C. Millar, for the plaintiff.
H. J. Scott, for the defendant.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Is the jury system a failure?—*American Law Reg.* Feb.

Warranties implied in sales of personal property in the United States and Canada.—*Ib.* Feb. and March.

[This is a very valuable article, and should be read in connection with "Benjamin on Sales." It is too long for reproduction in our crowded space—EDS. L. J.]

Evidence—*Res gestee*—(Continued)—*Central L. J.*, Jan. 19.

The compensation of experts—*Ib.*

Excuses for notice to a drawer of a bill of exchange—*Ib.*, Jan. 26.

Evidence—Peculiarities of handwriting—*Central L. J.*, Feb. 9, 16.

Sealed instrument executed in blank—*Ib.*, Feb.23.

Supplying dangerous goods—*Ib.*

Graveyard law—*Ib.*, March 2.

The act of God—*Ib.*, March 9.

The admissibility of character in civil actions—*Ib.*, March 16.

Entirety of contract for personal services—*Ib.*

Married women's debts—*Ib.*, March 30.

Mortgages and powers of sale—*Ib.*

Limitation of the doctrine of the dissolution of a corporation by the death of all of its members *Southern Law Rev.*, Feb., March.

Negotiable instruments—Collateral stipulations —*Ib.*

Corporate creation and existence—*Ib.*

Presumptions in indictments for conspiracy—*Ib.*

Conditions in pardons—*Ib.*

Auctions and auctioneers—*Ib.*

[This is a valuable article, and might usefully be reprinted in book form.—EDS. L. J.]

Surface water—*American Law Mag.*, Feb.

Trespassing animals—*Ib.*

The grand jury—*Criminal Law Mag.*, March.

The freedom of the navigation of the Suez Canal—*Law Mag.*

The British peerage and jurisdiction and procedure of the House of Lords as to the peerage—*Ib.*

The new Alabama law on the evidence of defendants in criminal cases—*Ib.*

Interlopers on railways—*Albany L. J.*, Jan. 20

Nuisance of noxious trades—*Ib.*, Feb. 3.

Criminal liability of physician for death produced by his gross negligence—*Ib.*, Feb. 10.

Rules relating to opinion evidence—*Ib.*, Feb. 17.

Icy sidewalks—*Ib.*, March 24.

Leases and agreements for leases—*London L. J.*, Jan. 13.

Nationality by inheritance—*Ib.*, Feb. 10.

Solicitors acting professionally against former clients—*Irish L. T.*, Jan. 27, *et seq.*

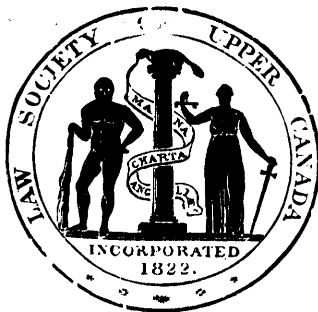
Criminal attempts—*Ib.*, March 10, *et seq.*

FLOTSAM AND JETSAM.

The *American Law Magazine*, of Chicago, has ceased to exist—merging in the *Central Law Journal*, of St. Louis, one of the best conducted legal journals in the United States.

An acute correspondent writes:—"Will you not favour us with a full report of *Clapp* v. *Boston*, noted in your last number, p. 38? My interest in it is indeed rather scientific than professional, because I am burning with longing to know how to 'erect a well.' And in such case does the truth, which is at the bottom of it, 'go up' with it?" But has not our correspondent heard of petroleum wells that have "gone up."—*Albany Law Journal.*

Law Society of Upper Canada.



OSGOODE HALL.

HILARY TERM, 1883.

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

William Renwick Riddel, Gold Medalist, with honours ; Louis Franklin Heyd, William Burgess (the younger), John Joseph O'Meara, Charles Coursolles McCaul, James Henry, Frederick William Gearing, James Albert Keyes, James Gamble Wallace, Harry Dallas Helmcken, Albert John Wedd McMichael, Hugh D. Sinclair, Christopher William Thompson, Walter Allan Geddes, James Thompson, John William Binkley, Richard Scougall Cassels.

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

Graduates—Joseph Nason, Henry Wissler, Robert Kimball Orr, Henry James Wright.

Matriculant—William H. Wallbridge.

Juniors—Joseph Turndale Kirkland, William James Sinclair, Francis P. Henry, Michael Francis Harrington, Thomas Browne, Charles Albert Blanchet, John Hood, Jaffery Ellery Hansford, Albert Edward Trow, Ralph Robb Bruce, Edwin Henry Jackes, William Herbert Bentley, Arthur Edward Watts.

Articled Clerk—William Sutherland Turnbull passed his examination as an articled clerk.

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 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.

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 :—

1883—Marmion, with special reference to Cantos V. and VI.

1884—Elegy in a Country Churchyard. The Traveller.