Canada Law Journal.

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DIARY FOR OCTOBER.

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

TORONTO, OCT. 1, 1883.

REFERRING again to the subject of the practice reports, alluded to in our last number, it is only fair to state that the reporter has given with much promptitude early notes of the points decided, which have been immediately published in this journal; so that, although there has sometimes been a delay in the issue of the reports, the profession have not been kept in ignorance of the points decided. The whole subject of the reports has been receiving much attention at the hands of the Reporting Committee, who are making every effort to place them on a satisfactory footing.

As we go to press we notice the retirement from the Bench of His Honor James Robert Gowan, County Judge of the County of Simcoe, and Chairman of the Board of County Judges. Those only, and the circle of these is no limited one, who know of his learning, his large and ripened experience, and his great services to the country in numberless ways, can measure the loss this will be to the Bench of which he was *facile princeps*. We shall endeavour in our next issue to give a short sketch of his judicial career. In the meantime, we would express the hope that many years may be given him to enjoy the rest he has won by a lifetime of hard work and devotion to the onerous duties of his position. He is succeeded by the Junior Judge of the County, His Honor Judge Ardagh, whom we congratulate on his promotion. It would have been difficult to find one more worthy to succeed his eminent predecessor. William Boys, Esq., of Barrie, takes the place vacated by Judge Ardagh.

DIVISION COURT STATISTICS.

We have received the annual report of the Inspector of Division Courts for 1881. It contains a number of interesting tabular statements. The Inspector has judiciously, we think, given the total figures for the preceding year 1880, under the totals for the year 1881, so that a very interesting comparison of the volume of business for the two years is readily made.

There has been a very marked decrease of business in the outer rural counties. In 1880 the number of suits of all kinds (including judgment summonses and transcripts) entered in all the Division Courts of the province was 85,156, while in 1881 the total number was only 59,792, showing a decrease of 25,364, or equal to about thirty per cent.

This is a satisfactory indication of the improved financial condition of the Province at large, especially in view of the fact that the increased jurisdiction conferred upon the Division Courts by the amendment to the Division Courts Act in 1880 would materially add to the number of suits entered. This Act came into force on the 6th March, 1880, and gave jurisdiction up to $200 in cases

where the liability of the defendant was ascertained in any manner by his signature, and by the same Act the jurisdiction in actions of tort to recover damages to $40 was increased to $60. We have only the returns for suits of the increased jurisdiction for ten months of 1880 (the amended Act being sanctioned on the 6th March, of that year), but if a proportion of one-sixth (equal to two months) be added to the returns furnished for 1880, a comparison can be effected between the years 1880 and 1881.

The falling off in suits for amounts exceeding $100, taking those figures, would be about 15 per cent. The number of these suits entered for the ten months of 1880 was 3,592, and the number for the twelve months of 1881, 3,744.

In looking through the report we find that the six counties having the largest number of Division Court cases in 1881 are the following:—

York, 6,723; Simcoe, 3,024; Middlesex, 2,946; Brant, 2,758; Kent, 2,587; Bruce, 2,543.

In the year 1880 they were:—

York, 7,252; Wentworth, 5,067; Simcoe, 4,000; Wellington, 3,965; Huron, 3,628; Bruce, 3,485.

The most remarkable falling off in the number of cases entered for the year was in the County of Wentworth, where it was over 51 per cent., while in the County of York the decrease was only about 7½ per cent. Another interesting fact is learned by comparing the business done in the County of York with that done in the whole Province. Over one-twelfth of the whole Division Court business of the Province was disposed of by the judges of the County of York in the year 1880, while in the year 1881 they actually performed over one-ninth of the same.

In the year 1880 the aggregate amount of claims entered for suit in the Province was $2,377,333, and in 1881, the sum of $1,843,034, showing a falling off in amount of over half a million of dollars.

Of these large amounts there was paid into Court in 1880 $894,556, and in 1881, $727,905, being about forty per cent. of the aggregate amounts in each year. The balance, or 60 per cent., would be represented by amounts paid by defendants to plaintiffs outside of the Court, judgments for defendants, nonsuits, reductions in amounts claimed by plaintiffs, set offs, &c., &c., and by uncollectable claims. If we assume that about 40 per cent. would be accounted for by the foregoing causes, except the last, it would leave about 20 per cent., which might not unfairly be set down as the probable amount of claims uncollectable.

There are 307 separate divisions in the various counties in which a Court is held, in a large proportion of them as often as six times a year, while in the case of cities, the Courts are held about once a month. There were 146 jury trials in the Division Courts of the Province in 1880, and 223 in 1881.

We have not space for more extracts, but the Report contains much information, valuable alike to the profession and our Legislators, and confirms the many opinions as to the importance and usefulness of our Division Courts.

MODE OF ENFORCING JUDGMENTS OF THE COURTS OF APPEAL.

The much vexed question as to the proper mode of enforcing a judgment of the Court of Appeal has reached another stage in the recent decision of the Court of Appeal in *Lowson* v. *Canadian Farmers' Insurance Co.*, *ante*, p. 293, but we do not think that it has even yet reached a satisfactory solution. The Appeal Act, R. S. O., c. 38, s. 44, says: "The decision of the Court of Appeal shall be certified by the Registrar of the Court of Appeal to the proper officer of the Court below, who shall therefore make all proper and necessary entries *thereof*; and all subsequent

proceedings may be taken *thereupon* as if the decision had been given in the Court below."

Prior to the Judicature Act two methods of carrying this section into operation prevailed. At law the certificate was, as we understand from *McArthur* v *Southwold*, 7 P. R. 27, acted upon without making it an order of the Court below, but we believe it was the practice to enter the certificate on the roll of the proceedings, and thereupon without any other physical alteration of the original judgment the certificate of the Court of Appeal was acted on as though it were a decision of the Court below.

In Chancery, however, a practice had grown up of making the certificate of the Court of Appeal an order of the Court of Chancery, and it was only on being so made an order in Chancery that it was enforceable in that Court: *Weir* v. *Matheson*, 2 Chy. Ch. R. 10.

In *Freed* v. *Orr*, 9 P. R. 181 (17th January, 1882), the Master in Chambers held that it was no longer necessary to make a certificate of the Court of Appeal an order of the High Court.

In February, 1882, Proudfoot, J., held that the former practice in Chancery was to be continued: *Norvall* v. *Canada Southern R. W. Co.* 9 P. R. 339, 18 C. L. J. 98, and on 1st March, 1882, in *National Insurance Co.* v. *Egleson*, 9 P. R. 202, Boyd C. referred to the practice as correctly laid down by Proudfoot, J., and on the 4th May, 1882, Ferguson, J., after consultation with Boyd, C., also decided that the former practice of the Court of Chancery was to be continued in the Chancery Division: *Canada Southern Railway Co.* v. *International Bridge Co.*, 9 P. R. 203, note.

The matter had also previously been before the Master in Chambers again in *Lowson* v. *Canada Farmers Insurance Co.*, 9 P. R. 185, and in that case the learned Master set aside an execution, among other grounds, because it was issued upon a certificate of the Court of Appeal. His opinion as to the mode in which the certificate should be dealt with, and which is apparently the one which the Court of Appeal has adopted, is stated as follows, p. 186: After quoting section 44 of the Appeal Act he proceeds: "That is, I take it, that the original judgment shall be in effect corrected by the judgment of the Court of Appeal by the proper officer, whose duty it is to make the entries; and that, upon that original decree of the Court of Chancery, so corrected by the judgment in Appeal, the writ of *fi. fa.* may issue." This not having been done, he held the execution irregular. Before the execution issued, however, in that case the certificate of the Court of Appeal had been actually entered in the judgment book of the Chancery Division, but this very material fact does not appear to have been brought to the attention of the learned Master in Chambers. Subsequently, the decision of the Master in Chambers was affirmed by the Divisional Court of the Chancery Division, upon the ground that the writ had issued prematurely, but the Court gave no decision as to the other point of practice. There can be little doubt, however, that if it had been necessary to express any opinion on the point, that the Divisional Court, as then constituted, would have pronounced in favour of continuing the old Chancery practice of making the certificates of the Court of Appeal an order of the Chancery Division.

In June, 1882, however, the question again came up before the Divisional Court of the Chancery Division then constituted by Wilson, C. J., and Ferguson, J., in *Norvall* v. *Canada S. R. W. Co.*, 9 P. R. 339, and although no express decision was arrived at by the Court on the point of practice we have under consideration, Wilson, C.J., thus referred to it: "We know the practice is to make these certificates orders of the Court. Why that is so, although the practice has long existed, I do not know. I can understand a submission to arbitration, or a judge's order, when it was the practice, being made an order or rule of Court, but I do not understand why the orders, decree, or judgment of a Superior Court, having cognizance of the cause, and

the power to dispose of the cause as it pleases, within the rules of jndicial discretion, and which can modify or amend the proceedings as they may think right, and can direct the Court below to proceed as may be ordered, should require to have their decree and judgments made proceedings in the cause in the Court below. They are so by mandate of a superior authority, *and they do not require the adoption of the Court below* before they can be acted upon; and proceedings in appeal are by statute a step in the cause."

In *St. John* v. *Rykert*, 3 C. L. T. 121, Patterson, J. A., said: "I am not aware of any reason or necessity for making the certificate an order of the Court of Chancery, or that that proceeding is attended with any particular effect. I understand the decision to be a judgment in the cause, which should be acted on in the same way, and by the same machinery, as an order made on rehearing in the Court of Chancery itself. The certificate is not from this Court to the Court below; it is from the Registrar of this Court to the officer of the Court below, who is to act upon it in the exercise of his ordinary ministerial functions."

It is strange that so simple a question could not have been settled without so many contrarient opinions. According to our note of the decision ot the Court of Appeal in *Lowson* v. *Canada Insurance Co. ante*, p. 293, that Court has determined that "the proper way of enforcing the judgment of the Court of Appeal is to have the judgment of the Court below amended if necessary according to the judgment in appeal, and when amended to issue process thereon."

Now, as we have already intimated, we do not think this is a very satisfactory conclusion, because it seems to contemplate the necessity of a physical alteration of the judgment of the Court below, against making which there are some very obvious objections. In the first place, the statute does not require it; and, secondly, the judgment of the Court of Appeal not being final, it might lead to serious difficulties in practice. The same practice to be pursued in regard to certificates of the Court of Appeal, is also prescribed by the Supreme Court Act with regard to certificates of the Supreme Court. Let us suppose a case where the action is dismissed in the High Court, and upon appeal the judgment is reversed, and relief granted Now, a judgment of dismissal is a very short affair comprised in about two folios, but a judgment granting relief, may extend to some ten or twelve or more folios. If the judgment entered in the judgment book is to be struck out and the judgment granting relief inserted, that alone might be very difficult to do; but it may afterwards happen that the case is carried to the Supreme Court where the original judgment may be affirmed and the judgment in appeal reversed, or it may be varied, which would involve a further physical alteration of the books. If, again, an appeal to the Privy Council be had, and the same process has to be pursued with the certificate of its judgment, it is quite possible to conceive that the judgment books would in time, in some places present a rather curious spectacle. The objections to making physical alterations in existing documents was considered by Fry, J., in *Fox* v. *Bearblock*, 45 L. T. N. S., 470. The application before him was to make a physical alteration in a Chief Clerk's certificate by striking out certain passages, casting doubt on the applicant's legitimacy. In his judgment Fry, J., says: "I have caused inquiries to be made, not only of my own chief clerks, but of the chief clerks of the Master of the Rolls, and the Vice Chancellors, and I find that, with the exception of one or two cases in which one chief clerk of one of the Vice-Chancellors has made alterations in the certificate, the uniform practice has been not to vary the actual certificate prepared by the chief clerk. In my judgment the practice is right and proper, because I think that anything like tampering with existing documents is a practice to be disapproved of and discouraged. In the next place, the alterations

which we often directed in the certificate are of that description that it would be difficult to make them on the original certificate." Sir Geo. Jessel, M. R., on appeal (46 L. T. N. S. 145), held that Fry, J., was correct in his statement of the practice, and that "a certificate is no more varied than a decree ordered to be varied is varied by touching the actual writing." We may add, moreover, that it never has been the practice in Chancery where a decree was varied on rehearing, to make any physical alteration in the original decree. From what we have said, therefore, we think it is a plain departure from well-established practice to make any physical alteration in the judgments of the Court below, and a practice the introduction of which is very much to be deprecated. All that was done with a decree on re-hearing, to which Patterson, J. A., very properly compares a judgment of the Court of Appeal, was to enter it in the decree book without making any physical alteration in the original decree, or the entry thereof, and this, we think, is all that should be done with a certificate of the Court of Appeal, or of the Supreme Court. As soon as the certificate of the appellate Court is entered in the judgment book of the Court below, such certificate, *ipso facto*, by force of the statute, becomes a judgment of the Court below, and may be enforced as any other judgment. We have referred to this matter at some length, because if the judgment of the Court of Appeal is to be understood as authorising and requiring physical alterations to be made in the records of the Courts below, we think it a matter that is of some importance, and deserving further consideration before it is put in practice. Considering the diversities of opinion which have prevailed, we are inclined to think a rule of Court should be passed definitely settling the practice to be pursued, and the course suggested by Patterson, J. A., in *St. John* v. *Rykert*, is, we think, the one that should be adopted by the Court.

SIR H. GIFFARD ON THE NEW ENGLISH RULES OF 1883.

In the English House of Commons on 11th August last, in the debate on the motion of Sir R. Cross—"That an humble address be presented to Her Majesty, praying that the Rules of the Supreme Court of Judicature, 1883, may be amended," Sir H. Giffard, after referring to petitions from a Committee of the Bar and the Law Society of Yorkshire, which he held in his hand, and upon which the motion was founded, and to the fact that the Government had not framed the rules, or incurred responsibility respecting them, said:

"The coming law which had been drawn up by the Rule Committee of the Judges, if not at once challenged, would soon have the force of a statute, and the only mode in which it could be altered afterwards would be by special Act of Parliament. He hoped that since these rules had been published hon. members had taken the trouble to ascertain for themselves what was the character of this new code of law—for such it actually was—which was rapidly becoming a statute, and which would shortly be binding upon all Her Majesty's subjects. The rules had been published in the form of a bulky volume. Rules of such bulk, and involving such important and numerous alterations of the existing law should not be allowed to become law without full and careful consideration. . . . The power that had been given to the judges by the statute under which they had acted was to frame rules for the regulation of the practice and procedure of the Court, and it was declared that if the rules so drawn up by them should remain unchallenged upon the table of the House for 40 days they should have the force of a statute—the only mode of challenging them being an address to Her Majesty praying that they might be amended. The rules which had been framed by the Rule Committee of the Judges, with their appendices, formed a volume of 417 pages, and the volume comprehended a great variety of matters. . . . These rules affected not merely the practice of the Courts in its popular sense, but in the widest sense, important political rights of the public. . . . . It was proposed by Appendix O. to repeal 22 sets of rules which were existing Acts of Parliament, setting forth

the extent and nature of the Acts to be repealed, and unless anybody waded through the whole of this volume he would find it impossible to understand the exact nature of the vast alteration in our whole system of law which these rules proposed to effect. It was not too much to say that by these rules our whole existing code of legal procedure, dating from 1852 downwards, was to be repealed. This was a very important matter, because every change in our legal procedure involved vast expense to the suitor, and, indeed, Baron Martin had once observed that every set of new Rules of Procedure cost the country some three million sterling in litigation.

"The way in which the alteration of the course of procedure was effected was unfortunate, because in a great number of instances where an existing rule was repealed it was re-enacted with what appeared at first sight to be a mere verbal alteration, which, however, on careful examination turned out to be an important and material change, and which, in some instances, gave an entirely new effect to the rule. . . ." Deprecating the haste with which they had been pressed upon the House late in the Session, Sir H. Giffard continued: "He was receiving letters every day from all parts of the country, pointing out difficulties that would arise under these rules, and it was because he could not bring these details before the House at this period of the Session that he asked that the consideration of the rules should be postponed until next Session. The whole tone of these rules tended to make Her Majesty's judges absolute despots in the Courts of Law. . . Doubtless, it had been said that it was the duty of a good judge to increase and enlarge his jurisdiction, but in his humble opinion that was a very immoral view to take of the duty of a judge. Certainly, in the present instance the judges had done their best to increase and enlarge their jurisdiction, because in almost every case in which a question could arise under these rules the judge was to have the power of deciding it summarily. In these circumstances how was that independence of the Bar, which it was so necessary for the good of the public at large should be maintained, to be preserved if counsel were to be met at every turn by the exercise of the discretion of the judge, who was to have the power in every case of punishing by the imposition of costs anything of which he did not approve? On every point, with regard to which parties had hitherto been entitled to an option, the opinion of a judge was now to be absolute. With all deference to these learned personages, he must point out that after all they were only mortal men, and as such, were liable to error in some cases, and that it would therefore be better for themselves as well as for the public that they should not have this despotic power conferred upon them. He would only refer to one example of what the judges had done in the exercise of their power of making those rules. By an Act known as Sir H. Keating's Act, no defence was permitted to be raised in certain circumstances in an action upon a bill of exchange, and the judges by these rules had by a stroke of the pen simply repealed that Act. They did not say in terms that the Act should be repealed—that would have been too scandalous, but they said that after the publication of these rules no writ under Sir H. Keating's Act should issue. He did not think that under the powers conferred upon them by the Act they were authorized to repeal Acts of Parliament in this summary fashion. What would have been thought if they had taken upon themselves to order that after the publication of these rules no writ of *habeas corpus* should be issued? And yet if they had the power to make a rule in one case they equally had the power to make it in the other . . . . No secret was made of the dislike of the judges for trial by jury. He had often expressed his preference for the verdict of a good special jury to the finding of the judge. No doubt barristers who practised on what used to be called the other side of Westminster Hall might take a different view. The judges had no power to interfere with the verdict of a jury, and the tendency to amplify the jurisdiction of the judge in that respect had of late received a check. It was a very dangerous thing to leave it to the discretion of a judge what cases he should try himself, and what cases he should remit to a jury. The only exceptions to that discretion were specified in Order 36, Rule 2, and they were actions for slander, libel, false imprisonment, sedition, and breach of promise of marriage. In these cases either plaintiff or defendant might, by notice to the other side, require the trial to be before a jury. In another class of actions, on special application, a jury trial might be ordered. That was a most undesirable system, and unless people were alive to

their rights, trial by jury, the principle of trial by jury, might be allowed to disappear. No doubt a jury was given on special application, but such applications entailed costs and repeated visits to the solicitor, unless a man was willing to forego his rights. Those changes were not within the fair limits of procedure—they touched the principles of the law themselves. He did not believe either that the choice of actions for jury trial was a good one. The right should above all be maintained in cases where a man's character and reputation were at stake, as in actions of fraud, actions against directors of companies, actions on bills of exchange, when there might be a good defence of conditional acceptance and conditions not fulfilled.

"Then there was the question of discovery. Under the new system the enlarged right of discovery had been one of the most valuable changes ever effected in the law. But under the new rules they could have no discovery unless the party seeking it deposited £5, and a further payment each time after the first, that he required discovery. Such payments pressed very hard upon the poor suitor, who might be called upon to pay £20 before he could obtain his rights. Then the rules tampered with the laws of evidence. The judges had no power to alter the laws of evidence which did not belong to procedure, but were part of the common law. The judges were to have absolutely despotic rights over the cross-examination of witnesses. By Order 36, Rule 38, a judge might disallow any question which he thought to be vexatious or irrelevant. Could such a rule be said to be only declaratory of the common law? If it were there was no need for it at all; if not, it was a dangerous innovation, and altogether *ultra vires*. Practically there would be no appeal from the decision of the judge in such a case, as the Court of Appeal would decline in almost all cases to interfere with the discretion of the judge who had the witnesses before him. The power of the advocate was thus unduly limited in a manner which might tell unjustly against the interests of suitors. No doubt an advocate might abuse his power, but there were other checks upon such abuse. Besides the judge could not always estimate the relevancy of a question, as counsel was not bound to disclose all that was in his brief. In one case a woman was questioned as to her having borne an illegitimate child eighteen years before the trial. Such a question under the new rules would certainly be disallowed Yet that question led subsequently to the conviction of the woman for perjury.

"Then there was a great extension of the power under Order 14 of the Rules of 1875, to obtain summary judgment in cases where there was no defence. That order was intended to be limited to demands for liquidated sums of money; but now that power was extended to actions for the recovery of land. So important a change in the law ought not to be made in a body of rules of procedure, but, if at all only by express enactment after debate.

"Then in what was called third party proceedings, the rules gave the judges despotic power. Under Rule 16, Orders 48, 49 and 52, a third party might, on receiving notice, be absolutely precluded from appearing on the trial.

"There were other rules dealing with the jurisdiction of the County Courts. Many attempts had been made in that House to extend the jurisdiction of those Courts, and the attempts had failed. Now, it was extended indirectly. In cases where there was concurrent jurisdiction the judge had the power, if the action was brought in a Superior Court, of allowing only those costs which would have been incurred if the action had been brought in a County Court. Such a change ought only to be effected by express enactments. With respect to the rules generally, both branches of the profession asked for further enquiry and examination.

"He had petitions for inquiry from the Incorporated Law Society, from the Yorkshire Law Society, and from the recently appointed Bar Committee. Those rules had been settled in secret. The Benchers of Lincoln's-Inn—a body which he feared enjoyed no great popularity—had asked for a copy of them, which the Lord Chancellor had courteously but firmly refused. A similar application on behalf of the Bar Committee had met with a like response. If the House had ever contemplated that a committee of judges—not the whole Bench—would have framed such an enormous body of rules, introducing such momentous changes, it would never have given them the power to do so. It was the Act of 1875 which delegated such vast powers to a small body of judges. He was glad to admit that the Act of 1873, which was the work of a Liberal Government, did not give

such wide powers to a committee of the Bench. He hoped that the House would not at once give its sanction to the rules, and begged to move—That an address be presented to Her Majesty, praying that the Rules of the Supreme Court of Judicature, 1883, may be annulled."

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

IN THE FIRST DIVISION COURT OF THE COUNTY OF YORK.

PHŒNIX MUTUAL INSURANCE COMPANY v. DEANS.

Mutual Insurance Company—Winding up proceedings—Qualification of directors—Assessment.

An order for winding up under 41 Vict. (Ont.) cap. 5, having been taken out to wind up a Mutual Fire Insurance Company,

Held, that the validity of these proceedings could not be questioned in a collateral proceeding, e.g. in a suit upon one of the undertakings at the instance of the liquidator.

The qualification of the directors being questioned,

Held, that they were qualified, and that a director could qualify upon a policy covering partnership property, as each partner had an insurable interest to the full extent of the value of the firm's stock-in-trade.

Quære, whether the qualification of the directors could be questioned, after a resolution of contributories had conferred express powers to levy assessments on the *Board of Directors*, and whether an assessment by a *de facto* board would not suffice.

The assessment was for the whole of all balances existing upon all undertakings held by the Company.

Held, proportionate and valid.

Held, that previous irregular assessments would not invalidate the final assessment if the effect of irregularity would not decrease the amount called for by the final assessment.

[Toronto. Sept. 5, 1883.

The facts of the case fully appear in the judgment of

MCDOUGALL, J. J.—This is an action brought by the Phœnix Mutual Insurance Company—a Company incorporated under the provisions of R. S. O., cap. 161, and having its head office in Toronto—against the defendant to recover $34.12 upon an undertaking given by the defendant, when he effected an insurance in the plaintiff company.

It appears from the evidence adduced at the trial that the plaintiff company is being wound up by proceedings taken under the provisions of 41 Vict., cap. 5, Ont.; and an order dated 3rd March, 1882, directing the winding up of the company, was proved and filed.

It appears that after the granting of the order in question, a special general meeting of the members of the company was held, pursuant to notice, on 21st March, 1882, at which meeting a liquidator, Mr. O. R. Peck, was duly appointed (see 41 Vict., Ont., cap. 8, sec. 8, sub-sec. 4). Certain other resolutions were passed at the same general meeting, amongst others one, conferring upon the directors certain limited powers pursuant to sec. 8, sub-sec. 6 of the Act, which resolution is in following words :—Moved by John Downey, seconded by Charles Nelson, "That, notwithstanding the appointment of a liquidator, the powers of the Board of Directors under secs. Nos. 27, 47, 56, and 63 of the Mutual Insurance Act statutes, Ontario, cap. 161, shall be continued."

Acting, it is alleged, under the powers conferred by this resolution, the directors at a subsequent board meeting held for that purpose, (and at the request of the liquidator) made a general assessment upon all the undertakings and premium notes, held by the company, which assessment, it appears from the evidence, was a call for the entire balance outstanding upon each and every premium note and undertaking in the hands of the company, at the date of such assessment, 21st April, 1882, and amongst the undertakings so assessed was the undertaking signed by the defendant. This assessment not having been paid by the defendant and others, the liquidator has commenced a number of actions in the First Division Court of the County of York in the name of the plaintiff company (see sec. 9, sub-sec. 1 of the Winding up Act) to recover the same.

The principal objections may, I think, be summarized as the following :

1. That the provisions of the Winding up Act do not apply to this Insurance Company, because the plaintiff company is virtually, if not actually, insolvent. The Act, it is urged, is only intended to apply to the case of a solvent

company desiring to wind up its affairs and withdraw from business.

2. That the company, even if within the Act, or if treated as levying this assessment under their statutory powers, was not *sui juris* at the date of the assessment in question, 21st April, 1882, as it did not possess a *de jure* Board of Directors, and that the assessment so levied is therefore simply nugatory and void.

3. If the assessment is properly and legally levied—under the company's statutory powers, or otherwise—the assessment is itself invalid, because it is not an assessment upon the premium notes and undertakings "in proportion to the amount of the said notes or undertakings" (R. S. O. cap. 161, sec. 50); that the resolution directing the same is irregular and informal, and does not comply with the statute in that behalf; that prior assessments of the company—notably those of the 11th November and 16th December, 1881—were also irregular and invalid, and the premium notes and undertakings assessed under such former invalid assessments are not included in the assessment in question—in other words, they are not re-assessed, and therefore, the present assessment is hopelessly and incurably defective, even if a general assessment of all balances unpaid upon all premium notes and undertakings could under all the circumstances of the case be sustained.

As to the first point, that the provisions of the Winding up Act do not apply, I do not think I need dwell long upon this objection. That is an objection which I think should be taken in the original proceedings, instituted for the purpose of winding up the company. The Winding up Act, by sect. 27, gives the right of appeal from any order of the County Judge to the Court of Appeal or one of its judges, which right would of course extend to the initial winding up order equally with any other. It has already been held by the Court of Appeal that insurance companies, incorporated under Provincial statutes, fall within the classes of joint stock companies affected or intended to be affected by the Winding up Act, and that too, notwithstanding other statutory provisions, may give special powers to the Court of Chancery to deal with the Government deposit of insurance companies: *Re Union Fire Insurance Co.* 7 App. R. 783. It appears also from the winding up order obtained in the case of the present company, that the company as such was represented by counsel upon the application of the petitioners, for the order in question, before the County Judge, and as the defendant is a member of the company I think he cannot be heard to attack the validity of the order in this collateral proceeding, he being deemed in law to be a party to the obtaining of it. Any question of lack of power in the judge to grant the order, or of the peculiar condition of the company's affairs, taking the case out of the operation of the Act, would be questions to be settled by appeal to the proper tribunal. Sitting as a judge of first instance, and with this order unreversed and unappealed against, I must assume that the proceedings leading to its issue were regular, and am only concerned in the regularity and validity of the subsequent steps alleged to have been taken under the Winding up Act, whereby it is claimed that this defendant has become liable to pay the amount of his undertaking: *Upton* v. *Hansborough*, 3 Bissel N.Y. 426.

The second objection is more formidable, and will require closer consideration.

The Winding up Act, by sect. 8, sub.-sect. 1, points out the consequences of proceedings to wind up: "The company shall, from the date of the commencement of such winding up, cease to carry on its business except in so far as may be required for the beneficial winding up thereof . . . . the corporate state and the corporate powers of the company shall, notwithstanding it may be otherwise provided by the Act, charter, or instrument of incorporation, continue until the affairs of the company are wound up."

Sub-sect. 6 enacts, "Upon the appointment of liquidators all the powers of the directors shall cease except in so far as the company, in general meeting, or the liquidators may sanction the continuance of such powers."

In this case the company, at a general meeting of its members, subsequent to the winding up order, expressly sanctioned the continuance of certain powers to the directors, amongst others the power to levy assessments under sec. 47 of R. S. O. cap. 161; and the assessment sued for in this action is an assessment levied by the directors pursuant to these express powers so conferred upon them. But it is contended that on the 21st April, 1882, (the date of the assessment), or even at the date of the general

meeting, 21st March, 1882, when these special powers were conferred by the company upon the directors, or indeed for some time prior to the date of the order for winding up (3rd March, 1882,) no valid board of qualified directors existed; and it is urged that this fact, if true, renders all proceedings subsequently taken by the so-called directors, or the *de facto* board, absolutely nugatory and void.

Now, what are the facts on this point established by evidence?

The names of those gentlemen who were present, calling themselves directors, on the 21st April, 1882, and who passed the resolution authorizing the assessment disputed, were Messrs. John J. Withrow, Thos. Mara, Wm. Myles, and C. H. Nelson. Of these Mr. Mara was undoubtedly qualified at the date of his election, and up to the 1st of April, 1882, when, by an entry on the books of the company of that date, said to be in the hand-writing of an assistant book-keeper of the company, his policy is marked cancelled. He appears to have paid up his premium note in full, and his policy would not expire by effluxion of time till 15th of December, 1882, therefore, the question of his qualification turns wholly upon the effect of the alleged cancellation of his policy.

Mr. Myles is in a somewhat similar position, he having been duly qualified at the date of his election. He had paid his premiums in full, and his two policies would not expire until June, 1882, but both were marked cancelled in the same assistant book-keeper's handwriting, in January, 1882, the latest entry of that fact being on January 23, 1883. To deal with the cases of these two gentlemen first:

They were both duly qualified at the date of their election as directors, had paid their premium notes in full, their policies were current for a period long subsequent to the date 21st April, 1882, when they purported to act as directors and levy the disputed assessment. We do not find any minute or resolution of the Board of Directors directing the cancellation of their policies, and the liquidator, Mr. Peck, (who had formerly been the inspector of the company) states that the entries of the alleged cancellation are in the hand-writing of Mr. Lightbourne, an assistant book-keeper of the company. In Mr. Myles' case his policies were so marked cancelled, one on 3rd of January, 1882, and the other on 23rd of January, 1882, in Lightbourne's handwriting, yet Mr. Myles appears to have continued to act as a director, for his name appears in the list of those present (though apparently erased) at a Board meeting on 28th of February, 1882, (after the alleged cancellation), a meeting held apparently just before the annual meeting of the company; the minutes of that meeting appear to be signed by him. Now it is quite clear that no cancellation of Mr. Myles' policies would be of any effect without his consent, he having paid his premium notes in full, unless the company duly notified him and made a return to him of a proper proportion of his premium: R. S. O. cap. 161, secs. 31 and 44. Neither Mr. Myles nor Mr. Lightbourne were called by the defendant to explain the so-called cancellation. Upon the evidence before me I must therefore hold Mr. Myles a duly qualified director at the date of the assessment.

Mr. Mara's case is slightly different, for his policy does not purport to be cancelled until after the liquidation proceedings had been instituted, and when called himself as a witness he says he desired his policy cancelled but that he took no steps to procure its cancellation except to speak to a Mr. Brandon, a local agent of the company at Toronto, to get it done, as he desired to effect insurance on the property covered by the Phœnix policy in some other insurance company. Now the cancellation of a risk at the option of the company under sec. 43 of the Mutual Act, and the cancellation of a policy at the instance of a member of the company under sect. 31 of the same Act, appear to me to be quite different things. Cancellation under sect. 44 would *doubtless* require the sanction or action of the directors, but a cancellation under sect. 31, at the request of a member, requires the express assent of the directors. Now all the powers of the directors had ceased to exist by virtue of the winding up proceedings, except the powers contained in secs. 27, 47, 56 and 63, which had been expressly continued to them by the resolution of the contributories at their special general meeting of March 21st, 1882. The Board then had *as such* no power to concur in any proposed cancellation under either secs. 31 or 44, unless indeed they were expressly requested to exercise these powers by the liquidator to that end; for it would appear under sec. 8, sub-sec. 6 of the Winding up Act, (41

Vict. (Ont.) cap. 5), that the liquidator could sanction the continuance of any of their former powers even if such powers were not continued by any resolution passed at a general meeting. I must therefore hold that Mr. Mara was a duly qualified director, on the 21st April, 1882, when the disputed assessment was levied.

The qualification of Mr. C. H. Nelson, another director present at the meeting of 21st April, is also impeached. The facts of Mr. Nelson's position, as detailed in evidence, would appear to be as follows: He was a member of the firm of H. A. Nelson & Sons. At the date of his election to the Board (22nd February, 1881), the firm of H. A. Nelson & Sons had policies in existence in the company, one No. 4717, dated 2nd March, 1880, for $1,000 for one year; a second, No. 5455, dated June 28, 1880, for $1,000 for one year; and on the 25th May, 1881, Mr. C. H. Nelson took out in his own name a policy, No. 7110 for $1,000 for three years.

It was strenuously argued by Mr. Osler, that as the only qualification possessed by Mr. Nelson at the date of his election to the Board, was his interest in the two policies issued to his business firm, amounting to $2,000, he was not an insurer within section 14 of the Mutual Act to the amount of $800 at least; and he further argued that if it could be implied or inferred that Mr. Nelson had an interest in these policies to the extent of $800 at the date of his election, one of these policies expired on the 2nd of March, 1881, and that between that date and the 25th May, 1881, when Mr. Nelson took a policy in his own name for $1,000, the only qualification he possessed would be his interest as a member of the firm of H. A. Nelson & Son in policy No. 5455 for $1,000, this policy continuing in force until 28th June, 1881; that it would be too violent a presumption to assume that his interest in a policy for $1,000, held by a firm (admittedly composed of several partners), would amount to $800 at least, and that Mr. Nelson had therefore ceased to hold the necessary qualification, and if so *de facto* had ceased to be a director.

There are, perhaps, three questions in view in considering this objection.

1. Can a director qualify upon a partnership policy at all?

2. Assuming this answered in the affirmative, must not the policy in that case be for an amount sufficiently large that on a loss, if the amount were divided amongst the partners in the proportions of their respective shares according to their articles of partnership, the partner elected a director would be entitled to at least $800 for his share. Or, in other words, must the director have an absolute individual interest in the policy to the extent of $800.

3. Can a person not possessing the necessary qualification at the date of his election qualify himself after his election by becoming an insurer for $800?

The words of section 14 of the statute are: "The directors shall be members of the company and insurers therein, for the time they hold office to the amount of $800 at least."

Now, there is no doubt but that partners insuring partnership stock would be insurers, and section 8 of the Mutual Act says that the several original subscribers, "and all other persons thereafter effecting insurances therein, shall become *members* of the said company." So that partners are both insurers and members of the company. Mr. Justice Lindley in his work on Partnership quotes as one of the definitions of partnership the following: Where two or more persons join money, goods, or labour, or all three together, and agree to give each other a common claim upon such joint stock, this is partnership: (Lindley on Partnership, pp. 8. Citing Inst. of Nat. Law. Book 1, c. 13, par. 9).

The interest of each partner in the assets of the firm is not a title to any aliquot part, as a-half a-fourth. Each partner being liable *in solido* for the engagements of the partnership has a right which is termed his equity to have the firm assets applied in the first instance to the payment of the firm debts—an equity through the instrumentality of which the partnership creditors have a priority over separate creditors to be paid out of the partnership funds. The interest of a partner is therefore only such a proportion of the capital and profits, as by the original articles of partnership or agreement he may appear to be entitled to receive after all the debts are paid and the affairs of the concern liquidated and wound up. It is plain, then, that each partner has an insurable interest in the entire stock, and on receipt of insurance upon a loss, must account therefore to the partnership: *Manhattan* v. *Webster*, 59 Penn. 227; *Groves* v. *Boston Marine Insurance Co.*, 2 Crouch 419; *Page* v. *Fry*, 2 B. and P. 240; *Murray* v. *Colum-*

bia Insurance Co., 11 Johns. 302; *Lawrence* v. *Sebor*, 2 Cains 203.

If this view is correct, any member of a firm, where the firm held a policy for $800 or upwards, would be interested in the sense of possessing an insurable interest in the entire amount of the policy, and if for the purposes of effecting an insurance he possessed an insurable interest to the extent of $800, though the policy covered partnership property only, he would be, in my opinion, an insurer to the amount of $800 at least within the meaning of section 14 of the Mutual Act.

But should this view not be correct, Mr. Nelson at the date of the levying the assessment in question held a policy in his own name for $1,000, and thus, while acting as a director in the premises was, as a fact, possessed of the necessary qualification in his individual right. Section 14 does not say that a member is ineligible for election who does not possess the necessary qualification at the date of his election, but that he is to possess the qualification during the time he holds office. Mr. Nelson was a member of the company, and whatever doubt may have existed as to his qualification to serve as a director was removed by his taking out the policy of 25th May, 1881. No steps had been taken to declare a vacancy in the Board, and in a case like this if a *de facto* Board is found acting—and acting in this case under a direct resolution of the contributories, or members of the company—upon a scrutiny of the qualification of the directors, if it appears that at the date of performing the ministerial act complained of, they were, in fact, duly qualified, I do not think a Court of Equity and good conscience would be astute in finding technical reasons for declaring void the acts of such a Board, or decide hastily to render nugatory the acts of such a Board in their efforts, in good faith, to realise the assets of the concern for the benefit of their creditors.

It is not necessary to the decision of this case to go so far, by reason of the conclusions I have hereinbefore expressed, but were it necessary to the decision of the case I should feel inclined to hold that any *member* of the company elected to the position of a director onbeing notified of that fact, could immediately qualify himself before entering upon his duties, by taking out a policy for the required amount, did he not hold sufficient insurance at the date of his election. For the reasons expressed I hold that Mr. C. H. Nelson was a duly qualified director at the date of levying the disputed assessment.

The effect of my view as to the qualifications of the foregoing three gentlemen to act as directors is to hold that on the 21st April, 1882, there was a duly qualified quorum of the Board of Directors; and this conclusion renders it unnecessary to consider the position of Mr. J. J. Withrow, who also acted on this occasion. I am strongly of the opinion, in view of all of the facts proved in evidence in his case, that it is more than doubtful if the cancellation of the policies in favour of his firm was regular and effective, and that as he continued to act as a director on the 21st April, and the *de facto* Board were duly authorized by the resolution of 21st of March, 1882, by the members of the company to perform the very acts now complained of, the defendant should not now be allowed to set up the defence that these acts are void because the agents nominated by himself directing them to to be done are not *de jure* directors: *Appleton Mutual Fire Ins. Co.* v. *Tessor*, 5 Allan (Mass.) 446; *Wyld* v. *Ames*, par. 286; *Re County Life Association*, L. R. 5, Ch. 288; *Re Canada Land Co.*, L. R. 14, Ch. D. 660; Brice on Ultra Vires.

As to the objection that there must be a full Board of at least five directors under sec. 4, that section was complied with because more than five directors were originally elected, but it does not follow that because certain members of the Board ceased to be qualified, and their colleagues failed to fill up the vacancies, that the corporation is thereby dissolved or the Board incapable of acting. Section 22 constitutes three directors a quorum, and gives them power to transact all business in connection with the company: *Thames Co.* v. *Rose*, 4 M. & G. 552.

There being then in my opinion a qualified board of directors capable of transacting business under the limited powers conferred by the resolution of 21st of March, 1882, and capable of exercising powers sanctioned by the liquidators: sec. 8, sub-sec. 6, Winding up Act, I must now consider the validity of the assessment levied by them.

[The learned judge then proceeded to consider the financial standing of the company, and showed that taking into account the difficulty of collection, the assets of the company are proved to be less than the liabilities, and as sufficient

losses occurred during the currency of the undertakings an assessment of all outstanding balances upon premium notes would be proportionate. He then proceeded to deal with the objection of Mr. Osler, that two former assessments were irregular, and that as a consequence the undertakings assessed in such former assessments not being included in the final assessments rendered the final one void. He held that there was not sufficient evidence of any irregularity, and that the objection is not open to the defendant, as he was not included in such former assessments, and that it appeared from the evidence that even if such undertakings, assessed in the alleged irregular assessments, had been included in the final assessment, the final assessment would still have required the calling in of all outstanding balances on all undertakings, and that therefore the defendant had not been prejudiced by such alleged irregularity. In any event, he would have had to pay the full amount of his undertaking. No fraud was alleged, and no mistake at all affecting the fairness of the assessment had been established, and held that an assessment is not invalidated by small errors made in good faith, and which have not produced damage to the member complaining, citing *Marblehead Mutual Insurance Co.* v. *Underwood*, 3 Gray (Mass) 210; *Long Pond Mutual* v. *Houghton*, 6 Gray 77, and concluded his judgment as follows :]

I have discussed this case at considerable length, because the conclusions which I have come to will probably affect the result in a number of cases yet remaining to be tried, but after the most careful consideration of all the objections argued, and of the evidence, and after a perusal of all the cases to which I have been referred by the able counsel concerned, I am of the opinion that the objections taken ought not to be allowed to prevail, and that the defence therefore fails. I am pressed, too, by another consideration—the chief creditors of this company are members of the company itself—members who have been unfortunate enough to incur fire losses, and who look not unnaturally to their fellow members to abide by their several undertakings, and to submit to any assessment necessary to provide funds for meeting their claims. All the members were in the same boat, and the present creditors might, had not the fates been unpropitious, been the losers to the extent of their undertakings only instead of, in many instances, to the amount of their policies. In a matter, then, like this, which is really a contest between partners, I think it would be unjust and inequitable in the highest degree, except upon the clearest evidence and for the soundest of legal reasons, to hold that any mere technical objections, or slight errors or mistakes should be allowed to prevail, and the efforts to realize the available assets of the company utterly frustrated. It is manifest that even with the utmost prudence, skill and care, a large portion of these assets will not be collected. Should the liquidator be more than usually successful I fear there will be, nevertheless, a considerable deficiency, and that creditors cannot hope to be paid in full. In this case the defendant has failed, in my humble judgment, to make out a defence which will relieve him from the liability he has incurred by subscribing his name to the undertaking sued upon.

There will be judgment for the plaintiffs for $34.12 and costs.

RECENT ENGLISH PRACTICE CASES.

BROWN v. COLLIS.

Imp. J. A. s. 18, 19—Ont. J. A. s. 13—Court of Appeal—Jurisdiction.

[W. N. 83, p. 155.

A judge of first instance cannot send a petition direct to the Court of Appeal without his making any order. The Court of Appeal has no jurisdiction to hear the petition in the first instance, but the case can only be brought before them on appeal after the judge of first instance has decided it.

IN RE LEE AND HEMINGWAY.

Imp. O. 55, r. 1—Ont. r. 428—Discretion as to costs.

Land belonging to persons under disability was taken by a company under the compulsory powers of a special Act. A petition was presented for payment out of the money to persons who had become absolutely entitled. The Act contained no provision for the payment by the company of the costs of such a petition. The petition asked that the company might be ordered to pay the costs.

Held, under the Judicature Act, the Court had a discretion to order the company to pay the costs. *Ex parte Mercer*, L. R. 10 Ch. D. 481 followed.

DANFORD v. MCANULTY.

Imp. O. 19, r. 15—Ont. r. 144—Action for recovery of land—Pleading possession—General principle of construction of Judicature Rules.

[L. R. 8 App Cas. 456.

In an action for the recovery of land a statement of defence alleging that the defendant is in possession operates, by virtue of the above rule, as a denial of the allegations in the plaintiff's statement of claim, and requires the plaintiff to prove them.

The obvious intention of this exceptional rule seems to be to leave the defendant in an action for the recovery of land in the same position substantially as he was before the Judicature Act and Rules, that is to say, entitled to rely on his possession as a sufficient denial of the plaintiff's title and a sufficient answer until the plaintiff had proved his title, and then enabling the defendant to rely on any defence he could prove though he had not pleaded it.

The Judicature Rules are to be construed so as to discover the intention expressed in the rules, and it is not a legitimate ground of construction for the person or persons who drew the rules to say, "We wished and meant to express a particular intention." That is not a legitimate ground upon which to construe any instrument in writing.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

Wilson, C. J.]

MCKNIGHT v. CITY OF TORONTO.

Municipal by-law — Nuisances — Prohibition against keeping swine and cows, validity of.

The defendants passed a by-law pursuant to R. S. O. ch. 174, sect. 466, sub-sect. 17, as amended by 44 Vict. ch. 24, sect. 12, which by-law, by sect. 2, provides that "no person shall keep, nor shall there be kept, within the City of Toronto, any pig or swine, or any piggery."

Held, that the by-law was *ultra vires* as being a general prohibition against the keeping of pigs, and not restricted to cases that might prove to be nuisances.

By sect. 3, sub-sect. 2, the by-law provided that no cows should be kept in any stable, etc., situate at a less distance than forty feet from the nearest dwelling-houses, and where two cows were kept that the stable should be not less than eighty feet from the nearest dwelling-houses.

Held, that it was unnecessary to declare expressly that the keeping of cows within such distances was or might be a nuisance, but that the prohibition was in effect such a declaration; that the distances prescribed were reasonable; and that the by-law as to that was unobjectionable.

Semble, that it was not bad in being so generally expressed that it would restrict the owner from keeping cows within the prescribed distances of his own dwelling-house, and

Held, that this objection not being clear should not at any rate be allowed to prevail in favor of the applicant, whose case was not shewn to be within the terms of the objections.

Read, Q.C., for applicant.

McWilliams, contra.

Cameron J.]

STAR KIDNEY CO. v. GREENWOOD.

Sale of medicinal composition—Representation as to curative properties—Discovery of ingredients.

Action on a promissory note given by the defendant in payment for a quantity of pads made by the plaintiff, and said to possess curative properties when applied to the body. The defence was that the note was obtained by fraud, and that the pads purchased were useless and possessed no healing properties. The defendant demanded production and discovery of the formula, or recipe, from which the pads were made, in order to show that they were valueless, which the plaintiff refused, on the ground that no representation was made as to their ingredients, that the composition was a secret not patented, and that discovery would injure them in their business.

Held, that the defendant was not entitled to the discovery.

Osler, Q.C., for the motion.

Bethune, Q.C., contra.

IN RE CANADA, ATLANTIC, &C., R. CO. AND TOWNSHIP OF CAMBRIDGE.

Municipal Corporation—Railway aid—Debentures—Mandamus.

Held, following the decision of the Supreme Court of Canada in *Re Grand Junction Railway and Peterborough* (not yet reported), that a writ of mandamus to compel the issue of debentures by a Municipal Corporation under a by-law in aid of a railway, will not be granted upon motion, but the applicant must bring his action.

CHANCERY DIVISION.

Divisional Court.] Sept. 12.

CAMPBELL V. MCKERRICKER.

Promise to make a will—Representation—Part performance.

In this case the plaintiff claimed to be entitled to certain land on the ground that his father in his lifetime owned the land, and that in sundry ways his father became indebted to him, and in 1870, in a settlement of accounts between them was found to owe him $540, and that his father then induced him to abstain from enforcing his claim for the said sum, and further, to go on working on the land with him, by representing that he would devise the land to him, the plaintiff, and that after coming to this agreement, his father represented to him that he had devised the land to him (as, indeed, he had), and so induced him to abstain from enforcing his claim for the $540 until now the period of limitations was gone, and also to remain and work on the farm for several years, but that his father had, nevertheless, revoked the former will, by a subsequent one devising the land to the defendant.

Held (reversing the decision of Proudfoot, J.,) that the plaintiff was entitled to the land in question, for there was no sufficient part performance to take the case out of the Statute of Frauds. Such acts of part performance must be done by the party seeking to enforce the contract, and they must be such as to manifest from their nature that there is some contract between the parties touching the land in question. But here the only act of part performance was the execution of the prior will, but that was the act of the person whose estate is sought to be charged, and, moreover, the mere execution of the will does not import a contract, but only indicates a benevolent intention displayed by the testator in the execution of an instrument essentially of a revocable nature.

The statement that the father had represented that he had devised the land to the plaintiff, so as to induce him not to enforce his claim for $540, was not proved, and *quære* whether if it had been it would have entitled the plaintiff to succeed. But different considerations would have arisen if the frame of the action had been on a representation by the father that he had made a will, which being in satisfaction for the wages, he agreed should be irrevocable.

The doctrine of part performance exempting a case from the statute is not encouraged by the trend of modern decisions. The strict boundaries of the law on the subject are fixed by the House of Lords in *Alderson* v. *Maddison*, L R. 8 App. 467, and the decision in this case only adopts the principles laid down in that one.

B. B. Osler, Q.C., *C. Moss*, Q,C., and *N. Mills*, for the appellants.

M. Wilson for the respondent.

Full Court.] [Sept. 15.

WETHERELL V. JONES.

Constitutional law—B. N. A. Act, s. 92, subs. 14 31 Vic., c. 76 Dom.

Held, the Act 31 Vict. c. 76 (Dom.) being an Act to provide for taking evidence in Canada in relation to civil and commercial matters pending before Courts of Justice in any other of Her Majesty's Dominions, or before Foreign Tribunals, is not *ultra vires*, and an order made by Proudfoot, J., under the above statute, for the examination of certain witnesses resident in Ontario under a commission and letters rogatory from the circuit Court of Cook County, Illinois, upheld an appeal.

The provisions of the above statute do not affect the administration of justice in this province within the meaning of B. N. A. Act, sec. 92, subs. 14, by which exclusive juri diction as to the latter is vested in the Provincial Government. For the taking of evidence in this province to be used in civil actions pending in foreign tribunals is of *extra*-provincial pertinence, and not a matter relating to civil rights in the province. The observations of Lord Selborne in *Valin* v. *Langlois*, L. R. 5 App. 120, answe

all contentions to the contrary, viz., "There is nothing [in the B. N. A. Act] to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing Provincial Courts, or to give them new powers as to matters which do not come within the classes of subjects assigned exclusively to the Legislatures of the Provinces."

The line of reasoning in *re Niagara election case*, 29 C. P. approved of.

W. Nesbitt for the appellants.

G. H. Watson contra.

Divisional Court.] Sept. 29.

MARTIN v. MILES.

Right of tenant to redeem mortgage.

The decision of Wilson, C. J. C. P. D. noted *supra*, p. 228-9, reversed so far as he held, that to grant or withhold redemption was a matter of discretion with the Court, and in the exercise of such discretion, withheld redemption.

Held now, the judgment should be for redemption by the plaintiff and with costs of action, if the tender before action was sufficient; if not sufficient, the costs should be added to the mortgagee's debt, except the extra costs occasioned by disputing the right to redeem, which should be deducted from what the plaintiff is to pay; and there should be a reference as to the sufficiency of the tender if the parties failed to agree.

The equity of redemption is an estate in the land, and in all cases where the right to redeem has not been barred by the Statute of Limitation, it exists as a right, and an estate over which the Court has no discretionary power. One will search the English books in vain to find anything upholding the view that the Court exercises discretionary power in granting redemption to a person interested in the equity of redemption.

Arnoldi for the appellant.

Beck for the respondent.

PRACTICE CASES.

Mr. Dalton, Q.C.] [Sept. 3.

HUYCK v. PROCTOR.

Judgment against executors de bonis propriis.

The plaintiff sued upon two promissory notes made by the defendant's testator. To this the defendants pleaded, 1st, that they never were executors; 2nd, *plene administravit*. Issue was joined, and upon the trial a verdict was found for the plaintiff for $703.77. Upon this a judgment was entered for the debt and costs to be levied of the goods of the testator in the hands of the executors if they have so much thereof, and if not then to be levied of the proper goods and chattels of the defendants.

This was a motion to amend the judgment and writs of execution issued pursuant thereto.

Held, that the verdict on the record as framed warranted the judgment entered.

Aylesworth, for the defendants.

Watson, for the plaintiff.

Mr. Dalton, Q.C.] [Sept. 10.

GRAND JUNCTION RY. v. COUNTY OF PETERBORO'.

Staying proceedings where costs of former proceeding unpaid.

In 1879 the Grand Junction Railway obtained from the Court of Queen's Bench a rule for a *mandamus* to enforce the delivery of bonds by the defendants to the amount of $75,000, pursuant to a by-law of the defendants to aid in the construction of the plaintiff's road. On appeal to the Court of Appeal this Rule was discharged, and on appeal to the Supreme Court of Canada the Court of Appeal's judgment was affirmed with costs against the plaintiffs. Since then the road has been completed, but the costs of the above proceeding have not been paid. This present action is brought in the name of the Grand Junction Railway and the Midland Railway to recover the aforesaid sum of $75,000 in money.

Upon motion to stay all proceedings in this action till the costs of the former proceeding shall have been paid:

Held, notwithstanding that new circumstances have arisen, and the proceeding is not the same as the first proceeding, nor grounded upon exactly the same facts, and notwithstanding that the Midland Railway Company are now joined as plaintiffs, the attempt to proceed in this action without first paying the costs of the former action is vexatious, and the order asked for must be made: following *Cobbett* v. *Warner*, L. R. 2 Q. B. 108.

McPhillips, for the plaintiffs.

Marsh, for the defendants.

Armour, J.] [Sept. 11.

MIDDLESEX ELECTION PETITION (DOM.)

WALKER v. ROSS.

Extending time for trial—Discretion of judge—38 Vict. (D.) ch. 10, sect. 2.

An application to extend the time for the trial of the Election Petition. It was conceded on both sides that more than six months had elapsed from the filing of this petition before this application was made.

Held, that the provision of 38 Vict. cap. 10, sect. 2, that the trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with *de die in diem* until the trial is over, unless on application, supported by affidavit, it be shown that the requirements of justice render it necessary that a postponement of the case shall take place, is directory only.

A judge has a discretion and a power to extend the time for proceedings to the trial of the petition, although the six months has expired before he is applied to.

Order made extending the time for six months.

Scott, Q.C., for the petitioner.

Bethune, Q.C., for the respondent.

Chy. Div.] [Sept. 15.

DARLING v. CULLATTON.

Interpleader—Right of sheriff to order—Delay—Discretion.

An interpleader matter. The sheriff seized the goods in question on the 31st of January, 1883, and on the 1st of February was notified of a claim by an assignee of the judgment debtor, (the assignee being an officer employed by the sheriff,) and on the same day the plaintiff's solicitors directed him to sell. The sale took place on the 12th of February, and on the 13th of February the sheriff received the money arising therefrom. On the 26th of February the sheriff informed the plaintiff's solicitors that the solicitors for the assignee forbad him to pay over the proceeds, and on the 2nd of March the plaintiff received a notice from the assignee's solicitors that they were instructed to sue him. On the 5th of March notice was given of the application for an interpleader order. The sheriff retained in his hands the proceeds of the sale, and in his affidavit, filed on the interpleader application, referred to a conversation which he had with the claimant's solicitor, in which the latter told him that the claimant did not propose to claim the goods or interfere with their sale, but would contest the right of the plaintiff to the money arising from the sale, which was to remain in the plaintiff's hands. The sheriff also swore that he related what the claimant's solicitor had said to the plaintiff's solicitor. The sheriff's excuse for his delay, from the 13th of February to the 5th of March, was that he did not understand that it was his duty to take the initiative.

An interpleader order was made by Mr. WINCHESTER, sitting for the Master in Chambers, but was set aside upon appeal to PROUDFOOT, J.

Upon appeal by the plaintiff to the Divisional Court of the Chancery Division:

Held, that the plaintiff sold with the consent of both parties, and did not therefore improperly exercise his own discretion, so that the contest properly arises as to the proceeds of the sale.

Held, that the delay, from the 13th February to the 5th March, no opportunity of trial being lost, was not unreasonable.

Held, that the fact of the claimant being an officer in the employment of the sheriff, made no difference.

Per BOYD, C.—The disposition of the Court is to be more liberal in relieving the plaintiff now than formerly.

Clement, for the sheriff appellant.

Hoyles, for the claimant.

J. A. Paterson, for the execution creditor.

Ferguson, J.] [Sept. 17.

RE CRAIG.

Application under V. and P. Act, (R. S. O. cap. 109) — Order thereon — Subsequent remedy where purchaser fails in his contract.

An order made upon an application under the Vendors' and Purchasers' Act upon the 21st of May, 1883, besides dealing with the title to the land in question, contained a clause directing the purchaser to carry out his contract to purchase forthwith. The purchaser failed to carry out his contract.

On the 17th September, 1883, *A. C. Galt*, for the vendor, moved, on notice, for an order directing the purchaser to pay his purchase money into Court, and in default of his so do

ing within period to be limited by the order, for leave to resell the property.

FERGUSON, J., doubted whether an order, which in fact amounted to a decree for specific performance, could be made under the Act.

A. C. Galt cited the case of *Thompson* v. *Ringer*, 44 L. T. 507, where a bill filed by a purchaser for specific performance, under circumstances similar to the above, was dismissed on the ground that the parties having once applied to the Court under the Act, all questions thereafter arising between them should be brought before the same tribunal on affidavit, without necessitating the expense of an action.

No cause was shown for the purchaser.

FERGUSON, J., followed the case cited, and made an order directing the purchaser to carry out his contract, in obedience to the former order, within two weeks, and in default for the vendor to be at liberty to re-sell, the purchaser to pay the costs of this motion, all costs of the re-sale, and any deficiency arising from the re-sale.

Cameron, J.] [Sept. 17.

WILBY V. THE STANDARD FIRE INS. CO.

Leave to appeal to the Court of Appeal under sect. 38, O. J. A.

On the 7th of September, 1883, the plaintiff applied for leave to appeal from the judgment of the Queen's Bench given on the 30th of June, 1883, discharging his order *nisi* to set aside the verdict entered at the trial.

By sect. 38 of the O. J. A. it is provided that no appeal shall be allowed unless notice is given in the manner prescribed within one month after the judgment complained of, or within such further time as the Court appealed from, or a judge thereof, may allow.

The plaintiff excused his delay by an affidavit in which he stated that he was advised by his solicitor of the judgment of the Court on the 3rd of July, but that he did not see his solicitor till the 20th of August, when he, for the first time, learned that he should have caused notice of appeal to be served within a month of the judgment. The plaintiff further swore that he was advised that the case involved questions of law hitherto undecided, and also that another claim was pending in the Chancery Division which would be affected by the result of this case.

The case was one which the learned judge who tried it considered not wholly free from doubt.

CAMERON, J., *held*, that under the circumstances he was precluded by authority from enlarging the time for appeal, and dismissed the motion with costs, referring to the following cases: *In re New Callao*, L. R. 22 Chy. D. 486; *Craig* v. *Phillips*, L. R. 7 Chy. D. 249; *International Financial Society* v. *City of Moscow Gas Co.* L. R. 7 Chy. D. 241.

Osler, Q.C., for the plaintiff.

W. N. Miller, for the defendant.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

The privilege of counsel and solicitors acting as advocates.—*Irish L. T.*, May 19.

Bills of sale by way of security for payment of money.—*Ib.* June 2.

Contracts on unread conditions.—*Ib.* June 9.

Conditions in restraint of marriage.—*Ib.* June 16, 30, July 7.

Statements by prisoners.—*Ib.* June 23, (from *Justice of the Peace.)*

Betting agents and their principals.—*Ib.* June 30.

Liability for over-holding by under tenants.—*Ib.* July 14.

Employees and dangerous works.—*Ib.* (from *Justice of the Peace.)*

User of dangerous instrumentalities for the protection of property.—*Ib.* July 21, 28.

The right to the custody of children.—*Ib.* Aug. 11, 18, 25.

Common words and phrases—(Require—May—Obvious danger—Lottery—Seaman—Insolvency—Gone east—Fairly merchantable—Abandoned—Lost—Seize—Device—Embezzle—Manual labour—Ecclesiastical purposes—Issue—Children—Common school.) —*Albany L. J.*, June 9.

(Regular passenger trains—Locomotive—Engine—Speed—Front part—Assigns—Trial—Premises—Cribs—Wharfage.)—*Ib.* June 30.

(Lessee—Indorsed—Brought—Commenced—Navigable—Article of manufacture—Debt owing or accruing—Permit—Open—Property—Debtor having a family—Manufacture—Wearing apparel.)—*Ib.* July 7.

Evidence of custom to explain contract—*Ib.* June 16.

Independence of married women.—*Ib.* June 23.

Defaulting purchaser at judicial sale.—*Ib.* June 30.

The presumption of knowledge.—*Ib.* July 7.

FLOTSAM AND JETSAM.

SOMETHING LIKE A CIRCUIT.—The arrangements for the Lord Chief Justice's "American Tour," having, according to a contemporary, at length been "substantially completed by the committee," it is satisfactory to find that the whole undertaking promises to prove a great financial success. It has long, of course, been known in legal circles that the beggarly pay received by the leading lights of the Bench, when taken in comparison with the heavy sums made latterly by their more fortunate rivals of the stage, had led to a tension of feeling on the subject that could only find ultimate relief in some spirited outburst. And the determined and business-like prominence of the Lord Chief Justice at a recent banquet, showed clearly in which way the wind was setting. It is therefore not a matter of surprise to hear that by the engagement of an excellent man of business, Mr. Elliot F. Shepard, Lord Coleridge, and the learned *troupe* who accompany him, have already managed before their arrival in the States, to fill up nearly every one of their dates, down to the very day of their return voyage home again across the Atlantic. It is satisfactory, too, to note that, while business has evidently been the guiding motive of all the arrangements, there will be no lack of recreation for the hard-working luminaries *en route*.

Nor is the Dominion behind-hand in graceful attentions to the hard-working *troupe*. Receptions are offered them freely on all sides. "At Quebec," the report proceeds, "they get a reception *and a dinner*." This is handsome. At Montreal there is a reception, but no dinner. Ottawa also prefers to indicate its hearty cordiality in the same unobtrusive fashion. There is hand-shaking, but nothing more. But Lord Chief Justice Coleridge, Lord Justice Bowen, Mr. Charles Russell, Q.C., and Mr. Ince, Q.C., and the several other distinguished members of the English Bar who make up the clever performing party, are not likely to resent the elimination of the dining element from the tariff of welcome set before them. Even an injudicious sandwich or two might be too much for them, as a glimpse at the rough sketch of their own capital but arduous programme, suffices to show. In fact, a good deal of severe training will be requisite to enable them to get through it at all. Still the programme, as far as can be gathered from the brief details as yet published, appears to have been capitally arranged with a view to securing the patronage of every class of the community, and large takings may be confidently expected.—*Punch*.

JESTING WITH A CHIEF JUSTICE.—Lord Coleridge's speech at the Irving Banquet was not a success. He is not an effective after-dinner orator, and then he needs people to explain their jokes to him. Mr. Toole, for example, was frightfully depressed on discovering this fact—for which neither he nor the company were quite prepared. The "Mammoth Comique" of the old Folly Theatre made an allusion to the Tichborne trial, and playfully suggested that Lord Coleridge not only invited him to a seat allotted to a member of the Bar, when the case was going on, but to their "consultation" together. "How far," said Mr. Toole, in accents full of serio-comic earnestness, "in our consultation, I was able to assist him in his difficult task must ever remain a profound professional secret between us;" an announcement received, as might be expected, with peals of laughter. Everybody saw that "Johnny" was simply giving "the Chief" a "cue" for a witty reply—and the dismay that seized on the company when Lord Coleridge took the great jester *au serieux*, and proceeded with ponderous gravity to give an official and formal denial to the fact that he ever held professional consultation with Mr. Toole on the occasion referred to, was a spectacle never to be forgotten. Mr. Toole is said to have congratulated his friend Irving on having had better luck. "Suppose, Henry," said he on going home, "the Chief had mistaken you for a Comedian."—*Pump Court*.

If the "ball," or cushion-like surface of the top joint of the thumb be examined, it can be seen that in the centre—as, indeed, in the fingers also—is a kind of spiral formed of fine grooves in the skin. The spiral is, however, rarely, if ever, quite perfect—there are irregularities, or places where lines run into each other here and there. Examining both thumbs, it will be seen that they do not exactly match; but the figure on each thumb is the same through life. If the thumbs of any two persons are compared, it will further be found that no two are alike. There may be, and generally is, a "family resemblance" between members of the same family, as in other features; there are also national characteristics; but the individuals differ. All this is better seen by taking "proof impressions" of the thumb. This is easily done by pressing it on a slab covered with a film of printers' ink, and then pressing it on a piece of white paper; or a little aniline dye, Indian ink—almost anything—may be used. The Chinese take advantage of all this to identify their important criminals, at least in some parts of the Empire. We photograph their faces; they take impressions from their thumbs. These are stored away, and if the detinquent should ever again fall into the hands of the police, another impression at once affords the means of comparison. The Chinese say that, considering the alteration made in countenance by hair and beard, and the power many men have of distorting or altering the actual features, etc., their method affords even more certain and easy means of identification than our plan of taking the criminal's portrait. Perhaps we might with advantage take a leaf out of their book.—*World of Wonders*.

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 1883.

During this term the following gentlemen were entered on the books of the Society as students-at-law, namely :—

Graduates—John Murray Clarke, Robert Urquhart Macpherson, George Somerville Wilgress, George Henry Kilmer, Robert Charles Donald, Arthur Freeman Lobb, John Joseph Walsh, Francis Edmund O'Flynn, John Hampden Burnham, William Smith Ormiston, Lyman Lee, John Samuel Campbell, Alfred David Creasor, Henry Smith Osler, Charles Perley Smith, Herbert Hartley Dewart, Duncan Ontario Cameron, Wellington Bartley Willoughby, Alexander Lillie Smith, William Chambers, Edward Cornelius Stanbury Huycke, William Hope Dean, Allan McNabb Denovan, Alexander Fraser, William Ernest Thompson, Alfred Buell Cameron.

Matriculants—Alexander James Boyd, John Wm. Mealy, Robert Sullivan Moss, Arnold Morphy, Thos. R. Ferguson, Robert James McLaughlin, William Henry Campbell, Malcolm Wright.

Junior Class—Wentworth Green, Frank Langster, Daniel Frederick McMartin, Frank Reid, Jonathan Porter, William Woodburn Osborne, George Frederick Bradfield, Charles Downing Fripp, Robert Franklyn Lyle, William Charles Fitzgerald, William Edward Fitzgerald, John Wesly Blair, Alexander Duncan Dickson, William George Munroe, Edward Henderson Ridley, Alexander Purdom, George Chesly Hart, William Henry Lake, Robert Ruddy.

The following gentlemen were called to the Bar, namely :—Messrs. Hugh Archibald McLean, William John Martin, Harry Thorpe Canniff, Henry Carleton Monk, David Haskett Tennent, Robert Peel Echlin, Charles Henderson, Alexander John Snow, Robert Taylor, Frank Howard King, William Armstrong Stratton, Robert Kinross Cowan, Thomas Parker, Daniel K. Cunningham, David Mills.

On and after Monday, October 1st, lectures will be delivered in the Law School as follows: —Senior class, Mondays and Tuesdays. Junior class, Thursdays and Fridays of each week, at 8.45 a.m.

Special Notice.—No candidate for call or certificate of fitness who shall have omitted to leave his petitions and all his papers with the secretary complete on or before the third Saturday preceding the term, as by rules required, shall be called or admitted, except after report upon a petition by him presented, praying special relief on special grounds.

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 1883 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.