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DIARY FOR OCTOBER.

3. Fri.....First edition English Bible printed 1535.
5. Sun.....*17th Sunday after Trinity.*
6. Mon.....County Court and Surrogate Term (except York). Non-jury sitting of County Court (except York).
8. Wed.....Harrison, C. J., sworn in, 1875.
11. Sat.....Guy Carleton, Gov. of Canada, 1774. County Court and Surrogate Term (except York).
12. Sun.....*18th Sunday after Trinity.* Lord Lyndhurst died, 1863.

TORONTO, OCTOBER 1, 1884.

THE case of *Herman Loog* v. *Bean* in the July number of the *Law Reports* which we have noted in our article on recent English decisions, is one of considerable public importance. It establishes that the Court has jurisdiction to grant an injunction to restrain the repetition of slanderous statements affecting trade and property. Injunctions have before been obtained to restrain libels of a like nature, but this is the first precedent for restraining slanders. It is almost to be hoped that the jurisdiction will be extended to other slanders and libels, besides those affecting trade and property. The law of slander and libel has heretofore, as it seems to us, afforded a very inadequate remedy for such injuries. By the time the case is tried and judgment given, the public will have very likely become thoroughly biassed against the unfortunate victim, and have received an impression which it is quite impossible to remove. It will, however, be much more satisfactory, if, as soon as the writ is issued, it is possible to obtain an interim injunction to be subsequently made perpetual, which will effectually clap a 'muzzle on the slanderer's mouth, and once for all upset the libeller's ink-bottle. We can imagine a certain railway company commencing an action for an injunction against a newspaper published not a hundred miles off, and the latter finally stopping its injurious comments in consequence. We commend *Herman Loog* v. *Bean*, and the cases referred to in it, to the notice of the solicitors of the Canada Pacific Railway.

IN a note appended to the case of *Re Bingham and Wrigglesworth*, 5 O. R. 612, which was an application under the Vendors' and Purchasers' Act, R. S. O. c. 109 s. 3, it is stated that the learned judge, in consenting to hear the petition, said that he did not desire to make a precedent in practice under the Act of entertaining petitions on all questions of a like kind, as he thought he foresaw undesirable consequences, if all questions of title were to be settled in this way, where the existence or validity of the contract was not disputed. The question at issue between the parties in that case was the construction of a deed in the chain of title, and we can conceive of no case in which it would be more eminently fit that the summary proceedings pointed out by the Act should be resorted to. Wherever the construction of the instrument affects the rights of third persons who are not before the Court, it is, we presume, open to the Court either to direct an action to be brought or such parties to be notified, but we should imagine without such express direction it would be always safer for the solicitor to resort in the first place to the summary method of the Act before plunging into an action.

Certainly in entertaining an application

for the construction of an instrument, the learned judge was making no new precedent in *Re East Williams*, 26 Gr. 110; *Givins* v. *Daniell*, 27 Gr. 502; *Re Eaton Estate*, 7 P. R. 396, this was done, and we think it would be a matter for regret if there should arise any disposition on the part of the judges to compel proceedings by action, in any case fairly within the scope of the summary procedure of the Vendors' and Purchasers' Act. In *re Eaton estate* it was expressly objected that the Court should not on an application under the Act construe an instrument; but Spragge, C., said that the rule invoked in support of that contention only applied "where executors and trustees apply for advice and direction of the Court, an entirely different thing, and with an entirely different object, from the provisions of the statute under which this application is made. If, in order to see whether a good title can be made, it is necessary to construe a will, or any other instrument, under which a vendor makes title, the Court will do it as it would be done upon an enquiry as to title on a bill for specific performance," and in *In re Burroughs*, L. R. 5 Ch. D. 601. James, L. J., thus expressed himself in regard to the scope and object of the corresponding English statute: "My opinion is, that upon the true construction of this Act of Parliament, whatever could be done in chambers upon a reference as to title under a decree when the contract was established, can be done upon proceedings under this Act, and that what this Act has done is this: it has enabled the parties to dispense with the form of a bill and answer, and at once put themselves in chambers in exactly the same position in which they would have been, and with all the rights, which they would have had under the old form of decree." See also the late case of *Re Barwick*, 5 O. R. 710.

RECENT ENGLISH DECISIONS.

The August numbers of the *Law Reports* comprise 9 App. Cas. pp. 433-594; 26 Ch. D. pp. 433-604; 13 Q. B. D. pp. 197-339; 9 P. D. pp. 121-148.

CONTRACT FOR DELIVERY OF GOODS BY INSTALMENTS—RESCISION OF CONTRACT.

The first case which demands attention is that of *The Mersey Steel and Iron Co.* v. *Naylor*, 9 App. Ca. 434, to which we drew attention *ante* vol. 19 p. 63, when it was before the Court of Appeal. The decision of the Court of Appeal has now been affirmed by the House of Lords.

In this case a contract had been entered into between the plaintiffs and defendants for the delivery to the defendants of a quantity of iron in instalments to be paid for within three days after receipt of each instalment. After two instalments had been delivered, a petition was presented to wind up the plaintiff Company, and the defendants, under advice of their solicitor, refused to make any further payments in respect of the second instalment without the sanction of the Court, which they asked the plaintiffs to obtain, thereupon the plaintiffs refused to make any further delivery, although demanded by the defendants. Subsequently the plaintiffs informed the defendants that they should consider the refusal to pay, as a breach of contract releasing the Company from any further obligations. Shortly afterwards a winding up order was granted against the plaintiff Company. The liquidator made no further deliveries, and brought the present action in the name of the Company for the goods delivered. The defendants counter-claimed for damages for non-delivery.

The House of Lords affirmed the judgment of the Court of Appeal, holding that upon the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim

the next delivery; and that the respondents had not, by postponing payment under erroneous advice, acted so as to show an intention to repudiate the contract, and thereby release the Company from further performance. This agrees with the decision arrived at by the Queen's Bench Division in the *Midland Railway Co.* v. *Ontario Rolling Mills Co.*, 2 O. R. I.

We may also note that Lord Bramwell expressly repudiated the dictum attributed to him in *Honck* v. *Muller*, 7 Q. B. D. 92, "that in no case where the contract has been part performed, could one party rely on the refusal of the other to go on," as amounting to a renunciation.

DISCLAIMER OF LEASE BY TRUSTEE IN BANKRUPTCY OF ASSIGNEE OF LEASE—LIABILITY OF LESSEE.

The next case which demands attention is that of *Hill* v. *East and West India Dock Co.*, 9 App. Ca. 448—though its importance in this Province since the repeal of the Insolvent Act is diminished.

In this case Hill was lessee of the East and West India Dock Co., and assigned his lease to one Clarke, with the consent of the Company, but on the express stipulation that the assignment should not release or prejudice Hill's liability for the payment of the rent and performance of the covenants; Clarke agreed to indemnify Hill against payment of the rent. Subsequently Clarke filed a petition in bankruptcy, and the trustee in bankruptcy having disclaimed the lease—the Company sued Hill for the rent, and the House of Lords affirming the Court of Appeal, held that he remained liable, and that the disclaimer of the trustee did not operate as a surrender of the lease so as to put an end to the liability of the original lessee upon his covenant, notwithstanding that the Bankruptcy Act, 1869, s. 23, provides that upon a disclaimer by the trustee, the lease "is to be deemed to have been surrendered."

The majority of the House adopted the law as laid down by James, L. J., in *Ex parte Walton*, 17 Ch. D. 756, where dealing with the same question, he said, "where a statute enacts that something shall be deemed to have been done, which, in fact and truth, was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. Now the bankruptcy law is a special law, having for its object the distribution of an insolvent's assets equitably amongst his creditors and persons to whom he is under liability, and upon this *cessio bonorum* to release him under certain conditions from future liability in respect of his debts and obligations. That being the sole object of the statute it appears to be legitimate to say that when the statute says that a lease which was never surrendered, in fact (a true surrender requiring the consent of both parties, the one giving up and the other taking), is to be deemed to have been surrendered, it must be understood as saying so with the following qualification, which is absolutely necessary to prevent the most grevious injustice, and the most revolting absurdity—"shall, as between the leasor on the one hand, and the bankrupt, his trustee and estate, on the other hand, be deemed to have been surrendered." Lord Bramwell, who dissented, considered this method of construction too much like legislation.

CHARTER PARTY—CONDITION AS TO LOADING.

The case of *Grant* v. *Todd*, 9 App. Cas. 470, turned upon the construction of a charter party which provided that the vessel should proceed to a certain dock, "cargo to be supplied as fast as steamer can receive. . . . Time to commence from the vessel being ready to load and unload and ten days on demurrage, over and above the said lay days, at £40 per day, except in case of hands striking work, or frosts or floods, or any other unavoid-

able accidents preventing the loading." The ship arrived at the dock and loaded part of the cargo; a frost then set in and made a canal, which communicated with the dock, impassable, so that the remainder of the cargo, which was ready at a wharf on the canal, could not for several days be brought in lighters to the dock. The dock itself was not frozen over, and if the cargo had been on the dock the loading might have proceeded. And it was held by the House of Lords, affirming the Court of Appeal, that the frost did not prevent the loading within the meaning of the exception.

The point was neatly put by Lord Fitzgerald: "It seems to me the exception applies only where the accident prevents the loading at the place of loading, and not where it prevents or retards the transit or conveyance of the cargo to the place of loading. The shipper was bound to have a full cargo at the place of loading, and he took on himself all risks consequent upon delay in transit. If he had had it there it could have been loaded within the lay days, and no case of demurrage could have arisen."

POWER OF ATTORNEY TO SELL AND PURCHASE.

Before closing the number containing the appeal cases, we may briefly notice the Indian case of *Jonmenjoy Condoo* v. *Watson*, 9 App. Ca. 561, which is one of general interest, turning on the construction of a power of attorney. The power in question authorized the donee "from time to time to negotiate, make sale, dispose of, assign and transfer" government promissory notes, and "to contract for, purchase, and accept the transfer" of the same, and "for the purposes aforesaid to sign for me and in my name, and on my behalf, any and every contract and agreement, acceptance, or other document." The question to be determined was whether this power authorized a pledge of the government notes as well as a purchase and sale thereof, and the Judicial Committee determined that it did not.

RIGHT OF WAY—UNITY OF POSSESSION OF TENEMENT AND WAY.

In the Chancery Division, the first case which calls for attention is that of *Bayley* v. *Great Western Railway Co.* (26 Ch. D. 434 C. A.). The defendants, under the powers of their Act, had purchased a piece of land on which was a stable. By the conveyance to the Company the premises were granted, together with "all rights, members, or appurtenances to the hereditaments belonging or occupied or enjoyed as part, parcel or member thereof." The vendor had, many years previously, made a private road from the highway to this stable over his own land, for his own convenience, and had used it ever since. The soil of the road was not conveyed to the Company, and no express mention of it was made in the conveyance. The plaintiff refused to allow the Company to use the road, and a special case was stated for the opinion of the Court as to whether or not, under the circumstances, the Company had any right of user of, or right of way over, the road; and it was held by the Court of Appeal, affirming the judgment of Chitty, J., that, notwithstanding the unity of possession of the stables and the private road at the date of the conveyance to the Company, a right of way passed to the Company under the general words of the conveyance following *Kay* v. *Oxley*, L. R. 10 Q. B. 360, and *Watts* v. *Kelson*, L. R. 6 Chy. 166. Secondly, that the fact of the stable having been purchased by a railway company, for the purposes of their undertaking, did not preclude them from claiming the right of way, so long as they used the premises as a stable, which they might lawfully do until they were required for the purposes of the railway, or were sold as superfluous land.

Fry, L. J., thus summed up the principle of construction laid down in *Watts* v. *Kelson* and *Kay* v. *Oxley*. "If one person owns both Whiteacre and Blackacre, and if there be a made and visible road over Whiteacre, and that has been used for the purpose of Blackacre in such a way that if two tenements belonged to several owners, there would have been an easement in favour of Blackacre over Whiteacre, and the owner aliened Blackacre to a purchaser, retaining Whiteacre, then the grant of Blackacre either 'with all rights usually enjoyed with it,' or 'with all rights appertaining to Blackacre,' or probably the mere grant of Blackacre itself without general words, carries a right of way over Whiteacre."

This decision would, no doubt, be deemed an authority for the construction of a conveyance under the Short Forms Act, R. S. O. c. 102, s. 4.

COSTS—TAXATION BETWEEN SOLICITOR AND CLIENT—NEGLIGENCE.

The next case which it is necessary to notice is another decision of the Court of Appeal. *In re Massey* and *Carey* (26 Ch. D. 459 C. A.) In this case, the Court held, affirming the decision of the Chancellor of the County Palatine, of Lancaster, that upon a taxation of a bill between solicitor and client the taxing officer may disallow the costs of particular proceedings in an action occasioned by the negligence or ignorance of the solicitor. Cotton, L.J., in delivering judgment, remarked:—"It was said that the taxing master had no jurisdiction to disallow charges on the ground of negligence, but that an action for negligence ought to be brought by the client against the solicitor. In my opinion the question here, is not the same as that which would arise in an action of negligence. The question here is, whether the client should be charged with costs which are referable only to amending a slip made by the solicitor. We have made inquiries of the taxing masters both of the Chancery, and Common Law, Divisions, as to what has been the practice in such matters. Undoubtedly the taxing master, in the Chancery Division have been more liberal in entertaining objections on the ground of negligence, perhaps because the order for taxation in the Chancery Division directs payment on taxation, while the order in the Common Law Division is only for a stay of proceedings on payment. Probably at common law if the objection was that the *whole action had failed* by reason of the negligence of the solicitor that would be considered a proper question to be decided not by the master, but in an action for negligence. Whether that would be so in the Chancery Division I do not know." This latter point we may remark was considered by Mowat, V.C., in *Thompson* v. *Milliken*, 13 Gr. 104 and he held that not only particular items might be struck off for negligence, but also, when the objection went to the whole bill, the taxing officer might, on a taxation between solicitor and client, under the common order, disallow the whole bill, upon the authority of *Re Clark* 13 Beav. 173 S. C. 1 D. G. M. and G. 49; *Re Atkinson* 32 Beav. 486.

COSTS—APPORTIONMENT—DEFENDANT APPEARING IN TWO CAPACITIES.

The question of the apportionment of costs in a case where a defendant appears in two capacities, in one of which he is entitled to costs, and in the other of which he is not, was discussed by the Court of Appeal in *In re Griffiths, Griffiths v. Lewis*, 26 Ch. D. 465. The action was brought for the administration of the estate of D. Griffiths, and the defendant was the executor of T. Evans, a defaulting executor, whose estate was insolvent. Chitty, J., the judge of first instance, ordered that the defendant should have out of Griffiths' estate, his costs as between solicitor and client, of taking the accounts of the Grif-

fiths' estate, and his costs and charges properly incurred in the administration of the trusts of the will, and one-half the remaining costs of suit. The defendant appealed, but the Court of Appeal sustained the decision of Chitty, J. Fry, L.J., said:—"Strictly speaking, the costs of the action are divisible into three categories: First, those incurred in taking the accounts of the original testator; Secondly, those which are incurred in seeking relief against the defaulting executor; Thirdly, those which come under neither of those heads. The first set of costs ought to be borne by the estate which is being administered; the second ought to be borne by the estate of the defaulting executor; and the third ought to be divided. In substance the judge has adopted this plan."

STATUTE OF LIMITATIONS (21 JAC. 1, C. 16, S. 3)—ACKNOWLEDGMENT.

In *Green* v. *Humphreys*, 26 Ch. D. 474, the Court of Appeal reversed the decision of Pollock, B., 23 Ch. D. 207. The plaintiffs were executors of one J. H., who had lent money to the defendant. By agreement between J. H. and the wife of the defendant certain rents of the T. estate, of which J. H. was trustee, and to which the wife was entitled as *cestui qui trust* for life without power of anticipation, were from time to time applied in reduction of the debt due by the defendant. The consent of the defendant's wife to this application of the rents ceased in 1859 and the rents subsequently accruing were thereafter claimed by the wife and paid to her by the plaintiffs after the death of J. H. in 1880. In 1879 the defendant wrote to J. H.:—"I thank you for your very kind intention to give up the rent of Tyn-y-Burwydd next Christmas, but I am happy to say at that time both principal and interest will have been paid in full." No letter of J. H. as to giving up the rent at Christmas was in evidence. The Court held this letter to be insufficient to take the case out of the statute. Bowen, L.J., said:—"It is clearly settled that to take a case out of the statute there must be an acknowledgment or a promise to pay, and that when there is a clear acknowledgment that the debt is due from the person giving that acknowledgment, a promise to pay will be inferred. . . . . It seems to me that although there is here an acknowledgment of a debt in a sense, there is not a clear acknowledgment of a debt in such a way as to raise the implication of a promise to pay, but on the contrary only in such a way as to exclude the idea of a promise to pay, and to imply that the writer did not undertake to pay," and Fry, L.J., thus paraphrased the letter in question:—"I thank you for your very kind intention to let my wife receive the rents of the estate after next Christmas, but your kindness is apparent not real, for by next Christmas the debt to satisfy which you have been stopping her rents will have been fully satisfied in some manner or another."

MORTGAGE—PRIORITY—NEGLIGENCE IN FIRST MORTGAGEE IN CUSTODY OF DEEDS—FOLLOWING MONEY OBTAINED BY FRAUD.

The case of *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 26 Ch. D. 482, is of comparatively little importance in this Province owing to the operation of our Registry Act, which in general prevents questions of the kind involved in that suit, from arising here. The plaintiffs were mortgagees, their mortgagor was one Crabtree, the manager of the plaintiff company. On the execution of the mortgage the title deeds were placed, with the mortgage, in the company's safe to which, as manager, Crabtree had access. Subsequently Crabtree took away the title deeds and mortgaged the property to Mrs. Whipp, the defendant, who advanced her money in ignorance of the previous mortgage to the plaintiff company. The Court of Appeal held (reversing the decision of the

Vice Chancellor of the County Palatine, of Lancaster) that the mortgage of the plaintiffs had priority over that of Mrs. Whipp's. The conclusions drawn from the authorities, by Fry, L.J., who delivered the judgment of the Court, were thus stated by him:—"(1) That the Court will postpone the prior legal estate to a subsequent equitable estate: (*a*) When the owner of the legal estate has assisted in, or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate, of which assistance or connivance—the omission to use ordinary care in inquiry after, or keeping, title deeds, may be, and in some cases has been held to be, sufficient evidence, where such conduct cannot otherwise be explained; (*b*) Where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has, by the fraud or misconduct of the agent, been represented as being the first estate. But (2) that the Court will not postpone the prior legal estate to the subsequent equitable estate, on the ground of any mere carelessness, or want of prudence on the part of the legal owner."

One other point was also decided by the Court which is not noticed in the head note—out of the money paid by Mrs. Whipp to Crabtree, £1,900 found its way from Crabtree into the banking account of the plaintiff company and was applied in payment of a larger debt due by Crabtree to the company, the latter, however, having no notice of the source from whence it was derived. On behalf of Mrs. Whipp it was argued that she was entitled to priority to this extent, on the ground that she was entitled to follow this money obtained from her by fraud. But Fry, L.J., disposed of that point thus:—"The proposition that money obtained by fraud can be followed into the hands of persons who take it in satisfaction of a *bona-fide* debt, without notice, is in our judgment devoid of support from principle or authority."

FRAUD ON BANKRUPT LAW — CONTRACT PURPORTING TO LIMIT RIGHTS OF TRUSTEE IN BANKRUPTCY IN PROF BANKRUPT.

The case of *Ex parte Barter*, 26 Ch. D. 510, demands a passing notice, although owing to the repeal of the Canadian Insolvency Act it is not of that importance that it would formerly have been. In that case a contract for building a ship provided that if at any time the builder should cease working on the ship for fourteen days, or should allow the time for completion and delivery of the ship to expire for one month without the same having been completed and ready for delivery; or in the event of the bankruptcy or insolvency of the builder—it should be lawful then and thenceforth for the buyer to cause the ship to be completed by any person he might see fit to employ, or to contract with some other person for the completion of the work agreed to be done by the builder, *and to employ such materials belonging to the builder* as should be then on his premises, and which should either have been intended to be, or be considered, fit and applicable for the purpose. The builder became bankrupt and his materials were used to complete the ship, but it was held that the clause in the contract, so far as it applied to the bankruptcy of the builder, was void as against his trustee in bankruptcy, as being an attempt to control the user of the bankrupt's property after his bankruptcy, and as depriving the trustee of the right to elect whether to complete, or abandon, the contract, as might seem most beneficial for the creditors—and it was held that this clause having been put in force by the buyer on the filing of a liquidation petition by the builder, the user of the builder's materials could not be justified on the ground of a subsequent cesser of work on the ship.

Recent English Decisions.

A TRAMWAY CO. IS NOT A RAILWAY CO.

The case of *In re Brantford* v. *Isleworth Tramways Company*, 26 Ch. D. 527, is worth noting as being a judicial determination of Bacon, V. C., that a "Tramway Company" is not a "Railway Company."

WILL—BEQUEST ON INDEFINITE TRUST—NON-COMMUNICATION OF TRUST TO TRUSTEE IN TESTATOR'S LIFETIME.

In re Boyes, *Boyes* v. *Carritt*, 26 Ch. D. 531, illustrates the danger to which testators expose themselves, of defeating their own intentions by trusting to unattested papers to control the effect of a formally executed will.

Mr. Boyes, the testator, desired to provide for a certain lady and her child, whose names he did not wish to appear in his will; he therefore, on 1st June, 1880, made a will in favour of his solicitor and friend, Mr. Carritt, the defendant, purporting to devise and bequeath all his property absolutely to him, but subject to a verbal understanding that he would give him further written directions as to the persons for whose benefit he was to hold the property.

The testator went abroad and made no further communication to Mr. Carritt of his wishes, and died in April, 1882. After his death two papers were found in his possession. One, dated 10th February, 1880 (which was proved to be a mistake for 1881), was in these words:

"F. B. CARRITT, ESQ., I wish you to have £25 of any property of which I may die possessed for the purchase of any trinket *in memoriam*, everything else I give to Nell Brown, formerly Sears, and I appoint you sole trustee, to act at your discretion. G. E. BOYES."

The other letter was in these terms:

"F. B. CARRITT, ESQ.,

DEAR SIR,—In case of my death I wish Nell Brown to have all except £25 in my memory. G. E. BOYES."

Under these circumstances, the next of kin claimed the property, which consisted of personal estate.

KAY, J., held they were entitled, and that the trust in favour of Nell Brown was void. He said "no case has ever yet decided that a testator can by imposing a trust upon his devisee or legatee, the object of which he does not communicate to him, enable himself to evade the *Statute of Wills* by declaring those objects in an unattested paper found after his death." . . . "The defendant having admitted he is only a trustee, I must hold on the authority of *Muckleston* v. *Brown*, 6 Ves. 52, *Briggs* v. *Penny*, 3 Mc. & G. 546, and *Johnson* v. *Ball*, 5 D. G. & Sm. 85, that he is trustee of this property for the next of kin of the testator."

MORTGAGOR—RIGHT TO CALL FOR ASSIGNMENT TO THIRD PERSON.

Alderson v. *Elgey*, 26 Ch. D. 567, is a decision under the Conveyancing and Law of Property Act, 1881, s. 15, which provides:—"Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly." In this case a tenant for life who had failed to keep down the interest obtained an order permitting him to redeem; the mortgagee was also entitled in remainder to part of the property covered by the mortgage; and it was held by Chitty J. that the tenant for life could not require an absolute transfer to his nominee under the above section, but only a transfer on such terms as he himself would be entitled to claim a re-conveyance. In Ontario, where we have no such express statutory provision the case would be *a fortiori*.

Will—"Unmarried" meaning of.

In re Sergeant, Mertens v. *Walley*, 26 Ch. D. 575, Pearson, J., was called upon to give a meaning to the word "unmarried," which occurred in a will, whereby certain property was left to "the unmarried daughters" of the testator's wife's sisters; and he held that although the word might mean "never having been married," or "not having a husband" at the time in question; yet, following the decision of Vice Chancellor Hall in *Dalrymple* v. *Hall*, 16 Ch. D. 715, the former was its primary and natural meaning of the word:—"Slight circumstances, no doubt will be sufficient to give the word the other meaning, but, if I was asked to construe the word as occurring in an absolutely colourless instrument, I should construe it 'never having been married.'"

Settlement of business on trust for successive tenants for life—Losses occurring during one tenancy for life, how made good.

In *Upton* v. *Brown*, 26 Ch. D. 588, a business had been assigned to trustees on trust for successive tenants for life—a receiver had been appointed to carry on the business; during the first tenancy for life the business was carried on by the receiver at a loss; during the life of the second tenant for life, profits were earned, and the short question was—Whether the losses were to be made good out of the subsequent profits, or out of the capital? and Pearson, J., held that they must be made good out of the profits:—"If the receiver had contracted debts in carrying on the business during the life of the first tenant for life, they would have been treated as contracted on behalf of the business generally, and must have been paid out of future profits, if there had been any. I think this loss must be treated as if it had been a debt incurred by the receiver and must be paid in the same way."

Tenant for life—Purchase of reversion.

The next case we have to consider is *Re Lord Ranelagh's Will*, 26 Ch. D. 590, which is an important decision, upon the question, whether an assignee of a tenant for life can purchase the reversion, to the prejudice of other *cestuis que trustent* under the same settlement. In that case certain lease hold estates were held by trustees under a will upon trust to renew the lease from time to time, and to hold the same for the benefit of a tenant for life with remainder to certain other parties. The tenant for life assigned his interest, and the lessor having refused to renew, the assignee purchased the reversion, and claimed to hold it absolutely for his own benefit. Subsequently part of the land was expropriated for public purposes and the purchase money paid into court. Pearson, J., held that the assignee of the tenant for life must be deemed to have purchased the reversion for the purposes of the trust, and that subject to the payment of the purchase money, the estate was held by the assignee subject to the trusts of the will; and that the assignee was not entitled to have his interest as tenant for life at the time the land was expropriated, valued and paid to him out of the purchase money. As to the first point, Pearson, J., remarked:—"It is impossible not to say in the present case that considering there was a permanent trust for the renewal of the lease, overriding the interest of the tenant for life, when the renewal afterwards became impossible it was the duty of the trustees (unless it was impossible to do so) to purchase the reversion from the lessors." He further observed that, in this case he was "dealing with a person who, not having the legal estate in the lease in him, assumed to act with reference to that property as if he had the legal estate, and must, I think, be considered to have acted in the place of the real trustees of the lease, and

to have acquired the property for the benefit of all the persons entitled under the will." And as to the second point, he said that at the time of the expropriation, "there was in equity no leasehold in existence. In equity the fee simple had been acquired by W. B. [the assignee of the tenant for life], and that of which he was possessed was not the leasehold interest depending on the life of Lord Ranelagh, but the fee simple which had been exchanged for that leasehold interest. That being so, all that he was entitled to, was the rent of the property which he had acquired in exchange, during the life of Lord Ranelagh, that is simply an interest in the property, during the life of Lord Ranelagh in exchange for the interest in the leasehold during the same life. . . . The tenant for life cannot ask to have the value of his life interest paid out to him, but is entitled simply for his life to the interest of the fund paid into Court."

WILL—POWER OF SALE, DISCRETIONARY—CONVERSION IMPERATIVE.

The only remaining case in the August number of the Chancery Division is that of *In re Raw, Morris* v. *Griffiths*, 26 Ch. D. 601, which was a decision upon the construction of a will. The testator, by the will in question, gave an annuity to his wife, and he gave and bequeathed to his seven children all his real and personal property after deducting the annuity, and after his wife's decease, the annuity, together with all rents, interests, dividends, and profits arising from his estate, to be divided between his seven children equally; and he directed his executors to sell and convert into money his furniture, lands, houses, tenements, and other property whenever it should appear to their satisfaction that such sale would be for the benefit of his children, and all money arising from the sale to be invested for the benefit of his children.

The testator left seven children, one of whom had subsequently died intestate. The freehold property had not been sold. The questions to be decided were whether the shares of the children of the testator under his will became vested immediately upon his death, and whether the direction in the will to convert was imperative, and operated from the death of the testator; and both were answered in the affirmative by Pearson, J., who held following, *Doughty* v. *Bull*, 2 p. Wens. 320, that the share of the child who had died must be distributed as if the property had been converted at the death of the testator.

REPORTS.

ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

MARITIME CASES.

CONLON ET AL. V. CONGER.

Demurrage—Liability of consignor or consignee—Negligence—Construction of bill of lading—"Free in and free out"—Deck-load at "risk of vessel and owners"—Effect of payment into court without defence.

[St. Catharines, December 31, 1883.

This case was tried before the County Judge of the County of Lincoln, without a jury.

McClive, for plaintiffs.

Falconbridge, for defendant.

The facts of the case fully appear in the judgment of

SENKLER, Co. J.:—The plaintiffs allege that they chartered to the defendant their vessel called the *Mary*, for the carriage of a cargo of coal to the city of Kingston, the defendant to load and discharge the cargo, that the cargo was duly carried and the vessel ready to be unloaded within the proper time, but defendant neglected to unload the cargo and delayed the vessel for several days beyond the time allowed by the charter party, and plaintiffs claim damages for this.

The defendant by counter claim alleges that the plaintiffs are indebted to him in $30 for shortage on the cargo of coal, claiming that plaintiffs received ten tons and 180 lbs. of coal more than they

delivered. He also pays into court $40 which he says is enough to satisfy the plaintiff's claim.

The plaintiffs deny the alleged shortage, and assert that any loss occurred through stormy weather and was of the part of the cargo stored on deck. They refuse to accept the money paid into court.

The evidence shews that the plaintiffs' vessel was loaded at Cleveland with a cargo of coal, and sailed with it for Kingston on the evening of the 6th June. There was no charter party in the proper sense of the term, but a copy (admitted to be a true copy), was produced of a shipping note which reads thus:

"CLEVELAND, OHIO, *June 6th*, 1883.

"Shipped by Martin & Co., in good order and condition on board the schooner *Mary*, of St. Catharines, John Cornwall, master, the following articles marked and consigned as per margin to be delivered in like order and condition (danger by fire, collision and navigation only excepted) as addressed on the margin, subject to freight and charges as below.

"All property on deck at the risk of the vessel and owners, 234 tons, St. L. V. Lump Coal. Freight to be one dollar and twenty cents per ton, free in and out.

(Signed) Martin & Co.

P. D. Conger, Kingston, Ont., for Asylum.

The *Mary* arrived at Kingston on the evening of the 11th June, about 8 p.m., and early the next morning the captain reported his arrival to the cashier of the asylum. Coal for the asylum is unloaded at a slip or wharf belonging to it, some distance from the harbour. At the time of the *Mary* arriving at Kingston, another vessel, the *Craftsman*, was lying at this slip discharging a cargo of coal. The *Craftsman* was also carrying coal for the defendant in the same way as the *Mary* was. There was room for two vessels to lie at the asylum slip, but owing to the arrangement of the buildings only one could unload at a time.

Upon being told by the captain, of the *Mary's* arrival, the cashier of the asylum told him he could stay where he was until they were ready to unload him. However, he went to the asylum slip on the morning of the 13th and lay there without anything being done until the 19th, when they began to unload the *Mary* and finished doing so next day.

The plaintiffs' claim is for the delay from the morning of the 12th to the morning of the 19th. They also allege that two days ought not to have been consumed in unloading as the *Mary* could be unloaded in one day, or at most a day and a-half, but it was admitted that but for the other delay no claim would have been preferred for this.

The first question that arises is: What is the effect of the payment of money into Court by the defendant without any other defence except the counter claim of $30. Is he at liberty to dispute the allegations in the plaintiffs' statement of claim? or, must he be taken to have admitted them? Payment of money into Court is no longer considered incompatible with other defences. A defendant can, as a general rule, deny the plaintiffs' cause of action and at the same time pay money into Court: *Berdan* v. *Greenwood*, L. R. 3 Ch. D. 251; *Hawkesley* v. *Bradshaw*, L. R. 5 Q. B. D. 302.

In England the rules of pleading upon which these cases were decided, required defendant to traverse all statements they wished to put in issue. In Ontario, silence of a pleading as to any allegation contained in a previous pleading of the opposite party is not to be construed as an implied admission of the truth of such allegation.

It is, therefore, contended by the defendant that a simple plea of payment into Court here has the same effect as the same plea joined with a denial of the plaintiffs' cause of action has in England. I cannot find any decision in Ontario on the point and it will be safer for me to decide the present case on the assumption that the defendant's contention is correct.

The plaintiffs, in their statement of claim, allege that the defendant delayed the vessel for several days beyond the time allowed by the charter party—no time for unloading is mentioned in the shipping note. The plaintiffs must consequently rely on the implied contract that the vessel would not be detained more than a reasonable time in unloading. When the number of the days are fixed by the contract of affreightment, the merchant will be liable for any delay beyond these days, although the delay is not attributable to his fault, "as he has engaged that the work shall be done within the time:" Abbott on Shipping, 11th edition, p. 68. Where, however, the charter party is silent as to the time to be occupied in the discharge, the contract implied by law is that each party will use due diligence in performing the part of the duty which, by the custom of the port, falls upon him; and there is no implied contract that the discharge shall be performed in the time usually taken at the port: *Ford* v. *Coatsworth*, L. R. 4 Q. B. 127.

The contract thus implied is between the shipper and the owner of the vessel; the consignee, as such, is not a party to it or liable to an action for a breach of it: *Kemp* v. *McDougall*, 23 U. C. R. 380; *Burnet* v. *Conger*, 23 C. P. 590. And the Ontario Act, 33 Vict. cap. 19, now R. S. of O. cap. 116, sec. 5 (which is a transcript of the Imperial Act 18 and 19

Vict. cap. 111), makes no difference in this respect, as it does not apply where nothing is said in the bill of lading as to demurrage: Maclachlan on Merchant Shipping, 2nd Ed. p. 490. Where the defendant is in effect both consignor and consignee, he is liable, of course, in the former capacity. In *Barker* v. *Torrance*, 30 U. C. R. 43, affirmed on appeal, vol. 31, p. 561, the defendants were the consignors on the bill of lading—the apparent consignees being other parties, and it was held that there was evidence that the defendants were in effect the consignors and they were held liable for unreasonable delay in unloading.

In the present case the apparent consignors are Martin & Co., and there is nothing on the face of the bill of lading to show that they acted as agents (as was the case in *Barker* v. *Torrance*), no objection was, however, taken to maintaining the action on the ground that the defendant was not the consignor, and, although he was called on his own behalf, he was not questioned on this point. He did, however, say that he had been compelled by the vendors of the coal to pay for the full amount covered by the bill of lading, and he produced the correspondence on the subject, which was not with Martin & Co., but other persons. This correspondence was not put in, being objected to by plaintiff's counsel. As the case stands, I can properly assume that the defendant was the real consignor and that Martin & Co. were his agents. The defendant in this case was the defendant in *Burnet* v. *Conger*, above mentioned, where this objection was successfully made, and his silence here is very significant.

The remaining and important question is whether there is evidence of negligence.

In *Kemp* v. *McDougall*, 23 U. C. R. at page 386, the present Chief Justice of the Court of Queen's Bench while agreeing that the rule for non-suit or new trial should be discharged, says that he wishes to lay down no rule as to the obligation of a shipper to guarantee the non-detention of the vessel by the want of readiness to receive. He points out that in the case of a general ship "no such obligation exists, as the carrier can always discharge his duty by unloading at an ordinary wharf or storehouse." He says also that the books are singularly barren of authority except in cases of regular charter party. In *Ford* v. *Cotesworth*, L. R. 4 A. B. 127 (referred to with approval by Hargarty, C. J., in *Burnet* v. *Conger*, 23 C. P. at page 595), the rule of law governing cases like the present is laid down by Blackburn, J., in the way I have already quoted, viz.: that the merchant and ship-owner should each use reasonable despatch in performing his part.

In the present case the coal was consigned to P. D. Conger, Kingston, Ont., for the asylum. The freight was to be $1.20 a ton, "free in and out." The meaning of the last words was conceded to be that the coal was to be loaded and unloaded by the consignor and consignee. The master and crew had only to take the vessel to its destination. This was done, and it was found that the vessel could not be uuloaded, owing to the only place for unloading at being occupied by another vessel of the defendant's, which had arrived first and was being unloaded. The whole delay was occasioned by this—the defendant did not provide nor suggest (nor did the authorities at the asylum) any other mode of unloading, nor was it contended that any other mode could have been adopted. If the plaintiffs were compelled to wait until this vessel was unloaded, why should they not be compelled to wait for a dozen, if they happened to be there? It cannot be said that the delay was occasioned by any act of the plaintiff; it was entirely the act of the defendants. It was not even occasioned by any pressure of business generally. It is laid down by Maclachlan, at page 488, that under the implied contract the ship-owner is liable in damage for detention, notwitstanding it is occasioned by the crowded state of the docks. The cases, however, cited in support seem all to be cases in which a number of days were fixed by the charter party. In the present case, however, I think that the defendant is responsible for the delay. He was sending the coal to a particular place, where the means of unloading were limited. He assumed the responsibility of unloading, and he delayed it by his own act. As to the measure of damage: the plaintiff received $268.80 freight, on a voyage lasting nine days (including the time occupied by unloading, and allowing two days for unloading); the expenses of passing through the canal came to about $60 and towage $4. During most of the trips made by the *Mary* in 1883 she went up the lakes light, although there is evidence that on this trip she had a chance of a cargo. On the whole case, I think $20 a day for seven days a reasonable allowance—making in all $140.

Sundays seem to be allowed in demurrage unless there is a custom in the port to the contrary: Abbott on Shipping, 11th edition, p. 266. The defendant counter-claims for a shortage in the cargo alleging that while the bill of lading is for 234 tons and admits the receipt of that quantity, only 223 tons and 1,800 lbs. were delivered.

The bill of lading is that the defendant contends for 234 tons, and the evidence shews that only 223 tons and 1,800 lbs. were delivered. The statute R. S. of Ont. cap. 116, sec. 5, sub-sec. 3, makes a

bill of lading conclusive evidence of shipment in the hands of a consignee, or endorsee for valuable consideration as against the master signing it, but as between the shipper and owner it is not conclusive evidence in respect of quantity: *Allen* v. *Chisholm*, 33 U. C. R. at page 244—it is, however, *prima facie* evidence against the owner: *McLean* v. *Fleming*, L. R. 2 App. 128 cited in *Merton* v. *Kingston and Montreal T. C.*, 32 C. P. at page 373.

In the present case the coal was received on the vessel at Cleveland through shoots from railway cars. The captain swears it was not weighed at the time of loading. He swears that none of it was removed on the voyage (and he is corroborated on this point by one of the crew who was called) and that it was delivered in the same condition as he received it except a small quantity of the deck coal which was washed off by the waves. There is nothing to contradict this evidence except the bill of lading, and I do not see any reason for disbelieving it. The plaintiffs endeavoured to prove a custom that ship-owners were not held responsible for shortage in cargoes of coal, but that freight was only payable in respect of the quantity delivered. I do not think the evidence established the existence of the custom claimed as to the non-liability for shortage, nor do I think such a custom could be established by law. The simple question is: What quantity of coal was shipped? That quantity must be accounted for unless the loss is excused by reason of something excepted on the bill of lading. The freight is only paid (as a general rule) on the quantity delivered because that is the quantity carried.

In the present case any loss that is admitted was of part of the deck load, The bill of lading provides "all property on deck at the risk of the vessel and owners." The words "owners" in a bill of lading stating "deck-load at risk of owners" means the owners of the goods, not the owners of the vessel: *Merrit* v. *Ives et al.*, M. T. 4 Vict. The phrase used in the present bill can only mean at the joint risk of the owners of the vessel and of the goods, per Harrison, C. J., in *Spooner* v. *Western Assurance Co.*, 38 U. C. R. page 72. Under such a provison, in case of a jettison of the deck load, such jettison is replaced by contribution between the owner of the deck-load and the owner of the vessel (same case at page 70), but I do not see that it affects the liability for loss as between those parties from the ordinary work of the waves. It was said by one of the defendants' witnesses that where shortage happened to a deck load it was at the owner's risk and the ship-owner would lose his freight. I think a loss of this kind must be within the clause as to danger of navigation and that the vessel owner is not responsible.

My judgment, therefore, is that the plaintiffs are entitled on their statement of claim, the same being amended as already indicated, to damages to the amount of $140, being $100 more than the amount paid into court, and I direct that judgment be entered for the plaintiffs for the sum of $100 with full costs, and I direct that on the counter claim judgment be entered for the defendants thereon (the plaintiffs in the original suit), with full costs, but I stay the entry of such judgment until the 9th January next.

RECENT ENGLISH PRACTICE CASES.

HILL V. HART-DAVIS.

Imp. (1883) *O.* 38, *r.* 11—*O.* 65, *r.* 27, *ss.* 20—*Ont. Rule* 435—*Chy. Ord.* 69.

Affidavits—Prolixity—Costs.

Although there is no rule of Court specially giving power to the Court to take pleadings or affidavits off the file for prolixity, yet the Court has an inherent power to do so in order to prevent its records from being made the instrument of oppression. Where, however, an affidavit was of oppressive length, but it appeared to the Court that delay and expense would be caused by filing a fresh one, the Court permitted it to remain on the file, but ordered the party filing to pay the costs of it.

[L. R. 26 Ch. D. 470, C. A.

The affidavit in question was an affidavit on production, in which the documents, instead of being referred to in bundles, and scheduled and numbered, were set out in detail.

It was stated in the course of the argument that when a document is ordered to be taken off the file, the practice is not to return it to the party who placed it there, but to destroy it by burning.

COTTON, L.J.—"Although the rules contain no provision for taking a document off the files for prolixity, yet it is the duty of the Court to see that its files are not made the instruments of oppression, and that without any provision in the rules the Court has power, and it is its duty to order oppressive documents to be taken off the file, even though this should result in their being burnt."

COLES V. CIVIL SERVICE SUPPLY ASSOCT'N.

Imp. (1883), *O.* 16, *rr.* 48, 52—*Ont. Rules* 107, 108, 110, 111.

Third party procedure—Indemnity over—Form of order.

[L. R. 26 Ch. D. 529.

Where in an action for damages in respect of alleged injury to the plaintiff's premises, the de-

fendant claiming to be entitled to indemnity over against a person not a party to the action, had served such person with a third party notice under Order 16, r. 48 (see Ont. R. 107, 108), and he had appeared thereto, the Court upon a summons for directions taken out by the defendant (see Ont. R. 111) give the third party, who did not admit his liability, liberty to appear at the trial of the action and take such part as the judge should direct, and be bound by the result, and ordered the question of his liability to indemnify the defendant to be tried at the trial of the action, but subsequent thereto.

In case a third party appears and admits his liability to indemnify, the Court will give him leave to defend the action.

SALM KYRBURG v. POSNANSKI.

Imp. (1883) *O.* 44, *r.* 2—*Ont. Rules* 357, 364, 365.

A judge at Chambers has power to order the issue of a writ of attachment for disobedience of an order of a judge at Chambers.

It is not necessary to make a judge's order a rule of Court as a preliminary to taking proceedings to enforce it.

[L. R. 13 Q. B. D. 211.

HUDDLESTON, B.—"It is contended that such obedience can only be enforced by proceeding according to the old practice, viz., by making the order a rule of Court, and by applying to the Court for an attachment for contempt of Court in disobeying the rule of Court."

Order 44, r. 2, enacts that no attachment shall issue without the leave of the Court, or a judge (see Ont. Rule 365). "Now, by the terms of s. 39, (see R. S. O., c. 39, ss. 20, 21), already alluded to 'any judge sitting in Court shall be deemed to constitute a Court.' Therefore the case of a single judge sitting in Court is included under the term 'Court' and 'judge,' can only mean a judge sitting at Chambers."

JONES v. CURLING.

Imp. (1883) *O.* 65, *r.* 1—*Ont. Rule* 428.

Costs—Action tried by jury—"Good cause," for not allowing costs to follow event—Appeal.

Where an action is tried by a jury the presiding judge has no jurisdiction under O. 65, r. 1 (Ont. Rule 428), to make an order by which the costs will not follow the event, unless there exist "good cause" within the meaning of that Rule, and consequently there is an appeal with respect to the existence of the facts necessary to give the judge jurisdiction to make such order.

"Good cause" within that Rule is the existence of facts showing that it would be more just not to allow the costs to follow the event, *e.g.*, oppression or misconduct of the successful party whereby costs have been increased unnecessarily.

The fact that an action is for the recovery of several closes of land, that the only defence is that the defendant is in possession, and that the plaintiff only succeeded as to some of the closes, does not constitute "good cause" within *O.* 65, r. 1 (Ont. Rule 428), since the verdict in such a case is distributive, and the costs would be taxed as upon a finding by the jury on separate issues.

[L. R. 13 Q. B. D. 262.

FRY, L.J., observed "the general scheme of Order 65, r. 1, is this: it places all costs in the discretion of the Court, but upon this there is an exception, namely, where there is trial by jury, and upon that there is a further exception, which brings the costs back within the discretion of the judge, namely, where there is "good cause." Now it appears to me whether the facts exist which give the judge the discretion must be the subject of appeal. It is not withdrawn from appeal because the discretion of it exist, is not the subject matter of appeal. . . . Now, in the present case what is there which can be called "good cause?" The plaintiff succeeded in recovering some closes, and failed with regard to other closes. The event in this case is a distributable event. The very form of the judgment shows that it is so, for it shows that the plaintiff only recovers certain of the closes, and it shows with equal distinctness that he fails to recover the others. Therefore, whether one looks at the form of the verdict or of the judgment, it is distributive, and the event with which it deals is not a single one. That being the case, I think that upon taxation the costs would follow those distinct issues. Is then the fact of the success of the plaintiff on some issues, and of his failure on other issues, by itself "good cause" for interfering with the rule that the costs follow the event? I am bound to say that it appears to me not to be so?"

BRETT, M. R., quoted with approval the *dictum* of the late Sir Geo. Jessel in *Cooper* v. *Whittingham*, 15 Ch. D., at p. 504: "As I understand the law as to costs it is this, that when a plaintiff comes to enforce a legal right, and there has been no misconduct on his part, no omission or neglect, which would induce the Court to deprive him of his costs, the Court has no discretion and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts. For instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind the rule is plain and well settled, and is as I have stated." This, he thought, though not said with reference to O. 65, r. 1, serves nevertheless as a good indication of what is meant by "good cause" in that rule.

See *Walmsley* v. *Mitchell*, 5 O. R. 427.

GRANT v. EASTON.

Imp. (1883), *O.* 3, *r.* 6—*O.* 14—*Ont. Rules* 14, 80.

Foreign judgment—Writ specially indorsed—Leave to enter final judgment.

In an action on a foreign judgment in which the writ of summons has been specially indorsed, the plaintiff may obtain an order empowering him to sign final judgment.

[L. R. 13 Q. B. D. 302.

BRETT, M. R.—"An action upon a foreign judgment may be treated as an action in either debt or assumpsit, the liability of the defendant arises upon the implied contract to pay the amount of the foreign judgment."

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

MARA v. COX ET AL.

Broker—Pledge of Stock—Sale by Pledge.

Plaintiff, a broker, pledged stock with defendants, brokers, for advances, plaintiff's object being to buy stock largely and hold it for a rise in the market, and it was agreed that if plaintiff was in default for interest, or in keeping up margins, defendants could sell stock on two days' notice. Defendants being in need of the stock used it. Subsequently defendants alleged plaintiff was in default, and plaintiff being ignorant of the disposition of his stock gave defendants his notes for amount claimed by them, and afterwards ascertained that his stock had been sold. Defendants pleaded the custom of brokers as to their right to sell the stock. *Held*, custom not proved, nor would it be valid. That the parties might agree to be bound by such a manner of dealing, but in this case no such agreement was proved. *Held*, also, that defendants might lawfully have repledged to enable them to raise their advances to plaintiff, but that the sale and other disposition by them without notice to plaintiff, and without default on his part, were wrongful, and entitled plaintiff to recover the prices at which defendants sold the stock.

Osler, Q.C., and *Nesbitt*, for plaintiff.

S. H. Blake, Q.C., and *Kerr*, Q.C., contra.

Rose, J.]

SLATER v. ANTHONY.

Sheriff—Interpleader—Abandonment—Attachment.

Under *fi. fa.* in *McLean* v. *Anthony*, the sheriff, on 17th April, 1883, having seized defendant's goods, sold same to Ferguson, rent being then overdue to landlord. Ferguson did not remove goods, but by agreement between sheriff, landlord and Ferguson, latter retained enough to pay rent. Ferguson then sold goods to E., who was to pay rent, with a further amount which subsequently accrued. Defendant then surrendered term and E. became tenant. On 23rd April, *fi. fa.* in *Slater* v. *Anthony* being placed in sheriff's hands, he seized same goods between 21st May and 23rd June, E. claiming goods, sheriff interpleaded, the result of which was in Slater's favour. Pending interpleader, sheriff allowed landlord's bailiff, who also claimed goods for taxes, to sell them and pay rent and taxes. It turned out that sheriff took no security for goods, and E. was worthless.

Held, sheriff liable to attachment on motion of execution creditor.

BROWN v. NELSON.

Contract—Part performance—Rescission.

Plaintiff agreed to buy from defendant seventy-six shares of a certain company's stock, held by him as representing one B.'s estate, plaintiff giving his note to defendant for the amount of the shares, and at his request pledging the shares with forty-four others to a bank note, discounted the note. Defendant, who controlled the company, was to retain plaintiff as managing director of the company at a fixed stipend. Defendant retired the note when due and took an assignment of the stock. Plaintiff, being dismissed from his position, sued for a return of the forty-four shares, as the object of the pledging of them had been attained, and a return of the note, and to be relieved of the purchase of the seventy-six shares, as the condition of the purchase (his being kept in office) had been broken.

Held, there being a part performance of defendant's agreement by retaining plaintiff for a time, there could be no rescission of the whole contract, that plaintiff was entitled to a return of his shares, defendant to judgment for the value of the seventy-six shares, and plaintiff must sue in a separate action for the dismissal.

Osler, Q.C., and *Nesbitt*, for plaintiff.

Robinson, Q.C., and *Biggar*, contra.

PRACTICE.

Mr. Dalton, Q.C.] [April 30.

WELLER v. PROCTOR.

Notice of trial.

On the 24th of April the plaintiff filed and delivered a reply with two paragraphs, in the first of which he denied directly certain allegations in the fourth paragraph of the statement of defence, and in the second he joined issue upon the balance of the defence. Notice of trial was served same day.

Aylesworth, now moved on notice to set aside the notice of trial on the ground of irregularity in that the same was given prematurely before the pleadings in the action were closed.

Holman, contra, contended that it was not negatived in the affidavit filed in support of the motion that no joinder was filed when notice of trial given; that so far as the affidavit showed a joinder might have been put in by the defendant on the 24th of April, and that the first paragraph of the reply was equivalent to a joinder of issue in that it was a simple denial of an allegation in the Statement of Defence.

The MASTER IN CHAMBERS held that the material filed was insufficient to support the motion, and while expressing opinion that the joinder of issue referred to in Rule 176 O. J. A., was the well recognized form of joinder of issue and not simply a denial of a previous pleading, dismissed the motion without costs.

Proudfoot, J.] [Sept. 22.

RINGROSE v. RINGROSE.

Costs—Action for alimony—R.S.O. c. 40, sec. 48.

Pending an action for alimony, and before trial, the plaintiff returned to live with the defendant.

Held, that an order for the payment by the defendant of the costs of the plaintiff's solicitors should be restricted to the cash disbursements of the solicitors.

Leonard v. *Leonard*, 9 P. R. 450, *Moore* v. *Moore*, 4 C. L. T., overruled.

Elgin Myers, for the defendant.

W. H. P. Clement, for the plaintiff's solicitors.

Osler, J. A.] [Sept. 23.

MCLAUGHLIN v. MOORE.

Examination of parties—Action for breach of promise—45 Vict. c. 10, sec. 3 (O).

Held, that since 45 Vict. c. 10, sec. 3 (O), the parties to an action for breach of promise of marriage are both competent and compellable witnesses.

Aylesworth, for the defendant.

W. H. P. Clement, for the plaintiff.

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

MCLAREN v. CANADA CENTRAL RAILWAY.

Judgment—Interest—Rule 326, O. J. A.

On the 23rd day of January, 1882, judgment was pronounced in Court by Osler, J., in the following words:—

"I direct judgment to be entered for the plaintiff against the within named defendants, after the 5th day of next Hilary Sittings, for $100,000."

Judgment was formally entered with the Clerk of the Court upon the 24th day of March, 1882, but was dated as of the 23rd day of January, 1882.

Upon a special case submitted for the decision of the Master in Chambers as to whether interest was to be computed from the 23rd January or the 24th March.

Held, that Rule 326, O. J. A. does not apply where, as in this case, the judgment itself regulates the entry, and interest must be computed from the time of the actual entry of the judgment. *Kelcher* v. *McGibbon*, 10 P. R. 89, distinguished. The judgment was amended by causing it to bear date on the day of the actual entry.

W. H. P. Clement, for the plaintiff.

A. H. Marsh, for the defendants.

Mr. Dalton, Q.C.] [Sept. 30.

CRANDELL v. CRANDELL.

Alimony—Costs against plaintiff.

The plaintiff, in an alimony suit, registered a certificate of *lis pendens* against the lands of the defendant.

Upon the defendant's motion to discharge the *lis pendens*.

The MASTER IN CHAMBERS made the order with costs against the plaintiff to be deducted from the payments (if any) for *interim* alimony.

Smoke, for the defendant.

Hoyles, for the plaintiff.

Rose, J.]

FREEMAN v. ONTARIO AND QUEBEC RAILWAY.

Award—Execution by Arbitrators.

This was a motion for an order directing payment out of Courts of moneys deposited there in proceedings under the Consolidated Railway Act, 1879, 42 Vict. ch. 9.

The defendants opposed the motion on the ground that award was invalid, having been signed by two of the arbitrators without notice to the third as required by sec. 9, sub-sec. 17 of the Act.

C. H. Ritchie, for the plaintiff.

H. Cameron, Q.C., for the defendants.

ROSE, J., after discussing the evidence adduced held that the award in this case was made at a meeting held at a time and place to which a meeting at which the third arbitrator was present, had been adjourned, and therefore the statute had been complied with. He referred to *In re Templeman* v. *Read*, 9 Dowl, 964, where Coleridge, J., states the law thus: "The principle on which this case must be decided is quite clear; the parties are desirous of having their disputes settled by a unanimous award of three, and no award of two can be good until the third has had a full opportunity of joining in it, and has declared his dissent from it, or withdrawn him from the reference. . . . Courts of law will always construe awards and bear motions respecting them, with a desire to sustain the judgment of the tribunal which the parties have selected," and concluded as follows: I think acting upon such rule and no case having been found going the length I am asked to go and believing that Mr. Kingsmill had full opportunity of joining in the award, and did declare his dissent from it and withdraw from the reference. Remembering that he received his fees without protest against the action of his brother arbitrators; that the Company made a motion against the award without raising this point, although a perusal of the facts in the Norval case could hardly fail to suggest it. I am convinced that the objection is an afterthought and should not be received with favour. I will leave it to a higher Court, to lay down a rule of law (if one is to be laid down on facts such as these) which will deprive this claimant of her award. I cannot assume the responsibility. The order will be made absolute with costs.

BOOK REVIEWS.

A LAW TREATISE ON THE CONSTITUTIONAL POWERS OF PARLIAMENT AND OF LOCAL LEGISLATURES, UNDER THE BRITISH NORTH AMERICA ACT, 1867. By J. Travis, Esq., LL.B., of the New Brunswick Bar. St. John, New Brunswick: *Sun* Publishing Co'y, 1884.

THE author on his title page makes no display of modesty, for he there sets out a long train of personal dignities or titles which, if attached to an ordinary lawyer, would necessitate the employment of a train-bearer. Inside the cover of the book may be discovered a mass of printing liberally interspersed with small capitals, italics, notes of admiration, and other modes of emphatic appeal to a careless reader's attention. Of calm or lucid argument there is little; of vigorous vulgarity, interspersed with sundry bursts of sarcasm, there is abundance, which, with venturesome vehemence, the author hurls against what he is pleased to call "pretentious and utterly absurd" arguments. In one place he struggles with the "crude absurdities" of a certain author, and though he tells us he does not wish "to take up time and space with any further consideration of that dreadfully weak publication," yet he devotes several pages to a consideration of its arguments, and finally annihilates the author with a sneer.

Taking an introductory sample of his style of criticism, we find on page 114 a reference to a rule of construction which the author says has been persistently denied or misunderstood "by judges who, though overflowing with pretension, are so ignorant of law that of one of the most ignorant and pretentious of them it is said (on the authority

of one of his most equally ignorant and still more pretentious brother-judges), that he made the humiliating confession *that he had never read but one law book in his life*—Selwyn's Nisi Prius."

Coming to details, he charges Mr. Justice Fisher with "misquoting the language of the B. N. A. Act;" Mr. Justice Henry with "leaving out of sight the very essence of the clause—playing Hamlet with the part of Hamlet omitted;" Mr. Justice Wetmore with giving "an absurd dissenting judgment." He also gives it as his opinion that in a certain dissenting judgment of Chief Justice Allen "there is a great amount of stilted nonsense;" that Mr. Justice Gwynne's "unsound rule—as it is claimed that it is—leads him astray;" that Mr. Justice Strong "contravenes the express language of the Act and the rule of construction there given," and "furnishes a rule as bad as are those of Mr. Loranger;" that "the judgments of Weldon, Fisher and Wetmore, JJ., were probably the most ridiculous of all the judgments that have yet been delivered on the *ultra vires* question;" that Mr. Justice Palmer "delivered a dissenting judgment which is very loosely reasoned, rambling and incoherent;" and that he "ridicules one of his brother-judges."

The character of the book may be gathered ered from the above, for we have neither patience nor space for further investigations. But our review would not be complete without two choice criticisms of the Judicial Committee of the Privy Council, which we give *verbatim* as follows:

"It is almost painful (a kind of—as Byron would call it—pleasing pain), in the excessively ridiculous aspect in which their views are presented, to follow them further. Their ignorance (to be perfectly candid and strictly just), actual, stupid, stolid ignorance of the matter they are examining, when we consider that *that* is our highest authoritative Appellate Court, is positively painful."

"It will scarcely be credited that the Privy Council were so utterly ignorant as so many children —but credited or not, astounding as the fact was even to ourselves, when it was forced upon our minds."

A man of "many minds." And by such arguments the author proposes to teach the public what are the Constitutional powers of Parliament and of the Local Legislatures!

The Naturalization Act, Canada, 1881, with Notes, Forms, Table of Fees, etc. Appendix containing Treaty, etc., also Naturalization Laws of United States, with forms, etc. By Alfred Howell, of Osgoode Hall, Barrister-at-Law, author of "Surrogate Courts Practice:" Carswell & Co., publishers, Toronto.

The new law establishing a uniform system of naturalization for the whole Dominion, which recently came into operation, is one of very great mportance, and is of interest not only to the legal profession, Clerks of Courts, Registrars, and Justices of the Peace, but to the whole foreign population of the country which, already large, is being increased by many thousands each year. The law covers not only the common naturalization, but the whole question of the nationality of Canadians as well as British subjects and of foreigners within our boundaries. It defines the national character of married women, widows and minors; and it places aliens on the same footing in Canada in holding and disposing of real and personal property as British subjects. The principle enunciated by Lord Chief Justice Cockburn, that—"it should be free to every one to expatriate and denationalize himself, and to transfer his allegiance to another country"—is embodied in it. The Act could not be understood or put into full practical operation unless read side by side with orders-in-council and other State papers referred to in it. In the treatise before us these have been collected, and with Mr. Howell's annotations and a disquisition on the old rule of perpetual allegiance in the United Kingdom, Canada, and the United States, form a complete exposition, in a condensed form, of the law upon the subject. Those desirous of using the United States law and forms or comparing it with the Canadian, will find the former set forth in the Appendix.

Mr. Howell appears to have done his work well and carefully. We have already commended this little work to the profession.

A Manual containing a Short Summary of the usual Practice and manner of Proceeding in Ordinary Cases coming under the observation of Justices of the Peace, Coroners, Constables, Landlords, Bailiffs, etc., and also containing a large amount of useful information for Farmers, Mechanics, Business men, and the Public generally, by Edward Norman Lewis, Barrister-at-Law. Toronto: Carswell & Company.

In this little book which has been "carefully revised" by Judges Toms and Doyle, of County of Huron, we have much information very useful to many classes of persons. After a few preliminary pages devoted to the practice before Justices of the Peace, the author proceeds to set out in alphabetical order a list of indictable and summary cases. Then follows Chapter IV., devoted to the subject of Coroners, and Chapter V. on Constables. Chapter VI. gives elementary information on such subjects as Registration of Births, Deaths and Marriages; Mechanics' Liens, Mills' Act, Line Fence Act, Estray Animals, Leases and Rent, and the Ditches and Watercourse Act. Many forms are given. Speaking generally the book will be found to contain a great deal of information, handily arranged. It is a pity that the author has not in all cases referred to his authority.

LAW STUDENTS' DEPARTMENT.

LAW SOCIETY EXAMINATION QUESTIONS

TRINITY TERM:

FIRST INTERMEDIATE.

Anson on Contracts and Statutes.

1. Define *escrow*, *merger*, *recognizance*.

2. "As a general rule it is optional to the parties to a contract to employ or not to employ the form of a deed." State *common law* exceptions to this.

3. Define and illustrate by an example of each *executory executed* and *past* considerations.

4. Give examples of agreements void under the rules of the common law as distinguished from statutory prohibition.

5. Write short notes on the assignability of the *benefit* of a contract.

6. Point out the requirements for a tender of money to be an answer to an action for a debt.

7. Mention the requirements of the Statute law in regard to parties to a Bill of Exchange writing their address after their names, and the consequence of neglect to do so.

Honors.

1. Give arguments for and against the assertion that agreement is not necessarily the basis of contract.

2. To what extent is the question of consideration in a contract by deed important in the discussion of the validity of the contract? Answer fully.

3. Write brief notes on the validity of contracts made with lunatics and persons in a state of intoxication.

4. Criticize the expression *legal fraud* as distinguished from *moral fraud*.

5. State accurately the effect of illegality of object between the original parties to the contract on a negotiable instrument in the hands of subsequent holders.

6. Point out cases in which extrinsic evidence affecting the terms of a contract is admissible.

7. What is the effect on an executed contract of sale of a chattel, when the article proves to be worthless and unmarketable? Answer fully.

Smith's Common Law.

1. Explain what is meant by *excessive distress*.

2. What is the chief difference between a *factor*, and a *broker?*

3. In an action for malicious prosecution may the jury infer (*a*) *malice* from *want of reasonable and probable cause;* (*b*) *want of reasonable and probable cause* from *malice?* Explain.

4. If a passenger take his baggage along with him in the passenger car, instead of having it put in the baggage car, what effect has that on the responsibility of the company therefor?

5. In the case of a vague imputation of dishonesty, what difference does it make, as to the liability of the person making it, whether it be oral or written?

6. What evidence is sufficient *primâ facie* proof that a letter was duly received by the person to whom it was addressed?

7. A butcher's boy is sent with the butcher's horse and cart to deliver meat to a customer: after delivering the meat he drives a mile further on some business of his own and, while doing so, he negligently collides with a waggon on the road. Is the butcher liable for the damage done to the waggon? Give reasons.

Real Property.

1. Define estate *par autre vie; cestui que vie;* freehold; grantee to uses; *cestui que use.*

2. What is meant by consolidation of securities?

3. What is the difference in the mode of creating a remainder and a reversion?

4. What was the common mode of conveyance before the statute of uses was passed?

5. How was a feoffment without consideration construed in equity?

6. By what tenure are lands held in Ontario?

7. What is meant by a term of years?

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 47 VICT., 1884.

During this term the following gentlemen were entered on the books of the Society as Students-at-Law:—

Graduates—C. I. T. Gould, S. C. Warner, W. T. Kerr, Ernest Heaton, F. M. Field, John A. Davidson, H. H. Langton.

Matriculants—A. A. McMurchy, J. F. Edgar, A. L. Baird, J. A. Macdonald.

Juniors—A. McDonell, J. G. Gauld, C. D. Scott, H. Scott, H. F. Errett, J. G. Kerr, T. Graham, W. J. McKay, H. Millar, W. B. Scane, D. T. K. McEwan, C. Pierson, E. M. Lake, R. M. Thompson.

The following gentlemen were called to the bar, namely:—

David K. I. McKinnon, honor man and gold medalist; Alexander Mills, honor man and bronze medalist; Alexander W. Ambrose, Alfred Craddock, Edmund Sweet, William J. Code, William A. Dowler, Andrew C. Muir, Edwin R. Reynolds, Thomas B. Shoebotham, Arthur W. Morphy, Charles H. Cline, John W. Russell, James W. Hanna, Robert N. Ball, Gerald Bolster, Robert Christie, William Cook, Robert A. Pringle, Jos. Walker.

BOOKS AND SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

1884 and 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—North America and Europe.
- Elements of Book-Keeping.

In 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 years.

Students-at-Law.

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. and III.

ENGLISH.

A Paper on English Grammar.
Composition.
Critical Analysis of a Selected Poem:—
1884—Elegy in a Country Churchyard. The Traveller.
1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,
Translation from English into French prose.
1884—Souvestre, Un Philosophe sous le toits.
1885—Emile de Bonnechose, Lazare Hoche.

or NATURAL PHILOSOPHY.

Books—Arnott's elements of Physics, and Somervilles Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-