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DIARY FOR MAY.

1. Sat.....Last day for filing papers with Sec. Law Society before call or admission.
2. Sun.....*1st Sunday after Easter.*
3. Mon....Sir J. Leach appointed M. R., 1827. J. A. Boyd, 4th Chancellor, 1881.
4. Tues....First intermediate examination.
6. Thur ...Second intermediate examination.
7. Fri.....Lord Chancellor Brougham died 1868, æt. 90.
9. Sun.....*2nd Sunday after Easter.* Clergy Reserves secularized 1853.
11. Tues....Sitting of Ct. of Appeal, and Sitting of Co. Ct. of York for trials begin. Solicitors' Examination.
12. Wed....Barristers' examination.

TORONTO, MAY 1, 1886.

OUR English namesake makes fun of an advertisement:—"To young Barristers —Wanted, one satisfied with fees at conclusion of cases; good start for beginner. —X"; and thinks the main result would be only the consciousness of having degraded the cloth. Young Barristers here would, we presume, be utterly beneath the contempt of their English brethren, for in Canada they are not only glad to get fees after the conclusion of a case, but to get them at all.

THE third year of the Dalhousie Law School at Halifax ended successfully on the 28th April. During the year the school has lost the services of Hon. Mr. Thompson, the present Minister of Justice; but two new lecturers have been added, namely, Mr. Harrington, Q.C., and Mr. Henry, Q.C., making in all a staff of two professors and eight lecturers. The attendance has been about fifty, of whom the following have received the degree of LL.B.:—W. A. Henry, Jr., Halifax; W. D. Carter, Kent, N.B.; Joseph A. Chisholm, Antigonish; Walter Crowe, Truro; J. A. Macdonald, Halifax; H. V. Jennison, Hants; W. W. Wells, Dorchester, N.B.; W. W. Walsh, Halifax; A. G. Troop, Dartmouth; A. E. Milliken, Moncton, N.B.; H. M. Robertson, Shelburne; and S. R. Thompson, of British Columbia. Mr. Chisholm made the highest general average in the senior year.

IT is a matter of surprise to us that no member of the numerous and diligent tribe of legal authors and compilers has ever, so far as we are aware, provided the profession with anything like a complete volume of precedents of mercantile forms; that is to say, of forms of various documents in use among banks, insurance companies, railway companies and business men generally. No doubt, in the appendices of various text-books relating to particular departments, will be found scattered precedents of such forms as we refer to, but we should have thought that a compilation containing within the covers of a single volume good and reliable forms of every kind, especially if there was a reference in the foot notes to any cases in which any of the forms given have passed through the fire of judicial trial, would have a ready sale. To give a concrete example of what we refer to, we were unable to find at Osgoode Hall a form of guarantee to be given by a party wishing to have transferred certain shares standing in the name of another party into his own name, providing that the bank should retain the same lien upon the shares after being so transferred as they would have had if the shares had not been so transferred, in respect to certain bills and notes held by the bank, and which had been discounted

by them for the said other party. We searched with considerable diligence, but by no means dogmatically assert that such a form was not to be found in some of the books in our admirable library; still it seems to us curious that it should not have been possible to put one's hand at once upon a book containing a form which must so often be required. It is, perhaps, only fair to add, that we did, in Kay & Elphinstone's "Conveyancing Forms," find a form of guarantee to a bank of a current account, from which we were able to extract such clauses as seemed to us to satisfy our immediate requirements. We offer this suggestion to any one who has the diligence to act upon it, subject, of course, to some of our readers being able to enlighten our ignorance as to such a book being already in existence.

RECENT ENGLISH DECISIONS.

The *Law Reports* for April comprise 16 Q. B. D. pp. 513-672; 11 P. D. pp. 21-30; and 31 Chy. D. pp. 351-503.

SECURITY FOR COSTS—INSOLVENT PLAINTIFF.

Taking up the cases in the Queen's Bench Division, the first requiring attention is *Rhodes* v. *Dawson*, 16 Q. B. D. 548, in which the Court of Appeal were called on to review an order of a Divisional Court of the Queen's Bench Division, directing security for costs to be given by a plaintiff in an interpleader issue, on the ground that he was insolvent, and that a receiver had been appointed of his assets. The Court of Appeal held the order to be wrong. An attempt was made to support the order on the authority of *Malcolm* v. *Hodgkinson*, 8 L. R. Q. B. 209; but the Court of Appeal point out that that case was decided on the ground that the case came within the rule which requires an insolvent plaintiff, suing as trustee for another person, to give security for costs which rule does not apply when the plaintiff, though insolvent, is suing on his own behalf.

AMENDMENT OF DEFENCE — PREJUDICE TO PLAINTIFF.

In *Steward* v. *The Metropolitan Tramways Co.*, 16 Q. B. D. 556, the Court of Appeal affirmed the order of Pollock, B., and Manisty, J., which was noted *ante*, p. 99.

INSPECTION OF DOCUMENTS.

In *Chadwick* v. *Bowman*, 16 Q. B. D. 561, a Divisional Court of the Queen's Bench Division affirmed an order of Day, J., granting an inspection of documents admitted by the defendant to be in his possession, but which he objected to produce on the ground of privilege, under the following circumstances. A correspondence had taken place between the defendant in an action and persons, other than the plaintiff, which was material to the questions at issue. The defendant had not preserved the letters received by him, nor copies of the letters written by him in the course of the correspondence, but after action brought his solicitor, for the purpose of the defence, procured from such third persons copies of the letters so written and received. Denman, J., says:

The originals of these documents would have been admissible in evidence against the defendant, and it seems to me that there is nothing in the circumstances, under which the copies came into existence, to render them privileged against inspection.

PERSON SUING IN FORMA PAUPERIS—RIGHT TO BE HEARD IN PERSON.

The simple question of practice the Court of Appeal was asked to pronounce upon, in *Tucker* v. *Collinson*, 16 Q. B. D. 562, was whether a person who had been admitted to sue as a pauper, but to whom no counsel had been assigned, was entitled to be heard in person. The Court held that he was. Lord Esher's judgment is noticeable for the fact that he denies that the Court is bound to assign a counsel and solicitor to a pauper, when it is of opinion that the claim of the latter is frivolous.

DAMAGES, MEASURE OF—BREACH OF CONTRACT.

Kiddle v. *Lovett*, 16 Q. B. D. 605, in view of the *Workmen's Compensation for Injuries Act*, 1886, passed at the recent session of our local Legislature, is of some interest. The plaintiffs employed the defendant to put up a platform for the purpose of enabling the plaintiffs to paint a house. This platform, through being insecurely fastened by the defendant, fell, and

hurt a painter in the plaintiffs' employment. The painter brought an action against the plaintiffs for injuries sustained, under the Employers Liability Act, 1880, from which the Act above referred to is taken, which action the plaintiffs compromised by the payment of £125. The present action was then brought against the defendant for breach of contract, and it was held by Denman, J., that though the defendant was liable under the contract, yet that the plaintiffs having employed a competent person to put up the platform, there was on the facts no evidence of negligence by the plaintiffs, and therefore, they were not liable to their servant for the injury he had sustained, and that the money paid by him to settle his action was therefore not recoverable against the defendant as damages for his breach of contract, and the learned judge therefore gave judgment against the defendant for nominal damages only, without costs.

Action for waste by reversioner—Measure of damages.

Witham v. *Kershaw*, 16 Q. B. D. 613, is another decision on the question of the measure of damages. In this action the plaintiff claimed as a reversioner to recover damages against his tenant for waste committed on the demised premises. The waste complained of consisted in the removal of soil from the demised premises. Matthew, J., before whom the action was tried, held that the proper measure of damages was the sum which it would cost the plaintiff to replace the soil which the defendant had taken, less a discount in respect of the time which would elapse before the reversion would fall into possession; but the Court of Appeal held, that this was an erroneous mode of computing the damages, and that the measure of damages, for breach of a covenant not to commit waste, is not necessarily the same as it is for breach of a covenant to deliver up the property at the end of the term, in the same state as that in which the tenant received it. For while in the latter case, the method of arriving at the damages adopted by Matthew, J., would be correct; the proper mode of estimating the damages in the former case, is to ascertain the actual injury occasioned to the reversion by the wrongful act complained of. In this case it was left to the Court of Appeal to fix the damages, and it appearing that the land in question was worth about £30 per acre, and that the soil which had been removed would have covered about a quarter of an acre, the damages were fixed at £10.

Larceny—Innocent receipt of chattel.

In *The Queen* v. *Flowers*, 16 Q. B. D. 643, it was necessary to explain *Reg.* v. *Ashwell*, 16 Q. B. D. 190, noted *ante*, p. 99. The latter case was supposed by the learned recorder of Leicester, to have abrogated the well-established rule of law, "that an innocent receipt of a chattel and its subsequent fradulent appropriation do not constitute larceny"; but the Court composed of Coleridge, C.J., Manisty, Hawkins, Day, and Grantham, JJ., were unanimous that it had no such effect.

Particulars — Names of persons to whom slander uttered.

The case of *Roselle* v. *Buchanan*, 16 Q. B. D. 656, was an action of slander, in which the defendant before delivering his defence, applied for an order for the plaintiff to deliver particulars of the names of the persons to whom the alleged slander was uttered. Field, J., had granted the application, and Grove and Stephen, JJ., now affirm his order.

Appointment of new trustees—Senile imbecility.

In re Phelps' trusts, 31 Chy. D. 351, was an application under the Trustee Act, 1850, to appoint a new trustee in place of one who was 85 years of age, and sworn to be and for the past twelve months, to have been, from advanced age and failing memory, mentally incapable of transacting any trusteeship business. Kay, J., thought the evidence showed that the trustee was "a person of unsound mind," and that the petition should therefore have been entitled in lunacy and he dismissed it; but upon appeal, the Court held the trustee was not a person of unsound mind, and that only persons can be said to be "of unsound mind," who would be found insane upon inquisition and they granted the application as being within sec. 32 of the Act.

Injunction—Restraining unauthorized use of name.

In *London and Blackwall Ry. Co.* v. *Cross*, 31 Chy. D. 354, an application was made to Chitty, J., for an injunction to restrain the de-

fendant from using the name of his lessor in a notice to arbitrate under an Act enabling the plaintiffs to expropriate certain rights. The defendant as lessee of these rights, had given a notice in his own name, and in that of his lessors, under the belief that the power of attorney contained in his lease enabled him to do so. The plaintiffs claimed that the use of his lessor's name was unauthorized, and Chitty, J., being of opinion that the lease gave the defendant no power to use the lessor's name, granted the injunction; but on appeal the Court of Appeal reversed his order, holding that though the Court may properly stay proceedings taken before itself in the name of any person without his authority, because such a proceeding is an abuse of the process of the Court, it has, nevertheless, no authority to restrain by injunction proceedings before arbitrators under the Act in question by persons who have no right to compensation. Such questions, they were of opinion, must be fought out in an action upon the award, and could not be determined upon a motion for an injunction.

DISCOVERY—GENERAL ALLEGATION OF FRAUD.

Leitch v. *Abbott*, 31 Chy. D. 374, is a decision of the Court of Appeal on a question of practice. The plaintiff alleged that he had employed the defendant as a stock-broker, but that the defendant had in many transactions dealt with himself as principal, and had also charged the plaintiff with moneys which he had not paid. The plaintiff delivered interrogatories asking for particulars of the dealings of the defendant on behalf of the plaintiff, and the names of the persons with whom he had dealt, and the amounts paid. The defendant objected to answer on the ground that the plaintiff was not entitled to this information until after decree. But Cotton and Bowen, L.JJ., held that though there were no particulars of the frauds alleged, the plaintiff was entitled to the discovery sought by him, and they therefore reversed the order of Chitty, J., Fry, L.J., doubting.

BREACH OF TRUST—LIABILITY OF HUSBAND FOR WIFE'S BREACH OF TRUST—RIGHT TO INDEMNITY BY CO-TRUSTEE.

Bahin v. *Hughes*, 31 Chy. D. 390, is a decision of the Court of Appeal, in which the decision of Kay, J., was affirmed. The action was brought by *cestuis que trust* against their trustees, and the husband of a deceased trustee, to compel them to make good certain losses arising from an improper investment of the trust funds. The investments in question had been made by the defendants Hughes and Burden, but the wife of the defendant Edwards had passively permitted the investment to be made. Two points were made by Edwards—first, that his wife not having actively participated in the improper investment he was not liable, but the Court determined this point against him; and the second point made by him, that his co-defendants were bound to indemnify him, was also held untenable, though as to this Bowen, L.J., expressed considerable doubt. The other members of the Court (Cotton and Fry, L.JJ.) were clearly of opinion that all the trustees were equally in the wrong, and that none of them were entitled to indemnity from their co-trustees. Cotton, L.J., says:—

> In my opinion it would be laying down a wrong rule to hold that when one trustee acts honestly, though erroneously, the other trustee is to be held entitled to indemnity who by doing nothing neglects his duty more than the acting trustee.

And Fry, L.J., makes use of the following language:—

> In my judgment the Court ought to be very jealous of raising any such implied liability as is insisted on, because, if such existed, it would act as an opiate upon the consciences of the trustees; so that, instead of the *cestui que trust* having the benefit of several acting trustees, each trustee would be looking to the others for a right of indemnity and so neglect the performance of his duties.

MOTION FOR JUDGMENT ON ADMISSION IN PLEADINGS—(ONT. RULE 322).

The point of practice determined by the Court of Appeal in *United Telephone Co.* v. *Donohoe*, 31 Chy. D. 399, is deserving of attention. The action was for an infringement of a patent. The statement of defence admitted certain instances of infringement, and denied the commission of any others. The plaintiff moved for judgment under Rule S. C., Ord. 32, r. 6 (Ont. Rule 322) upon the admission in the pleadings. He claimed a general inquiry as to all infringements committed by the defendant, but the Court of Appeal sustained Bacon, V. C., in limiting the inquiry to the

damage sustained by the plaintiff by reason of the infringements admitted by the defendant. By moving for judgment on the admission in the defence, Lord Esher, M.R., said the plaintiff accepted the statement of defence "and must take the negative as well as the affirmative allegations therein contained."

MARRIED WOMEN'S PROPERTY ACT, 1882, s. 5 (47 VICT., C. 19, SEC. 5, ONT.)

The conflict of decisions as to the proper construction of the English Married Women's Property Act, 1882, s. 5, which is similar in its terms to our own statute, 47 Vict., c. 19, s. 5, (O.), has at last been composed by the Court of Appeal in *Reid* v. *Reid*, 31 Chy. D. 412. That section, it may be remembered, provides that "every woman married before the commencement of this Act shall be entitled to have, and to hold, and to dispose of in manner aforesaid, as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money and property so gained or acquired by her as aforesaid." The point in controversy has been whether property, to which a married woman prior to the passing of the Act of 1882 had acquired a contingent title either in reversion, or remainder, became her separate property under the Act on its subsequently to the passing of the Act falling into possession. Some of the Judges had held that the title of the wife "accrued" when the estate became an estate in possession, but the Court of Appeal has determined that that is wrong. Cotton, L.J., says, at p. 408 :—

> In my opinion, considering the section truly and fairly, there must be an accruer of title after, and not before, the passing of the Act, and the title must be considered as accruing when the married woman first acquires her interest in the property, whether such interest is at that time in possession, reversion, or remainder.

Notwithstanding this case, however, it is probable that in this Province a married woman would, under the Act in force prior to 47 Vict., c. 19, be entitled under the circumstances appearing in *Reid* v. *Reid* to claim the property as separate estate.

NON-PAYMENT OF COSTS—CONTEMPT—STAYING PROCEEDINGS.

In *Re Neal, Weston* v. *Neal*, 31 Chy. D. 437, Bacon, V. C., followed the decision of Pearson, J., in *Re Youngs*, 31 Chy. D. 239 (see *ante*, p. 102), and held that the proceedings must be stayed until the plaintiff had paid the defendant certain interlocutory costs she had been ordered to pay. In this case the objection that the plaintiff was in default was taken by the defendant on the action coming on for trial, and was held not to be too late.

POWER OF APPOINTMENT—REVOCATION—INVALID APPOINTMENT.

The short question in *Duguid* v. *Fraser*, 31 Chy. D. 449, was whether where a person having a power of appointment by will in favour of a class, executes a will making a valid appointment in favour of the class, but subsequently, on a member of the class dying, adds a codicil purporting to appoint his share in favour of certain persons who were not objects of the power, the codicil could be deemed to be a revocation of the appointment made by the will *pro tanto*. Kay, J., held that it could not, and that the valid appointment made by the will was unaffected by the subsequent invalid appointment made by the codicil.

WILL—BLANKS LEFT BY TESTATRIX—EVIDENCE OF INTENTION.

In *Re Bacon, Camp* v. *Coe*, 31 Chy. D. 460, is the second case which has appeared in the reports within the last four months arising out of a testatrix using a printed form of a will and neglecting to fill up the blanks. The other case, *Mr. Harrison*, we noted *ante*, p. 77. In the present case the testatrix, after giving certain legacies, gave all her estate, real and personal, unto —— to and for —— own use and benefit absolutely, and then appointed C. W. C. to pay all her debts and to be executor of her will. The testatrix was illegitimate, and a contest arose between the Crown and the executor as to the residue: and on the part of the latter parol evidence was offered to show that it was the intention of the testatrix that the executor should have the residue, if any for his own benefit; and it was held by Kay J., that, under the peculiar circumstances, the evidence was admissible to rebut the presump-

tion against the executor arising from the blanks, and as this evidence established it to have been the intention of the testatrix to give the executor the residue for his own benefit, it was so decreed.

NON-PRODUCTION BY DEFENDANT—JUDGMENT FOR DEFAULT OF DEFENCE.

In *Haigh* v. *Haigh*, 31 Chy. D. 478, a defendant made default in production. Her solicitor explained to her the effect of the order and the consequences of disobeying it. Her defence was struck out, and judgment was obtained against the defendant for default of defence. An application to set aside the judgment was refused by Pearson, J., on any terms. See *Dunn* v. *M. Lean*, 6 P. R. 156.

MOTION FOR JUDGMENT BY INFANT PLAINTIFF IN DEFAULT OF DEFENCE—EVIDENCE.

In *Ripley* v. *Sawyer*, 31 Chy. D. 494, Pearson, J., held that on a motion for judgment in a partition action in default of pleading where some of the defendants were infants, it was not necessary to file affidavits to substantiate the allegations in the statement of claim. This is contrary to the practice which has hitherto prevailed in this Province. In *Perry* v. *Perry*, before Boyd, C., 10th March, 1886, where the plaintiffs were infants, affidavits proving the statements in the statement of claim were dispensed with.

MORTGAGE ACTION—RECEIPT OF RENTS BEFORE DAY FIXED FOR REDEMPTION.

In *Jenner-Fust* v. *Needham*, 31 Chy. D. 500, Pearson, J., decided that, if between the date of the report and the day fixed for redemption rents are received, either by the mortgagee or by a receiver appointed in the action, those rents must go in reduction of the amount due to the mortgagee and a fresh account must be taken. This decision CHITTY, J. refused to follow in *Farquhar* v. *Young*, 80 L. T. 339, but it was followed in *Peal* v. *Nicholson*, 80 L. T. 394, by Kay, J.

This completes our review of the *Law Reports* for April.

REPORTS.

ONTARIO.

ASSESSMENT CASE.

IN THE MATTER OF AN APPEAL FROM THE COURT OF REVISION FOR TORONTO.

Ministerial exemptions—Editors of religious papers, and managers of church funds—R. S. O., cap. 180, sec. 6, sub-sec. 23—48 Vict. O. cap. 42, sec. 12.

In a number of appeals by clergymen claiming the exemption under R. S. O. cap. 180, section 6, sub-section 23, as amended by 48 Vict. (Ont.) cap 42, section 12,

Held (1), that clerical professors in theological institutions for the training of ministers, who were lawfully paid out of church funds, and not by fees; (2) the missionary secretaries, and president of conference, whose whole duty was clerical; and superannuated ministers, not engaged on lay employment, were exempt.

Held, also, that clerical editors of religious newspapers and periodicals, and clerical managers of church business institutions were not exempt, as their duties were chiefly of a lay character, and their clerical duties only occasional.

Held, also, that a minister living in one municipality and doing only clerical duty in another municipality, was entitled to the $2,000 exemption on residence.

[Toronto, Dec. 20, 1885—MacDougall, Co. J.

The facts of the case fully appear in the judgment of—

MACDOUGALL, Co. J.—A number of appeals from the Court of Revision of Toronto were argued before me on the 30th November, raising the question as to what clergymen could legally claim the exemption allowed by sub-section 23, of sec. 6, cap. 180, R.S.O., as amended at the last session of the Ontario Legislature by sec. 12 of cap. 42 48 Vic. (Ontario). The language of the revised statute before amendment was as follows:—"The stipend or salary of any clergyman or minister of religion, while in actual connection with any church, and doing duty as such clergyman or minister, to the extent of $1,000, and the parsonage or dwelling-house occupied by him, with the land thereto attached, to the extent of two acres, and not exceeding $2,000 in value." The language of this section as amended by the Act of 1885 is as follows:—(The changes are italicized):—"The stipend or salary of any clergymen or minister of religion while in actual connection with any church, and doing duty as such clergyman or minister, to the extent of $1,000, and the parsonage, *when occupied*

as such or unoccupied; and, if there be no parsonage, the dwelling-house occupied by him, with the land thereto attached, to the extent of two acres, and not exceeding $2,000 in value. *This sub-section shall not apply to a minister or clergyman whose ordinary business or calling at the time of the assessment is not clerical, though he may do occasional clerical work or duty.*" Now, in construing an amendment to a statute, one must examine the old law and the judicial construction it has received; and, in the light of any such construction, the language of the amending clause, to learn what, if any, limitation the Legislature has placed upon such construction, or to ascertain if such amendment is intended to give a wider application to the law. It is clear in examining the amendment made by the Act of 1885 that the Legislature intended to give a larger exemption as to parsonages. The old law exempted the parsonage or dwelling-house only when occupied by the parson. The new law exempts the parsonage when occupied as such or unoccupied; and as if to prevent any quibble on the word "parsonage," adds the words:—"If there be no parsonage, the dwelling-house occupied by him," etc., is to be exempt to the value of $2,000. Then comes the added clause, which limits the application of the whole subsection, and states that it shall not apply to a minister or a clergyman whose ordinary business or calling at the time of the assessment is not clerical, though he may do occasional clerical work or duty. It was argued before me by the City Solicitor that the word "church" in the second line of the section in the Act of 1885 meant congregation, and that the Legislature intended to exempt only those clergymen and ministers in actual charge of congregations; that it was not intended that the exemption should apply to any clergyman or minister who was performing duties assigned to him by his church-governing body, if such duty did not include the actual charge of a congregation. Upon this view of the language of the section under consideration, the President or Superintendent of the Methodist General Conference, the secretaries of the missionary enterprises of any of the churches, the clerical professors in the theological institutions of the various churches, the clerical editors of the magazines and newspaper organs published by the different denominations, the clerical treasurers of the various funds connected with the several religious bodies, and other clergymen assigned by their respective governing bodies to special duty other than having charge of a congregation—all these clergymen, it was argued, were not entitled to claim exemptions for either stipend or residences. It was pointed out by the appellants that the word "church" in the clause in the revised statute had received judicial construction, and that the County Judges throughout the Province had decided in past years that it meant the church or denomination in the general and collective sense, and not a church or congregation in the narrower sense; and it was argued, with much reason and fairness, that the Legislature must be assumed to have known of this construction, and in re-enacting the clause in 1885 had chosen to repeat the exact language of the revised statute in this particular. I think this contention sound, and upon this view allowed the exemption in the case of Dr. Williams, the Superintendent of the Methodist Church of Canada, whose whole duty was clearly clerical; and upon the same grounds I allowed the appeals of Rev. Dr. Sutherland and the Rev. John Shaw, the Missionary Secretaries of the same church, as it was shown that their duties (to which they had been assigned by the General Conference of the Methodist body) were wholly clerical, their entire time and attention being devoted to the supervision, inspection and assistance in the mission work of the church from the Atlantic to the Pacific, and their stipend was payable wholly out of church funds. The other appeals, relating to the several classes of clergymen covered by the contention of the City Solicitor, I reserved for further consideration, feeling somewhat impressed at the time with the argument that the added subsection was intended to reach some, if not all, of them. These appeals can conveniently be treated under certain distinct divisions, which will embrace a number of individual cases. I have divided them as follows:—1. Professors in theological institutions 2. Clerical editors of religious newspapers and periodicals; 3. Treasurers and managers of various church funds, and managers of other church institutions; 4. Superannuated ministers.

The language of the new portion of the section in the Act of 1885 is that the exemptions to be allowed shall not extend to the case of a minister or clergyman whose ordinary business or calling at the time of the assessment is not clerical. What are we to understand as clerical work? Is it restricted to preaching and the administration of the sacraments? Is it not clerical work to train, educate and prepare others to become clergymen, especially if the position of professor in a theological school, by the rules of the denomination, can only be filled by a clergyman, and if the stipend paid such professor is taken solely from church funds and is not derived from fees payable by the students? It may be argued that the act of the church in establishing the institution, maintaining it by church funds appointing to its chairs clergy-

men only, its sole object being to educate candidates for the ministry, constitutes the performance of such duties on the part of its professors clerical work. It could also be said that such professors are clergymen in actual connection with the church and doing duty as such clergymen. They yield obedience to the governing body of their denomination, and do the duty appointed them, and the work is regular, not occasional. They preach on Sundays, administer the sacraments to the students, hold religious services with them, and, in addition, on week days lecture and teach them the subjects in which candidates for ordination are required to attain a certain degree of proficiency before they can be licensed to preach themselves. I have arrived at the conclusion, from some of the foregoing considerations—though I am not altogether free from doubt—that it is not straining the construction to be placed upon the Act to hold that the performance of such duties is clerical work, and that the ordinary business and calling of such clergyman, discharging these duties by the order and appointment of his ecclesiastical superiors, is clerical. I therefore allow the appeals of the following gentlemen:—Rev. Messrs. Caven, J. H. Castle, William Gregg, William McLaren, H. McVicar, D. H. Welton, A. H. Newman, J. W. A. Stewart.

The next division of the reserved appeals that I have made are the cases of those clergymen who are appointed by their governing bodies to act as editors of the religious newspapers and periodicals of their several denominations. In the case of these gentlemen I feel much more doubt. It is the aim and object of all laws regulating the question of taxation to lay the burden upon the persons and property of all equally, and all clauses exempting persons and property are to be construed with strictness, and an exemption should be denied unless so clearly granted as to be free from fair doubt. The editorial charge of a religious weekly newspaper or monthly magazine can hardly be viewed as work that is strictly clerical. The contents of a religious newspaper are somewhat varied in character and though much of the editor's work in such a publication is naturally an appeal to the religious sentiment and instincts of his readers, yet a large portion of the editor's task and duty is to record the various transactions of his religious body, the progress of church work, statistics, items of church gossip, matters of church government and policy; to discuss religio-political questions such as Prohibition, State aid to church institutions, legislation affecting the morals of the community, and kindred subjects. That they do a great deal of good, and are widely read by a constituency of thoughtful readers, cannot be denied; and possibly, as was argued, the clerical editor may preach to a vastly larger congregation, than could be gathered into the churches. Yet can the ordinary business and calling of a clergyman filling such a position be called clerical? Was it the intention of the Legislature to exempt the stipend and residence of the fortunate editor of the religious newspaper, while his secular brother should be compelled to pay not only his own tax on income and home, but indirectly bear a portion of the burden of the taxes that his reverend confrère casts upon the general community? It was argued that such clergymen, appointed to these positions, were paid out of church funds; that as they retained their clerical status in their own order, notwithstanding their occupation, and as they were allowed to count the years passed by them in the editorial chair as though these years had been occupied by them in doing duty in the pulpit—for these reasons their duties should be considered clerical. I cannot accede to this contention. The internal regulations of their governing bodies upon these matters cannot *ex vi termini* make their ordinary business and calling anything but that of editors. The position is different from that of professors in theological institutions. The latter, in my view, can only claim the exemption when their teaching or preaching is confined to the education and religious training of students intended only for the church, and at the sole expense of the church. Where they are teachers as well of other classes open to other students than catechumens, then I think they fall within the exception in the statute of 1885, and their ordinary business and calling becomes that of teachers and professors; while the clerical portion of their work, in the light of the limitations I have placed upon it, becomes occasional. I therefore disallow the appeals of the Rev. Drs. Withrow, Dewart and Stone.

The third class of appeals are the managers of church funds and business institutions. As to the managers of business institutions, such as book stewards, etc., they fall within the *ratio decidendi* applicable to editors of religious newspapers, and I must therefore disallow the appeal on income of Rev. Mr. Briggs, book steward of the Methodist body—it being admitted that he derived his income solely from this office. As President of the Toronto Conference without salary, it might perhaps be argued that his residence should be exempt, as falling within the decision I have made in the Rev. Dr. Williams' case, as Superintendent of the General Conference of the Methodist Church; but I fear that the duties and responsibilities of his

office as book steward, with which the whole of his income is connected, absorb the chief portion of his time and attention, and therefore his strictly clerical work or duty will fall within the statutory limitation of "occasional." His appeal for exemption upon his residence will therefore be also disallowed.

But what is the position of clerical treasurers of church funds? I cannot, I think, upon principle, distinguish their position from that occupied by the managers of the business institutions connected with the religious bodies. They are sitting in the counting-house, dealing with the funds, their investment and distribution, and though clothed in full canonicals, the clerical side of their work and duty can, I think, with all fairness, be only viewed as "occasional." The appeals, therefore, of the Rev. Wm. Reid and Rev. James Grey will be dismissed.

I lastly approach, with considerable doubt, the last division of these appeals—that of superannuated ministers. Where they are entirely unconnected with any lay employment, their small superannuation allowance will, in most instances, escape the tax collector's claim, by being within the $400 exemption applicable to all citizens. I am quite clear in their case that any excess of income which they may fortunately possess beyond $400, unless the same is derived from clerical employment or church funds, will not be exempt, because the words of the statute are, "stipend or salary." But the question of their right to the $2,000 exemption for dwelling-house is less free from doubt. It is quite true that the clerical work and duty they do, in one view, may be said to be only occasional; yet it is the only work or duty they perform. They are still in actual connection with the church, and any duty they perform is done as such clergymen. They have no ordinary business or calling that is not clerical. If the Legislature had the intention to deal gently with the clerical order, and to free them from some of the burdens imposed upon the ordinary citizen, one cannot but think that these veteran soldiers of the church, worn out in the service, the vast majority of them decayed in body and estate, were amongst the most fit objects of its bounty. Though I am bound to construe the legislative language with strictness, yet I shall not, I think, be deemed reprehensible if, in the case of this deserving class of claimants, I am not astute in finding reasons for depriving them of what, in their case, will indeed be a benefaction. I shall therefore allow the appeals for exemption for residence of the Rev. Messrs. C. Campbell, W. Cleland, John Hunt and Samuel Rose. There remains only one appeal undisposed of which presents some curious features. It is that of Rev. J. D. Gilbert, who states that he has charge of a poor congregation in an outlying township of an adjoining county; that he preaches to them every fortnight; and they are so poor that they barely raise enough to pay the expense of his fortnightly journey to them to perform service. He lives in Toronto, and does no other than clerical work. The exemption claimed by him is in respect to his residence, assessed at $600. No assessable income is returned. Modern science has so bridged over distance that it may well happen that a clergyman may live in one county and perform clerical duty in another. I can see no reason why this appeal should not be allowed. Though at first sight it does appear somewhat incongruous that one municipality should practically provide a dwelling-house for a minister whose charge lies in another, I can find nothing in the Assessment Act which prevents this claim from being successfully set up under the law. The appeal will therefore be allowed.

I cannot conclude this judgment without expressing the hope that at its next session the Legislature will see fit to re-cast the clause of the Act of 1885 which I have had under consideration, and by the use of clearer and more explicit language free the construction of the section from any reasonable doubt. If, as was urged before me, it desires to grant the exemption to those clergymen only who are in actual charge of congregations, let it say so in plain and unambiguous language. The conflicting decisions pronounced in different counties upon the clause in question warrants me in expressing the hope that all doubts will be set at rest by some clearer expression of the Legislative will.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

ADAMSON (Defendant), Appellant v. ADAMSON (Plaintiff), Respondent.

Statute of limitations—Conveyances to trustees—In trust for tenant for life—Remainder to joint-tenants or tenants in common-possession by tenant of tenant for life.

Appeal from the Court of Appeal for Ontario.

By a deed to trustees in 1837, two lots of land were conveyed in trust for E. A. for her life, with remainder as follows:—Lot No. 2 to G. A. and lot No. 1 to A. A., to the use of them, their heirs and assigns as joint-tenants, and not as tenants in common. E. A., the tenant for life, entered into possession of lot No. 2, and in 1863 put her son, the husband of the defendant, into possession without exacting any rent. The son died a few months after, and the defendant, his widow, continued in possession of the lot, and was in possession in 1875, when the tenant for life died.

In 1878, A. A., the plaintiff, obtained a deed of the legal estate in the two lots from the executors of the surviving trustee (G. A. having died a number of years before), and brought an action against the defendant for the recovery of the said lot No. 2.

Held, that as there was no time prior to the death of the tenant for life, when either the trustee or the remainder-man could have interfered with the possession of the said lot, the statute of limitations did not begin to run against the remainder-man until the death of the tenant for life in 1875, and he was therefore entitled to recover.

Held, also, that for the purposes of the said action it was immaterial whether the plaintiff was entitled to the whole lot by survivorship on the termination of the joint-tenancy by the death of his brother, or only to his portion of the lot as one of his brother's heirs.

Appeal dismissed with costs.

C. Robinson, Q.C., for appellants.

Mowat, *Attorney General*, and *Maclennan*, Q.C., for respondents.

FAULDS ET AL. (Plaintiffs), Appellants v. HARPER (Defendant), Respondent.

Mortgagor and mortgagee—Foreclosure and sale—Purchase by mortgagee—Right to redeem after—Statute of limitations—Trustee for sale.

Appeal from the Court of Appeal for Ontario.

In a foreclosure suit against the heirs of a deceased mortgagor who were all infants, a decree was made ordering a sale: the lands were sold pursuant to the decree and purchased by J. H., acting for and in collusion with the mortgagee; J. H., immediately after receiving his deed, conveyed to the mortgagee, who thereupon took possession of the lands, and thenceforth dealt with them as the absolute owner thereof; by subsequent devises and conveyances the lands became vested in the defendant M. H., who sold them to the defendant L., a *bona fide* purchaser without notice, taking a mortgage for the purchase money. In a suit to redeem the said lands, brought by the heirs of the mortgagor, some eighteen years after the sale, and more than five years after some of the heirs had become of age.

Held, reversing the judgment of the Court of Appeal, that the suit being one impeaching a purchase by a trustee for sale, the statute of limitations had no application, and that, as the defendants and those under whom they claimed had never been in possession in the character of mortgagees, the plaintiffs were not barred by the provisions of R. S. O. cap. 108, sec. 19, and that the plaintiffs were consequently entitled to a lien upon the mortgage for purchase money given by L.

Held, also, that as it appeared that the plaintiffs were not aware of the fraudulent character of the sale until just before commencing their suit, they could not be said to acquiesce in the possession of the defendants.

Appeal allowed with costs.

McCarthy, Q.C., for appellant.

Street, Q.C., for respondent.

PETRIE (Plaintiff), Appellant, v. GUELPH LUMBER CO., ET AL.

INGLIS ET AL. v. SAME.

STEWART v. SAME.

Corporation—Promoters of—Action against company and promoters for fraudulent misrepresentation—Action ex delicto for deceit—Fraudulent concealment.

Appeal from the Court of Appeal for Ontario.

A suit was brought against a joint stock company, and against four of the shareholders who had been the promoters of the company. The bill alleged that the defendants, other than the company, had been carrying on the lumber business as partners and had become embarrassed; that they then concocted a scheme of forming a joint stock company: that the sole object of the proposed company was to relieve the members of the firm from personal liability for debts incurred in the said business, and induce the public to advance money to carry on the business: that application was made to the Government of Ontario for a charter, and at the same time a prospectus was issued which was set out in full in the bill: that such prospectus contained the following paragraphs among others, which the plaintiff alleged to be false:

1. The timber limits of the company, inclusive of the recent purchase, consist of 222½ square miles, or 142,400 acres, and are estimated to yield 200 million feet of lumber.

2. The interest of the proprietors of the old company in its assets, estimated at about $140,000 over liabilities, has been transferred to the new company at $105,000, all taken in paid up stock, and the whole of the proceeds of the preferential stock will be used for the purposes of the new company.

3. Preference stock not to exceed $75,000 will be issued by the company to guarantee eight per cent. yearly thereon, to the year 1880, and over that amount, the net profits will be divided amongst all the shareholders *pro rata*.

4. Should the holders of preference stock so desire, the company binds itself to take that stock back during the year 1880 at par, with eight per cent. per annum, on receiving six months' notice in writing.

5. Even with present low prices the company, owing to their superior facilities, will be able to pay a handsome dividend on the ordinary, as well as on the preference stock, and when the lumber market improves, as it must soon do, the profits will be correspondingly increased.

The bill further alleged that the plaintiffs subscribed for stock in the company on the faith of the statements in the prospectus: that the assets of the old company were not transferred to the new in the condition that they were in at the time of issuing the prospectus: that the embarrassed condition of the old company was not made known to the persons taking stock in the new company, nor was the fact of a mortgage on the assets of the old company having been given to the Ontario Bank, after the prospectus was issued, but before the stock certificates were granted: that the assets of the old company were not worth $140,000, or any sum over liabilities, but were worthless; and prayed for a rescission of the contract for taking stock, for repayment of the amount of such stock, and for damages against the directors and promoters for misrepresentation.

There was evidence to show that the promoters had reason to believe the prospects of the new company to be good, and that they had honestly valued their assets.

On the argument, three grounds of relief were put forward:

1. Rescission of the contract to subscribe for preference stock.

2. Specific performance of the contract to take back the preference stock during the year 1880 at par.

3. Damages against the directors and promoters for misrepresentation. The company having become insolvent, the plaintiffs put their case principally on the third ground.

Held, affirming the judgment of the Court below, 11 Ont. App. R. 336, that the plaintiffs could claim no relief against the company by way of rescission of the contract, because it appeared that they had acted as shareholders, and affirmed their contracts as owners of shares, after becoming aware of the grounds of misrepresentation.

Held, also, as to the action against the defendants other than the company for deceit, that the evidence failed to establish such a

case of fraudulent misrepresentation as to entitle plaintiffs to succeed as for deceit.

Held, also, as to the alleged concealment of the mortgage to the Ontario Bank, it having been given after the prospectus was issued it could not have been in the prospectus, and moreover that the shareholders were in no way damnified thereby, as the new company would have been equally liable for the debt, if the mortgage had not been given; and as to the concealment of the embarrassed condition of the old company, the evidence showed that the old firm did not believe themselves to be insolvent; and in neither case were they liable in an action of this kind.

Appeal dismissed, with costs.

McCarthy, Q.C., for appellants.

Robinson, Q.C., and *Cassels*, Q.C., for respondents.

COURT OF APPEAL.

From C. P. Div.] [February 10.

DYMENT v. THOMPSON.

Sale of goods—Place of inspection—Acceptance of part—Cross-action for damages.

The judgment of the Court below, 9 Ont. R. 566, was upheld.

Lount, Q.C., and *Kappele*, for the appellants.

McCarthy, Q.C., and *Pepler*, for the respondents.

From C. C. Renfrew.] [February 10, 1886.

DAVIS v. CANADIAN PACIFIC RAILWAY CO.

Consolidated Railway Act, 1879—*Railway Act*. 1868—"*Occupied land*"—"*Proprietor*"—*Company's duty to fence—Free Grant and Homestead Act—Neglect to fulfil settlement duties, effect of—Partial answer of jury to written question—Contributory negligence.*

The plaintiff and one N. were occupants of adjoining lots of land, the plaintiff residing upon lot 11, and N. being in possession of lot 10, and by agreement between them, the plaintiff was permitted by N. to pasture one of plaintiff's horses on N.'s lot. The horse strayed from N.'s lot, which was unfenced, upon the defendants' track, and was killed by a passing train, whereupon the plaintiff sued the defendants for damages.

N. had been located for lot 10 in 1882, by the Crown Land Agent at Pembroke, and N.'s name had been entered upon the agent's book opposite the lot, and upon receipt of the affidavit required by the Act, 43 Vict. cap. 4, sec. 1, amending sec. 7 of the Free Grant and Homestead Act, R. S. O. cap. 24, the agent duly returned him to the department as being located therefor. No license of occupation was issued, and nothing more was done beyond filing the return in the department. About twenty acres of N.'s lot were cleared and in pasture, and from a portion hay had been mowed for several seasons. N. had been working on the lot thirteen years, although the settlement duties required by the Act as regards putting up a house, actual residence, etc., had not been fulfilled. It was in evidence that the department did not usually take advantage of a forfeiture by non-performance of settlement duties, unless another party applied for the lot. No such application was here shown, but the defendants argued that N. was not an "occupant," in whose interest they were required to fence. The plaintiff resided in lot 11, adjoining N.'s lot, but he only occupied, without title, a small portion of it, remote from the railway.

At the trial, a question was submitted by the learned judge to the jury, in the following terms:—"Was Nadeau, mentioned in the evidence, the occupant of lot 10 in Range A, on the 11th August, 1884, or of any part of it; and did the horse sued for escape from such occupation?" And the answer rendered by the jury was:—"We unanimously agree that he is the occupant of the whole lot." After verdict for the plaintiff, the defendants obtained an order for a new trial upon the ground that the jury had omitted to answer fully one of the questions submitted to them. It appeared from the evidence that there was ample testimony to prove that the animal escaped from N.'s lot, and could not possibly, owing to a deep rock cutting, have escaped from the plaintiff's lot; and that there was no conflict of evidence on the point, nor any suggestion by counsel at the trial that the defendants disputed it; nor was any objection taken at the trial to the form of the answer; and

that all parties had tacitly agreed to dispense with a formal finding. Furthermore, the frame of other questions submitted to the jury, and their answers, assumed the fact. The learned judge granted an order for a new trial on the ground that the facts not being formally and distinctly found by the jury, the verdict could not be supported. On appeal to this Court,

Held, that by the words, "occupied land," under 46 Vict. cap. 24, is intended to be denoted land adjoining the railway, and either actually occupied up to the railway line, or constructively occupied by reason of the actual occupation of some part of the section, lot, or smaller tract by the person who owns it, or is entitled to the possession of the whole; and that while mere occupation as that of a squatter, apart from a right to occupy, is not contemplated by the statute, N. was here in a position to require the company to fence.

Held, also, that N., as locatee of the lot, was properly an occupant and proprietor under the statute, notwithstanding his failure to fulfil his settlement duties, as this failure did not *ipso facto* divest him of his interest in the land, in the absence of action by the Crown to dispossess him by cancellation of the location.

Held, also that a new trial was unnecessary, and that the plaintiff was entitled to his verdict; and that, under the circumstances, the question of contributory negligence could not properly arise.

Aylesworth, for the appellants.

Hector Cameron, Q.C., and *R. White*, for the respondents.

From Proudfoot, J.] [February 25.

DORLAND v. JONES.

Religious body—Grant for the benefit of—Change in faith and discipline—Confirmation deed—Right of settlor to add new condition.

The judgment of PROUDFOOT, J., 7 Ont. R. 17, 4 C. L. J. 195, was reversed.

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

Maclennan, Q.C., and *Arnoldi*, for the respondents.

CHANCERY DIVISION.

Divisional Court.] [March 6.

DAWSON v. MOFFATT.

Creditors Relief Act of 1880—Execution creditors—Stop orders—Priorities—Rateable distribution.

Since the coming into force of the "Creditors Relief Act of 1880," March 25th, 1884, execution creditors who obtain stop orders on funds in Court do not obtain any priority thereby; but all must share rateably. As some of the provisions of the statute are to enable simple contract creditors to come in and obtain the position of execution creditors they must have the same right with regard to funds in Court as they would have with regard to funds in the sheriff's hands; and in any case when an execution creditor obtains a stop order there will have to be a reference to the Master to ascertain if any other creditors desire to ask a share of the fund.

J. H. Ferguson, for the appeal.

Arnoldi, *Shepley* and *Ruttan*, for other creditors contra.

Boyd, C.] [March 23.

MUNSIE v. LINDSAY.

Occupation rent—Allowance for improvements—Mode of taking account—Will—Construction—Charge on interest of remainderman after decease of devisee for life.

Appeal from the Master's report.

In fixing the amount of occupation rent to be paid by a person who had been in occupation of land under mistake of title, and also the amount to be allowed to him in respect of improvements made upon the land, the Master in Ordinary charged occupation rent on the unimproved value, and allowed no interest on the value of the improvements.

One of the grounds for the present appeal was because the Master should have estimated the rental on the full improved value.

Held, that apart from the statute R. S. O. ch. 95, sec. 4, when lasting improvements were the subject of compensation, whether in favour of a mortgagee, or a part owner, or a stranger, the rule was to make him account for profits of the whole property improved. The said

statute, though it limits the lien for improvements to the amount of enhanced value at the date of action, does not interfere with the manner of accounting as to the occupation rent, having regard to the improvements. That remains to be settled, so that equitable restitution may, as far as possible, be awarded on each side. When the possessor makes lasting improvements, and thereby increases the occupation rent, and the owner seeks to charge him with this rent, he should do equity by allowing interest on the cost or value, as the case may be, at that time. The claim for the full rent of the improved land, and the counterclaim for interest on the outlay, appear to be reciprocal and entitled to equal respect. Assuming that the outlay is greater than the rental, and that the rental is more than the interest, the strictly correct way to take the account, in view of expenditure from time to time, would be thus: at the end of the first year ascertain the fair rent based on the improved value, and apply this to reduce the actual cost of proper outlay for lasting repairs and improvements, with interest from the date of doing or paying for the work. The balance will represent the amount of principal expended, which is to bear interest for the next year. Add any other expenditure in that year, and so carry on the account to the end. Then, in order to satisfy the statute, ascertain how much principal money has been paid from time to time by the overplus of the rent, and so find how much has been paid in respect of the enhanced value of which a lien is given. If the total of these repayments of principal equals the amount of the enhanced value, the lien has been fully satisfied; if not, there should be a lien for the difference. If, in the aggregate, the lien has been overpaid yet, so long as the cost of improvement has not been fully recouped, it cannot be said that the result is any hardship to the real owner, who need not have invoked this manner of accounting.

By a certain will the testator bequeathed to his wife his farm during her natural life. He then said: "I give and bequeath to my son Adam his board and lodging, with £5 per year during his natural life, to be given as hereinafter mentioned. I give and bequeath to my son Alexander (certain other land) under the following restrictions: . . to pay to Adam £3 currency each and every year during Adam's natural life. I give and bequeath to my son Robert (the said farm) after his mother's death, on the following conditions, that is to say: £2 in each and every year to be paid by him to Adam (my son), and to keep him (my son, Adam) in board and lodging during his natural life."

Held (affirming the decision of the Master in Ordinary) that the will meant that Robert was to supply maintenance continuously after the testator's death as a condition of enjoying the land, and not only after the death of his mother, and such maintenance formed a charge upon the land left to Robert.

It is not, as a general thing, the best rule in cases of varying opinion as to value, to reject one set of witnesses *in toto*, and to adopt the figures of an opposing set. One should rather conclude that neither is exactly to be followed, and that the truth lies somewhere between the extremes.

W. Cassels, Q.C., and *R. Cassels*, for the appellants.

C. Moss, Q.C., and *Barwick*, contra.

PRACTICE.

Mr. Dalton, Q.C.* [April 12.

CARNEGIE v. COX ET AL.

Examination of witnesses before trial—Discovery—Rule 285, O. J. A.

The defendants asserted as a counter claim in this action a claim against the plaintiff, which they had bought from the assignee for creditors of F. & L., stockbrokers, who were not parties to the suit. This claim was the balance of an account for carrying stock for the plaintiff. The plaintiff swore that he believed that F. & L. had dealt improperly with the stock that they were carrying for him, but that he had no means of discovering what they did with it, unless by examining them.

Under these circumstances an order was made under Rule 285, O. J. A., for the examination of F. & L., for the purpose of discovery only.

J. R. Roaf, for the plaintiff.

H. Cassels, for the defendants.

Mr. Dalton, Q.C.] [April 27.

PRETTIE v. LINDNER ET AL.

Serving papers—Toronto agents—Disclosing principal.

Service of papers on a Toronto agent for solicitors in the country is not good unless accompanied with a statement of the name of the solicitors for whom the agents are served.

MacGregor, for plaintiff.

Holman, for defendants.

Mr. Dalton, Q. C.] [April 29.

RE RAINY LAKE LUMBER CO.

Security for costs—Action on behalf of others—Financial incompetency of plaintiff.

One S., a contributory of the company, petitioning to set aside a winding-up order, was required to give security for the costs of the company and a creditor opposing the petition, where it appeared that S., although he had a nominal interest as the holder of stock upon which nothing was paid, was not in such a position that anything could be made out of him upon execution, and was petitioning merely in the interest of other persons who lived out of the jurisdiction, and who had indemnified S. as to costs.

J. R. Roaf, for the company.

Worrell, for the petitioning creditor.

J. B. Clarke, for S.

Wilson, C.J.] [April 29.

RE FOLEY V. MORAN.

Division Court — Jurisdiction — Setting aside judgment—Time—Rule 270, O. J. A.

The Judge of a Division Court has no jurisdiction to set aside a judgment after the expiry of fourteen days from the trial.

Although the defendant has fourteen days to move against a verdict in the Division Court it is proper for the plaintiff to enter judgment and issue execution before the expiry of the fourteen days.

The practice under Rule 270, O. J. A., is not applicable to Division Courts.

Kappele, for the plaintiff.

A. D. Kean, for the defendant.

COUNTY COURT CASES.

COUNTY COURT, COUNTY OF ONTARIO.

FOLEY V. MORAN ET AL.

Transcript from Division Court—Wrongful return of "nulla bona"—No return against one defendant—Rule 113—New trial.

[Whitby—Dartnell, J.J.

This was a motion to set aside a judgment founded upon a transcript to the County Court of the County of Ontario, from the 6th Division Court of the same County.

The suit was originally brought in the Division Court upon a joint note, made by Patrick and James Moran. Patrick was not served, it being now stated that he was out of the country. James filed a dispute note, but, not appearing at the hearing, judgment was entered against him by default, there being no evidence taken. No application was made to strike out the name of the defendant Patrick under Rule 113. Execution was issued against James Moran alone, and the bailiff returned "*nulla bona.*" Thereupon a transcript from the Division to the County Court was filed, and writs against lands and goods of James Moran were placed in the hands of the sheriff, who seized goods to the value of $400 or $500.

DARTNELL, J.J., set aside the judgment in the County Court on the ground that the transcript did not show a return against *both* defendants, one of them not having been served and his name not struck out under Rule 113.

Held also, that an alleged wrongful return of "*nulla bona*" in the Inferior Court is not of itself ground for setting aside the County Court judgment.

Held also, that where, at the hearing, the defendant not appearing, judgment was entered by the Judge; that there was no adjudication on the merits, and the judgment could be set aside notwithstanding fourteen days had elapsed.

N. F. Paterson, Q.C., for plaintiff.

A. W. Kean, for defendant.

ONTARIO BANK v. MADILL ET AL.

Transcript—Irregularity apparent on its face—Setting same aside.

[Whitby—Dartnell, J.J.

When on the face of a transcript there appeared to be two defendants, but only one was served, and judgment was entered against one, and "*nulla bona*" returned as against one, the udgment was set aside.

REVIEWS.

THE CANADIAN FRANCHISE ACT, with Notes of Decisions on the Imperial Acts relating to Registration, and on the Provincial Franchise and Election Acts, with an Appendix containing the Franchises of the several Provinces of the Dominion, by Thomas Hodgins, M.A., Q.C., editor of Hodgins's Election Cases, Manual of Voters' Lists, etc. Toronto: Rowsell & Hutcheson, Law Publishers, 1886.

This, Mr. Hodgins's last work, is the best of his many valuable contributions to Canadian legal literature. It gives a full summary of the law affecting all classes of cases relating to the Electoral Franchise likely to arise under the Canadian Act of 1885.

As claimed by the author in his preface, the annotations seem to embody all the leading cases which have been decided under analogous statutes in England and the various Provinces. To these are added references to the decisions of the American Courts which illustrate the English or Canadian cases. To show the industry and research of the author, it may be stated that nearly nine hundred authorities have been cited, and not, as is too often the case, simply interjected at the foot of a section in a haphazard manner, but, judging from specimens we have examined, evidently carefully read and considered, and the marrow of the case extracted and appropriately placed.

The history of the Franchise is a very interesting one. It is referred to in the book before us in an able resumé, and is illustrated by a table of the statutes affecting this branch of the law, commencing with the Imperial Act of 28 Edward I., which shows the course of legislation from that time to the present. But for the recognized imperfection of all human thought and expression, and the constantly changing phases of life and circumstances, one would suppose that perfection would by this time have been reached.

In the earlier part of the book we find elaborate notes on what is meant by "owner," and "in right of his wife." To the learning in the latter may now be added a reference to the Act of the last session of the Local Legislature of this Province, and to the judgment of the Master in Chambers in *Reg. ex rel. Felitz* v. *Howland* (not yet reported), which, by the way, would have been more valuable if it had discussed the two main points taken on the argument in favour of the defendant's qualification, viz.: the decision of Chief Justice Richards in the *Prescott case*, Ho. E. C. 1, and the effect of this decision when the same words are used in a subsequent statute. It is a pity that this case was not appealed, and so remove doubts and settle the law. In subsequent parts of the work, and, in fact, all through it, are to be found other notes of much value, showing that the author has fully and intelligently considered and mastered the subject he writes upon.

The work is free from the too common fault, not to say literary fraud, of "padding," and is an honest and successful attempt to throw light upon a statute which has received great attention on the part of the public, and is likely to come often before the profession and the Bench. For convenience of form and size, as well as in typographical execution, the volume is all that can be desired.

CANADIAN FRANCHISE AND ELECTION LAWS. A Manual for the use of Revising Officers, Municipal Officers, Candidates' Agents, and Electors. By C. O. Ermatinger, Q.C., etc. Toronto: Carswell & Co., Publishers, 1886.

This volume is divided into two parts. Part I., which contains the Franchise Laws of the Dominion and of the several Provinces in full, and treats of the same subject as the one noticed above. Part II. gives chapters on some points of election law, corrupt practices, agency, penalties, conduct of the election, ballot papers, and persons who may not be elected, nor sit and vote. The annotations in Part I. are confined almost exclusively to the Dominion Statute.

Mr. Ermatinger's book was published promptly after the passing of the recent statute, and in this respect was of service to many who took advantage of the information given; but though such promptness has its advantages, it does not always pay in the end, especially when competing against a book published by one so thoroughly versed in this branch of the law as the present Master in Chancery. But, at the same time, Mr. Ermatinger has done his work well, and his book will be a valuable addition to the literature on the subjects treated of, and be useful to all who are concerned

in the administration of the Franchise Acts and the Election Law. It treats of more subjects than the manual of Mr. Hodgins, but is not so full in its treatment of the Franchise Act.

It was alleged by a writer in the daily press that the author had copied, without credit being given, some notes from Mr. Hodgins's Manual of Voters' Lists. We are quite sure that if such be the case it must have been a slip on Mr. Ermatinger's part. We offer no opinion on the subject, but would merely refer to a few of the several passages complained of, as follows:—

Voters' Lists Manual.	Ermatinger's Fran. Act.	Some Complaints.
p. 89	p. 10	Printer's errors reproduced in cases cited.
p. 20, note (g)	p. 90	Note taken, copying also error in date which should be 6th, not 7th July.
p. 10	p. 89	Reproduction of clerical error —7 Ves. 274; correct reference is 7 Ves. 265.
p. 10	p. 89	Reference to *Gallaway* v. *Ward* 1 Ves. 318, an error in Manual (there being no such case reported), but error reproduced by Mr. E.
p. 100	p. 107.....	Reproduction of mistake in citing *Rex* v. *Mitchell*, as from 8 East 511; should be 10 East.

Some of the coincidences above cited, and others on pp. 16, 22, 23, 43, 100, etc., of the volume before us, as compared with corresponding notes or citations on pp. 111, 92, 5, 99, 107, etc., in the Voters' Lists Manual, are perplexing; but Mr. Ermatinger has publicly denied the charge of copying from the previous work. In his letter he says:

"I hardly think Mr. Hodgins claims the copyright of all the authorities cited in his manual. He must do so, were he to complain of any one citing the same cases. They are mingled with other cases obtained from all available sources It would be as reasonable to charge plagiarism in respect of every case cited, because the digest in which it was found is not duly credited therewith I would be the last to decry the merits or usefulness of Mr. Hodgins's little work, now out of print, and, owing to changes in the law, somewhat out of date. It contains a valuable digest of many of the older authorities. I was under the impression that it was in the list of authorities given in my book, until "Scrutator's" letter drew my attention to its absence, which, I suppose, is due to the fact that Mr. Hodgins's opinions are not cited; while the similarity of the subjects dealt with in a portion of my book with those treated in his necessitated many of the same authorities being cited in both volumes. . . As to whether Gallaway should be spelled with an "o" or three "a's," Grosenny with one or two "n's," or Burgis with an "e," or whether Mr. Hodgins, or his printer, or I, or my printer, were originally responsible for these trifling errors, are not, I think, questions of sufficient moment to call for discussion."

SUMMARY PROCEEDINGS BEFORE JUSTICES.

Hon. Mr. Gowan has introduced in the Senate a Bill in relation to this matter which has passed its second reading. In moving it the learned Judge says:—

"A similar Bill to the one before you was submitted last session and met the approval of this hon. House in the form in which it is now presented. It was very fully debated at the time, but I may be pardoned if I briefly remind hon. gentlemen of its leading features and the principle upon which it is based. It proposes to deal with one branch of the Criminal Law—that in relation to Summary Jurisdiction—by giving the Judges of the Superior Courts in the several Provinces ample powers to prevent a failure of justice in cases where guilt is established, but technical exactness is not found in the history, so to speak, of what has passed bef e the Court of first instance. In a word, to confer upon these judges the like full powers they are now invested with in regard to more serious offences as well as in civil cases.

The authority to hear and determine summarily in respect to offences of a minor character has, of necessity, been delegated to convenient tribunals accessible to all, and is now very extensive, embracing a multitude of subjects, and is exercised by a very numerous class—the Justices of the Peace throughout the Dominion.

Their decisions are subject to review—first, upon the ordinary appeal to the Court of General Sessions of the Peace; second, upon the appeal to the Judges of the Superior Courts before whom the proceedings may be brought by writ of *certiorari*; the former, the appeal to the Sessions, is not a matter of common right, but must be given by express enactment—the latter is not a qualified right, like the appeal to the Sessions, but lies of course, as a matter of common law, unless expressly taken away by statute.

The general enactment respecting appeals to the Sessions is found in the Acts of 1869, cap. 31, sec. 65, and secs. 67 and 68 enable a decision on the merits notwithstanding some defect in the form of the conviction or order; and if the person charged or complained against is found guilty the conviction or order shall be affirmed, and the Court shall amend the same if necessary, and any conviction or order so affirmed or affirmed and amended shall be enforced in the manner provided by law.

Thus local tribunals have very full power to prevent a failure of justice upon appeal lodged before them, but the Judges of the Superior Courts have no such powers in respect to summary convictions,

but are compelled to deal with the subject in a strictly technical way.

It is different when a case comes before them from an inferior court of record. Everything is presumed in favour of the regularity of the proceedings of a Court of Record, the presumption is the other way in respect to proceedings before Justices of the Peace, and the only mode in which their proceedings can be reviewed by the Superior Courts is when brought up on a writ of *certiorari*.

Also in matters of civil concern the Judges of the Superior Courts have power to amend an error or defect, and give judgment according to the very right and justice of the case.

Moreover, in indictable offences the Dominion Procedure Act of 1869 makes full provision for curing defects in form.

Thus the anomaly exists that the Court of Sessions, an inferior Court, has larger powers for preventing a miscarriage of justice in this particular than have the Judges of the Superior Courts. That while not merely in civil cases but in the graver criminal cases—indictable offences—these judges are properly invested with extensive power to guard against a miscarriage of justice, such powers are denied them when they come to pass upon cases of summary conviction, cases where the power is more necessary, because the original proceeding is not before regularly trained men. Hon. gentlemen will see in this an evil, and the object of this Bill is to bring this branch of administration more into harmony with modern ideas, here and at home, which aim at securing substantial justice, notwithstanding purely technical objections not touching the very merits of a case. Every member of the legal profession who hears me will know that the defective power in respect to summary conviction, when under review by the judge upon *certiorari*, is not over stated." The speaker then referred to several cases, to give some idea to others of the extreme exactness in form required under the law as it exists, and how the judges are crippled and handicapped, in their desire to prevent miscarriage of justice—to prevent the law being set at nought. And then read extracts he had received from some leading jurists approving of the measure before the House.

CORRESPONDENCE.

UNPROFESSIONAL ADVERTISEMENTS.

To the Editor of the LAW JOURNAL:

DEAR SIR,—I send you an advertisement from a newspaper published in this city, as follows:—"Will be sold by public auction, on the premises, in the city of St. Thomas, on Tuesday, the 6th April, at 3.30 p.m., the stock of Moore, Munn & Co., consisting of dry goods, clothing, gents' furnishings, as per inventory, amounting to $7,295.15. This is a new and good stock. Premises can be had. Terms ½ down; balance, 2, 4 and 6 months, secured, interest 7 per cent. Stock list on premises, and with ——— ——, Vendors' Solicitors, London."

This advertisement, "displayed" after the usual manner of advertisements, gives one rather a rude shock when the names of a large legal firm appear at its foot. Some people seem to get used to this kind of thing, and it does not seem to occur to this enterprising firm that there is anything in bad taste in this way of doing business.

Yours, etc.,

SOLICITOR.

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

What is a voluntary appearance in a foreign Court. —*Law Journal* (London), Jan. 9.

Divulging a client's name.—*Ib.*

The disposing power of married women.—*Ib.*, Jan. 16.

Appropriation of payments.—*Central L. J.*, Dec. 4., 1885.

Rights of a person suffering an injury when violating the Sunday law.—*Ib.*, Dec. 18.

Litus of personal property for taxation.—*Ib.*, Jan. 1.

Some points ruled in telephone law.—*Ib.*, Jan. 8.

The doctrine of "account stated."—*Ib.*, Jan. 22.

Verdicts in civil cases. Their form and substance. —*Ib.*, Jan. 29.

Profert of the person in criminal cases.—*Criminal Law Magazine*, Nov., 1885.

Competency as witnesses of attorneys, judges, jurors and prosecutors.—*Ib.*

Habeas corpus in controversies touching the custody of children.—*Ib.*, Jan., 1886.

Liquor laws.—*Ib.*, February.

Conviction of one crime under an indictment for another.—*Ib.*

The legal profession in England. Its history, its members and their status.—*American Law Review*, Sept., Oct., 1885.

Insurance law. Expert evidence as to increase of risk.—*Ib.*

Railway delinquencies.—*Ib.*

Title to dividends as between life tenants and remaindermen.—*Ib.*

Definition of a lien.—*Ib.*

Contracts of insurance as affected by changes of title.—*Ib.*, Nov., Dec.

Codification. Its defects and advantages discussed.—*Ib.*, Jan., Feb., 1886.

Survival of actions.—*Ib.*

Civil liability of physicians and surgeons.—*Ib.*

Garnishment. (What establishes liability—Who are liable—Indemnity—Answer—Defences—Priorities—Evidence.)—*American Law Register*, Oct., 1885.

The power of an administrator with the will annexed over his testator's real estate.—*Ib.*, Nov., 1885.

Injury to minor child by collision while a voluntary passenger in vehicle driven by her father. Contributory negligence of father.—*Ib.*

Assignment of life insurance policies. General principles affecting—Title of the assignee—Rights of the assignor—Insurable interests as applied to assignees.—*Ib.*, Dec., 1885.

Citizenship in the United States.—*Ib.*, Jan., 1886.

Legislation impairing the obligation of contracts.—*Ib.*, Feb.

Testamentary provisions as affected by the rules of private international law.—*Ib.*, March.

Insurable interest in life.—*Albany L. J.*, Nov. 14, 21, 1885.

The law of sidewalks.—*Ib.*, Nov. 28.

Report of the committee of the New York Bar Association on the delay and uncertainty in judicial administration.—*Ib.*, Jan. 30, 1886.

Right of husband to sue wife for breach of nuptial contract.—*Irish L. T.*, Jan. 16.

Inspection of ballot papers.—*Ib.*, Jan. 2.

Inn-keeper's servants.—*Ib.*, Feb. 20.

Real estate brokers. Their right to commission.—*Central L. J.*, Feb. 5 (will be re-published hereafter).

Negotiable notes secured by mortgage. Right of assignees by endorsement or delivery.—*Ib.*

Municipal and quasi-municipal contracts.—*Ib.*, Feb. 12.

Fence law.—*Ib.*, Feb. 26.

Right of set-off as against holder of a note endorsed to him after maturity.—*Ib.*, Feb. 19.

Names of persons—Various points in reference to. *Ib.*, Mar. 5.

Delay in presentment of claims against decedents estates.—*Ib.*

Risks attending the purchase of certificates of stock.—*Ib.*, Mar. 19.

Evidence of intent.—*Ib.*

Sunday observance.—*Albany L. J.*, Feb. 6.

Survival and abatement of actions.—*Ib.*, Feb. 27, Mar. 13.

The Law Courts under the Judicature Acts.—*Law Quarterly Review.*

The transfer of land.—*Ib.*, Jan.

A difficulty in the law of consideration.—*Ib.*

Duties of insuring safety. Risk to others. The rule in Rylands v. Fletcher.—*Ib.*

Mistakes of law again.—*Ib.*

FLOTSAM AND JETSAM.

A PINCH OF SALT.—Some time ago a lawyer in Boston was trying a case against a street railway company, and there was an old sailor on the jury who seemed to give no heed. The lawyer made his most eloquent appeals, but all in vain. Finally he stopped in front of the sailor and said: "Mr. Juryman, I will tell you just how it happened. The plaintiff was in command of the outward-bound open car, and stood in her starboard channels. Along came the inward-bound close car, and just as their bows met she jumped the track, sheered to port, and knocked the plaintiff off and ran over him." The old sailor was all attention after this version of the affair, and joined in a $5,000 verdict for the injured man.—*Washington Law Reporter.*

WHOSE IS THE PRESCRIPTION.—The Supreme Court of Massachusetts, in a decision on the question as to who owns the prescription, has ruled as follows: "The question before the court seems to be very simple indeed. A patient applies to a physician and receives from him certain advice

for which he tenders a fee. The physician hands a piece of paper to the patient, purporting to be a written order for certain goods, called drugs, which order is filled by a merchant or apothecary. The payment of the fee and the delivery of the goods or drugs terminates the verbal contract, and the druggist keeps the prescription as evidence that the contract has been fulfilled as far as he is concerned. The druggist can, if he so please, on his own responsibility, renew the drugs, for he is but a merchant, and has a perfect right to sell drugs to any one and in any shape. He need not keep the presoription, nor is he bound to give a copy, but, should error occur, he has no protection in case of suit. From this it would appear that a prescription is but an order for drugs, and the delivery of the drugs settles the matter."—*Washington Law Reporter.*

BOTH the new Lord Chancellor and the new Attorney-General are men who have worked their way to the top through the dust and heat of the profession. Sir Farrar Herschell's father was at the end of his days the incumbent of a proprietary chapel at Kilburn, having passed through several stages of religious doubt, and finally become a clergyman of the Church of England. His son, until he rapidly came to the front on the Northern Circuit, was a contributor to the law newspapers. Mr. Russell began his professional life as a solicitor in Belfast, where he was the partner of the well-known Mr. John Rea, whose extraordinary talents were extinguished by an excitable temper and eccentric habits, and who put an end to his life in 1881. The idea always prevailed in Ireland that Mr. John Rea was a far abler man than his partner. Mr. John Morley, the new Chief Secretary for Ireland, was called to the Bar two years after his colleague on the woolsack, but did not practise. Mr. Arnold Morley, the new "Whip," has been at the Bar twelve years, and went the Midland Circuit. Many Chancellors of the Exchequer have been lawyers before Sir William Harcourt, including Mr. Lowe, Mr. Spencer Perceval, and Mr. William Pitt. Perceval, like the New Chancellor of the Exchequer, had been a law-officer. Mr. Childers breaks the practice which has prevailed of late years of having a lawyer at the Home Office.—*Ex.*

A LAW STUDENT WHO OUGHT TO BE A LAWYER.—I fell across an amusing story the other day in Madame Adam's interesting book, *La Patrie Hongroise.* Hungary, says Madame Adam, swarms with barristers. It is the ambition of the Hungarian peasant to make one of his sons an advocate, as it is the ambition of the Breton and the Irish peasant to make one son a priest. The son of a small farmer in the neighbourhood of Pesth was sent by his father to the law school of the town, but either from want of parts or application, was plucked in the qualifying examination. Not daring to return home empty handed, after all the money that had been spent on his education, he forged a legal diploma. The father, however, was not so ignorant as not to be aware that such diplomas are always written on parchment *Kutya-ber*—"dog-skin" in Hungarian. "Why is your certificate not made out on *Kutya-ber*"? asked the old man. "The fact is, father," answered the youth, "that there are more barristers than dogs in Hungary, and so there is not enough *Kutya-ber* to make diplomas for us all."—*London Life.*
