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DIARY FOR NOVEMBER.

1. Mon...All Saints' Day. Sir Matthew Hale born 1609.
2. Tues..First Intermediate Examination.
4. Thur..Second Intermediate Examination.
7. Sun....*20th Sunday after Trinity.*
9. Tues..Sittings of Ct. of Appeal, and sittings C. C. York for trials, begin. Solicitors' Examination.
10. Wed...Barristers' Examination.
12. Fri.....G. T. R. opened from Quebec to Toronto, 1856. W. B. Richards, 10th C. J. of Q. B. 1868.
13. Sat....Last day for filing papers with S. L. S. before call or admission. J. H. Hagarty 12th C. J. of Q. B. 1878.
14. Sun....*21st Sunday after Trinity.*
15. Mon...Michaelmas sittings of Q. B. & C. P. Div. H. C. J. begin. J. B. Macaulay, 1st C.J. of C. P. 1849.

TORONTO, NOVEMBER 1, 1886.

MECHANICS' LIENS AND THE REGISTRY ACT.

[COMMUNICATED.]

ONE of the provisions of the Mechanics' Lien Act (R. S. O. c. 120), which has a very important bearing on the proper construction of the Act in its relation to the registry laws, has for some reason or other failed to receive either from the bench or the bar that attention which it deserves. On the contrary, its existence seems to have been generally ignored, if we may properly use so contemptuous a word. At any rate, so far as the reports show, with but one exception, no reference is made to it in any of the cases in which it appears to have had a vital bearing on the question before the Court.

This clause is the last in the Act, and possibly its position may account for its having so generally escaped the attention it deserves. It reads as follows:—"26. Except so far as herein otherwise provided, the provisions of the Registry Act shall not apply to any lien arising under the provisions of this Act." From the earliest to the latest case which has come before the courts, in which there has been a contest between a lienholder and a registered incumbrancer, with but one solitary exception, it will be found that this important provision is not even mentioned either in the reported arguments of counsel, or the opinions pronounced by the bench; and, for aught that appears to the contrary, these cases were argued and disposed of as if no such provision existed.

The scheme of the Mechanics' Lien Act in its relation to the registry laws we take to be this: The lienholder, by virtue of being employed, is to have a lien binding on the owner and all persons claiming under him, whose rights accrue after the commencement of the work for a certain period without registering his lien, and he is not to be prejudiced on account of the non-registration of his lien during this period by anything contained in the Registry Act. After this period, in order to preserve his lien, he must register it; if he does not, then the provisions of the Registry Act take effect as against his lien. If, on the other hand, he does register his lien within the limited time, then he is entitled to stand in the position of a purchaser, within the provisions of the Registry Act, not only from the date of registration, but from the date the lien first accrued.

We think this position is clear from a perusal of the 2nd, 4th, 6th, 20th, 21st and 26th sections of the Mechanics' Lien Act. By registering his lien within the prescribed time it can never have been intended that the lienholder is to lose a priority he had previously acquired, but

rather that the registration of the lien is to be a means by which that priority is to be preserved and continued.

For the period which intervenes between the date at which the lien first accrues, and the time within which it is registered (assuming the registration to take place within the period prescribed by the Act), the lien is to be dealt with as though the Registry Act did not exist. Any other construction, we think, fails to give due effect to the 26th section.

The earliest reported case in which the effect of the Registry Act in its relation to mechanics' liens is considered is *Douglas* v. *Chamberlain*, 25 Gr. 288, but that case went off on a question of pleading, the allegations in the plaintiff's bill being held to be insufficient to support his claim. The bill was filed by a lienholder under section 7, to obtain priority over a mortgagee in respect of the increase in the selling value of the mortgaged property occasioned by the lienholder's improvements. The effect of the 26th section upon the point actually involved was not very material. There is, however, a doubt thrown out by the learned judge who disposed of that case as to whether mortgagees, under deeds executed during the progress of the work, would be affected by any notice of lien. Whether he means to doubt whether actual notice of the lien would affect the mortgagee so acquiring title, or merely that the performance of the work would not of itself be notice to the mortgagee, is not very clear. In any case it is clear the solution of the doubt there thrown out, but not attempted to be solved, must depend very largely on the effect of the 26th section, which, however, is not referred to in that case.

The case in which the point in question was first directly raised is *Richards* v. *Chamberlain*, 25 Gr. 402. This was an attempt on the part of a lienholder to establish his priority over a mortgagee whose mortgage was dated prior to the lien, in respect of so much of the mortgage debt as had not been actually advanced, until after the accruer of the lien of the plaintiff. The plaintiff in this case failed, but neither in the argument of counsel as reported, nor in the reasons of Spragge, C., for his judgment, do we find the 26th section once mentioned, or its effect anywhere noticed, but the case is argued and discussed as though it had no existence. This case came before the court on motion for decree; the bill alleged that the advances made after the lien accrued were made with notice of the lien, but this allegation was denied by the answer. The plaintiff's counsel, according to the judgment, appears to have relied on the mortgagees having had a constructive notice of the lien, on the ground that they must be assumed to have known that the work was being done in respect of which the lien was claimed. The learned judge (Spragge, C.,) held that the plaintiff was not entitled to the priority he sought, and he based his judgment on the fact that the plaintiff had not registered his lien before the advances were made; but notwithstanding the vital importance of section 26, he did not consider in any way the bearing of that section upon the question before him. The decision arrived at may possibly be correct, and we are inclined to think it may be supported on the ground that the mortgagees, having made their advances without actual notice of the plaintiff's lien, had an equal equity with the plaintiff, and having, moreover, the legal title which their mortgage gave them, the maxim that "when the equities are equal the law must prevail" applied, and, therefore, quite irrespective of the Registry Act, the mortgagees were entitled to priority. There may be a difficulty, however, in supporting the judgment even on this ground, arising from the fact that it assumes that the plaintiff's claim is an

equity, whereas it may be argued that it is a legal right given by statute, and therefore not a right subject to the maxim of equity we have cited; and it might be said that, it being a conflict between two legal rights, therefore the maxim, "*qui prio est in tempore potior est in jure*," should govern; and, therefore, the lien-holder should have priority over all advances made by the mortgagees after the lien attached. We are, however, disposed to think the plaintiff's right was really equitable in that case, because he was seeking relief out of an equitable estate, and also claiming to cut down the legal debt created by the mortgage deed to a lesser sum on equitable grounds. But whether the judgment in that case be right or wrong, it is certainly unsatisfactory in that it ignores the 26th section, which has so important a bearing on the question involved.

The next case in which the matter was considered appears to be *Hynes* v. *Smith*, 8 P. R. 73, reported subsequently on the rehearing before the full court in 27 Gr. 150. It is equally unsatisfactory. That case originally came before Spragge, C. upon appeal from the master's ruling, refusing to add mortgagees as subsequent incumbrancers, but neither in the argument before him nor in his judgment, nor in that of Blake, V.-C. on the rehearing, is any reference whatever made to the 26th section. The only judge who considers the effect of that section is Proudfoot, V.-C., and he dissented from the opinion of Spragge, C. and Blake, V.-C. The case of *Hynes* v. *Smith* was this. The plaintiff commenced work before 31st December, 1877; two mortgages by the owner were afterwards registered, one on 31st May, 1878, the other 8th June, 1878; the plaintiff registered his lien on the 18th June, 1878. His lien having, as he claimed, attached prior to the registration of either of the mortgages, the usual decree having been obtained to enforce the lien, the plaintiffs applied to the master to add the mortgagees as parties in his office as subsequent incumbrancers. The master ruled that the mortgagees were not subsequent incumbrancers, and refused to add them. Spragge, C., on appeal, sustained this ruling, and upon the rehearing the full court was divided, Blake, V.-C. being in favour of affirming the order, and Proudfoot, V.-C., for reversing it. The order of Spragge, C. was therefore affirmed.

In the judgments of Spragge, C., and Blake, V.-C., we look in vain, as we have said, for any reference to sec. 26.

It may be remembered, that by the original Act of 1873, the lien only came into existence upon the claim being registered. The Act of 1874, however, made an important change in this respect, and gave the mechanic a lien "by virtue of being so employed, etc."; it repealed all acts inconsistent, and enacted that, except as therein otherwise provided, the Registry Act should not apply to any lien arising under the provisions of the Act.

When the statutes were revised, it, of course, became necessary in view of the the Act of 1874, to modify the provisions of the Act of 1873 respecting registration.

That Act had read "no lien under this Act shall exist unless and until" registration; but these words were of course omitted from the Revised Statutes.

Notwithstanding their omission Spragge, C., appeared to think the statute, at all events as to third parties, must still be construed as though they were still there. But here another very important section appears to have been overlooked, and that is section 2, which defines that the word "owner" shall extend to and include a person having any estate or interest, legal or equitable, in the lands upon or in respect of which the work is done, etc., at whose request and upon whose credit, or on whose behalf, or with whose privity

or consent, or for whose direct benefit any such work is done, etc., *and all persons claiming under him, whose rights are acquired after the work in respect of which the lien is claimed is commenced, etc.* The words we have italicized say nothing of registration. The 3rd section goes on to provide that the mechanic is to have a lien not by virtue of registration of his lien, but "by virtue of being so employed;" and the 6th section provides that every lien is to attach upon the interest of the "owner," which word, as we have seen, includes not only the person by whom the mechanic is employed, but all persons claiming under him, whose rights are acquired after the work in respect of which the lien is claimed is commenced.

Any other result than that which the Court arrived at in *Hynes* v. *Smith* might perhaps appear to work injustice, and it may not unreasonably be said, that to postpone a mortgagee to a lienholder under such circumstances, assuming that the mortgage is taken without actual notice of the existence of the lien, would be a very great hardship. We are disposed to think that it would. At the same time, we are not at present concerned with that aspect of the case. What we desire now to arrive at is, What is the true state of the law on the point? From the sections of the Act we have referred to, we are clearly of opinion that that case ought to have been decided without reference to the Registry Act. For it cannot for a moment be contended that the 26th section, while expressly declaring that the Registry Act shall not apply to liens, nevertheless permits a mortgagee to set up its provisions against the lienholder. The true effect of section 26 is to take mechanics' liens out of the provisions of the Registry Act requiring registration in order to preserve their priority, except so far as the Mechanics' Lien Act itself requires their registration for that purpose. Dealing then with that case apart from the Registry Act, there is no ground for contending on the facts stated that the lien of the plaintiff was not prior in point of time to the two mortgages, because by the words of the 3rd section it attached, "by virtue of the plaintiff being so employed," and his employment dated prior to the mortgagors, and his work was commenced prior to the mortgages, and by the terms of the 6th section, taken in connection with the meaning assigned to the word "owner" by the 2nd section, his lien bound not only the interest of the mortgagor who employed him (as Blake, V.-C., erroneously assumed), but also that of all persons claiming under the mortgagor, whose rights were acquired after the plaintiff's work was commenced.

The judgment of Proudfoot, V.-C., in that case appears to be conclusive, as set out on p. 152.

On the other hand, we cannot agree with Blake, V.-C., as given on p. 151.

How his argument can be reconciled with the words of section 26, which declares that the Registry Act shall not apply, and with section 2, which declares that "owner" includes a person claiming under the person by whom the lienholder is employed, whose rights are acquired after the commencement of the work, we fail to see.

The last case on the subject is *McVean* v. *Tiffin*, 13 App. R. 1, which was very similar in its circumstances to *Richards* v. *Chamberlain*, 25 Gr. 402. The arguments of counsel in this case are not reported, but here again, in the judgment of the court, which was delivered by Osler, J. A., we look in vain for any consideration of the effect of section 26. The reasons on which the judgment of the Court of Appeal is based are practically that the Registry Act did apply to the lien and did protect the mortgagee, and a passage from the judgment of Blake, V.-C., in *Hynes* v.

Smith, in which he argues that registration of the lien is necessary to protect the lienholder as against registered incumbrances is cited, apparently with approval. *McVean* v. *Tiffin* may, equally with *Richards* v. *Chamberlain*, be possibly supported on the grounds we have suggested, or on other grounds which might be mentioned; but the actual reasons given for the judgment appear to us, with all due deference to the Court of Appeal, quite untenable.

RECENT ENGLISH DECISIONS.

The English *Law Reports* for September comprise 17 Q. B. D., pp. 413-493; and 32 Chy. D., pp. 525-642.

MASTER AND SERVANT—DEFECTIVE CONDITION OF WAY OR PLANT—EMPLOYERS' LIABILITY ACT, 1880—49 VICT. c. 28 s. 1 (o.).

Proceeding first to the consideration of the cases in the Queen's Bench Division, we think *Thomas* v. *Quartermaine*, 17 Q. B. D. 414, deserving of attention The case was one under the English Employers' Liability Act, 1880, 43 & 44 Vict. c. 42, from which 49 Vict. c. 28 (O.) has been adapted. The facts of the case were that the plaintiff was an employee of the defendant in his brewery, and was engaged in the cooling room, in which were a boiling vat and a cooling vat, and between them was a passage which was in part only three feet wide. The cooling vat had a rim rising sixteen inches from the floor of this passage, but it was not protected by any rail or fence. The plaintiff went along this passage in order to get, from under the boiling vat, a board which was used as a lid. As this board stuck, the plaintiff gave an extra pull, when it came away suddenly, and the plaintiff, falling back into the cooling vat, was severely scalded; and for the injuries thus sustained, the plaintiff in the present action sought to recover compensation; but it was held by Wills and Grantham, JJ., that there was no evidence of any defect in the ways, works, or plant of the brewery within the meaning of the Act, and therefore, that the action should be dismissed. The case was distinguished from *Weblin* v. *Ballard*, 17 Q. B. D. 122, which we noted *ante*, p. 239, on the ground that in the latter case the ladder was found to be not in a proper condition for the purpose for which it was used, which amounted to a defect in the plant, whereas the court found in the present case that the passage and the vats were in a proper state. Wills, J. says at p. 417:

> Now the test whether machinery or plant be defective or not within the meaning of the statute, laid down in the case of *Heske* v. *Samuelson*, 12 Q. B. D. 30, and adopted by the Court of Appeal in *Cripps* v. *Judge*, 13 Q. B. D. 583, was whether the machine was fit or unfit for the purpose for which it was applied. The same test must of course apply to a "way," and following that test, I am of opinion that there was in this case no defect within the meaning of sec. 1.

ASSIGNMENT OF CHOSE IN ACTION—RIGHT OF ASSIGNEE TO SUE.

In *Harding* v. *Harding*, 17 Q. B. D. 442, the plaintiff claimed to recover from the defendants, who were executors and trustees under a will, a balance appearing to be due to a residuary legatee upon the footing of an account which they had rendered to him, and upon which the legatee had written the following direction: "I hereby instruct the trustees in power to pay to my daughter Laura Harding, the balance shown in the above statement." Notice in writing having been given to the trustees, they at first assented to the assignment, but subsequently refusing to be bound by it, the action was brought by Laura Harding to enforce payment. For the defendants it was argued that the assignment, being of a *chose in action*, was invalid, and could not be enforced because it appeared to have been made without consideration. But the court (Wills and Grantham, JJ.,) were of opinion that the assignment was valid, and the plaintiff was entitled to recover under it. With regard to the argument that the plaintiff was a mere volunteer, and therefore, equity would not enforce the assignment in her favour. Wills, J., says at p. 444:

> The rule in equity comes to this; that so long as a transaction rests in expression of intention only, and something remains to be done by the *donor* to give complete effect to his intention, it remains uncompleted, and a Court of Equity will not enforce what the donor is under no obligation to fulfil. But when the transaction is completed, and the donor has created a trust in favour of the object of his bounty, equity will interfere to enforce it.

Recent English Decisions.

Expropriation of land – Compensation for land injuriously affected.

On perusing *The Queen* v. *Essex*, 17 Q. B. D. 447, we find that the decision of the Divisional Court (14 Q. B. D. 753,) which we noted *ante*, Vol. 21, p. 209, has been reversed by the Court of Appeal. The point involved, strange to say, was a somewhat novel one, arising under an Act providing for the expropriation of lands for public purposes. Part of a plot of land laid out as a building estate was expropriated for the purpose of a sewage farm, by reason whereof the value of other parts of the land was depreciated; but these parts, though situate near to the part expropriated, were separated from it by the intervening lands of other owners. Compensation had been allowed by the court below, but the court now decide that although the lands in respect of which the compensation was allowed may have been actually injuriously affected by the expropriation, they were not so injuriously affected within the meaning of the Act as judicially interpreted. The case chiefly relied on by the respondents was the *Stockport Case*, 33 L. J., Q. B. 251, but the court distinguished that case, on the ground that there the land in respect of which the compensation was allowed was a part of the estate of which the land expropriated formed a part without any other land intervening. Lord Esher, M. R., does not hesitate to say that the Stockport case should be overruled, and gives the following lucid statement of the legal result of that case:

> It appears to my mind to raise this extraordinary proposition, that something to be done under an Act of Parliament by those who have to pay compensation, being necessary to the original object which they are to carry out, and not being the mere subsequent user of the land, if it is not done actually on the claimant's land, although it is done on the very border of his land, is to be taken as not injuriously affecting the claimant's land within the meaning of the Lands Clauses Act; but that if some few feet of the claimant's land are taken, the main body of the land is to be considered as injuriously affected.

Water works—Highway—Nuisance.

The case *Moore* v. *Lambeth Water Works Co.*, 17 Q. B. D. 462, was one brought to recover damages for injuries sustained by the plaintiff in falling over a fire plug on the sidewalk. It appeared from the evidence that the fire plug in question had been placed by proper authority in the sidewalk, but that the pavement, which had originally been on a level with the top of the plug had become worn away, so that the plug projected about half an inch above the level of the pavement, the plug itself being in perfect repair. Day, J., who tried the case, was of opinion that *Kent* v. *Worthing*, 10 Q. B. D. 118, was in point, and gave judgment for the plaintiff for £600; but on appeal the Court of Appeal (Lord Esher, M. R., and Lindley and Lopes, L.JJ.,) unanimously reversed this decision and dismissed the action, holding that the fire plug, being in good repair and having been lawfully fixed in the highway, the defendants were not liable.

Trustee in bankruptcy – Improper rejection of proof—Costs.

The only point necessary to be noticed in *Ex parte Brown*, 17 Q. B. D. 488, is the fact that when the court found that a trustee in bankruptcy, acting under the directions of the committee of inspection, had unreasonably and improperly rejected the proof of a claim tendered to him, it not only reversed his decision, but ordered him personally to pay the costs.

Easement—Prescription—Landlord and tenant.

Proceeding now to the cases in the Chancery Division, the first which challenges attention is *Chamber Colliery Co.* v. *Hopwood*, 32 Chy. D. 549, in which the question at issue was the right to the flow of water through an artificial course which had been constructed and enjoyed by the defendants under the following circumstances. In 1834, the defendants demised to the plaintiffs the coal under the C. estate for 50 years, with a right to make drains, etc., for supplying their engines with water, and for draining the demised mines, and any other mines of which the plaintiffs might become lessees of any other persons. In 1836 the plaintiffs became lessees of the O. Colliery from a neighbouring landowner; and in 1846 made a drain about a mile long, chiefly on the C. estate, by which they diverted a small natural stream on the C. estate and brought it down to the O. Colliery, where they made reservoirs for the water at considerable expense. The plaintiffs did not ask leave to make the drain, but the defendants' agent saw the work going on and encouraged it. In 1872 the plaintiffs acquired the fee of the O. Colliery. In 1884, the lease from the defendants having expired, they stopped the drain and diverted the water.

The plaintiffs, claiming a right by prescription to the water, commenced the action to restrain them. The Court of Appeal (affirming the Vice Chancellor of the County Palatine) held that if the making of the drain was not authorized by the lease (as to which, the court pronounced no opinion), it was made and enjoyed either under the belief of both parties that it was authorized by the lease, or under a comity between landlord and tenant, and that there was no enjoyment "as of right," so as to give the tenant a right to the water after the lease expired.

TRUSTEE—BREACH OF TRUST—FRAUD OF ONE TRUSTEE—FOLLOWING TRUST FUND—PURCHASER FOR VALUE.

In *Taylor* v. *Blakelock*, 32 Chy. D. 560, an attempt was made to follow trust moneys which had been misappropriated, into the hands of trustees who had received them innocently without notice of the breach of trust. One Carter, being trustee with the plaintiff under a will, and trustee with the defendant under a settlement, having misappropriated a portion of the settlement fund, applied an equal portion of the will fund to the purchase of stock which he transferred to the names of himself and the defendant. Both the plaintiff and defendant were ignorant of Carter's fraud, and the defendant and the *cestui qui trust* under the settlement had no notice that the stock was purchased with part of the will fund. Carter having died insolvent, the plaintiff thereupon sought to compel the defendant to transfer the stock to him; but the Court of Appeal (affirming the judgment of Bacon, V. C.,) held that the defendant having, by accepting the stock, given up the right to sue Carter for his debt to the trust, was entitled to be treated as a purchaser for value without notice, and was therefore entitled to retain the stock as part of the settlement fund. On the part of the plaintiff the doctrine that an assignee of a chose in action takes subject to all the equities attaching to it was invoked, but Cotton, L.J., as to that argument says, at p. 567:

> It is said this Caledonian Railway stock, the ransfer of which the plaintiff seeks to obtain, is a chose in action, and that anyone who takes an assignment of a chose in action takes it subject to all existing equities. But that rule applies only to a chose in action not transferrable at law; that is not the rule as regards the right to sue on a bill of exchange or promissory note.

ADMINISTRATION—FOLLOWING ASSETS.

In *Blake* v. *Gale*, 32 Chy. D. 571, the Court of Appeal affirmed the decision of Bacon, V. C., 31 Chy. D. 196, which we noted *ante*, p. 101. The case, it will be remembered, is one in which the plaintiffs as unpaid mortgagees, whose interest had been paid up to 1880, but whose security had since proved worthless, sought to make the residuary legatees of the mortgagor's estate refund the legacies paid them some twenty years ago. The Court of Appeal, in affirming the decision of Bacon, V. C., proceed upon the ground that the mortgagees were aware of the distribution of the estate by the executors, and had acquiesced in it, and that the right they sought to enforce was a mere equity, and that, under the circumstances, this acquiescence debarred the plaintiffs from recovery. Cotton, L.J., says at p. 580:

> It must be remembered that the right of the creditors to proceed against the residuary legatees is simply a right given by equity in order that justice may be done. It does not depend on any right against the executor, because, even if the executor has distributed the assets under the decree of the court, so that there is no claim against him, still creditors who come in within a reasonable time and have not in any way barred themselves, retain the right as against the legatees. Here having regard to the knowledge and assent of these creditors, in my opinion it would be wrong to give them relief against the legatees.

MORTGAGE ACTION—RECEIPTS BY RECEIVER AFTER REPORT AND BEFORE DAY FIXED FOR REDEMPTION.

The Court of Appeal in *Fenner-Fust* v. *Needham*, 32 Chy. D. 582, affirms the decision of Pearson, J., 31 Chy. 500, noted *ante*, p. 158, holding that when a receiver appointed in a mortgage action receives money in the interval between the making of the report and the day fixed for redemption, the mortgagee is not entitled to the money so received, except upon the terms of bringing it into account, and having a new day appointed for redemption. This delay may, according to the practice prevailing in Ontario, be obviated by giving notice of credit under Chy. Ord. 457.

MONEY PAID TO TRUSTEE IN BANKRUPTCY IN MISTAKE OF LAW.

Mr. Justice Kay, in *Re Brown, Dixon* v. *Brown*, 32 Chy. D. 597, by analogy to the cases of *Ex parte James*, 9 L. R. Chy. 609, and *Ex parte Simmonds*, 16 Q. B. D. 308, decided that where money had been paid to a trustee in bankruptcy in mistake of law it must be refunded by him.

The payment in question was made under the following circumstances: An estate was devised to nine persons as tenants in common, with a power to three of them to sell the whole, to obviate the difficulties of making a partition. W., one of the three, conducted certain sales under the power and retained more than his share of the purchase moneys, and went into liquidation. Further sales were made, and out of the proceeds a further sum was paid to W.'s trustee, in respect of, and in excess of his share, taking into account what W. had previously received. Kay, J., held that W. was not entitled to any part of the purchase money of the subsequent sales until he had made good the sum he had received in excess of, his share, of the proceeds of the previous sales, and therefore his trustee had no right to the money paid on account of the subsequent sales, and he was ordered to refund it.

POWER — TESTAMENTARY APPOINTMENT — REVOCATION.

The question submitted for the decision of Kay, J., in *Re Kingdom, Wilkins* v. *Pryer*, 32 Chy. D. 604, was whether a will made expressly in exercise of a special power of appointment contained in a settlement, had or had not been revoked by a subsequent will. The will made in exercise of the power of appointment was made by a married woman in 1866, during coverture. After her husband's death she made three other wills, in the first and second of which she said: "I revoke all other wills," and in the third "I hereby revoke all wills, codicils and other testamentary dispositions heretofore made by me, and declare this to be my last will and testament," and then disposed of all her estate, "including as well real estate as personal estate, over which I have or shall have a general power of appointment"; but she did not in any way exercise or affect to exercise the power in the settlement, nor did she refer to it, nor to the property the subject of the power. For the parties interested in upholding the will of 1866, *In the Goods of Joys*, 4 Sw. & Tr. 214, and *In the Goods of Merritt*, 1 Sw. & Tr. 111, were relied on. But the learned judge considered those cases not to be exactly in point and, relying on *Harvey* v. *Harvey*, 23 W. R. 478, and *Sotheran* v. *Derring*, 20 Chy. D. 99, held that the testamentary appointment of 1866 had been revoked.

ADMINISTRATION SUIT—CREDITOR—COSTS.

Owing to the method of paying costs in administration by an *ad valorem* commission, the point decided in *Re McRea, Norden* v. *McRea*, 32 Chy. D. 613, is not of so much importance as it otherwise might have been in this Province The action was brought by a separate creditor on behalf of himself and all other the creditors of a testator who was one of a firm of traders, for a general administration of the testator's estate. The estate proved sufficient to pay the separate creditors in full, but insufficient to pay the joint creditors. Under these circumstances it was held by Kay, J., that the plaintiff was entitled to costs out of the estate as between solicitor and client.

ADMINISTRATION ACTION—PURCHASE OF CREDITORS' CLAIM BY PLAINTIFF'S SOLICITOR.

The only remaining case we think it necessary to notice is *In re Tillet, Field* v. *Lydall*, 32 Chy. D. 639, which was an administration action in which the usual accounts had been directed, and upon proceeding before the Chief Clerk it appeared that the plaintiff's solicitor had purchased several creditors' claims for less than their face value. The Chief Clerk reported that the solicitor was a trustee of the creditors for any profit which might be made on the purchase; but North, J., held on appeal, that in the absence of any direction in the order of reference, the matter was not open for the decision of the Chief Clerk, and his certificate was therefore varied accordingly. North, J. says at p. 641:

> The question is one between W. H. Tillett (the solicitor) and the other creditors of the testator, and does not affect the estate. It is an equity subsisting between the parties, which any one of them has a right to say should, if dealt with at all, be decided in a formal way. I think that as the objection is taken and persisted in, the question raised can only be decided properly in a separate proceeding.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

THE QUEEN v. LYNCH.

Conviction.—Retrospective operation of 49 Vict. cap. 49., Can.—Excess of jurisdiction.

That, notwithstanding it is not so expressly enacted, 49 Vic. cap. 49, Dom., has a retrospective operation upon cases decided prior to the passing of the Act.

That under sec. 7 of that Act the right to *certiorari* is taken away upon service of notice of appeal to the sessions, that being the first proceeding on an appeal from the conviction.

Conviction *held* bad, following *The Queen* v. *Brady*, that where imprisonment is directed for non-payment of a penalty, the adjudging of a distress of the goods to levy it and then imprisonment, in case the distress proves insufficient, is invalid in law and an excess of jurisdiction.

T. W. Howard, for application.

Clement, contra.

REGINA v. HODGINS.

Canada Temperance Act, 1878.—Disqualification of convicting magistrate.—R. S. O. ch. 71, s 7—Variance between information and conviction.—Amendment.

The court refused to quash a conviction under Canada Temperance Act, 1878, on the ground that one of the convicting justices had not the necessary property qualification, the defendant not having negatived the justice's being a person within the terms of the exception or proviso of sec. 7 of ch. 71, R. S. O.

Held, also, that it was no variance between the information and the conviction that the former used the expression "disposal," and the latter "sale"; and that, if there had been, an amendment would have been made under secs. 116, 117, 118 of the first-mentioned Act.

Clement, for motion.

McLaren, contra.

REGINA v. MCDONALD.

Trespass—Obstruction—Right of way.

S. owned lot 38 in 8th con. of N., containing 200 acres. In 1866 he sold the west half of the lot to complainant, reserving a strip of thirty feet along the north line thereof, as a road for himself and successors in title, to and from the highway at the west of lot 38 to and from the east half of the lot. S. put up a gate at the west limit of the lane, where it meets the highway, which gate had been there from 1866 until removed by the defendants. The defendants were successors in title to S., and removed the gate in question as an obstruction, and were convicted for unlawfully and maliciously breaking and destroying the gate erected at the west end of said road as the property of the complainant.

Held, that the defendants were acting in good faith in claiming the right to remove the gate, and under a fair and reasonable supposition of right to do so, and therefore the convictions were quashed.

Held, also, following *Regina* v. *Malcolm*, 2 O. R. 511, that the question of a fair and reasonable supposition of right to do the act complained of was a fact to be determined by the justice, and his decision upon a matter of fact would not be reviewed; but that this rule did not apply where all the facts showed that the matter or charge itself was one in which such reasonable supposition existed; that is, where the case and the evidence were all one way.

Quære, whether a gate across a right of way was an obstruction in law.

Held, also, that the proviso in sec. 60 of 32 and 33 Vict., c. 22, is to be read as applicable to sec. 29 and to the whole Act.

Kappele, for motion.

Aylesworth, contra.

CHANCERY DIVISION.

Ferguson, J.] [Sept. 6.

JAMES v. ONTARIO AND QUEBEC RY. CO.

Railways—The "taking"—Compensation.

In fixing compensation to a landowner for land expropriated by a railway, the rule is, as laid down in Pierce on Railways, p. 211, and in *Ontario and Quebec Ry. Co.* v. *Taylor*, 6 O. R. at p. 348, viz.: to ascertain the value of the land of which it forms a part before the taking, and the value of such land after the taking, and the difference will be the actual value to the owner of the part taken; and "the taking" is properly fixed as at the date of the company giving notice to the landowner of their intention of taking the lands.

It is not correct to say that the value should be taken as of a date prior to knowledge of intention to construct the railway.

Interest is properly allowed to the landowner on the amount of his compensation from the time of the taking to the time of the award.

Wells, for the railway company.

Delamere and *English*, for the landowner.

Osler, J.A.]
Ferguson, J.] Full Court. [Sept. 11.

WILSON v. GRAHAM.

Will—Construction—Life estate.

This was an appeal from the judgment of PROUDFOOT, J., in the matter of the construction of the following will: "I do hereby bequeath to my beloved wife, E. K., all the real and personal property that I am possessed of after my funeral expenses and just debts are paid. My wish and desire is that she shall divide the said real estate or personal property, £50 to my eldest daughter S., £50 to my daughter E., the balance to my son W. Provided any more, if a daughter, £50, and if a son, then the balance, £50 to each of my daughters to be equally divided betwixt them after her decease."

The testator died October 15th, 1850, leaving him surviving one son and two daughters, and his widow, who was then pregnant with another child, who proved to be a daughter, the present plaintiff. The son William died intestate, unmarried, and without issue.

Held, that the widow took a life estate under the will in both real and personal property, except what was necessary to pay the legacies to the daughters.

McCarthy, Q.C., and *Fitzgerald*, for the plaintiff.

Bruce, Q.C., and *Burton*, for the defendant.

PRACTICE.

Proudfoot, J.] [May 26.

RE PLUMB TRUSTS.

Executor's accounts—Practice.

Application to the court under R. S. O. c. 107.

One of the trustees of an estate desired to retire from the trusts, and a new trustee had been nominated in his stead under the provisions contained in the deed of settlement of the trust estate. Some of the securities taken over by the trustees under the settlement on assuming office had turned out badly, and considerable loss of capital had resulted therefrom. Consequently, the newly nominated trustee would only accept the position of trustee on the condition that the accounts of the said trust estate up to the time of the transfer of the trust estate to him, as such trustee, should be duly passed before this court by the petitioners, the trustees.

The trustees now petitioned the court to take said accounts, and also to fix the trustees' compensation.

PROUDFOOT, J., ordered a reference to the Registrar of the Chancery Division to take the accounts of the dealings of the said trustees with said trust estate, and in taking such accounts to fix and apportion the compensation proper to be paid to the said trustees respectively for their care and pains in the past management of the said estate.

F. D. and costs reserved.

D. T. Symons, for petitioners.

J. H. Ferguson, for adult respondents.

F. W. Harcourt, for infant respondent.

Proudfoot, J.] [Sept. 21.

RE BOUSTEAD & WARWICK.

Vendor and Purchaser—R. S. O. c. 109, s. 3 - Solicitor's abstract—Paper title—Title by possession—Declaration evidence — Affidavit evidence—Viva voce evidence—Title by decree—Specific performance.

B. agreed to sell certain land to W., and in the agreement it was provided that "the examination of title to be at the expense of the purchaser, who is to call for only those deeds and papers in my possession or under my control." W. demanded a solicitor's abstract which B. declined to furnish, and on the examination of the title it was discovered that a deed was missing which had not been registered, so that a clear paper title could not be made out. B. then offered evidence of a title by possession by declarations under 37 Vict. c. 37 (D.), which W. declined to accept.

Held, on an application under the Vendor and Purchaser Act, R. S. O. c. 109, s. 3, that B. was bound to furnish an abstract, and that W. was not bound to accept declaration evidence of the title by possession, and the vendor was directed to obtain affidavits from the declarants when the purchaser could cross-examine the deponents, and if not satisfied with that, although he might be thought unreasonable, the purchaser was entitled to have the evidence taken *viva voce* and have his title sanctioned by a decree, in which case and for that purpose leave was given to him to institute a suit for specific performance, all costs of which were reserved until the hearing.

Mills, for the vendor.

W. M. Hall, for the purchaser.

Proudfoot, J.] [Sept. 21.

HOSKIN V. THE TORONTO GENERAL TRUSTS CO.

Railway Co.—Expropriation—Award—Compensation—Price of land taken and depreciation to remainder—Who entitled to on death of land owner—Trustee of real estate or executor—Conversion.

P., being the owner of certain lands, was served by a railway company with notice of expropriation, and tendered $3,635 for right of way and damage, which he refused. Subsequently, on the application of the company, and with the consent of P.'s solicitor, the county judge made an order fixing the amount of security to be given for damages and the price of the land at $7,300, and giving the company possession upon their paying that amount into a bank to the joint credit of P. and the company. The money was paid in pursuant thereto. An arbitration was then proceeded with, and the compensation to be paid was fixed by the award at $3,516, being $924 for the land taken and $2,592 for depreciation in value to the remaining land. Proceedings and appeals as to the costs kept the matter open, and the money remained to the credit of the joint account until P. died, after making his will, by which he devised all his real estate to a trustee, and his personal estate, after certain specific bequests, to his executors.

The plaintiff proved the will as executor, and the defendants were appointed by an order of court trustees in place of the trustee named in the will. Upon a special case for the opinion of the court as to whether the plaintiff, as executor of the personal estate, or the defendants, as trustees of the testator's land, was or were entitled to the $3,516, or any part thereof, or who should pay the costs of the case. It was

Held that notice to treat was given, a claim made by the landowner refused by the company, money paid into court and possession taken by the company. These circumstances, under the authority of *Nash* v. *The Worcester Improvement Commissioner*, 7 Jur. N.S. 973, would entitle the landowner to have specific performance against the company, and the result follows that the land was converted into money, and the plaintiff entitled to the $3,516 and costs of the special case.

McMichael, Q.C., for plaintiff.

Edgar, for defendants.

Mr. Dalton, Q.C.] [October 18.

BROMLEY v. GRAHAM.

Production—Privilege—Affidavit of documents—Criminal libel.

Held, that to obtain privilege for a document, in an affidavit on production, the grounds upon which it is claimed must be stated.

Held, also, that a statement in the affidavit that according to the plaintiff's contention the document contained a libel and therefore exposed the defendant to a criminal charge, and did not protect the document; the defendant should have gone further and expressed his belief that the production of the document would expose him to a criminal charge.

Webb v. *East*, 5 Ex. D. 108, followed.

Holman, for the plaintiff.

Douglas Armour, for the defendant.

Ferguson, J.] [October 25.

PICKUP v. KINCAID ET AL.

Jury notice—Issue—Account—Discretion—R. S. O. ch. 50, sec. 255.

Where the action was upon a physician's bill for medical attendance, no equitable issue was raised, and it clearly appeared from the pleadings and examination of parties that the only matter really in dispute was the amount of the bill, a judge in chambers exercised the discretion given him by R. S. O. ch. 50, sec. 255, and struck out the defendants' jury notice.

Hoyles, for the plaintiff.

George Macdonald, for defendants.

Ferguson, J.] [October 25.

FOSTER v. MOORE.

Lis pendens—Vacating registration.

In an action by a creditor of M. to set aside a conveyance to M.'s wife as fraudulent, the plaintiff registered a certificate of *lis pendens* against the lands covered by the conveyance.

Held, that the registration was proper, and that pending the action no order could be made to vacate it.

Bain, Q.C., for the plaintiff.

E. D. Armour, for defendant.

Wilson, C. J.] [October 26.

HALL v. PILZ ET AL.

Mechanic's lien—Costs, scale of.

The action was brought to enforce a mechanic's lien for $142. At the time of the commencement of the action there was registered against the property affected by the plaintiff's lien another mechanic's lien for $130.

Held, that as the aggregate amount of the two liens was over $200 the action was properly brought in the High Court of Justice, and the costs should be on the scale of that court, and it made no difference that the second lienholder failed to substantiate his claim.

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

F. Colquohoun, for the defendants Conrad.

CORRESPONDENCE.

PLEADING A JOINDER OF ISSUE.

Editor of the LAW JOURNAL:

SIR,—Under the above heading an article appears in the last number of the *Canadian Law Times*, commenting upon the decision in *Hare* v. *Cawthrope*, 11 P. R. 353; and as the point decided in that case must arise almost daily in the practice of solicitors, it deserves consideration. The case in question decides that a joinder of issue may be filed by way of defence to a statement of claim or reply to a counter-claim. In order to sustain this decision, two propositions must be admitted or proved, namely: (1) That a joinder of issue is a pleading; (2) That it is equivalent to a statement of defence. The provisions of the Judicature Act are certainly not every explicit in dealing with joinders of issue; and there is a good deal to be said in favour of the negative of both the above propositions. In the definition of a "pleading" given in the Interpretation Clause (sec. 91) of the Act, no reference is made to a joinder of issue, nor is it mentioned in Rule 126, which specifically directs what pleading may be filed by the plaintiff and defendant respectively. It is strange that this rule is not referred to either in the above case or article.

CORRESPONDENCE.

Rule 126, after providing for the statement of claim, reads as follows:

(*a*) "The defendant shall, within such time and in such manner as hereinafter prescribed, deliver to the plaintiff a statement of his defence, set off, or counterclaim (if any)."

(*b*) "The plaintiff may, in like manner, deliver a statement of his reply (if any) to such defence, set off, or counter-claim."

We have in this rule, a specific direction as to the names and order of pleadings, and a joinder is expressly omitted.

In dealing with questions of pleading we have to bear in mind that we can no longer look to the common law rules for guidance. In *Heap* v. *Marris*, L. R. 2 Q. B. D. 630, Grove, J. says: "In my opinion, it was the intention of the Legislature in introducing a new practice and procedure, to follow as guides the practice and procedure previously existing in the Court of Chancery." This is equally true of the Judicature Act here. Under the former Chancery practice, where a plaintiff wished to simply traverse the facts alleged in the answer, he did so in a pleading called a Replication, but which was framed in the same words as the Common Law Joinder of Issue. Did any one ever hear of filing such a pleading by way of answer to a Bill? The question, however, is not whether a joinder (which states no fact) can now be properly termed a Replication (in the sense in which it was formerly used in Chancery proceedings) and pleaded as such, but whether it can be termed and pleaded as a Statement of Defence, or as a Reply, under the Judicature Act.

The illustrations given by the writer of the article in the *Canadian Law Times*, in commenting upon the judgment in question, are singularly unfortunate; for in the first one he admits the very point which he seeks to controvert, namely, that the plaintiff may, under certain circumstances, join issue upon a counter-claim. And in the second illustration he takes it for granted that a defendant can give evidence of fraud, satisfaction, etc., without setting up such defences in his pleading—a procedure forbidden by Rule 147.

The reasoning of the court in *Hare* v. *Cawthrope* may be seen by the following extract from the judgment. At page 354, Mr. Justice Rose says "Order 21, Rule 176, O. J. A., differs essentially in its language from the above section (i.e., sec. 117 of the C. L. P. Act)." It reads:—"As soon as either party has joined issue upon any pleading of the opposite party simply, without adding any further or other pleading thereto . . . . . the pleadings as between such parties shall be deemed to be closed without any joinder of issue being pleaded by any or either party."

"In the Interpretation Clause, sec. 91 of the Act, pleading is said to include the statement in writing of the claim or demand of any plaintiff. It seems clear therefore, that a defendant may under Order 21, join issue upon a statement of claim without adding any further or other pleading thereto."

If Rule 176 is to be read in this very literal manner as entitling either party to join issue upon *any pleading* of the opposite party, and thereby close the pleadings, some curious results must follow.

Under sec. 91, we find that "pleading" shall include *any petition or summons*. So that if a defendant requires speedy justice, he may join issue the day after he is served with the writ or summons, and, under Rule 255, give notice of trial for the assizes which, perhaps, are fixed to commence within a fortnight. This would be a safe defence to rely upon in cases in which the plaintiff requires evidence to be brought from a distance. The defendant, however, would not have all the advantage of this novel procedure on his side, for all a plaintiff would have to do to rid himself of an awkward summons for security for costs or for particulars, under Rule 425, would be to clap a joinder of issue on the fyles, and give notice of trial for the approaching sittings.

But seriously speaking, if a joinder of issue be pleadable as a defence, then the rules applicable to a defence must govern it. When it is filed by way of defence, to a statement of claim or, reply to a counter-claim, then under *Hare* v. *Cawthrope*, the pleadings are closed and either party may give notice of trial.

In the case of a counter-claim, what becomes of Rule 153, and the right it gives to defendants to amend on precipe within eight days? Or, in the case of a defendant who files a joinder by way of defence, what becomes of the rights of the plaintiff, who may, under Rule 179, without any leave, amend his statement of claim once at any time before the expiration of the time limited for reply and before replying?

If a defendant rests his defence upon a denial of the facts alleged by the plaintiff, there is no reason why he should not put his denial in some other shape than in that of a joinder of issue.

There are several instances given in the forms which accompany the Judicature Act of all the pleadings authorized by the Act, and among them may be found several denials of the truth in the statement of claim. But I have searched in vain for an instance of a joinder of issue being pleadable as a statement of defence.

Is it not possible to read Rule 176 in a less literal but more consistent manner as follows: "As soon as either party, *who is entitled under the rules aforesaid to join issue*, has joined issue, etc."? This reading would harmonize with the former Chancery practice, and also with the other rules and forms of the Judicature Act, and a joinder of issue would once more find itself postponed to a statement of defence.

A. C. GALT.

Toronto, Oct. 20, 1886.

LAW STUDENTS' DEPARTMENT.

STUDENT'S CONDUCT OF LIFE.

It is somewhat old-fashioned, though there is plenty of authority for it in our legal literature, to offer general good advice for the student's conduct of life. Such advice is apt to fall upon a dilemma. If you have had the experience on which it is founded, you do not need it; if not, you will not believe it. And after you have forgotten the advice and the adviser, and discovered the truth of things at your own charge, you will say to yourself quite innocently, Why did not some one tell me this before? Yet a few hints of warning and encouragement may fall on kindly soil and ripen. And therefore I would say to the student going forth into the heat of the day, Trust your own faculties and the genius of your University, and beware of the idols of the forum. You will meet those who will endeavour to persuade you that it is "unbusinesslike" to be a complete man: that you should renounce exercises and accomplishments, abjure the liberal arts, and burn your books of poetry. Do this, and the tempters will shortly make you as one of themselves. You will steadfastly regard your profession as a trade; you will attain an intolerable mediocrity, the admiration of crass clients, and the mark of double-edged compliments from the court: you will soberly carry out the rule laid down in bitter jest by a judge who was a true scholar, of attending to costs first, practice next, and principle last: you will stand for Parliament, not as being minded to serve the common weal, but as thinking it good for you in your business; and if you are fortunate or importunate enough, you may ultimately become some sort of an Assistant Commissioner, or a Queen's Counsel with sufficient leisure to take an active part in the affairs of your Inn, and prevent its library from being encumbered with new-fangled rubbish of foreign scientific books. But if you be true men, you will not do this; you will refuse to fall down and worship the shoddy-robed goddess Banausia, and you will play the greater game in which there is none that loses, and the winning is noble. Let go nothing that becomes a man of bodily or of mental excellence. The day is past, I trust, when these can seem strange words from a chair of jurisprudence. Professors are sometimes men of flesh and blood, and professors of special sciences are not always estranged from the humanities. For my part, I would in no wise have the oar, or the helm, or the ice-axe, or the rifle, unfamiliar to your hands. I would have you learn to bear arms for the defence of the realm, a wholesome discipline and service of citizenship for which the Inns of Court offer every encouragement, and for learning to be a man of your hands with another weapon or two besides, if you be so minded.* Neither would I have you neglect the humanities. I could wish that every one of you were not only well versed in his English classics, but could enjoy in the originals Homer, and Virgil, and Dante, and Rabelais and Goethe. He who is in these ways, all or some of them, a better man will be never the worse lawyer. Nay more, in the long run he will find that all good activities confirm one another, and that his particular vocation gathers light and strength from them all.

And what is to be the reward of your labour, when you have brought all your best faculties to bear upon your chosen study? Is it that you will have more visible success and prosperity than others who have worked with laxer attention or with lower aims? Is it that the world will speak better of you? Once more, that is not the reward which science promises to you, or to any man. These

*The Inns of Court School of Arms is well approved by the authority of our old writers on Pleas of the Crown and the office of a Justice of the Peace, who all say that cudgel-playing and such like sports, as tending to activity and courage, are lawful and even laudable. Hawkins (P. C. 1. 484) closes a whole *catena* of such authority.

things may come to you, or they may not. If they come, it may be sooner or later; it may be through your own desert, or by the aid of quite extraneous causes. The reward which I do promise you is this, that your professional training, instead of impoverishing and narrowing your interests, will have widened and enriched them; that your professional ambition will be a noble and not a mean one; that you will have a vocation and not a drudgery; that your life will be not less but more human.

Instead of becoming more and more enslaved to routine, you will find in your profession an increasing and expanding circle of contact with scholarship, with history, with the natural sciences, with philosophy, and with the spirit if not with the matter even of the fine arts. Not that I wish you to foster illusions of any kind. It would be as idle to pretend that law is primarily or conspicuously a fine art as to pretend that any one of the fine arts can be mastered without an apprenticeship as long, as technical, as laborious, and at first sight as ungenial as that of the law itself. Still it is true that the highest kind of scientific excellence ever has a touch of artistic genius. At least I know not what other or better name to find for that informing light of imaginative intellect which sets a Davy or a Faraday in a different rank from many deserving and eminent physicists, or in our own science a Mansfield or a Willes from many deserving and eminent lawyers. Therefore I am bold to say that the lawyer has not reached the height of his vocation who does not find therein (as a mathematician in even less promising matter) scope for a peculiar but genuine artistic function. We are not called upon to decide whether the discovery of the Aphrodite of Melos or of the unique codex of Gaius were more precious to mankind, or to choose whether Blackstone's Commentaries would be too great a ransom for one symphony of Beethoven. These and such like toys are for debating societies. But this we claim for the true and accomplished lawyer, that is, for you if you will truly follow the quest. As a painter rests on the deep and luminous air of Turner, or the perfect detail of a drawing of Lionardo; as ears attuned to music are rapt with the full pulse and motion of the orchestra that a Richter or a Lamoureux commands, or charmed with the modulation of the solitary instrument in the hands of a Joachim; as a swordsman watches the flashing sweep of the sabre, or the nimbler and subtler play of opposing foils; such joy may you find in the lucid exposition of broad legal principles, or in the conduct of finely reasoned argument on their application to a disputed point. And so shall you enter into the fellowship of the masters and sages of our craft, and be free of that ideal world which our greatest living painter has conceived and realized in his master-work. I speak not of things invisible or in the fashion of a dream; for Mr. Watts, in his fresco that looks down on the Hall of Lincoln's Inn, has both seen them and made them visible to others. In that world Moses and Manu sit enthroned side by side, guiding the dawning sense of judgment and righteousness in the two master races of the earth; Solon and Scævola and Ulpian walk as familiar friends with Blackstone and Kent, with Holt and Marshall; and the bigotry of a Justinian and the crimes of a Bonaparte are forgotten, because at their bidding the rough places of the ways of justice were made plain. There you shall see in very truth how the spark fostered in our own land by Glanville and Bracton waxed into a clear flame under the care of Brian and Choke, Littleton and Fortescue, was tended by Coke and Hale, and was made a light to shine round the world by Holt and Mansfield and the Scotts and others whom living men remember. You shall understand how great a heritage is the law of England, whereof we and our brethren across the ocean are partakers, and you shall deem treaties and covenants a feeble bond in comparison of it; and you shall know with certain assurance that, however arduous has been your pilgrimage, the achievement is a full answer.—FREDERICK POLLOCK, *in the Law Quarterly Review.*

STUDENT'S PRAYER BEFORE THE STUDY OF LAW.

BY DR. SAMUEL JOHNSON.

(September 26, 1765.)

ALMIGHTY GOD, the Giver of Wisdom, without whose help Resolutions are vain, without whose blessing Study is ineffectual, enable me, if it be Thy will, to attain such knowledge as may qualify me to direct the doubtful, and instruct the ignorant, to prevent wrongs, and terminate contention; and grant that I may use that knowledge, which I shall attain, to Thy glory, and my own salvation; for Jesus Christ's sake. Amen.

—*Columbia Jurist.*

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

The unification of the law of bills of exchange.—*Law Quarterly Review*, July.

The effect of mistake on delivery of chattels.—*Ib.*

Registration of title to land.—*Ib.*

Two offences committed in one transaction (Former jeopardy—Prosecuting for less than the entire offence—Splitting up an act—General rule respecting divisibility—Stealing gas—Theft of several articles from one owner—Articles stolen belonging to several owners—Larceny, forgery, assault, murder, etc.)—*Criminal Law Magazine*, June

Unauthorized sale of liquor by servant—When a defence.—*Ib.*

Accomplices as witnesses (1. Competency, 2. Credibility).—*Ib.*, July.

Liability of officer making wrongful arrest in good faith,—*Ib.*

Taking of life not justified by necessity to prevent unlawful arrest.—*Ib.*

Larceny distinguished from embezzlement, false pretences and breach of trust on the line of trespass.—*Ib.*, August.

The competency, as witnesses, of husband and wife.—*American Law Register*, June.

Life insurance—Death by suicide or self-injury.—*Ib.*

Railway companies as common carriers—Issue of commutation rates—Rights of holders—Duty of company to sell to every applicant.—*Ib.*, July.

Fellow servants—Negligence.—*Ib.*, August.

Libel—Privileged communication—Charges in newspapers read at public meeting.—*Ib.*

Income bonds and mortgages (Definition—Lien on income—Equitable assignment—Distinction between income bonds and common mortgages—Bonds secured by mortgage—Remedies and special conditions—Assignment of fund—Earnings).—*Ib.*, September.

Negligence—Fire from mills.—*Ib.*

Sale of land—Misrepresentation as to quantity.—*Ib.*

Codification.—*American Law Review*, May-June.

Special interrogatories to juries.—*Ib.*

Privity of estate.—*Ib.*

The security of railroad bonds.—*Ib.*, July-August.

Origin and policy of wills.—*Ib.*

Are railroads subject to assessment for local improvements?—*Ib.*

Agreements for separation followed by re-cohabitation.—*Irish Law Times*, June 12.

Liability of master for acts of servants contrary to orders.—*Ib.*, June 19.

Common words and phrases (Paper—Store—Strategy—Benevolent and charitable—Book—Crops—Place of burial).—*Albany L. J.*, June 26.

Methods of legal education.—*Ib.*, July 31.

FLOTSAM AND JETSAM.

A CERTAIN lawyer was compelled to apologize for alleged contempt of Court. With stately dignity he rose in his place and said: "Your Honor is right and I am wrong, as your Honor generally is." There was a dazed look in the judge's eye, and he scarcely knew whether to feel happy or to fine the lawyer for contempt. He began to realize, however, as other judges have, that there is a boomerang tendency in this mode of supporting the dignity of a Court.—*Ex.*

THE shortest and yet the most pointed charge to a jury that has come under our notice is that reported by *The Law Journal* to have been delivered by Mr. Commissioner Kerr, famous for the terseness of his charges, while sitting as assistant judge at Middlesex Sessions. The prisoner concluded his defence by saying, "After all, gentlemen, you have only the prosecutor's word for it that I took his watch." "That is true, gentlemen," said the judge; "but if you believe his word, you will find the prisoner guilty; if you don't believe it, or are in doubt, acquit him. Consider your verdict."

FUGITIVE INK.—A friend of ours is about to make a fortune out of an ink which fades out in a short time, varying with the strength of the preparation, from six weeks down to twenty-four hours. We hazard the prediction that it will fill a long-felt want. Politicians have suffered untold annoyance, and at times a bitterness of soul which amounted almost to repentance, for lack of this invention. Letters written in moments of rash confidence which were not burned as directed have turned up at inopportune junctures to blast their authors. Harmless little transactions of a speculative character, recorded in permanent fluids, have proved "damned spots" which will not "out" It is, however, for its usefulness to the legal profession that we call attention to this ink. Lawyers will earn the gratitude and favour of overworked judges, and materially promote their clients' interest, by writing their briefs

in it. On the other hand, a large number of judicial opinions might with advantage be written in it, and the law preserved from precedents which ignore the best settled principles. It is especially recommended for those appellate courts which are in the habit of over-ruling their own decisions at intervals of a few years in a way which gives a new meaning to the bandage on the eyes of justice in allegorical pictures.—*American Law Review.*

THE *Law Journal* (London), referring to the suggestion that the young Prince Edward of Wales might be created Duke of Australia and Earl of Ontario, in celebration of the colonial reunion and of Her Majesty's jubilee, finds that such a title is not altogether unsupported by precedent. "Originally it would seem to have been proper that the place from which a title is taken should be within 'the realm;' but there are many instances to show that it need only be within the allegiance of the king in right of one of his crowns. Thus the earldom of Tankerville (in Normandy), the marquisate of Dublin, and the earldom of Kilkenny (in Ireland), were in the peerage of England; while the Earl of Llandaff, the Earl of Ely, and Viscount Hawarden were peers in the 'kingdom of Ireland;' and (what is more to the present purpose) there was formerly a Viscount of Canada in the Scottish peerage. It is well known that the Marquis Wellesley aspired to be Duke of Hindostan. Lord Coke (in *Calvin's Case*) expressly says that the Channel Islands are 'no part of the realm of England;' but yet, as they are within the 'dominions' of the Crown, we have an Earl of Jersey and a Lord Guernsey in the peerage of England."

LITIGATION IN ENGLAND.—The London *Times* gives the following statistics of litigation for 1870 and 1884:—

The total number of writs of summons issued in 1870 in the Queen's Bench, Common Pleas, and Exchequer was 72,660; in the year ending October 31, 1884, the corresponding number was 48,747. Including the writs issued in the district registries, the total number was 75,857. That the actual increase should be only about 4 per cent. is a significant fact. Judgments have increased about 21 per cent. But there is no such increase in writs of execution of all kinds, which were 17,725 in 1870 and 20,117 in 1884. It is significant that only 45 special cases were heard in 1884, against 73 in 1870. In the circuit work there has been much fluctuation. On the whole South-Eastern Circuit were entered in 1884 only 110 cases, as against 313 entered on the old Home Circuit. While on the old Northern Circuit only 33 causes were entered in 1870, the numbers for the present Northern and North-Eastern circuits were 354 and 217 respectively. The annual amount recovered by the agency of the Courts for 1870 was 369,503*l.*; in 1884 it was 227,660*l.* The amounts recovered on circuit in these years were 188,509*l.* and 95,822*l.* respectively. The summonses at chambers, which were 52,764 in 1870, were only 39,800 in 1884. Of Chancery business, while the fees paid in the taxing-master's office and the costs taxed were respectively 31,519*l.* and 1,004,660*l.* in 1870, they were in 1883—434,799*l.* and 1,247,016*l.* While the total amounts of cash paid into and out of Court respectively in 1870 were 9,775,517*l.* and 10,296,363*l.*, the figures for 1884 were 12,373,149*l.* and 12,495,421*l.* The purely contentious business, and, in particular, that part of it which devolves on the Queen's Bench Division, seems on the decline, or, at least, has not expanded in proportion to the growth of wealth and population. The returns as to the Admiralty Court are also indicative of decline. During the period which we have selected the work of County Courts has expanded. The plaints entered rose from 912,298 in 1870 to 953,414 in 1884, and the total amount for which they were entered was 2,644,762*l*, in the former year, as agaiust 2,936,820*l.* in the latter. But we are inclined to think that, compared with the advance by "leaps and bounds" in wealth and population, statistics of legal business indicate an arrest in development and a partial atrophy of our Courts.

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 1886.

During this Term the following gentlemen were called to the Bar, namely:—*Sept. 6th*—John Murray Clarke (Honours and Gold Medal); William Smith Ormiston, Edward Cornelius Stanbury Huycke, William Murray Douglas, William Chambers, William Nassau Irwin, George Henry Kilimer, Francis Cockburn Powell, Lawrence Heyden Baldwin, Lyman Lee, Robert Charles Donald, George Hutchison Esten, Thomas Urquhart, Joseph Coulson Judd, Walter Samuel Morphy, John Wesley White, Thomas Johnson, William H Wardrope, Francis Edmund O'Flynn. *Sept. 7th*.—Thomas Joseph Blain (who passed his examination in Trinity Term, 1885), William Lees, Charles True Glass, Alexander David Hardy, John Campbell, Richard John Dowdall, John Carson, Richard Vanstone, George Edward Evans, Charles Bagot Jackes. William Hope Dean; And *Sept. 17th*, William Robert Smythe (who passed his examination in Hilary Term, 1886). The following gentlemen received Certificates of Fitness to practise as Solicitors, namely:—John Murray Clarke, George Hutchison Esten, Wm. Smith Ormiston, Wm. Chambers, Alex. McLean, Robt George Code, Henry Smith Osler, Edward C. S. Huycke, Wm. John McWhinney, Wm. Murray Douglas, Chas. True Glass, Robt. Charles Donald, Herbert Mcdonald Mowat, Francis Edmund O'Flynn, Lawrence Heyden Baldwin, John Bell Dalzell, Lyman Lee, Augus McCrimmon, Ranald D. Gunn, Joseph Coulson Judd, Heber Hartley Dewart, John Wesley White, Alex David Hardy, Wm. Mansfield Sinclair, Hubert Hamilton Macrae, John Geale (who passed his examination in Hilary Term, 1886, also received his Certificate of Fitness). The following were admitted into the Society as Students and Articled Clerks, namely:—

Graduates.—George Ross, John Simpson George Wm. Bruce, John Almon Ritchie, James Armour, John Miller, Frederick McBain Young, Malcolm Roblin Allison, Robert Baldwin, Charles Eddington Burkholder, Alexander David Crooks, Andrew Elliott, Robert Griffin Macdonald, Thomas Joseph Mulvey, James Milton Palmer, James Ross, John Wesley Roswell, Richard Shiell, Alfred Edmund Lassier, Charles Murphy, George Newton Beaumont, Charles Elliott.

Matriculants of Universities.—William Johnston, Samuel Edmund Lindsay, Nelson D Mills.

Junior Class.—Richard Clay Gillett, Alexander James Anderson, George Prior Deacon, Louis A. Smith, Andrew Robert Tufts, William Wright, Kenneth Hillyard Cameron, Harry Bivar Travers, John Alfred Webster, Thomas James McFarlen, William Elijah Coryell, John Henry Glass, Albert Henry Northey, Archibald Alexander Roberts, Charles B. Rose, George S. Kerr, William Egerton Lincolm Hunter, Francis Augustus Buttrey, Frederick Thomas Dixon, Hector Robert Argue Hunt, Daniel O'Brien, Franklin Crawford Cousins, Thomas Alexander Duff, William G. Bee, Stephen Thomas Evans, William Mott, Thomas Arthur Beamert, and John Alexander Mather was allowed his examination as an Articled Clerk.

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 Somerville's 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 Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

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

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV., Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Socity as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:
Hilary Term, first Monday in February, lasting two weeks.
Easter Term, third Monday in May, lasting three weeks.
Trinity Term, first Monday in September, lasting two weeks.
Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will be held the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9 The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and he the first six

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

FEES.

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 889 AND 1890.

Students-at-law.

CLASSICS.

1886.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Cæsar, Bellum Britannicum.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. VI.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (vv. 1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (vv. 1-33)

1890.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, Ancient Mariner and Christabel.

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

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

1886 } 1888 - Souvestre, Un Philosophe sous le toits
1890 }

1887 } Lamartine, Christophe Colomb.
1889 }

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics; *or* Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

ARTICLED CLERKS.

Cicero, Cato Major; *or*, Virgil, Æneid, B. I., vv. 1-304, in the year 1886: and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

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.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.