THE

CANADA LAW JOURNAL.

VOLUME XXIII.

From January to December, 1887.

TORONTO:
CANADA LAW JOURNAL OFFICE, 5 JORDAN STREET,
1887.

TABLE OF CANADIAN CASES

REPORTED AND NOTED IN THIS VOLUME.

TABLE OF CANADIAN CASES.

TABLE OF ENGLISH CASES

NOTED IN THIS VOLUME IN "RECENT ENGLISH DECISIONS."

TABLE OF ENGLISH CASES.

Canada Law Journal.

VOL. XXIII. JANUARY 1, 1887. NO. 1.

DIARY FOR JANUARY.

1. Sat.....*New Year's Day.* Holiday in H. C. J.
2. Sun.....*2nd Sunday after Christmas.*
3. Mon....Co. Ct. term begins. Lord Eldon died 1838, æt. 87.
6. Thur....*Epiphany.* Christmas vacation H. C. J. ends.
8. Sat.....Co. Ct. term ends. Christmas vacation in Exchequer Court ends.
9. Sun.....*1st Sunday after Epiphany.*
10. Mon....Christmas vacation in Sup. Ct. Canada ends.
11. Tu... Sittings of Court of Appeal begin.
12. We.... Sir Chas. Bagot, Gov.-Gen., 1842.

TORONTO, JANUARY 1, 1887.

MORTGAGEES AND THE STATUTE OF LIMITATIONS.

FOLLOWING close upon the case of *Newbould* v. *Smith*, 55 L. T. N. S. 194, to which we recently referred (see *ante* p. 373), comes the deliverance of the judicial Committee of the Privy Council in *Lewin* v. *Wilson*, 55 L. T. N. S. 410, on appeal from the Supreme Court of Canada (since reported in 11 App. Cas.). In this case *Newbould* v. *Smith* is not referred to, and the decision arrived at appears very materially to modify the effect of that case.

The facts in *Lewin* v. *Wilson* were very simple—a principal and surety joined in a bond to secure a debt, and as collateral security for the bond, the surety gave a mortgage. In this mortgage the proviso for redemption stipulated that the mortgage should be void on payment of the mortgage debt, either by the mortgagor or by the principal debtor, the latter, however, was no party to the mortgage, and was not bound by any covenant therein. The principal paid interest on the debt down to 1879, but no payment had been made by the surety himself. The action was brought to foreclose the surety's mortgage, and the question was whether payment by the principal prevented the statute from running as against the surety in respect of the land covered by his mortgage. The majority of the judges of the Supreme Court thought that the result of the authorities was to establish that a payment in order to prevent the statute from running must be made by the mortgagor, or by some person in privity of estate with him, or the agent of one of them; in short, that the only person competent to make a payment sufficient to stop the statute is one who is competent to give an acknowledgment of title. Strong, J., however, dissented from this view, and the Privy Council have determined that the conclusion at which he arrived was the correct one.

In *Bolding* v. *Lane*, 1 D. G. & S. 122, Lord Westbury determined that an acknowledgment of the mortgage debt given by the mortgagor would not bind a *puisne* incumbrancer. But in *Lewin* v. *Wilson*, Lord Hobhouse, who delivered the judgment of the Privy Council, says "that payments made by a person who, under the terms of the contract, is entitled to make a tender, and from whom the mortgagee is bound to accept a tender of money, for the defeasance or redemption of the mortgage, are payments, which, by section 30 (see R. S. O. c. 108, s. 22) give a new starting-point for the lapse of time."

Assuming this to be an authoritative statement of the law it would seem to follow that a payment by a mortgagor, even after he has assigned or incumbered the equity of redemption, would prevent the

statute from running against the mortgagee, wherever the mortgagor is bound by a covenant to pay the mortgage debt, or the proviso for redemption stipulates that the mortgage is to be void on payment by him. There is no doubt that so long as the original mortgagor, in such cases chooses to pay, the mortgagee is bound to accept payment, and it would certainly be in the highest degree unreasonable if payments made under such circumstances were not sufficient to keep the statute from running.

The rule deducible from *Newbould* v. *Smith* and *Lewin* v. *Wilson*, appears to be this: a payment to prevent the Statute of Limitations from running as against a mortgagee must be made by some person who, at the time of the payment is interested in the equity of redemption; or by some person from whom the mortgagee is bound to receive payment, whether such person be or be not interested in the equity of redemption at the time the payment is made; or the agent of some such person.

MOTIONS FOR NEW TRIALS.

Every sitting of the Divisional Court of the Chancery Division reveals the fact that there is a widespread ignorance in the profession as to the proper practice to be pursued in that Division in regard to motions to set aside verdicts and for new trials.

The sittings which have just taken place have been no exception. No less than eight applications were made to get cases set down which had not been set down owing to the slip of the solicitor engaged, and the difficulty is not lessened by the fact that the court has laid down a rigid rule, which it appears to be extremely loath to relax, that slips of solicitors are not a sufficient reason for granting any indulgence. The result was, that of the eight applications only one was successful, and that one, owing to the fact that it was unopposed, and that judgment had not been given in it a sufficient time before the sittings to permit the case to be set down within the time prescribed by Rule 522.

It may be that no injustice has been done in the seven cases. It may be that every one of them would have been affirmed, even if they had been set down and duly argued. At the same time the fact remains that the suitor, though entitled to have the opinion of the Divisional Court on the merits of his case, has been deprived of that privilege through no fault of his own, but owing to a mistake of his lawyer. Clients, we fear, will not view this mode of disposing of their cases with any satisfaction; and we think it is always to be regretted in the public interest when any suit goes off on any such ground, Courts of Justice must feel that their highest duty is to dispose of business, so that suitors may be reasonably satisfied that their causes have been fully heard and carefully considered, and no court can expect to satisfy the public when the suitors are driven from the judgment seat merely on the ground that some technical rule of practice has not been complied with.

We do not wish to exculpate solicitors who are at fault; at the same time we do not think the ignorance which appears to prevail upon this branch of practice is altogether the fault of the profession, The policy of the Judicature Act has had the effect of lulling them into a false security. They have rashly assumed that what that Act professedly aimed at effecting, namely, a perfect assimilation of the practice in all the Divisions of the High Court, has been, in fact, accomplished. Such experience as they have recently gained in the Chancery Division, has

somewhat rudely taught them, that in thinking thus, they have been living in a fools' paradise.

Why the practice should not be uniform we are at a loss to understand.

The Judicature Act, it is true, as passed by the Legislature, did prescribe a uniform practice on this point for all the Divisions, but one of the earliest exercises of the power of the Judges to make rules, was signalized by their passing rules to destroy this uniformity.

We do not say that the scheme prescribed by the original rules was perfect, or one that could not have been improved upon; but we cannot help thinking that the learned Judges would have acted more within the spirit of the Act, and would have saved a great deal of unnecessary complexity, if, instead of doing as they have done, they had striven to lay down a simple, expeditious and inexpensive procedure, and made it applicable to all the Divisions. As the practice now stands there is one rule for the Queen's Bench and Common Pleas Divisions, and another for the Chancery Division. In the Queen's Bench and Common Pleas Divisions, if the case has been tried by a jury, in order to set aside the verdict, an application for an order *nisi* is necessary; but in cases tried without a jury, then, in order to set aside the verdict, a notice of motion is necessary, and in order to make assurance doubly sure in some cases, we believe, it is customary, when an order *nisi* is obtained, to give notice of motion as well. It cannot be said by introducing this variety in practice the new rules have made any improvement in the practice which formerly prevailed.

In the Chancery Division, the same double practice is also prescribed by the rules of the Supreme Court, with the further extraordinary procedure that an application for the order *nisi* is to be set down, and notice of the application served. To get rid of this absurdity, however, the Judges of that Division passed a regulation in September last (see *ante* p. 293), whereby they determined not to grant orders *nisi*.

It appears to us that the present practice, as prescribed by the rules, is defective in two respects; first, in providing a different mode for making the application in jury and non-jury cases; and second, in providing that the practice in the Chancery Division is to be different from that of the other Divisions.

In these two respects we trust it may be soon amended. The retention of the old system of rules *nisi*, we believe to have been a mistake, and one that leads to a great waste of judicial time.

It is said that it saves time, because it enables the court to nip cases in the bud. But the question is whether many of these cases would ever be brought before the court at all, if, in every case, the applicant were exposed to the penalty of having to pay the costs of the motion if he failed. We do not think they would, and it is certain that in every case in which an order *nisi* is granted, the court first hears an argument on the motion for the order, and then a second argument on the motion to make it absolute. Then, again, is it not the fact that on not a few days during the sittings the Judges are not fully occupied, owing to the fact that the orders *nisi* are not ripe for hearing, owing to the delay which has necessarily to take place between the granting of the rule and the time of its return?

OUR ENGLISH LETTER.

Already the Christmas vacation is upon us, and the term almost at an end; nevertheless, it is agreed on all hands that the revival of business after the long vacation has been almost preternaturally slow. During the long vacation the stagnation was absolute. Ambitious juniors, willing to try what unfailing diligence would achieve in the way of winning the hearts of the solicitors, took nothing for their pains, and even men of greater standing who stayed in London during part of the vacation found that they had only wasted to no purpose a part of their much-needed holiday. Unquestionably the long vacation is a trying time for men who depend upon their profession for their subsistence, and there are few men who are not thoroughly weary of inactivity by the time that October has come. One objection to the long holiday lies not so much in itself as in its consequences. In other words, one would not complain bitterly if the legal machine was stopped for three months and then went on running as if nothing had happened. But the case is otherwise, since, after the long vacation, business is long before it ripens and regains a working or, so to speak, a lucrative condition. During this autumn and early winter, too, we have been beset by a series of *cause célèbres*, which, as all practical men know, are fatal to ordinary work, because they block the cause-list. There have been two—if two can form a series—and both of great interest.

First came the libel action against Lord Coleridge, of which it may be written that it was the very best thing, from Lord Coleridge's point of view, that could possibly have happened. Mr. Adams was beaten upon every point, and both the veteran Chief Justice and his son emerged from the trial with triumph, gaining the hearty sympathy not only of the profession, but also of the public. So offensive was the manner of the plaintiff, who had "a fool for his client," that the jury and the public were very near losing sight of the fact that something had happened which ought not to have been permitted. The late Lord Monkswell, it will be remembered, had consented to act as arbitrator, and to assess the damages in the original action brought by Mr. Adams. To that end there were sent to Lord Monkswell copies of all documents relating to the matter, and it was admitted that Lord Coleridge's solicitor's clerk sent a number of documents of which Mr. Adams had no knowledge. The jury found that this was an act of inadvertence, much to be regretted, on the part of the solicitor; but when one comes to reflect upon the matter in cold blood, at a time when the feeling of sympathy caused by the sight of the Chief Justice of England undergoing cruel and unnecessary torture has faded a little, it is not altogether easy to see how such a mistake could possibly have been made. It is true that Lord Monkswell wrote that the documents in question had not influenced his judgment; but then, how can a man tell, after arriving at a given conclusion, what has led him to it, and what has not? The case is not dissimilar to that of a jury who, having heard the answer to an inadmissible question, are told that they ought not to permit the words which they have heard to influence their judgment in the smallest degree.

Two good results may be expected from this great and lamentable case. We may anticipate, with some confidence, a reaction against the growing custom of giving extraordinary latitude to parties in person: coincidently there is ground for hoping that the tendency may be in the other direction, and that judicial notice may be taken of that lamentable waste of public time and money, of which parties in person are the source. Secondly, it is

to be hoped that, after this great example, steps may be taken to check that license in cross-examination of which Lord Coleridge said the other day that it caused people to loathe and detest not only the courts, but also the law.

Our other sensational case is the Colin Campbell divorce case, which is full of the most painful and disgusting details. At the present moment it has been progressing for rather more than a week. It promises to last, according to one of the counsel engaged, at least a fortnight more. From a legal point of view, it has no features of interest; but the columns of every paper are full of indications of the fact that the popular appetite for filth is ravenous. If any further proof is desired upon this point by any one in England, he has only to walk past the Courts of Justice, in front of which there assembles daily an enormous crowd.

The most important judicial change has been the retirement of Vice-Chancellor Bacon, the last of his order, full of years and honour. Of all the judges Sir James Bacon was far the most plentifully provided with shrewd and caustic humour, and it would be difficult to conceive a man more unlike him than his successor. Mr. Kekewich, Q.C., at the bar was about as dry a man as could be heard. Without attaining anything like eminence, he had an eminently lucrative practice, although rumour says that his practice would have been a greater indication of ability if the number of his clients had been a little larger. *Mais que voulez vous?* Rumour will always have something to say against a new appointment. We are promised a new batch of judges to fill vacancies to be caused by the resignations of Justices Grove, Field and Denman. I know of no ground for the rumour, and believe it to be an idle fancy. It is not, however, without plausible grounds, for Mr. Justice Field is very deaf; and Mr. Justice Grove is rich and is said to dislike law and like chemistry. The case of Mr. Justice Denman is different, for he is at least as good a judge as ever he was.

In conclusion, although late in time, a word must be said upon the appointment of Mr. Henry Matthews, Q.C.,—now Sir Henry—as Home Secretary. Unquestionably it is the most popular appointment that has been made since Mr. Gladstone promoted Sir John Holker, and if the Government had wished to propitiate the bar by a well-chosen appointment, no better course could have been taken than by the selection of Mr. Henry Matthews.

Temple, Dec. 6.

SELECTIONS.

SUBSTITUTION OF MORTGAGES.

This question, along with the rights of intervening lien holders, is one that is scarcely mentioned by text-writers, though one that may be at times of vast importance. It would appear upon a casual observation that the establishment of liens should run from record date of instrument in force; but upon a careful consideration it will be seen that an equitable rule enters into the merits of this subject, and that the conclusion should be different from the one above suggested.

It may be stated, as a generally well-established rule of law, that the taking of a new note and mortgage, to secure an indebtedness already existing by note and secured by mortgage, will not discharge the lien of the first mortgage. In *Packard* v. *Kingman*, Smith and Kingman executed a mortgage on personal property to one Horner. On December 22, 1858, Smith and Kingman moved into a hotel property, and by statute a landlord's lien attached upon the effects of Smith and Kingman. On December 24, the plaintiff took a new note and mortgage for the balance unpaid of the debt, and at the same time released

the old mortgage. The Appellate Court, in passing upon the cause, takes occasion to say that "the taking of a new note and mortgage on personal property, to secure an indebtedness already evidenced by a note and mortgage on the same property, does not, even when the first note and mortgage are cancelled, operate to discharge the lien of such first mortgage." It is a proposition well established that the giving of one's note does not pay or extinguish the debt; so accepting the mortgagor's note for interest due on a mortgage does not pay that portion of the debt, nor discharge the lien of the mortgage to that extent.

In an action to reform a mortgage, the facts were shown to be as follows: A executed a mortgage to B, but made a mistake in description of property. He (A) made a second mortgage on same property to C, to secure a note given in payment of several long past due notes. Action by B to reform mortgage against C, who had no notice of mistake in first mortgage. *Held*, that action would lie, as second mortgage was given to secure prior debt and no new consideration passed. The right of restoration is allowed where the holder of a first mortgage, in ignorance of the existence of a subsequent recorded one, releases his mortgage and takes a new one; and under such circumstances the first mortgagee would be entitled to have the mortgage restored, and given the original priority.

The surrender of unpaid notes, secured by mortgage, and the taking of new notes and mortgage for the balance, does not of itself discharge the lien of the first mortgage. But this would be otherwise if the indebtedness secured by the second mortgage was created by the parties getting together and having a settlement of mutual running accounts and other debts, among which was the first mortgage debt, and a balance is found due the plaintiff. This balance being put in a new note and mortgage would form a new consideration, and the lien of the first mortgage be divested. But where there is an express agreement that the mortgage, under such circumstances, shall continue as a security, the lien of the first mortgage is not destroyed.

In *Burns* v. *Thayer*, it was held that, where a husband gave a mortgage for the purchase money of real estate, and this mortgage was afterwards discharged, and at the same time and as a part of the same transaction a new note and mortgage were given for the same purchase-money debt, the instantaneous seisin of the husband did not operate to give the wife a homestead in the premises.

A mortgage secures a debt or obligation and not the evidence of it, and no change in its form will discharge the mortgage. Whether a new mortgage, given in the place of an old one, shall be treated as a payment of the one for which it was substituted, will depend upon the purpose and understanding of the parties to the transaction. But not only will the intention of the parties be determined by the express agreement, but, in the absence of such, by the circumstances attending the transaction, from which such intention may be inferred. The court, in *Swift* v. *Kreamer*, says: "We regard the cancellation of the old mortgage and the substitution of the new as cotemporance acts. It was not creating a new incumbrance, but simply changing the form of the old. A court of equity looking to the substance of such a transaction would not permit a release intended to be effected only by force of, and for the purpose of giving effect to the last mortgage, to be set up, even if the last mortgage were inoperative."

A mortgagee who takes a new mortgage from the grantee of his mortgagor in the place of the old one, does not lose his priority over judgment liens existing subsequent to the date of the old mortgage. If a mortgagee release his mortgage and accept a new mortgage, without knowing of the existence of a second mortgage, the second mortgagee will not be allowed to avail himself of the advantage thus gained; and the law will uphold a mortgage lien in favour of a mortgage against an intervening title, even where the parties had undertaken to discharge the mortgage, unless injustice would be done thereby. And thus a mortgagee lien, purchased by the owner of the equity of redemption, will, in the absence of a contrary intention manifest to the court, be kept alive in equity for the purchaser's protection against an intervening incumbrance.

In *Rump* v. *Gerkens*, the plaintiff released his mortgage, not knowing of a junior mortgagee, and the court say, that such did

not extinguish the lien of the first mortgage, so that he (the plaintiff) could not use it as a protection to his right against the subsequent mortgage. "In other words, a court of equity will regard it as still existing as a lien and not having merged, so as to protect him against the subsequent mortgage, . . . In law a merger always takes place when a greater estate and a less coincide and meet in the same person, in one and in the same right, without any intermediate estate. The lesser estate is said to be annihilated or merged in the greater; but a court of equity is not guided in this matter by the rules of law. It will sometimes hold a charge extinguished where it would exist at law, and sometimes preserve it where at law it would be merged. The question is one of intention, actual or presumed, of the person in whom the interests are united."

A mortgagor, for his own advantage, yet in good faith, procures satisfaction pieces from his mortgagee, and cancels the mortgages without paying the mortgage money, and does so upon an understanding to give new mortgage, but dies without accomplishing it, and his heirs after him give such new mortgage: *held*, that the new mortgage executed by the heirs should have the same effect as the old securities.

Contrary Doctrine.—A rule contrary to the one above maintained is steadily followed by the courts of Maryland, and, as far as we are able to discover, that State is alone in its position. It is there said that the release of one mortgage and the giving of another on the same property, for the same debt to the same mortgage, does not avoid the loss of the first mortgage lien by the release, and although the only consideration for the release is the simultaneous execution of another mortgage to the same tenor and effect as the released mortgage.—*Central Law Journal.*

[The authorities will be found on reference to the above publication, vol. 23, p. 579.]

REPORTS.

MUNICIPAL CASE.

BAGGS V. CITY OF TORONTO.

Surface water—Raising grade of street—Flooding of adjacent land—Note—Liability of corporation.

B., residing on Lippincott Street, Toronto, had his premises flooded by surface water flowing into his cellar after a storm. The flooding was greater owing to the raising of the grade of Lippincott Street by the defendants block-paving same.

Held, That right of drainage does not exist *jure naturæ*. That the defendants were not liable for the damage claimed, as they had only exercised a legal power vested in them by statute to raise the grade of the street, and block-pave same; they had been guilty of no negligence, and were not bound to provide drainage for surface water.

[County Court, Co. of York—Toronto, 1886.

The plaintiff claimed damages from the defendants in this proceeding for the flooding of his cellar and premises on Lippincott Street, in the City of Toronto.

Heighington, for plaintiff.

McWilliams, for defendants

The facts, as disclosed in evidence, are set ou in the judgment of

MCDOUGALL, Co.J.—Lippincott St. runs north and south. The natural fall of the land from Bloor St. is from the north to the south-west; and it appears that, prior to the doing by the defendants of any of the acts complained of, the surface water collected on the lands to the north and north-east of the plaintiff's property, flowed in times of heavy rains or freshets in a southerly and westerly direction partly across the line of Lippincott Street and partly across the plaintiff's land, then south-westerly till they found their way into certain natural watercourses west on Bathurst Street.

The plaintiff admits that on former occasions in times of heavy freshets he had been flooded by surface water, but said that by reason of the side ditches on Lennox Street, a street running east and west, and north of his premises, (which ditches were cut through and across the line of Lippincott Street) a good deal of the surface water was intercepted before reaching him, and transferred and discharged upon the lands lying west of Lippincott Street, though in times of heavy freshets even this diversion did not protect him, and his premises suffered more or less. In May, 1885, the defendants block-paved Lippincott Street. In doing so the grade of the street was necessarily raised Prior to block-paving, some years, a sewer had been put down on the street, and,

after raising the grade and block-paving, two culverts or man-holes were put down on the east side of Lippincott Street at the north-east and south-east corners of Lennox Street. The effect of raising the grade on Lippincott Street was to prevent the flow of surface water across the street; and the result was that when freshets or very heavy rains occurred a considerable portion of the surface water, which the culverts at Lennox Street were inadequate to carry off, flowed down the east side of Lippincott Street and through and over the plaintiff's lot, some finding its way into his cellar and filling it up, and more flowing under the plaintiff's house, and then easterly till absorbed at other points. The plaintiff alleges that his building was seriously injured, and about a foot of rubbish and mud deposited in his cellar, which he had to remove at some expense. Other injuries also resulted to his building, which he alleges arose in consequence of this flooding. The worst flood was one occurring on the 3rd and 4th January, 1886, when there was a very heavy downpour for several days, resulting in the flooding of the natural water-courses in the west end of the city, and in overcharging all the sewers in this vicinity. A flood also occurred in 1885 about the time of the construction of the block-paving, and another in March, 1886. The latter was not so serious as the January one, which, according to the evidence, was much the heaviest of the three. The plaintiff also states that the March flood was less injurious to him, because the defendants had put in some additional culverts at Bloor Street, these taking off a quantity of the surface water coming down from the north, and discharging it into sewers on Borden Street and Brunswick Avenue, streets parallel to Lippincott Street and to the east of it. *All the injuries the plaintiff complains of were the result of flooding by surface water, and did not arise from the overflow of the sewer.*

The defendants urge that they are not legally responsible for the damages in question on two grounds: first, they say, We are not bound to protect you from injury from surface water: and second, they say that the plaintiff was flooded by surface water before they graded this street and if, as a fact, it appears that the flooding is any more extensive by reason of their having raised the grade of the street, they contend that they are not responsible, because, in raising the grade in order to block-pave it was the proper exercise of a legal power by the corporation, and they have not exceeded these powers, nor have they been guilty of any negligence in their mode of exercising them.

On the first point there is no doubt whatever that the defendants are right. The right of drainage does not exist *jure naturæ*. The principles applicable to running water which are *publici juris* do not extend to the flow of mere surface water. *McGillivray* v. *Millin*, 27 U.C.R. 62; *Crewson* v. *Grand Trunk*, 27 U.C.R. 68; *Murray* v. *Dawson*, 19 U.C.C.P. 314; *Darby* v. *Crowland*, 38 U.C.R. 338. Dillon on Corporations, second ed., par. 798.

The second point, however, as to whether a corporation, raising a grade of a street and thereby preventing the escape of surface water from one side of the street to the other, and causing damage to an adjacent proprietor, is liable, is perhaps not so free from doubt. The case most in point that I have been able to find is *Darby* v. *Crowland*, 38 U.C.R. 338. The facts in that case, as stated in the head-note, are as follows: There had for many years been a culvert across a highway adjoining the plaintiff's land, through which the surface water from his land had been accustomed to pass, and the pathmaster had closed it up and made the road-bed solid, by which the flow of surface water from the plaintiff's land was impeded, and the land remained longer wet than it would otherwise have done. The corporation by resolution approved of the pathmaster's action. It was there held that the plaintiff had no cause of action, for there was no right of drainage across the highway for the surface water, and the corporation could not be liable for not exercising their discretionary powers with regard to the drainage of lands.

The numerous cases cited in that judgment show that both in England and the United States it has been distinctly decided, as I have before said, that the right of drainage of surface water does not exist *jure naturæ*, and that long enjoyment of the right would not create an easement. Chief Justice Harrison, after affirming this proposition of law, adds: "The fact that the defendants are a municipal corporation cannot give to the plaintiff any greater rights than he would have against the private individual. It is true that municipal corporations have power, under certain circumstances, to pass by-laws for the drainage of lands; but this, like many other powers conferred on municipal bodies, is a discretionary, not an obligatory, power." In Dillon on Corporations, paragraph 798, the law is laid down as follows: "Authority to establish grades of streets, and to graduate them accordingly, involves the right to make changes in the surface of the ground which may injuriously affect the adjacent property owners; but where the power is not exceeded there is no liability unless created by statute, and then only in the mode and to the extent provided for the consequences resulting from its being exercised and properly carried into execution. On the one hand, the

owner of the property may take such measures as he deems expedient to keep surface water off from him or turn it away from his premises on to the street; and, on the other hand, the municipal authorities may exercise their powers in respect to graduation, improvement and repair of streets without being liable for the consequential damages caused by surface water to adjacent property."

The principle is well settled, that a corporation is not liable to an action for consequential damages to private property or persons unless it be given by statute, where the act complained of was done by it under and pursuant to authority conferred by an Act of the Legislature, and there has been no want of reasonable skill in the execution of the power: *Mersey Dock Cases*, 11 H. of L. Cases, 713. Adjoining property owners are not entitled of legal right, without statutory aid, to compensation for damages which result as an incident or consequence of the exercise of this power by the municipality by authority from the legislature. If we examine the statutory provision made by our legislature when conferring the many extensive powers vested in municipal corporations, and which provisions direct how and under what circumstances compensation is to be made to persons injuriously affected by the exercise of those powers, we will find them as follows, section 486 of 46 Vict. chap. 18, Ontario, enacts: "Every Council shall make to the owners or occupiers of, or other persons interested in, real property entered upon, taken, or used by the corporation in the exercise of any of its powers, or *injuriously affected by the exercise of its powers*, due compensation for any damages (including cost of fencing when required) necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work, and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under this Act." Compensation is here provided in respect of all acts by which lands are *injuriously affected*. These words, however, have been held, by a long series of decisions of the highest authority, to embrace only such damages as would have been actionable if the work causing it had been executed without statutable authority. *Re Collins* v. *Water Commissioners of Ottawa*, 42 U.C.R 378; *Re Penny*, 7 Ell. & B. 660; *Rickett* v. *The Metropolitan R. R. Co.*, L. R. 2 E. & I. Appeals 175; *Buccleuch* v. *The Metropolitan Board of Works*, L. R. 5 E. & I. App. 418; *McCarthy* v. *The Metropolitan Board of Works*, L. R. 7 E. & I. App. 245.

The law largely regards surface water as a common enemy (as Lord Tenterden phrases it), which every proprietor may get rid of as best he may and as said by Mr. Dillon in the passage before quoted by me: "The owner of the property may take such measures as he deems expedient to keep surface water off from him, or turn it away from his premises on to the street; and, on the other hand, the municipal authorities may exercise these powers in respect to graduation, improvement and repair of streets without being liable for the consequential damages caused by surface water to adjacent property." Had the defendants raised the grade of this road without statutory authority, they would not then have been liable for the interruption of the flow of the surface water, there being no right of action before the passage of the Act directing compensation to be made in cases where lands were injuriously affected. Under the decisions last referred to, no legal claim for damages can be successfully established or maintained. In *McCarthy* v. *The Metropolitan Board of Works*, above cited, Lord Hatherly uses the following language: "I believe the rule to be a sound one, that wherever an action might have been brought for damages, if no Act of Parliament had been passed, the case is brought within the class of cases in which a property is injuriously affected within the meaning of the Act." And Lord Penzance in the same cases thus clearly expresses his conclusion: "It may reasonably be inferred that the Legislature, in authorizing the works and thus taking away any rights of action which the owner of land would have had if the works had been constructed by his neighbour, intended to confer on such owner a right to compensation co-extensive with the right of action of which the statute had deprived him; but on no reasonable grounds, as it seems to me, can it be inferred that the Legislature intended to do more, and actually improve the position of the person injured by the passing of the Act."

I have examined with care the cases cited to me by Mr. Heighington, but I can find in them no authority which in the least impeaches these doctrines. I am, therefore, compelled to hold that the plaintiff has not established before me any claim for damages resulting from the acts of the defendants in raising the grade of Lippincott Street, for which, under the cases, he is entitled to recover against them any sum whatever.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

British Columbia.]

CANADIAN PACIFIC RAILWAY CO. v. MAJOR.

Canadian Pacific Railway Act, 44 *Vict. ch.* 1—*Consolidated Railway Act*, 1879, *s.* 19.

By the Act incorporating the Canadian Pacific Railway Co., 44 Vict. ch. 1, the provisions of the Consolidated Railway Act, 1879 are made applicable to the building of the Canadian Pacific Railway, in so far as they are not inconsistent with or contrary to the said act of incorporation.

Held, (HENRY, J., dissenting), that the provision contained in section 19 of the Consolidated Railway Act, 1879, that no railway company shall have any right to extend its line of railway beyond the termini mentioned in the special act, is inconsistent with the power given to the company under sec. 14 of the contract contained in said Act to build branch lines from any point within the Dominion, and with the declaration in section 15 of the charter that the main line, branch lines, and any extension of the main line thereafter constructed or acquired shall constitute the Canadian Pacific Railway.

The Canadian Pacific Railway has, therefore, a right to build their road beyond Port Moody in British Columbia, the terminus mentioned in said Act of incorporation.

Appeal allowed with costs.

Robinson, Q.C., *and Tait*, Q.C., for appellants.

Ebert, for respondent.

EXCHEQUER COURT OF CANADA.

BERLINQUET v. THE QUEEN.

Petition of right—Intercolonial Railway contract—31 Vict. ch. 13, s. 18—Certificate of engineer—Condition precedent to recover money for extra work—Forfeiture and penalty clauses

The suppliants engaged by contracts under seal dated 25th May, 1870, with the Intercolonial Railway Commissioners (authorized by 31 Vict. ch. 13) to build, construct and complete sections 3 and 6 of the said railway for a lump sum for section 3 of $462,444, and for section 6 for a lump sum of $456,946.23.

The contract provided, *inter alia*, 1. That it should be distinctly understood, intended and agreed, that the said lump sums should be the price of, and be held to be full compensation for, all works embraced in or contemplated by the said contracts, or which might be required in virtue of any of its provisions, or by law, and the contractors should not, upon any pretext whatever, be entitled, by reason of any change, alteration or addition made in or to such works, or in the said plans or specifications, or by reason of the exercise of any of the powers vested in the Governor in Council by the said Act intituled, "An act respecting the construction of the Intercolonial Railway," or in the commissioners or engineer by the said contract or by law, to claim or demand any further sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and every such claim or pretension, to all intents and purposes whatsoever, except as provided in the fourth section of the said contract, relating to alteration in the grade or line of location; and that the said contract and the said specifications should be in all respects subject to the provisions of 31 Vict. ch. 13. That the works embraced in the contracts should be fully and entirely completed in every particular and given up under final certificates and to the satisfaction of the commissioners and engineer on the 1st of July, 1871 (time being declared to be material and of the essence of the contract), and in default of such completion contractors should forfeit all right, claim, etc., to

any money due or percentage agreed to be retained and to pay as liquidated damage $2,000 for each and every week for the time the work might remain uncompleted. That the commissioners upon giving seven clear days' notice if the works were not progressing, so as to ensure their completion within the time stipulated or in accordance with the contract, had power to take the works out of the hands of the contractors, and complete the works at their expense; in such a case contractors were to forfeit all right to money due on the works, and to the percentage returned.

On 24th May, 1873, the contractors sent to the commissioners of the Intercolonial, a statement of claims showing that there was due to them a large sum of money for extra work, and that until a satisfactory arrangement be arrived at they would be unable to proceed and complete the works.

Thereupon, notices were served upon them, and the contracts were taken out of their hands and completed at the cost of contractors by the Government.

In 1876 the contractors by petition of right, claimed $523,000 for money *bona fide* paid, laid out and expended in and about the building, and construction of said sections 3 and 6 under the circumstances detailed in their petition.

The Crown denied the allegations of petition, and pleaded that the suppliants were not entitled to any payment, except on the certificate of the engineer, and that the suppliants had been paid all that they obtained the engineer's certificate for, and in addition filed a counter claim for a sum of $159,982.57, as being due to the Crown under the terms of the contract for moneys expended by the commissioners over and above the bulk sum of the contract in completing of said sections.

The case was tried in the Exchequer Court by TASCHEREAU, J., and he held that under the terms of the contract the only sum for which the suppliants might be entitled to relief, were 1st, $5,850.00 for interest upon, and for the forbearance of divers large sums of money due and payable to them, and 2ndly, $27,022.58, the value of plant and materials left with the Government, but that these sums were forfeited under the terms of the third clause of the contract; that no claim could be entertained for extra work without the certificate of the engineer, and that the Crown were entitled to the sum of $159,953.51 as being the amount expended.

An appeal to the Supreme Court of Canada having been taken by the suppliant, it was

Held (affirming the judgment of the court below), FOURNIER and HENRY, JJ., dissenting. 1. That by their contract the suppliants had waived all claim for payment of extra work; and 2. That the contractors not having previously obtained from or being entitled to a certificate from the chief engineer as provided in the 18th sec. 31 Vict. ch. 13, for or on account of the moneys which they claimed, the petition of the suppliants was properly dismissed. 3. Under the terms of the contract, the work not having been completed within the time stipulated, or in accordance with the contract, the commissioners had the power to take the contract out of the hands of the contractors, and charge them with the extra cost for completing the same, but that in making up that amount the court below should have deducted the sum awarded as being the value of the plant and materials taken over from the contractors by the commissioners in June, 1873.

Appeal dismissed with costs.

Irvine, Q.C., and *Girouard*, Q.C., for appellants.

Burbidge, Q.C., and *Ferguson*, Q.C., for respondents.

CHANCERY DIVISION.

Ferguson, J.] [Nov. 8.

JENKINS v. DRUMMOND ET AL.

Will—Devise to children—Period of division—Who entitled.

S. P., by her will, provided as follows: "Also I will and ordain that my said property, after the death of my before mentioned daughters, E. O. W. and S. A. W., be sold, . . . and the proceeds . . . be divided between the children of my daughters, E. O. W., M. K., and S. A. W. . . . one-third to the children of the said E. O. W., one-third to the children of the said M. K., and one-third to the children of the said S. A. W., share and

share alike, and in case of the decease of one of the said families of children as aforesaid, then I will and ordain that the said proceeds . . . be equally divided between the two remaining families, the children of each family receiving share and share alike of such half to each family." At the time of the making of the will M. K. was dead, leaving three children who survived the testatrix. S. A. W. survived E. O. W., and died in 1886, many years after the death of the testatrix. All three of the said children of M. K. predeceased S. A. W., two of them intestate and without issue, and one leaving two children who survived S. A. W. E. O. W. had three children, one of whom died childless before the testatrix, and the other two survived M. A. W. S. A. W. had several children, one of whom died during her lifetime leaving children, and the others all survived her.

Held, that the period of distribution was the time of the death of M. A. W., and that the children of E. O. W. and M. A. W. then living were entitled to the whole of the property, one moiety to each family, the members of each family sharing equally their moiety.

Geo. M. Evans, for the plaintiff.

Walkem, Q.C., for the children.

Delamere, for the grandchildren.

Boyd, C.] [Nov. 30.

WYLD ET AL. V. CLARKSON.

Guarantee—Creditors' right to rank on two estates in hands of assignees—Valuing security—48 Vict. c. 26 (O.).

The plaintiffs supplied B. with goods on the guarantee of M. M. made an assignment for the benefit of creditors under 48 Vict. c. 26 (O.), on March 20, 1886. B. assigned in like manner on March 30, 1886. On April 6 the plaintiffs proved their claim for the full amount on M.'s estate, and stated that they held as security their claim against B.'s estate, but did not value it. On April 8 B. effected a compromise with creditors at fifty cents on the dollar, and gave composition notes therefor. The defendant, M.'s assignee, claimed that the plaintiffs should value their security, and refused to pay their dividend until they did. Upon a special case being stated for the opinion of the court, it was

Held that by B.'s assignment her estate was placed in *custodia legis*, protected from judgments and executions, and available for the creditors who were thus potentially seized of their proper proportion of the assets. The original personal claim was thus transmuted into a claim *in rem*, and so could fairly be regarded as in the nature of a security which the plaintiffs were bound to value.

Geo. Kerr, Jr., for the plaintiffs.

Foy, Q.C., for the defendant.

Boyd, C.] [Nov. 30.

MUTTLEBURY V. STEVENS.

Mortgage—Foreclosure—Rate of interest for time given for redemption.

M. took proceedings to foreclose a mortgage made by S. on which the principal money had become due by default being made in the payment of interest, although the time for which the mortgage was made had not arrived.

Held, that the rate of interest for the six months allowed to S. to redeem should be computed at the same rate as the mortgage provided for, which, in this case, seemed a reasonable rate.

F. E. Hodgins, for the plaintiff.

Divisional Court.] [Dec. 6.

THOMPSON ET AL. V. GORE ET AL.

Marriage settlement—Fraud on creditors.

The judgment of O'CONNOR, J., affirmed.

Lount, Q.C., and *Marsh*, for defendant, Jane Gore.

Falconbridge, Q.C., for defendants, Brydon and James Gore.

G. T. Blackstock, and *T. P. Galt*, for plaintiffs.

PRACTICE.

Wilson, C.J.] [October 29.

REGINA v. MEYER.

Criminal law—Refusing to provide for wife and children—Defendant a competent witness on his own behalf before a magistrate—Magistrates' powers and duties—32 & 33 Vict. ch. 20, sec. 25 (D.)—49 Vict. ch. 51, sec. 1 (D.).

Under 32 & 33 Vict. ch. 20, sec. 25 (D.), as amended by 49 Vict. ch. 5, sec. 1 (D.), defendant was charged by his wife, before a magistrate, with refusing to provide necessary food, clothing and lodging for herself and children. At the close of the case for the prosecution defendant was tendered as a witness in his own behalf. The magistrate refused to hear his evidence, not because he was the defendant, but because he did not wish to hear evidence for the defence; and subsequently, without further evidence, committed him for trial.

Held, that the defendant's evidence should have been taken for the defence; that a magistrate is bound to accept such evidence in cases of this kind, and give it such weight as he thinks proper, and that the exercise of his discretion to the contrary is open to review and correction.

Held, also, that the amended section of the Act is intended to enlarge the powers and duties of magistrates in cases of this nature, and that the word "prosecution" therein includes the proceedings before magistrates as well as before a higher court.

King (Berlin), for defendant.

E. F. B. Johnston, for the Attorney-General.

Mr. Dalton, Q.C.] [Dec. 7.
Galt, J.] [Dec. 14.

BURGESS v. CONWAY.

Appeal bond, liability on, after appeal allowed—Further appeal pending—Motion, notice of.

A judgment by the Court of Appeal in favour of a defendant appellant puts an end to all liability upon the appeal bond, which may, after such judgment, be delivered up to the appellant, even where the other party has given notice of appeal to the Supreme Court of Canada. Notice should be given to the opposite party of a motion to take the appeal bond off the files.

Aylesworth, for the plaintiff.

George Kerr, for the defendant.

Mr. Dalton, Q.C.] [Dec. 8.

DART v. CITIZENS' INSURANCE CO.

Defence—Jurisdiction—Service—Appearance.

The defendants appeared to the writ of summons, and set up in the statement of defence that the High Court of Justice had no jurisdiction; that the cause of action arose in Winnipeg, the defendants' head office was at Montreal, and the service of process was on their agent for local purposes at London.

Held, that there was nothing in these facts to show want of jurisdiction, and that the appearance had precluded all question as to the sufficiency of the service.

Rae, for the plaintiff.

Aylesworth, for the defendants.

Mr. Dalton, Q.C.] [December 20.
Armour, J.] [December 21.

MACGREGOR v. MCDONALD ET AL.

Disobeying order—Contempt—Appeal—Staying proceedings.

A party who has been ordered by the court to attend for further examination, after a refusal to answer questions, is in contempt if he does not so attend, but that is not a bar to his appealing from the order. Proceedings under the order will not be stayed pending the appeal.

MacGregor, for the plaintiff.

H. Cassels, for the defendant

Boyd, C.] [Dec. 23.

SHEPHERD v. THE CANADIAN PACIFIC RAILWAY CO.

Award, appeal from—Time—Filing—R. S. O. c. 50, secs. 191, 192, 193.

In the case of a voluntary submission to arbitration in which a right of appeal is reserved by consent, the procedure is governed by R. S. O. ch. 50, secs. 191, 192 and 193, and the time for appealing from the award runs from the date of filing.

McEdwan v. *McLeod*, 46 U. C. R. 235, followed.

A. H. Marsh, for plaintiff.

George Macdonald, for defendants.

Q. B. Divisional Court.] [December 23.

RE WALSH v. ELLIOTT.

Division Court—Jurisdiction—Liquidated and unliquidated amounts.

The decision of WILSON, C.J., 22 C. L. J. 387, was reversed on appeal.

J. B. Clarke, for appeal.

Shepley, contra.

Q. B. Divisional Court.] [December 23.

GORDON v. PHILLIPS.

Discovery—Rule 285—Discretion—Information for purpose of pleading.

The plaintiff had a good cause of action but was unable to frame his statement of claim without first examining the defendant and another.

Held, that he was entitled to such discovery under Rule 285, O. J. A., and that a local judge had exercised a proper discretion in granting it.

Osler, Q.C., for the plaintiff.

A. H. Marsh, for the defendant.

C. P. Divisional Court.] [December 24.

TOMLINSON ET AL. v. NORTHERN R. W. CO.

Costs—Third party—Appeal—Discretion—Sec. 32, O. J. A.

Held, that the order of ARMOUR, J., *ante* p. 419, refusing the third parties their costs, was made in the exercise of a discretion, which by sec. 32, O. J. A., was not subject to review, without leave, and, as no such leave had been given, an appeal from the order was dismissed with costs.

The court directed that such costs as had been incurred by the third parties in establishing the defence which might properly have been incurred by the defendants, should be allowed by the taxing officer.

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

Boulton, Q.C., for the defendants.

Tilt, Q.C., for the third parties.

C. P. Divisional Court.] [December 24.

STEWART v. SULLIVAN.

Staying proceedings—Interlocutory costs—Default—Practice in equity and at common law.

In equity, if interlocutory costs payable by the plaintiff remained unpaid, the court might, but was not bound to stay proceedings, and would not if it were not equitable to do so.

At common law, while non-payment of such costs was not a ground for staying proceedings, yet if it appeared equitable to stay procesdings until they were paid the court in the exercise of its inherent jurisdiction might direct a stay. The common law practice is the more convenient one, and should now be followed.

And where the plaintiff served in succession four notices of trial for the same assizes, all of which were set aside as irregular, with costs against him, and he was in default for non-payment of such costs, the action was stayed until they should be paid.

Aylesworth, for the plaintiff.

McIntyre, Q.C., for the defendant.

FLOTSAM AND JETSAM.

ANGLO-AMERICAN LAW SCHOOL OF JAPAN.—The mere fact of the existence of an Anglo-American law school in the remote country of Japan will have a curious interest for American lawyers. We may therefore be pardoned for reprinting at length the speeches which were made at the annual banquet of that law school, which took place in February last at Tokio, the capital of Japan. We take leave to premise by saying that some inquiry into the laws and habits of the people of Japan, prior to the time when the country was, through the intervention of the United States, opened to commercial intercourse with foreigners, leads us to doubt whether her municipal institutions will be improved by the introduction, or even by the study, of Anglo-American law. Contact with the Western nations will, of course, lead to changes in some features, such as the abolition of the practice of torturing prisoners in order to procure a confession; but we should sincerely hope that the Japanese will never go to the other extreme by adopting the rule of Anglo-American jurisprudence, *nemo seipsum accusare tenetur*, which in its full length and breadth prevents the officers of justice from interrogating the accused person on trial, who of all others knows best the essential fact whether he is guilty or not guilty. We also understand that the land laws of Japan and her political institutions are founded upon a system resembling the feudal system which prevailed in Europe at the close of the Middle Ages; but we should hope that the lawyers of Japan will not make the attempt of improving this system, however bad it may be, by introducing the English law of real property. We furnish a specimen of that law in another portion of this issue of the *American Law Review*, in the form of an able and well considered essay on the meaning of the legal term "privity of estate"; and, after reading that essay carefully and racking our recollection for what else we have learned upon that subject, we undertake to say now that no lawyer lives or ever has lived who could tell what is meant by privity of estate or who could with any certainty forecast the meaning which a court of justice will put upon the term in many common cases. The English law of real property is an agglomeration of monstrosities possessing about the same resemblance to rules of simple reason that a "Japanese mermaid," which consists of the stuffed head and bust of a monkey, joined to the stuffed tail of a fish in a manner so dexterous that no one without the aid of a minute search can detect the manner in which the joining process had taken place, bears to any created being. Not only the English law of real property, but much of the rest of the so-called "wisdom of ages," of which the common law is supposed to be the result, possesses just about as much congruity as this "Japanese mermaid," or as an entomological collection which some very shrewd and thrifty Japanese imposed upon a friend of ours, by joining with great skill, by means of fine threads of silk and lacquer, the bodies, limbs and wings of different members of the insect family. This collection our friend, in the simplicity of his heart forwarded to the late Prof. Agassiz, by whom he had been commissioned to make it; and when the specimens were exposed before the Cambridge professors, there was no bound to the surprise and delight which they produced. Then, according to the usual method where the collector has not proceeded in the most scientific manner, they undertook to apply steam to the different insects in order to render them flexible and get them into proper shape; when lo, the most wonderful specimens in the collection immediately fell to pieces! The common law, fitted to the institutions of Japan, would produce incongruities of a similar character. Milton did not describe a worse monstrosity in the lines, "Dagon his name, sea-monster, upward man and downward fish."—*American Law Review*.

THE CASE OF THE PREHISTORIC SHIP.—If a tenant in digging upon his land comes upon a prehistoric ship embedded in it, what and whose is it? Is it his, or his landlord's? Is he to boast not only of the discovery, but of the possession: or is he, like the hapless finder of "treasure trove," forced to deliver it up to some one else? Such was the question decided yesterday by Mr. Justice Chitty, the Judge who is so fortunate as to have before him all the odd, out-of-the-way cases, the cases unprovided for by rule or precedent. The matter at issue was the prehistoric ship which, as was described in our columns at the time, was discovered last April in a field at Brigg in Lincolnshire; and the suit of *Elwes* v. *The Brigg Gas Company* was brought to determine whether the landlord or the persons who made the discovery were the owners of the extraordinary vessel. It cannot be said that the case is of direct interest to large numbers of people, for prehistoric ships are not dug up every day; but in itself it was a problem that puzzled and interested the lawyers, and Mr. Justice Chitty was excusable in taking time to consider his

judgment. He doubted, as well he might, under what legal category the strange "find" was to be classed; but there is no doubt at all as to the interest and the extraordinary character of the vessel, archæologically speaking. As our correspondent, Mr. Stevenson, described it at the time, the boat is cut out of a solid block of oak, and is 48 feet long, 4ft. 4in. wide, and 2ft. 9in. deep. "The tree," he wrote, "is the finest stick of oak I have ever seen, and there is no tree growing in England to-day that is its equal." It is so straight and of such large size that it must have grown in some forest where the soil was highly favourable; while to choose such a tree and to be able to work it into the shape of a vessel shows that the primitive Britons who formed it were very capable and ambitious workmen. The head is rounded off. The sides are sloped or bevelled; there are marks where some kind of a raised deck has been fitted in; and the floor is perfectly flat and level, and has evidently been shaped by men handy in the use of the axe or adze. It is very natural that so curious a relic should not be surrendered without an appeal to the law by either the finders or the owners of the land.

But when the lawyers got the matter in hand, it became difficult to see how the vessel was to be described and classified. Was it a mineral? for if so, the defendants' lease barred them from appropriating it. Was it a chattel? or did it come under the old legal maxim, *quicquid plantatur solo solo cedit?* In any of these three cases the landlord could claim it; but the defendants were naïvely anxious to have the ship regarded as "among the substances which the lessee was under obligations to excavate and get rid of." The defendants had the right of excavating to a depth of fifteen feet, and on the site so excavated they were to build their gas-works. It happened by the most extraordinary piece of luck that this unique vessel was found, buried four or five feet in the alluvial soil, on the very spot where they were to excavate; and they would of course desire that so curious a discovery should come to them, to be dealt with according to their good pleasure, and to their profit, just as they would deal with the clay. But then arose the questions which we have stated. Mr Romer, the plaintiff's counsel, would rather have liked to prove the ship to be a mineral; for why should a ship not fossilized differ essentially from the same fossilized? But if it was not a mineral, then either of the other alternatives would suit him equally well; as Mr. Justice Chitty agreed, in giving judgment in his favour. The Judge demurred to the idea of the boat being a mineral; it might not differ scientifically very much from the wood which has become coal by long burial, but there was no need to proclaim its identity with coal. In fact, the simplest and truest way of describing the boat was as a chattel; and as such it would come under the well-known principle which says, if a man finds money in a secret drawer of a bureau that he has purchased, the money, though the seller had not known of its existence, belongs to the seller. "Obviously the right of the original owner," said the Judge with admirable gravity, "cannot be established; it has for centuries been lost or barred." We shall never know even the name of the potentate whose men paddled him in state down the Humber in this compact vessel, this master-piece of primeval engineering, this "Great Harry of the ancient Britons," as Mr. Stevenson called it. But we know that for the present it belongs to the owner of the soil, and that the Brigg Gas Company must be content with the barren honour of having dug it up.

What is to be the future lot of the vessel was not a question for the court to decide; but we trust that Mr. Elwes, who has thought it worth while to go to law about the title to the vessel, will take all rational measures for preserving it. Such a block of oak is not very easy to move; and it may be that we shall have to content ourselves with the plan originally proposed—the plan of keeping it in a covered shed in the field where it was found. If, however, the situation allows it to be placed upon a raft, and floated down the Humber, there is no reason why so extraordinary a relic of a remote British past (as we assume it to be) should not be taken to Hull, or even to London, where thousands might see it. An ancient British boat excavated in Robinson Crusoe fashion from the trunk of an oak tree, is not quite as historically important as Cleopatra's Needle, and we do not claim for it the same adventures and the same honours. But it is important enough to be preserved with the greatest care, and to be housed, if possible, where students and scholars can see it without the necessity of a long journey to a remote Lincolnshire town. If this, however, is pronounced impossible, we trust that the newly-established owner will take the best scientific advice, and will at once adopt measures for securing his curious possession from the decay which, after its long burial, would be likely to invade it.—*London Times.*

OSGOODE HALL LIBRARY.

The following is a list of books received at the Library during the months of October, November and December, 1886:—

American Decisions, Digest of 1760-1854, San Francisco, 1886.
Archbold's Pleading and Evidence in Crim. Cases, 20th ed., London, 1886.
Adams' (H. C.) Glossary, vol. 1, A to Eyre, Albany, 1886.
Baily (W. H.) *Onus Probandi*, New York, 1886.
Beach (C. F.) on Contributory Negligence, New York, 1885.
Chancery Cases (Am. Reprint), New York, 1828.
Carleton (A. B.) on Homicide, Cincinnati, 1872.
Deering (J. H.) on Negligence, San Francisco, 1886.
Dewey (T. H.) Contracts for Future Delivery, etc., New York, 1886.
Danforth (H. G.), Wicks (R. B.) N. Y. Ct. Appeals Dg't, New York, 1886.
Digest American Decisions 1760-1854, San Francisco, 1886.
Fletcher (B.) on Dilapidations, London, 1883.
Foyster (J. A.) "Married Women Act, 1886," 2nd ed., London, 1886.
Hodgins Canada Franchise Act Amendment, Toronto, 1886.
Hodgins on Voters' Lists, 2nd ed., Toronto, 1886.
Morawetz (V.) on Private Corporations, 2nd ed., Boston, 1886.
Morgan (J. A.) Legal Maxims, 3rd ed., Cincinnati, 1878.
Newberry (J. S.) Admiralty Reports, vol. 1, New York, 1857.
North-Western Reporter Digest, vols. 1-20, St. Paul, 1886.
Ohio, Revised Statutes of, vols. 1, 2 and 3, Cincinnati, 1886.
Patents, Commissioner of, Annual Report, Washington, 1886.
Patterson (C. S.) Railway Accident Law, Philadelphia, 1886.
Pomeroy (J. N.) on International Law, Boston, 1886.
Pollock (F.) on Contracts, 2nd Am. from 4th Eng. ed., Cincinnati, 1885.
Randolph (J. F.) on Commercial Paper, 2 vols., Jersey City, 1886.
Salmon (Lucy M.) on Appointing Power of President U. S., New York, 1886.
Selwyn (A. R. C.) Catalogue Economic Minerals of Canada, London, 1886.
Sheldon (H. N.) on Subrogation, Boston, 1882.
Sinclair (J. S.) Division Ct. Act, Hamilton, 1886.
Saunders (T. W.) on Negligence, Cincinnati, 1872.
Thompson on Negligence, 2 vols., San Francisco, 1880.
Thompson on Homesteads and Exemptions, San Francisco, 1878.
Thring (Sir H.) on Joint Stock Companies, 4th ed., London, 1880.
Wald (G. H.) Pollock on Contracts, Cincinnati, 1885.
Watson (W. B.) Compendium of Equity, 2nd ed., London, 1886.
World's Industrial Exhibition Catalogue, Washington, 1886.

NEW VOLUME OF THE LIVING AGE.—With the first number in January, *Littell's Living Age* enters upon its one hundred and seventy-second volume. It is a magazine whose value constantly increases as the field of foreign periodical literature widens, and it has become fairly indispensable to the American reader. The first weekly number of the new year has the following table of contents:—Mobs and Revolutions, *Fortnightly Review;* A Secret Inheritance, by B. L. Farjeon, *English Illustrated Magazine;* Mrs. John Taylor of Norwich, *Macmillan;* A Siege Baby, by the author of "Bootles' Baby," etc., *English Illustrated Magazine;* France As It Is and Was, Government and Society, by a Parisian, *National Review;* Mohammedanism in Central Africa, *Contemporary Review;* A Pilgrimage to Selborne, *Leisure Hour;* together with choice poetry, etc. This, the first number of the new volume, is a good one with which to begin a subscription. For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

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 Lussier, 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. Rae, 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 Beament, 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:

Law Society of Upper Canada.

French.

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

of 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 begin on 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 his Second in 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, 1889 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. 133.)
- 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 21 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
1889 } Lamartine, Christophe Colomb.

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.