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DIARY FOR SEPTEMBER.

17. Sat.....First Parliament of Upper Canada met at Niagara, 1792. Trinity term ends.
18. Sun.....*15th Sunday after Trinity.* Quebec surrendered to the British, 1759.
21. Wed.....Sir Walter Scott died, 1832.
25. Sun.....*16th Sunday after Trinity.*
28. Wed.....W. H. Blake first Chancellor U. C., 1849.

TORONTO, SEPTEMBER 15, 1887.

THE following alterations have been made in the date of the Chancery Sittings at the following places:—Kingston will be held on 9th November instead of 12th September; Peterborough will be held on 27th October instead of 27th September; Barrie will be held on 1st November instead of 10th October. Mr. Justice Ferguson will take the Woodstock Sittings instead of Mr. Justice Robertson.

Mr. Justice Robertson, in addition to his Chancery Sittings, will hold the Assizes at Owen Sound on 26th September, Ottawa on 3rd October, Pembroke 17th October.

A LEARNED Q.C. in the city of Winnipeg has, we are informed, put up at the doorway of his office a huge black signboard, four feet long and three feet wide, on which are printed in large gold letters:

X. Y. Z——,
Q.C.,
Barrister, etc.,

the letters Q.C. being three times the size of the others.

This method of advertising has, at all events, the merit of novelty, and we are informed it excites great curiosity among the uninitiated as to the meaning of the letters Q.C. Some think they cannot mean "Queen's Counsel," otherwise "Barrister," etc., would not have been added, because no man can be a Queen's Counsel unless he is a barrister, and to add barrister after Q.C. is like adding the words "biped, masculine gender." While the learned gentleman may be congratulated on the fertility of his ideas, and his ability to create a mystery out of a very simple matter, yet we think it is to be regretted that these qualities should be exercised in a way that is calculated to make his professional brethern conclude that he has forgotten the maxim *noblesse oblige*.

A POINT of some novelty and importance was recently considered by the Chancellor in Chambers, *in re Hall*. The facts of the case were as follows:—An intestate had left among his assets a promissory note for $500 made by his son; the son had predeceased the intestate and his estate was insolvent; he however left issue, and the question submitted to the Chancellor was whether the $500 due on the promissory should be brought into hotch-pot as an advancement made to the son, or whether it could be set off against the distributive shares which the children of the maker were entitled to of the intestate's estate. The point was raised by the administrator as against the grandchildren on an application to which the other next of kin were not parties, and consequently the learned Chancellor was unable to dispose of the whole case. He however determined that as between the parties before him the $500 could not be required to be brought into hotch-pot in fixing the shares of the grandchildren; nor could the debt due by their parent be set off against their distributive shares of the estate. He therefore directed the ad

ministrator to pay the whole share of the grandchildren into court, leaving the other next of kin to make application in respect to it as they might be advised.

In *Filman* v. *Filman*, 15 Gr. 648, Spragge, V.-C., pointed out the difference in our own and the English law respecting the advancement of children; this provision in our statutes, though appearing as section 41 of the Act respecting the descent of real property, nevertheless in terms applies to the descent both of real and personal estate, and requires any advancement to be so expressed by the intestate in writing, or to be so acknowledged in writing by the child to whom it is made. In the absence of writing, either of the intestate, or the child, evidencing the advancement as an advancement, it would seem that there is no liability to bring into hotch-pot sums received by a child from his parent. A promissory note, the Chancellor held, was not such a writing as the statute contemplated; it was evidence of a debt, and created a legal liability, and, in his opinion, it could not also be treated as an acknowledgment by the son of an advancement. This point, however, owing to the absence of the other next of kin, can not be said to be conclusively settled by *Re Hall*.

RECENT DECISIONS UNDER THE MARRIED WOMEN'S PROPERTY ACT.

IT IS a very singular fact that it is almost a legislative impossibility to frame a Married Women's Property Act which can stand the test of judicial construction, and at the same time successfully carry out the intention of the framers of the Act. By what the uninitiated and irreverent critic might be disposed to term a perverse ingenuity, the judges seem always able to show that these Acts have precisely the opposite effect to that intended.

It was fondly hoped that the English Act of 1882, on which our Provincial Act of 1884 is based, had succeeded in removing all the defects that the course of judicial decision had disclosed in the former Acts, but this hope we fear is altogether illusory. In *Palliser* v. *Gurney*, 22 L. J. 112, Lord Esher, M. R., and Lindley and Lopes, LL.J., sitting as a Divisional Court of the Queen's Bench Division, held, that in an action founded on contract against a married woman, the plaintiff must give evidence that the defendant was possessed of separate property at the time when the contract was made, otherwise he must be non-suited. As supplementary to this case we may also refer to the decision of *Becket* v. *Tasker*, 19 Q. B. D. 7, where it was held, that property acquired by a married woman after her coverture has ceased, is not liable for the payment of debts contracted by her while under coverture.

It has always been a recognized principle of the Married Women's Property Acts that the property, and not the person, of the married woman should be rendered liable for her debts; and it is owing to the endeavour to maintain this principle, that the Act of 1882 has been found wanting. That Act provides "a married woman shall be capable of entering into and rendering herself liable in respect of, and to the extent of, her separate property, on any contract," etc. And the court in *Palliser* v. *Gurney* appears to have reasoned, that as she is only capable of making herself liable to the extent of her separate property, it must be affirmatively proved that at the time she entered into the contract sued, on she had some separate property, otherwise there was nothing for the contract to operate upon. It is not, of course, necessary to prove that the separate property she then had

was sufficient to answer the demand, it is enough, apparently, to prove that she had some separate property, no matter how insignificant it may have been in amount. The result of the case is, that if it can be shown that at the time a married woman enters into a contract she had a dollar of separate property, the contract may be enforced against her to the extent of any separate property she may subsequently acquire during her coverture; but if it cannot be proved that she had the dollar, then the contract is invalid and cannot be enforced, though she may subsequently during her coverture have acquired ample separate property to answer the demand. No one can reasonably suppose that the Legislature intended any such absurd result. Then the Act provides that "every contract entered into by a married woman with respect to, and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." Here again the process of judicial construction has materially limited the operation of the Act. Seizing on the words "separate property," the court has held that that species of property can only be acquired during coverture, and therefore if a married woman having made a contract subsequently becomes a widow, and during her widowhood acquires property, that property is not "separate" property, and is therefore not liable to answer a debt contracted by her during coverture. Here again we cannot help thinking the intention of the Legislature has been frustrated. Any such limitation as the court has discovered in the language used, could hardly have been contemplated by the framers of the Act. This section was no doubt framed to meet the case of *Pike* v. *Fitzgibbon*, 17 Chy. D. 454, which determined that a married woman, in the then state of the law, could not by her engagements bind anything but her separate estate, to which she was entitled without restraint on anticipation at the time when the engagement was entered into. And that any engagement entered into by her was a nullity as respects any separate estate she might afterwards acquire, or which when she entered into the engagement she held subject to a restraint on anticipation, although the restraint on anticipation were subsequently removed by the death of her husband.

It is clear, therefore, that if *Beckett* v. *Tasker* and *Palliser* v. *Gurney* are rightly decided, that the attempt to get rid of the effect of *Pike* v. *Fitzgibbon* has been only successful to a very limited degree. It is still necessary to establish affirmatively the possession of separate property by a married woman at the date of any contract she may make, and although it is not now necessary to go on and prove that she is still, at the time of the trial, possessed of that same property, it would seem to be still necessary to go on and prove that at the date of the trial she has some separate property. Furthermore, though separate property acquired by a married woman subsequently to her contract is made liable to the creditor, yet property acquired by her after the coverture has ceased is, as we have seen, declared to be exempt from liability for her contracts made during her coverture.

There is yet another recent case to which attention may be directed, which, though of no direct importance in this Province, is nevertheless illustrative of the disposition of the courts to restrict the operation of the Acts attempting to emancipate the property of married women from marital control.

The case we refer to is *Re Smith, Clements* v. *Ward*, 35 Chy. D. 589, 56 L. T. N. S. 850. There a testatrix who was married before the Married Women's

Property Act, 1882, died in 1886 leaving her husband surviving, and by her will in 1885 she bequeathed £300 of her separate property for the erection of a church. But the Act 43 Geo. III., c. 108, which empowers persons to make bequests for the erection of churches, contained a proviso excluding women covert without their husbands; and it was held by Stirling, J., that the proviso was not affected by the Married Women's Property Act of 1882, and that the gift was therefore void under the statutes of mortmain for want of the husband's concurrence, and this, notwithstanding that the Act of 1882 provides that "a married woman shall in accordance with the provisions of this Act be capable of acquiring holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole* without the intervention of any trustee."

RECENT ENGLISH DECISIONS.

The *Law Reports* for August comprise 19 Q. B. D. pp. 149-280; 12 P. D. pp. 157-166; and 35 Chy. D. pp. 399-613.

PRACTICE—REFERENCE TO REFEREE UNDER J. A., S. 56—POWER OF REFEREE TO EXAMINE WITNESSES—COMPANY BORROWING ULTRA VIRES—SUBROGATION OF LENDER TO RIGHTS OF CREDITORS.

In *Wenlock* v. *The River Dee Co.*, 19 Q. B. D. 155, two points were determined. The first was, that under a reference to a referee under the Judicature Act, 1873, s. 56, an inquiry by the examination of witnesses is contemplated, and not only an inquiry by personal observation of the referee. The second point was this, that when a company borrows money *ultra vires*, the lender is entitled to be subrogated to the rights of the creditors who are paid out of the money so borrowed, whether their debts were in existence at the time of the loan, or were subsequently contracted, and whether such debts were paid by the defendant company or their bankers out of such advances.

BILL OF EXCHANGE—BILL DRAWN ON FIRM—ACCEPTANCE IN NAME OF INDIVIDUAL—PRINCIPAL AND AGENT—AUTHORITY TO ACCEPT.

Odell v. *Cormack*, 19 Q. B. D. 223, was an action on a bill of exchange, drawn and accepted under the following circumstances; The defendant was a partner in a firm of C. Brothers, and she agreed with her co-partner to a dissolution of the partnership, and that the affairs of the firm should be liquidated by an agent, who was to realize the assets and pay the creditors, and the business was thereafter to be carried on by the defendant. The defendant and the agent opened a joint banking account, and requested the bank to honour drafts signed by either of them. Cheques were drawn on the joint account signed by the agent in the names of the defendant and himself, and bills were drawn on C. Brothers and accepted by the agent in the names of the defendant and himself and honoured, but the defendant knew nothing of these cheques and bills. The action was brought by the plaintiff as indorsee for value of a bill of exchange, drawn on C. Brothers, accepted by the agent in the names of himself and the defendant, and made payable at the bank where the joint account was opened. It was held by Hawkins, J., that the agent had no authority to accept the bill in the defendant's name so as to bind her, and that not being a partner in the firm of C. Brothers, he had no authority to accept bills drawn on the firm, and the defendant was not liable. The judgment turns simply on the fact of the want of authority of the agent to bind the defendant.

If Mrs. Cormack had authorized Carter (the agent) to accept bills drawn on the firm in her own name, the learned judge says he should have held the acceptance in question sufficient to bind her, and that the addition of the agent's own name would have been immaterial and might have been rejected as surplusage.

PARTNERSHIP—SALE OF GOODS—BILL GIVEN FOR PRICE—UNSATISFIED JUDGMENT ON BILL—ACTION AGAINST JOINT CONTRACTOR—RES JUDICATA.

In *Cambefort* v. *Chapman*, 19 Q. B. D. 229, the principle laid down in *Kendall* v. *Hamilton*, 4 App. Cas. 504, was applied. The plaintiffs sold goods to a partnership consisting of the defendant and W. After the sale the partnership was dissolved, and the plaintiffs, in ignorance of the dissolution, drew bills for the price

of the goods, which were accepted after the dissolution by W. in the partnership name. The plaintiffs sued W. in the partnership name on the bills, and recovered judgment, which was not satisfied. The plaintiffs then brought the present action against the defendant for the price of the goods; but it was held by Field and Manisty, JJ. (affirming Mathew, J.), that the judgment against one joint contractor on the bill given by him alone for the joint debt, though unsatisfied, was a bar to the action against the other joint contractor on the original contract.

PERSONAL REPRESENTATIVE—CONTRACT MADE WHILST NO PERSONAL REPRESENTATIVE TO DECEASED PERSON'S ESTATE—RATIFICATION.

In re Watson, 19 Q. B. D. 234, the Court of Appeal affirmed the judgment of the Queen's Bench Division, 18 Q. B. D. 116, noted *ante* p. 64. During a period in which there was no personal representative of the estate of a deceased testatrix, the appellant, acting upon the instructions of a relative of the deceased, did work as a solicitor in respect of the administration, and for the benefit of the estate. Subsequently another person obtained letters of administration *de bonis non*, and refused to pay the appellant's bill of costs, and the Court of Appeal held that the respondent was not bound as administrator to pay such costs. Lord Esher, M. R., says, at p. 236:

It was said that the work having been for the benefit of the estate, and Philips, as administrator, having received that benefit, it would be unconscientious in him not to pay for it. I decline to make new law in order to compel persons to do that which they are bound in conscience to do; and I am not satisfied that it is unconscientious in an administrator to refuse to pay out of other people's money for work done under such circumstances as exist here."

LIFE INSURANCE—NOTICE OF DEATH—CONDITION IN POLICY—OMISSION TO COMPLY WITH CONDITION.

Stoneham v. *Ocean, Railway, and General Accident Insurance Company*, 19 Q. B. D. 237, was an action brought on a policy of life insurance which was made subject to the conditions indorsed thereon, which were to be considered as incorporated therein. One of these conditions provided that "in the event of non-fatal injury by an accident occurring to the assured, notice thereof in writing shall be given to the company within seven days of the occurrence thereof;" and another condition provided "in case of fatal accident notice thereof must be given to the company at the head office in London within the like time of seven days."

The assured was accidentally drowned in Jersey and notice was not, and under the circumstances of the case could not have been, given to the company in accordance with the last mentioned proviso. The question for the court was whether this condition was a condition precedent to the right to recover on the policy. The court (Mathew and Cave, JJ.,) held that the giving of notice was not a condition precedent, and that the plaintiff was therefore entitled to recover. The court was led to this conclusion, from the fact that certain other conditions also indorsed on the policy were expressly made conditions precedent, whereas this particular condition contained no such stipulation. Cave, J., says at p. 241:

The conditions indorsed on the policy are of all sorts and vary much in their language. Some of them contain provisions that in case of non-compliance the policy shall be void; others do not. It seems to me that the rational conclusion is that all these conditions mean what they say, and that where there is a provision that the condition shall be a condition precedent it is so, but where there is no such provision it is not.

MARINE INSURANCE — DAMAGE TO CARGO BY IMPROPER NAVIGATION—NEGLIGENCE.

Carmichael v. *Liverpool Mutual Indemnity Association*, 19 Q. B. D. 242, is a decision of the Court of Appeal on a question of marine insurance law. By the articles of a mutual insurance association, the plaintiffs as members were to be indemnified against loss arising to goods or merchandise caused by "improper navigation of the ship carrying the goods."

A cargo of wheat was shipped on board a vessel belonging to the plaintiff. During the loading of the cargo a port hole in the side of the vessel was, by negligence of persons employed by the plaintiffs, insufficiently secured, so that, during the voyage, water leaked in and damaged the wheat. The leak did not hinder or impede the navigation of the ship. The question was whether this was a loss arising from "improper navigation," and the Court of Appeal (Lord Esher, M.R., and Fry and Lopes, LL.J.,) held (affirming the judgment of the Divisional Court (A. L. Smith and Wills,

JJ.,) that it was, and that the plaintiffs were entitled to recover.

COMPANY—LIQUIDATION—MASTER AND SERVANT—APPOINTMENT OF MANAGER AND RECEIVER—DISCHARGE OF SERVANTS.

Ree. v. The Explosives Company, 19 Q. B. D. 264, is another decision of the Court of Appeal. The plaintiff was in the employment of the defendant company under a contract which provided that his employment might be determined by a six months' notice. The company having got into difficulties, a manager and receiver was appointed by order of the Chancery Division, at the instance of the debenture holders of the company. The plaintiff, by the instructions of the manager, continued for more than six months to discharge his former duties at the same salary. The business was then sold to a new company, and the plaintiff was dismissed without notice. The action was then brought for wrongful dismissal. But the Court of Appeal (affirming Manisty, J.) held that the appointment of the manager and receiver operated as a discharge of the servants of the company, and that the plaintiff therefore could not recover.

The court while holding that on the appointment of the receiver there was a wrongful dismissal by the defendant company, for which the plaintiff would have had a right of action if nothing further had occurred, yet held that as the plaintiff had been employed by the receiver for a period of time equal to the time agreed on for notice of dismissal, he had employment of equal value to that which he had lost, and had therefore sustained no damage.

BILL OF SALE—SUFFICIENCY OF DESCRIPTION OF CHATTELS.

In *Witt* v. *Banner*, 19 Q. B. D. 276, it was held by Wills and Grantham, JJ., under the Bills of Sale Act, 45 & 46 Vict. c. 43, s. 4, which provides that every bill of sale is void, except as against the grantor, in respect of chattels not specifically described in the schedule annexed thereto, that a description of "four hundred and fifty oil paintings in gilt frames, three hundred oil paintings unframed, fifty water colours in gilt frames, twenty water colours unframed, and twenty gilt frames," was not a sufficient description.

None of the cases in the Probate Division require notice here.

COMPANY—PROMOTERS—PURCHASE OF MINE BY SYNDICATE—RESALE TO COMPANY—FIDUCIARY RELATION—SECRET PROFIT—PRINCIPAL AND AGENT—SALE OF AGENT'S PROPERTY TO PRINCIPAL.

Proceeding now to the cases in the Chancery Division, the first to be noted is *Ladywell Mining Company* v. *Brookes*, 35 Chy. D. 400, in which the Court of Appeal affirmed the decision of Stirling, J., 34 Chy. D. 398, noted *ante* p. 164. This was one of those cases in which an attempt was made to fix the defendants with liability for profit made by them on a sale of property to a company, on the ground of an alleged fiduciary relationship.

On the 1st February, 1873, five persons (one of whom was a solicitor and conducted the negotiations) purchased a leasehold mine for £5,000, with a view to selling it to a company to be thereafter formed, but at that time no steps had been taken to form the company. The purchase was completed on 17th March, 1873, and the purchase money paid out of their own moneys. On the 4th April they entered into a provisional contract with a trustee for an intended company for the sale of the mine to the company for £18,000.

On the 8th April the company was registered under the Companies' Act, its principal object as stated in the articles of association being the purchase of the mine. The contract of 4th April was adopted, and four of the vendors were named as directors; but the contract of the 1st February, 1873, was not disclosed to the company. The share capital, £30,000, was paid up, and out of it the vendors were paid the £18,000. In 1882 the company was wound up, and the facts relating to the purchase of the mine by the vendors became known to the company. In 1883 the company suffered judgment to go against them by default in an action by the lessor to recover possession of the mine. In 1884 the company commenced this action against two surviving vendors, and the representatives of three deceased vendors, to recover the secret profits made on the sale of the mine to the company, on the ground that the vendors stood in a fiduciary relation to the company. But the Court of Appeal agreed with Stirling, J., that the evidence did not establish that the vendors, when they purchased the mine, were promoters of, or in a fiduciary position towards, the company which was ultimately formed; and that even assum-

ing that the vendors committed a breach of duty in not informing the company, at the time of the sale to the company, that the mine was their own property, and consequently that the company might have then rescinded the contract; yet, as rescission was now impossible, because the property no longer belonged to the company, the company could not recover from them the profits which they had made.

PATENT — NOVELTY — PRIOR PUBLICATION — FOREIGN SPECIFICATION IN PATENT OFFICE LIBRARY.

Harris v. *Rothwell*, 35 Chy. D. 416, is an important decision on a point of patent law. In December, 1878, and February, 1880, the specifications in the German language were deposited in the free public library of the English patent office, of certain inventions for which German patents had been granted; and the journal published periodically by the English patent commissioners, amongst the list of patents granted in Germany, contained entries of the particular patents, with a note in each case that the specifications as well as the list of applications might be consulted in the free public library of the office. In April, 1880, a patent was obtained in England for an invention similar to those for which the German patents had been granted, and it was held by the Court of Appeal, affirming the decision of Chitty, J., that the proper inference from the above facts was, that the public availed themselves of the facilities afforded them for obtaining information as to the inventions, and accordingly that there was sufficient evidence of prior publication to invalidate the English patent, and that this inference was not affected by the fact of the prior specifications being in the German language. Cotton and Lindley, LL.J., however, were agreed that if, as in *Plimpton* v. *Malcolmson*, 3 Chy. D. 531, and *Plimpton* v. *Spiller*, 6 Chy. D. 412, and *Otto* v. *Steel*, 31 Chy. D. 241, it were proved that the foreign publication, although in a public library, was not in fact known to be there, the unknown existence of the publication in England would not be fatal to the patent.

PARTNERSHIP — SALE OF PARTNER'S INTEREST UNDER EXECUTION — PURCHASE BY PARTNER OF COPARTNER'S INTEREST — SETTING ASIDE SALE — UNDERVALUE.

Helmore v. *Smith* (1), 35 Chy. D. 436, was an action brought to set aside the sale of a partner's interest in the copartnership, to a copartner, which had been effected under an execution, under the following circumstances The plaintiff had become temporarily insane, and, during his insanity, judgments were recovered against him, and executions placed in the sheriff's hands. Under these executions the plaintiff's interest in the partnership was put up for sale, and purchased by the defendant who was his copartner, at a sum very much below its actual value, and an assignment of the plaintiff's interest was executed by the sheriff to the defendant. The purchase money was paid by the defendant by a cheque drawn by the defendant on the partnership banking account, and the amount was debited to the plaintiff in the partnership books. After the sale the defendant changed the name of the firm, and assumed to carry on the business as his own. But the Court of Appeal (affirming Bacon, V.-C.) held that the sale was void and must be set aside, and that under the circumstances there was no dissolution of the partnership by the seizure and sale. The Court of Appeal proceeded on the ground that the defendant had not bought with his own money. As Cotton, L.J. says:

> The defendant bought with part of the partnership property, subject to such rights of account as there might be between the plaintiff and defendant; and, in my opinion, that being so he cannot insist that he bought for himself, so as to prevent the plaintiff from being considered as still a partner in the business, on the ground that the purchase from the sheriff was of that which the sheriff had a right to seize.

And Lindley, L.J., neatly puts it thus:

> In point of law the necessary result of buying this share with the funds of the concern is, that there was no dissolution at all.

PRACTICE — ATTACHMENT — CONTEMPT OF COURT — INTERFERENCE WITH MANAGER AND RECEIVER.

The next case, *Helmore* v. *Smith* (2), 35 Chy. D. 449, is one that arose out of the preceding case. After the court had made an order in the last case appointing a receiver and manager of the partnership business, a former clerk of the firm sent round a circular to the customers of the firm containing an unfair statement of the effect of the order, in that, while stating that a receiver had been appointed it omitted to state that the receiver was also manager of the business, and in this circular he solicited their custom for his own business. On a motion to commit the clerk for contempt

he declined to give an undertaking to abstain from issuing circulars calculated to draw off the customers of the firm. Though refusing to give this undertaking, he offered to undertake not to send circulars omitting to state that the receiver was also manager of the business. This Kay, J., refused to accept, and committed the offender to prison for contempt, and on appeal, the Court of Appeal sustained the decision of Kay., J.

CHARITY—MORTMAIN—CY-PRES.

Biscoe v. *Jackson*, 35 Chy. D. 460, is an illustration of the application of the doctrine of *cy-pres*. A testator directed his trustees to set apart a sum of money out of his personal estate as might by law be applied to charitable purposes, and apply it in the establishment of a soup kitchen, and cottage hospital, for the parish of Shoreditch, in such manner as not to violate the Mortmain Acts. In a suit to administer the trusts, it having been found impossible to apply the fund in accordance with the directions of the will, as no land, already in Mortmain, could be obtained within the parish of Shoreditch; under these circumstances, the fund was claimed by the next of kin; but Kay, J., held (and his decision was affirmed by the Court of Appeal) that the will shewed a general charitable intention to benefit the poor of the parish of Shoreditch, and that although the particular purpose of the bequest had failed the court would execute the trust *cy-pres*, and a scheme was directed accordingly.

CHARITY—MORTMAIN—INDEFINITE GIFT—INCLUSION OF OBJECTS WHICH ARE NOT CHARITABLE.

In re Douglas, Obert v. *Barrow*, 35 Chy. D. 472, a testatrix gave legacies to several charities and societies, among others to the "Society for the Protection of Animals Liable to Vivisection," and the "Home for Lost Dogs"; and she directed the trustees to apply the residue of that portion of her personal estate which might by law be appropriated by will for such purpose, among such charities, societies and institutions (including or excluding the above-mentioned societies as might be preferred), and in such shares and proportions as Lord Shaftesbury should by writing nominate. It was contended on behalf of the next of kin, that this bequest was void for uncertainty, and because it permitted the application of the fund towards the support of the two societies above-mentioned, which they claimed were not charitable. But the Court of Appeal (affirming Kay, J.), without determining whether the two societies were charities, upheld the gift, on the ground that the scope of the will shewed that the testatrix referred only to charitable societies and institutions.

PRACTICE—PLEADING—EMBARRASSING AND INCONSISTENT DEFENCES.

In re Morgan, Owen v. *Morgan*, 35 Chy. D. 492, is an action brought by the representatives of a wife against the executor of the husband in respect of sums of money and stock alleged to have been received by the husband as trustee for the separate use of his wife. The defendants pleaded (1) that the sums had not been received; (2) if received, not as trustee; (3) if received, repayment; (4) alternatively, free gift by wife to husband; (5) alternatively, accord and satisfaction; (6) alternatively set-off; (7) the Statute of Limitations; (8) laches and delay. The plaintiff applied to North, J., to strike out the defences 3, 4, 5 and 6. The learned judge declared that the statement of defence was embarrassing and gave the defendant leave to amend, but on appeal, the Court of Appeal (Lindley and Bowen, LL.J.,) discharged the order of North, J., and directed the defendant either to amend, or to give particulars as to the defences objected to, within fourteen days after discovery of documents.

COMPANY—WINDING UP—DIRECTORS, LIABILITY OF—PAYMENT OF DIVIDENDS OUT OF CAPITAL—DIRECTORS REMUNERATION.

In re Oxford Benefit Building Society, 35 Chy. D. 502, was an application by a creditor to compel directors of a limited company in process of being wound up, to make good sums alleged to have been misapplied by them. By the articles of association of the company it was provided that no dividends should be paid except out of "realized profits," and that no remuneration should be paid to the directors, until a dividend of 7 per cent. had been paid to the shareholders. The business of the company consisted principally of lending money to builders on mortgages payable by instalments; and the directors treated as part of the profits available for dividends the value for the time being (upon an estimate made by a surveyor, who was also their secretary) of

the instalments of principal and interest remaining unpaid by each mortgagor. Upon this footing the directors paid for several years out of the floating capital from time to time in their hands, (1) dividends of 7½ per cent. and upwards; (2) remuneration to themselves. But it was held by Kay, J., that "realized profits" must be taken to mean profits tangible for the purpose of division, and that the directors having treated estimated profits as realized profits, and having in fact paid dividends out of capital on the chance that sufficient profits might be made, which was not the case, were jointly and severally liable, as upon a breach of trust, to repay, and must repay, the sums improperly paid as dividends, and also the remuneration they had respectively received, with interest in each case, at 4 per cent.

The directors having also, without the knowledge of the shareholders, voted and paid themselves out of the funds of the company a commission on certain purchases and sales, and entered such payment in the books of the company, but made no mention of it in their reports or balauce sheet, they were held jointly and severally liable to repay this amount, with interest at 5 per cent.

LEASE — LESSOR AND LESSEE — TRUSTEE — POWER OF LEASING — COVENANT FOR RENEWAL — BEST RENT — SPECIFIC PERFORMANCE.

The case of *Gas Light and Coke Co.* v. *Towse*, 35 Chy. D. 519, was an action for specific performance of a covenant for renewal of a lease. The lease containing the covenant had been executed by trustees under a private Act of 1828, whereby the trustees were empowered to grant building leases in possession not exceeding seventy-five years at "the best yearly rent." The lease was sanctioned by the court in the presence of the beneficiaries, and was for thirty years at a yearly rent of £30, the lessors covenanting to renew at the end of the term for a similar term, at the like rent. At the expiration of the term, the value of the property had very largely increased, so that the original rent was not now "the best rent" and the lessors therefore declined to renew. It was held by Kay, J., that the covenant was not *ultra vires*, and if the original rent had now been "the best rent" it might have been enforced; but that specific performance of it could not now be enforced, as the original rent was not now the best rent; and that the lessees could not recover damages for a breach of covenant arising from infirmity of title. On the last point the learned Judge rests his decision on the cases of *Floreau* v. *Thornhill*, 2 W. Bl. 1078, and *Bain* v. *Fothergill*, L. R. 7 H. L. 158.

MORTGAGEE—SALE UNDER POWER—SURPLUS PROCEEDS—AMOUNT UNDERSTATED BY MORTGAGEE—INTEREST—COSTS.

Charles v. *Jones*, 35 Chy. D. 544, was an action against a mortgagee who had sold under a power of sale, for an account; the defendant admitted that a sum was due from him, which he paid into court. On the taking of the accounts a much larger sum was found due,—and it was held by Kay, J., that he was bound to pay interest on the sum found due, and was not entitled to his costs of taking the accounts.

WILL—CONSTRUCTION—ILLEGITIMATE CHILD DESCRIBED AS "NEPHEW" OF TESTATOR.

In re Hall, Branston v. *Weightman*, 35 Chy. D. 551, is a decision of Kay, J., upon the construction of a will wherein the testator described R. W., who was illegitimate, and another person who was legitimate, as "my two nephews." He gave his residuary estate upon trust for the children of his brothers, E. H. and T. H., and of his sister, J. W., and his late sister, J. B., in equal shares with a gift over if any one or more of his "nephews and nieces" should die before him leaving children. R. W. was the illegitimate child of J. W., who had four legitimate children. It was held that the fact that the testator had described R. W. as "nephew" was not sufficient to entitle him to share under the gift to the children of J. W.

WILL—CONSTRUCTION—"CHILDREN" HELD TO MEAN GRANDCHILDREN.

In re Smith, Lord v. *Hayward*, 35 Chy. D. 558, is another decision of Kay, J., upon the construction of a will. In this case the testator gave his residuary estate to trustees in trust for sale and to divide the proceeds in six shares, and to pay one of such shares to the "children" of his deceased sister, and he gave the other five shares in similar terms to the children of five deceased persons. At the date of the will there were no children of the sister living, but there were two grandchildren, and these facts were well known to the testator. Both the grandchildren survived the testator and it was held by Kay, J., that

they took the one-sixth given to the "children" of the deceased sister.

VENDOR AND PURCHASER—TITLE—SALE BY EXECUTOR MANY YEARS AFTER DEATH OF TESTATOR.

In re Whistler, 35 Chy. D. 561, was an application under the Vendors and Purchasers Act. A testator bequeathed leaseholds to his executrix upon trust to pay an annuity and bequeathed his residuary estate to the executrix. Shortly before twenty years had elapsed from the testator's decease the executrix contracted to sell the leaseholds at a price to be ascertained by a named person. Shortly after the twenty years had elapsed the price was ascertained. It was not shown that there were any debts of the testator remaining unpaid, nor did it appear that the executrix had been in possession of the leaseholds as legatee. The purchaser claimed that the annuitant should be required to concur in the sale to which the vendor objected; and it was held by Kay, J., that the rule *In re Tanqueray-Willaume and Landau*, 20 Chy. D. 465, that where the executor is selling real estate after twenty years from the testator's decease, a presumption arises that the debts have been paid, and the purchaser is therefore put on nquiry,—does not in general apply to the case of an executor selling leaseholds, and therefore the concurrence of the annuitant could not be insisted on.

SOLICITOR AND CLIENT—TAXATION AFTER TWELVE MONTHS—SPECIAL CIRCUMSTANCES.

The only point necessary to be noticed *In re Pybus*, 35 Chy. D. 568, is the fact, that where a mortgagor's solicitor charged his client with a fee for negotiating the loan, in addition to the procuration fee paid to the mortgagee's solicitor, it was held by Chitty, J., that this was an overcharge amounting to fraud, so as to entitle client to an order for taxation after the expiration of a year from the delivery of the bill, especially when the solicitor making the overcharge had neglected to comply with his clients' instructions to get the bill taxed.

PRACTICE—COMPANY—WINDING UP PETITION—WITHDRAWAL BY PETITIONER—COSTS.

In re District Bank of London, 35 Chy. D. 576, is a decision of North, J., on a question of costs. With the object of putting a stop to dilatory proceedings by a joint stock company, and to protect the assets, a shareholder presented a winding-up petition; subsequently the shareholders consented to wind up voluntarily, and the petitioner then applied to dismiss his petition, and the question was whether he should be ordered to pay the costs. North, J., though conceding the general rule to be, that when a petitioner withdraws his petition he should be ordered to pay the costs of the parties appearing, yet considered the rule not to be inflexible, and having regard to the circumstances of the present case, he refused to order the petitioner to pay costs.

MORTGAGOR AND MORTGAGEE—STATUTE OF LIMITATIONS—CESTUI QUE TRUST OF MORTGAGE DEBT, BECOMING OWNER OF EQUITY OF REDEMPTION.

The only case remaining to be noted is *Topham* v. *Booth*, 35 Chy. D. 607, in which the facts were somewhat peculiar. Mary Sharp was under a will entitled for her life to the interest on a sum of money secured by a mortgage of land. She subsequently became equitably entitled to a life estate in the equity of redemption in the mortgaged land, which was conveyed to trustees on trust for her for life. During her life she received and retained the rents for more than twenty years. On her death it was claimed by the owners of the equity of redemption, that the rights of the trustees of the mortgage were barred by the Statute of Limitations. But it was held by Kekewick, J., that though no interest had been actually paid, yet as the person who was entitled to the rents was also entitled to the interest on the mortgage debt, the rights of the trustees of the mortgage were not barred, and that the fact of the rents being payable to one set of trustees, and the interest being payable to another set of trustees, did not alter the case, when the *cestui que trust* was in each case the same. At p. 612 Kekewick, J., thus summarizes the position of Mrs. Sharp.

I think that in this case the court ought to presume that Mrs. Sharp did that which any reasonable person would have done, and said, "I being entitled to receive, I being in fact for all interests and purposes liable to pay, I will not have time and trouble and expense wasted in passing money or documents from hand to hand; I shall remain in possession, I shall take the rents and profits, and the result is, I shall not get the interest on the mortgage debt *qua* interest, but I shall get it *qua* rents and profits." That seems to be the fair conclusion from the circumstances. It is, I think, supported by *Burrell* v. *Earl of Egremont*, 7 Beav. 205, and not controverted by any other case cited or any principle on which the court administers justice between parties.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

Divisional Court.]

CANADA LOCOMOTIVE CO. v. COPELAND.

Schooner carrying cargo of coal late in fall of 1883 from Sandusky to Kingston was injured by stress of weather on Lake Erie. The cargo was unloaded to repair the vessel, and the coal could not be delivered till the spring of 1884. The master of the vessel tendered the coal to the consignees at Kingston on arrival of the vessel there, and the consignees refused to accept it, disclaiming all title to it, asserting that the consignors or insurers must assume it. The master also refused to deliver the coal unless upon payment of a larger sum for freight than he was entitled to.

The coal was by consent of parties unladen on the consignees' wharf, they receiving it as wharfingers. It was afterwards sold by consent of parties, and the consignees became the purchasers of it.

Held, the shipowners were entitled to charge for unloading, selling and delivering the coal, and to their proper freight charges, although the master had refused to deliver it unless he was paid a higher freight, for the consignees refused, in any case, to accept the coal as consignees or purchasers.

Osler, Q.C., for motion.

Britton, Q.C., contra.

COMMON PLEAS DIVISION.

Div. Ct.]

CLARKSON v. STIRLING.

Bankruptcy and insolvency—Insolvency—Preference—Evidence.

On 19th December, 1885, a transfer of certain book debts was made by the firm of B. & W., in pursuance of the terms of a contract entered into therefor on 16th August, 1884, between the firm and defendant, whereby in consideration of defendant lending the firm $15,000, which was to be repaid at any time after six months' notice, with interest in the meantime at 10 per cent., the firm were to employ defendant as a clerk at a salary of $2,000 a year. The firm subsequently made an assignment for the benefit of creditors to the plaintiff, who sought to set aside the contract as giving, or having the effect of giving, the defendants a preference over the other creditors, and that at the time of the transfer the firm were insolvent and unable to pay its debts in full.

Held, on the evidence the firm were not insolvent at the time the agreement was entered into; and that the agreement was valid.

Maclennan, Q.C., for the plaintiff.

George Kerr, Jr., and *Duggan*, contra.

Div. Ct.]

BATE v. CANADIAN PACIFIC RAILWAY.

Railways—Defective construction—Negligence—42 Vict. ch. 9, sec. 15 (D.), applicability of.

The road bed of the defendants' railway was on an embankment about fifteen feet high, built on the sloping side of a rock, which sloped into a muskeg or small lake, the embankment being made by the side of the rock being filled in with loose sand, which had no cohesion, and without any retaining wall to keep the sand from slipping. The sand slipped off the side of the rock into the muskeg, and the train on which the plaintiff was travelling on arriving at the place in question was thrown into the cavity caused by the sand so slipping, whereby the train took fire and the plaintiff's baggage was burnt. This part of the road had been in existence about seven years, and had been built by contractors under the Government before the defendants acquired the road, and it was not shown that the defendants had any notice or knowledge of any defect.

By 42 Vict. ch. 9, sec. 25 which is headed "working of the railway," it is enacted that the trains shall be started and run at regular hours, etc., and shall furnish accommodation for transportation of goods and passengers, etc., such goods and passengers to be taken, transported and discharged at, from, and to, such places on the due payment of the due toll, freight, or fares, etc.; and the party aggrieved by any neglect or refusal in the premises shall have an action therefor against

the company, from which action the company shall not be relieved by any notice, condition or declaration, etc., if the damage arises from any negligence or omission of the company or its servants.

The defendants gave the plaintiff a ticket at a reduced rate, on which was printed a condition relieving the company from liabilities beyond $100.

Held (ROSE, J., dissenting), that sec. 25 only applied to negligence in the management, etc., of the train, and not to defective construction; and therefore the defendants, under the circumstances, could avail themselves of the condition.

Per ROSE, J., there was, and *per* CAMERON, C.J., there was not evidence of negligence to go to the jury.

Osler, Q.C., and *Wallace Nesbitt*, for the plaintiffs.

Robinson, Q.C., and *G. H. Watson*, for the defendants.

Div. Ct.]

CARR v. FIRE INSURANCE ASSOCIATION.

Insurance—14 Geo. III., ch. 78, sec. 83—Application to Ontario—Notice by first mortgagee to rebuild.

A mortgage was made by T. H. C. and B. H. C. to D. of certain lands which contained a covenant to insure. A second mortgage was made by the same parties to the Bank of Toronto for securing a large indebtedness to the bank, which also contained a covenant to insure. At the time of the first mortgage there was an insurance for $1400 which was allowed to lapse, and on the bank discovering this, their manager procured T. H. C. to effect an insurance, advancing the amount to pay the premium, charging T. H. C.'s account with the amount, and discounted a note made by T. H. C. and endorsed by B. H. C., the plaintiff herein to cover the same. The policy was to T. H. C. alone, and was on saw mill, $400; on fixed and moveable machinery, shafting, gearing, etc., $1000; on boiler and connections, $100; and on engine and connections, $500. Loss, if any, payable to the bank. On a fire occurring and the property being burnt, D. required the insurance company to expend the insurance moneys as far as they would go in rebuilding the insured premises.

Held, doubting, but following *Stinson* v. *Pennock*, 14 Gr. 604, that the 14 Geo. III., ch. 78, sec. 80, was not merely of local application, but extended to this Province, and that it applied to a case like the present one; but

Per CAMERON, C.J., it only applied to the amount insured on the building, and did not extend to a distinct insurance on fixtures or machinery.

Per ROSE, J., that it covered the fixtures or machinery, etc.

Dalton McCarthy, Q.C., and *Pepler*, for the plaintiffs.

Strathy, Q.C., for the defendants.

Div. Ct.]

DOMINION LOAN AND SAVINGS SOCIETY v. KILROY.

Husband and wife—Separate business—Property of wife.

K., about six years before the trial of this action, had failed in business and become insolvent. The plaintiffs recovered a judgment against him in respect of a debt contracted before his failure. About three years afterwards he made an arrangement with a wholesale firm to supply goods to the wife upon her own credit and responsibility. The wife had no capital of her own. The business was managed solely by the husband, under a power of attorney from the wife, who took no part whatever in the same, and was at first carried on in premises owned by K., subject to a mortgage, for which she neither paid rent nor agreed to do so, but subsequently in premises leased by the wife. These goods were sold, and further goods from time to time purchased. The plaintiffs having seized the goods under an execution issued on them judgment against K.

Held (ROSE, J., doubting), that the goods were the property of the wife and not of the husband.

Osler, Q.C., for the plaintiff.

Moss, Q.C., for the defendant.

[Rose, J.

DOMINION BANK v. COWAN.

Bankruptcy and insolvency—"Unable to pay debts in full"—"Insolvent circumstances," meaning of.

There is no wider meaning to be given to, the words "unable to pay his debts in full," than to "insolvent circumstances"; but both expressions refer to the same financial condi-

tion, that is, to a condition in which a debtor is placed when he has not sufficient property subject to execution, to pay all his debts, if sold under legal process at a sale fairly and reasonably conducted.

The fact that all the assets are either mortgaged or under warehouse receipts is not alone sufficient to render a debtor insolvent.

McGee, for the plaintiffs.

G. T. Blackstock, for the defendant.

[O'Connor, J.

REGINA V. COLLINS.

Canada Temperance Act, 1878—*One justice in summons—Charge laid before two—Waiver—Week—Computation of time.*

The summons for an offence under the Canada Temperance Act, 1878, stated that he was charged with the offence before one justice. The information in fact was taken before two justices, one of whom issued the summons. The defendant appeared on the summons when the two justices were present raised no objection, and the defendant was tried and convicted.

Held, no objection could now be raised.

Sec. 46 of the Act provides that the hearing may be adjourned to a certain time and place, and no such adjournment shall be for more than one week.

Held, that the week must be computed as seven days exclusive of the day of the adjournment.

Aylesworth, for the Crown.

Masten, contra.

[O'Connor, J.

FAWCETT V. WINTERS.

Referee—Report—Effect of—Reasonable and probable cause—Evidence.

The report of a referee is equivalent to the verdict of a jury. It should state the referee's conclusions; and he need not give the reasons or his findings.

The referee found that there was a want of reasonable and probable cause for the defendant proceeding criminally against the plaintiff. It was objected that this was a finding of law and not of fact. The referee was a barrister.

Held, that this was equivalent to a verdict for the plaintiff rendered by a jury under instruction by a judge of what would be evidence of want of reasonable and probable cause; and on the evidence the findings could not be interfered with.

Holman and *Birney*, for defendant

H. J. Scott, for the plaintiff.

[Galt, J

CLAYTON V. MCCONNELL.

Building contract—Termination of.

In a building contract the defendant refused to pay the full amount due according to the terms of the contract, and caused the plaintiff delay in not having the joists ready at the proper time for plaintiff's use, and when asked for more money the defendant told plaintiffs to go on with their work, or, if they would not go on, to leave the building.

Held, that the plaintiffs were entitled to consider the contract at an end, and entitled to recover any balance that might be due them.

Roaf, for the plaintiff.

Lash, Q.C., for the defendants.

[Wilson, C.

REGINA V. MCAULAY.

Indians, selling liquor to—Sale by wife—Service on wife—Conviction of husband—Jurisdiction of Indian agent.

An information for selling liquor to certain Indians, giving their names, but without describing them, of any particular tribe or locality, was laid by R., of the township of Rama, before D. M., "an Indian agent by royal authority duly appointed," and alleged that defendant and Fanny his wife, or one of them, did on, etc., sell, etc., to the said Indians spirituous liquors contrary to the statute, etc. The summons issued thereon described D. M. as Indian agent, and shewed it was issued at Rama township. It was directed to defendant and his wife, who were described as of the township of Rama, and was served personally on the wife, and a copy left with her at their most usual place of abode for the husband This was proved by an affidavit of service. The enquiry was held at Rama before D. M.,

as Indian agent, and he subscribed the different depositions as Indian agent of the Chippewas of Rama, and *ex officio* justice of the peace. The conviction was that on, etc., "at Rama Indian Reserve, in the township of Rama," the defendant "is convicted before D. M., Indian agent for the Chippewas at Rama, and *ex officio* justice, a J.P. for the purpose, and under the Indian Act of 1880, for that he did on, etc., at the township of Rama, unlawfully sell to certain Indians, to wit (naming them), intoxicating liquor, to wit, whiskey, etc." The warrant of commitment recited that the conviction was before D. M., as Indian agent of the county of Ontario. The liquor was sold at the defendant's hotel in the township of Rama by the defendant's wife, the husband being away at the time, and for some time afterwards. He stated he knew nothing of the summons having been issued, or of the proceedings thereon, and never authorized any one to act for him. There was nothing said to D. M. to shew why defendant was not present at the enquiry, and D. M. had no reason whatever to believe that the case was other than a neglect or refusal to attend.

Held, that the service was regularly made and duly proved before the Indian agent, and he was justified in proceeding to investigate the charge; and that the act of the wife was in law that of the husband, and that he could be convicted therefor.

Quære, whether D. M.'s appointment was as an Indian agent of the Chippewa Indians of Rama, or for the county of Ontario; but the latter might include the township, and so give him jurisdiction; but in any event the conviction could not be supported, for it did not appear that the Indians to whom the liquor was sold were Indians over whom the agent had jurisdiction; for it did not appear that they were Chippewa Indians, Indians residing in the township or even in the county.

The discharge of the defendant was therefore granted; and so far as necessary, and as there was power to do so, no action was to be brought against the Indian agent.

George Bell, for the motion.

Aylesworth, contra.

[Robertson, J.

RE CLARK AND CORPORATION OF HOWARD.

Drainage by-law—Assessing lands benefited—Alteration of assessments.

A by-law was passed to provide for the repairing and cleaning out a drain constructed under a prior by-law, and to make the assessments more equitable. The engineer was limited in making his assessments to the lands only which were included in the original by-law. In his report he stated that great injustice would be inflicted by his limited instructions being carried out, and that a large area of land which would be benefited by the work would escape assessment. The council, notwithstanding, passed the by-law in the limited form. There was an appeal to the Court of Revision against the assessments, and the court altered some of the assessments by deducting amounts therefrom and placing the amounts thus deducted on other assessments without making a *pro rata* variation on all the assessments.

Held, that the by-law was bad and must be quashed.

M. Wilson, for the applicant.

Pegley, for the corporation.

[Rose, J.

REEVE V. THOMPSON.

Landlord and tenant—Notice to quit—Action for possession.

In July, 1880, M. conveyed the land in question to the plaintiff. At the time of the conveyance the defendant was tenant from year to year under M. of lands which included the lands in question, under a tenancy in force since 1868. The defendant had no knowledge of the conveyance to the plaintiff at the time it was made. In December, 1880, the plaintiff executed what purported to be a statutory lease of the lands in question. The *habendum* was, "during the term of the occupancy as tenant of the lessee of said defendant of the lands leased to him, the said term to be computed from the 2nd July, 1880, and from thenceforth next ensuing and fully to be complete and ended, as soon as the said lessee shall vacate the said premises or cease to reside thereon."

The rent reserved was 20 cents, payable on the 1st July, 1880, in each and every year. The defendant continued to pay rent to M. and never was called upon to attorn or to pay rent to plaintiff, and received no notice to quit from M. prior to action brought and no demand of possession from the plaintiff until about the commencement of this action, In 1886 the plaintiff and defendant had a dispute about the plaintiff's boundary line, but defendant did not dispute plaintiff's title. The defendant claimed that the conveyance to the plaintiff did not affect his rights under his lease. The plaintiff, claiming that he was entitled to the possession of the land in question, brought an action therefor against the defendant.

Held, that the defendant was entitled to the possession until he received proper notice to quit.

Walkem, Q.C., for the plaintiff.

Macguire, Q.C., for the defendant.

Rose, J.]

THE BANK OF MONTREAL v. STEWART.

Action for possession of land—Mortgage—Foreclosure—Trust—Statute of Limitations.

The plaintiffs claimed the possession of certain land under a final order of foreclosure obtained on a mortgage to the plaintiff made by W. S., a brother of the defendant. The defendant set up that W. S. was merely a trustee for him, and that he was entitled to the land under the trust, and also by the Statute of Limitations.

Held, that the evidence failed to establish the defendant's contention, and the plaintiffs were entitled to recover.

Hudspeth, Q.C., for the plaintiffs.

Lount, Q.C., and *Stewart*, for the defendant.

CHANCERY DIVISION.

Rose, J.] [March 19.

MCCASKILL v. RODD.

Illegal distress—No rent reserved—2 Wm. & M., sess. 1 c. 5, s. 5—Double value.

In an action for illegal distress in which the learned judge who tried the case found that the plaintiff occupied the premises in question under an agreement with the defendant, by the terms of which no rent was payable by the plaintiff to the defendant, and that the distress was therefore illegal, plaintiff's counsel asked for double the value of the goods as damages under 2 Wm. & M. sess. 1 c. 5, s. 5.

Held, that the 5th section of the statute, by reference to the 2nd section, does not extend to a holding of land when there is no rent reserved, and that the plaintiff was not entitled to double value.

J. A. McGillivray, for plaintiff.

D. J. McIntyre, for defendant.

Boyd, C.] [May 27.

PRATT v. THE CORPORATION OF THE CITY OF STRATFORD.

Municipal corporation—Jurisdiction over streets—Absence of by-law for the work—Damage to adjacent owners—Remedy by action or arbitration—46 Vict. c. 18 (O.).

The plaintiff was the owner of certain premises which were injuriously affected by the raising of the street by the defendants in building a bridge and its approaches, brought an action for damages.

Held, that he could not avail himself of the absence of a by-law for the construction of the bridge in order to proceed by way of an action for damages, that his remedy was under the arbitration clauses of the Consolidated Municipal Act, 1883, 46 Vict. c. 18 (O.), for compensation, and his action was dismissed with costs.

An owner of land has by common law no vested right to the continuance of the highway at the level it was when he purchased.

The corporation, as owners or trustees for the public, have the right to repair and im-

prove streets and bridges without a by-law for that purpose.

Cassels, Q.C., and *Pennyfather*, for the plaintiff.

Idington, Q.C., for the defendants.

Ferguson, J.] [June 13.

MOVERS v. GOODERHAM.

Contract for sale of cargo of rye—Action for price—Breach of implied warranty that rye sound and merchantable—Acceptance—Caveat emptor—Return of goods—Rescission of contract—Damages.

The plaintiffs sold a cargo of rye to the defendants to be delivered at a future time at the defendant's dock in Toronto. At the time of its delivery it was inspected by an inspector employed by the defendants, and pronounced by him to be sound so far as he could inspect it. Subsequently, as it was being unloaded into defendant's elevator, it was found to be damaged. In an action for the price in which the defendants set up an implied warranty that the rye would be sound and merchantable, and a breach thereof, and the plaintiffs contended there was an acceptance of the rye, and that, as there was an opportunity for inspection at Toronto, the maxim *caveat emptor* applied. The defendants contended that as there was no opportunity to inspect at the time of the contract, and no subsequent waiver, the opportunity in Toronto was immaterial as long after the contract of sale.

Held, that there was an implied promise on the part of the plaintiffs that the commodity delivered would be saleable or merchantable under the description "rye," and that the maxim *caveat emptor* did not apply, and that there was a breach of the warranty contained by implication in the contract: *Jones* v. *Just*, L. R. 3 Q. B. 197, cited and followed.

The breach of the warranty of a specified chattel does not entitle the purchaser to return the chattel and rescind the contract, and is no defence to an action by the seller; but evidence may be given of the breach of the warranty in reduction of damages.

Walkem, Q.C., and *J. B. Walkem*, for the plaintiffs.

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

Boyd, C.] [June 28.

RE DENNIS.

DOWNEY ET AL. v. DENNIS ET AL.

Will—Devise—Sale by trustees directed if wished by majority of heirs—Consent of majority—Application by minority for partition.

J. C, died in 1867, having by his will provided as follows: "And whereas trouble . . may arise among my family with regard to the property . . . on account of its being put out of the power of my trustees to sell or dispose of the property, I hereby order, direct, and fully authorize, at and after twenty years after my death, my trustees . . . to absolutely sell and dispose of my said property in T. to the best advantage, provided only that it be the wish of a majority of my heirs who may then be living to do so, and not otherwise, etc." In 1887 a meeting of a large majority of those interested was held, and it was decided to sell by public auction.

On an application by the plaintiffs who were trustees for one of the heirs, and represented only $\frac{1}{6}$ share of the property, for the usual court order for partition and sale, which was resisted by a majority of the heirs, it was

Held, that the land in question was vested in the trustees on the express trust to sell at the end of twenty years from the testator's death, provided a majority of the heirs were in favour of a sale, which was proved, and that the jurisdiction to partition was ousted.

J. Maclennan, Q.C., for the plaintiffs.

Lash, Q.C., and *J. R. Roaf*, for the defendants.

John Hoskin, Q.C., for the infants.

Boyd, C.] [June 30.

PEGG v HOBSON.

Mortgage—Action on covenant—Mortgagee becoming owner—Extinguishment.

In an action on the covenant for payment in a mortgage, for the amount of the deficiency, after the exercise of a power of sale, defendant set up the sale under the power to one W., and a retransfer by W. on the same day to plaintiff, by which plaintiff became the owner of the land.

Held, on demurrer, no defence.

E. B. Brown, for the demurrer.

W. M. Douglas, contra.

Div. Ct.] [June 24.

NORMAN v. HOPE.

Replevin—Action against sheriff for taking insufficient bond—Damages recoverable therein—R. S. O. c. 53, s. 11—R. S. O. c. 1, s. 8, sub-sec. 18.

Judgment of ARMOUR, J., reported, 13 O. R. 556 affirmed.

Lash, Q.C., for the defendant.

Langton, for the plaintiffs.

Div. Ct.] [July 5.

CAMERON v. CAMERON.

Misrepresentation—Bona fides—Actual fraud—Conveyance executed—Rescission—Cancellation.

H. D. C. agreed in writing with C. C. on January 17th, 1882, to sell to him Lots 37 and 39 for $5,450, payable $1,791 on the delivery of the deed and upon the title to Lot 37 being found satisfactory to C. C. or his solicitor, and upon a quit claim deed of Lot 39 being delivered, the balance to be secured by mortgage, said sale to be completed within thirty days, otherwise the deposit of $25 to be forfeited. H. D. C. *bona fide* believing such to be the case, represented to C. C. at the time of the sale that a patent from the Crown had issued for Lot 37, and relying on this representation H. D. C. entered into the agreement, and afterwards verbally agreed to sell Lot 37 at a large advance to one R. On February 10th, 1882, the conveyance was executed, the bulk of the purchase money, $4,025, having been paid prior thereto in cash, a promissory note being taken for the balance in lieu of a mortgage. It afterwards appeared that no patent had ever issued for Lot 37, and notwithstanding the efforts of H. D. C. and C. C. it was not till April 25th, 1883, that the department at length issued a patent, and then, only for four chains of the lot, leaving ninety links outstanding. In February, 1883, H. D. C. had told C. C. that he would not keep the property, that by reason of no patent having issued R. had withdrawn from his offer, and he demanded his money back with his actual expenses incurred. C. C. refused to cancel the sale, and H. D. C. now took these proceedings to have the sale rescinded and the deed delivered up to the chancellor.

Held, that there having been no actual fraud and the deed of conveyance having been executed, the plaintiff could not have the relief sought for.

Wilde v. *Gibson*, 1 H. L. C. 605, and *Brownlee* v. *Campbell*, 5 Ap. Cas. 925, *Holland*, *Hart* v. *Swaine*, 7 Chy. D. 42, considered.

McCarthy, Q.C., for the plaintiff.

Moss, Q.C., and *Witherspoon*, for the defendants.

Div. Ct.] [July 5.

REGINA v. BRIERLY.

Bigamy—R. S. C. c. 161, s. 4.—Second marriage contracted abroad by British subject resident in Canada — Ultra vires — Evidence — Proof of foreign law—Proof of second marriage.

Held, that R. S. C. c. 161, s. 4, which enacts that every one who, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada or elsewhere, is guilty of felony, provided that the person who contracts such second marriage is a subject of Her Majesty, resident in Canada, and leaving the same with intent to commit the offence, is not *ultra vires* the Dominion Legislature, either as being repugnant to Imperial legislation or on any other grounds.

Per BOYD, C.—This statutory law is nearly half a century old, it has been confirmed by the courts, passed upon more than once by competent colonial legislatures, and ratified by the express sanction of the Imperial Parliament, and Her Majesty in person.

In order to prove the second marriage which took place in Michigan, the evidence of the officiating minister was tendered, who showed that during the last twenty-five years he had solemnized hundreds of marriages; that he was a minister of the Methodist Church; that he understood the laws of Michigan relating to marriage; that he had been all the while resident in Michigan; that he had communications with the Secretary of State regarding these laws; and that this so-called second marriage was solemnized by him in

Michigan according to the marriage laws of the State.

Held, that this evidence was admissible in proof of the validity of the second marriage, and was sufficient proof of the same, even assuming that such ought not to have been presumed.

Per BOYD, C.—In the case of a second marriage, it is not essential to prove the foreign law n the case of British subjects, such as were in question in this case.

W. R. Meredith, Q.C., for the prisoner.

J. R. Cartwright, for the Attorney-General of Ontario.

[The Attorney-General of the Dominion was notified, but did not appear.—ED. L. J.]

Div. Ct.]

AMBROSE v. FRASER ET AL.

Husband and wife—Covenant running with the land—Assignment of the reversion by the lessor to his wife—Set-off.

Judgment of FERGUSON, J., reported 12 O. R. 459, affirmed with costs.

Per BOYD, C.—Privity of estate is not tantamount to privity of contract in order, without more, to affect the separate estate of a married woman as if she had expressly contracted with reference thereto. There is no right therefore to fix liability for the amount claimed herein upon the separate estate of the defendant Amelia Fraser.

Moss, Q.C., for the plaintiff.

Osler, Q.C., for the defendants.

REVIEWS.

STATUTES OF THE PROVINCE OF ONTARIO. Passed in the session held in the fiftieth year of Her Majesty Queen Victoria.

We have received from the Queen's Printer for Ontario, a copy of the Statutes of the last session. We have already in a former issue referred at length to most of the statutes of public importance comprised in this volume. Chapter 16, which was not published in the *Gazette*, we see provides for the introduction of the Torrens system of registration of titles into the Districts of Algoma, Thunder Bay (including Rainy River), Muskoka, Parry Sound and Nipissing, and practically makes the system compulsory as regards all newly patented lands. The operation of the Act is, however, suspended until the revision of the statutes now in progress is complete.

A NATIONAL ANTHEM.

We have been favoured by our veteran friend and oft contributor, Mr. G. W. Wicksteed, Q.C. of Ottawa, with a copy of a National Anthem composed by him for Canada. It is an animated effusion, in a broad and generous tone, and when set to suitable music deserves to become popular. Mr. Wicksteed has also sent us a copy of an ode to Her Majesty on the occasion of her jubilee; both compositions are marked by good taste and elegance of expression.

FOURTH ANNUAL REPORT OF THE INSPECTOR OF LEGAL OFFICES FOR THE YEAR 1886.

The annual report of Mr. John Winchester, the Inspector of Legal Offices, for the year 1886, contains a good deal of statistical information which is deserving of consideration. On the whole we think it indicates, in spite of the croakers, that during the year 1886 the country was in a fairly prosperous condition. One of the tests by which this may be estimated is the amount of work the sheriffs do in the way of realizing claims on executions. It appears from the report that 4219 writs, indorsed to levy $2,856,155.12, were received by the sheriffs, and of these only 315 resulted in a sale of goods producing $76,555.91, and only 90 in a sale of lands producing $18.251.76, while $125,687.06 was realized by the sheriffs without actual sale. Thus of the $2,856,155.12 indorsed

to be levied, $220,494.73 was actually recovered under execution, or a trifle less than ten per cent. of the whole amount. How many of the executions were settled without the intervention of the sheriff it is of course impossible to say, but as in only about ten per cent. of the cases did the sheriff sell, it would appear that in the other ninety per per cent. of cases the debtors were so impecunious that they had no property available in execution, or that they effected a settlement before sale. Turning to the table showing the number of actions commenced in the High Court during the year, we find that in the Q. B. and C. P. Divisions 4,037 writs of summons issued, and in the Chancery Division 2,025, making a total of 6,062. The number of judgments entered after trial was only 454, while 1,069 judgments were entered without trial. The litigated suits are therefore not quite eight per cent. of the whole number; a large proportion of the remaining cases, we presume, must have been settled between the parties. The returns of judgments entered are however incomplete, and do not include the County of York. In the litigated cases it appears that the total amount of costs taxed was $40,230.90 in the Q. B. and C. P. Divisions, and $14,834.25 in the Chancery Division, making a grand total of $55,065.15, and of this sum $27,849 or more than half was for disbursements. In the non-litigated cases the total amount of costs taxed appears to have been $23,640.68 in the Q. B. and the C. P. Divisions, and $9,499.70 in the Chancery Division, making a total of $33,140.38; but of this sum $11,543.39, or rather more than one-third, was for disbursements. These figures appear to us very conclusively to demonstrate, if any such demonstration be needed, either that the fees of court are altogether too high or that the remuneration of solicitors is altogether too low. It is surely unreasonable that for every dollar earned in a litigated case the solicitor should have to disburse a dollar; and that in non-litigated cases for every sixty-six cents earned he should have to disburse thirty-three cents. These facts are deserving the attention of the judges and the Attorney-General when they come to frame the long expected tariff of disbursements.

FLOTSAM AND JETSAM.

STATUTES OF THE DOMINION.

A table of the statutes of the Dominion of Canada and the British North America Act, 1867, showing the acts they amend or affect, or by which they are amended or affected, has just been issued from the Parliamentary printing office. This index has been prepared by Dr. R. J. Wicksteed, barrister at law, in the Law department of the House of Commons. The work has been entirely voluntary on his part, and for which, as in many similar cases, he receives no extra pay from the Government. This public spirited action on his part is all the more commendable when it is remembered that Dr. Wicksteed was, as he considers most unjustifiably, passed over when promotions were taking place in his office, in order to make way for an undeserving protege of the Hon. Mr. Chapleau. The index is a volume of one hundred and sixty pages. It contains information not to be found elsewhere, and will be found most invaluable to members of parliament and members of the legal profession.—*Ottawa Free Press.*

BARBED WIRE FENCES.—A sharp controversy concerning barbed wire fences has recently been terminated in the Supreme Court of New Jersey. The defendant owned a field fenced with barbed wire, and the plaintiff kept in an adjoining pasture a valuable colt, which, coming into contact with the barbed wire, was so badly injured that it had to be killed. It seems that the argument of the case, like the subject-matter, was quite pointed, for the newspaper report says:—

Counsel for the plaintiff argued that the barbed wire fence was an invention of the devil, and was, therefore, entitled to no consideration in court. Judge Magil, in a measure, upheld him, declaring that the right and duty of the owner is to put up a suitable and proper barrier to prevent the incursions of his neighbour's cattle, and to keep within his own inclosure his own animals. But that right is subject to the duty which the owner, in common with every one else, owes to his neighbour; that duty is to so use his own property as to do no injury to the property belonging to another. The duty which the owner who erects a fence owes to his neighbour is a duty to be performed with reference to the use of the adjoining land; and if that use be in the way of pasturage for horses or cattle, it must be with reference to the habits of such animals in their disposition to break through, and no owner has a right to erect such a barrier, or to incorporate in it that which, in view of the natural habits and dispositions of such animals as would

naturally be kept on the adjoining land, would be dangerous and likely to produce injury. The judge held that the plaintiff is entitled to recover, although he had bailed his colt to the adjoining owner to be kept at pasturage, and although that owner knew of the existence of this wire fence.

If, however, the owner of the adjoining pasture in which the colt was domiciled had "joined fences," as they say in the West, with the owner of the barbed wire fence, or, in other words, if the wire fence was by agreement, express or implied, a partition fence, the ruling of the court could hardly be sustained, for the catastrophe was as much the fault of the owner of the colt, or his agent and bailee, as of the defendant himself. We will look with much interest for the full report of the case. The newspaper account of it concludes as follows :—

The case will doubtless be appealed, as the barbed wire manufacturers cannot afford to let such an injurious decision stand uncontested, if there is any hope of having it reversed. The plea will doubtless be set up that the barbed wire, from its cheapness, convenience and practicability is a necessity; that it is, with few exceptions, harmless, and that in this case nothing but the total depravity was at fault for the injury. The case will be watched with no little interest, and especially at the West, where barbed wire is used almost exclusively for fencing.—*Central Law Journal.*

AN OCULIST'S TEST.—In a large factory in which were employed several hundred persons, one of the workmen, in wielding his hammer carelessly allowed it to slip from his hand. It flew half way across the room, and struck a fellow-workman in the left eye. The man averred that his eye was blinded by the blow, although a careful examination failed to reveal any injury, there being not a scratch visible. He brought a suit for compensation for the loss of half of his eyesight, and refused all offers of compromise. The day of the trial arrived, and in open court an eminent oculist retained by the defence examined the alleged injured member, and gave it as his opinion that it was as good as the right eye. Upon the plaintiff's loud protest of his inability to see with his left eye, the oculist proved him a perjurer, and satisfied the court and jury of the falsity of his claim. And how do you suppose he did it? Why, simply by knowing that the colours green and red combined make black. He procured a black card on which a few words were written with green ink. Then the plaintiff was ordered to put on a pair of spectacles with two different glasses, the one for the right eye being red, and the one for the left eye consisting of ordinary glass. Then the card was handed him, and he was ordered to read the writing on it. This he did without hesitation, and the cheat was at once exposed. The sound right eye, fitted with the red glass, was unable to distinguish the green writing on the black surface of the card, while the left eye, which he pretended was sightless, was the one with which the reading had to be done.—*Central Law Journal.*

A SUBSCRIBER sends us a paper containing some details of a partition suit of elephantine proportions which has just been wound up in the county of Elgin. It appears that one William Boyce, who owned several hundred acres of land in the township of Bayham, died in November, 1878, leaving no children, consequently his real estate descended to his lawful heirs. He had in his lifetime six brothers and one sister, all of whom had predeceased him, leaving heirs and heiresses extending down to the fifth and sixth generations. The plaintiff was the only heir in the county of Elgin, and he could not give any definite information, either as to the names or residences of the remaining heirs, and it fell to the lot of his solicitors to obtain the necessary information, that a petition for partition of the real estate might be filed in the County Court of the county of Elgin. A correspondence with the heirs who were known was commenced, and link by link the line of heirship was unravelled, until about 130 heirs and persons interested in the real estate were discovered. Of this large number only twelve were found in Ontario sixty being in New York State, two in Massachusetts, three in Connecticut, three in Dakota, ten in Montana, one in Michigan, fifteen in Pennsylvania, and the remainder were scattered throughout Wisconsin, Ohio, and Minnesota. Fifteen infants appeared as defendants, the youngest of whom was only ten months old, and its share, amounting to fifty cents, will remain in Court until it attains the age of twenty-one years. Two claimants were women who had been divorced from their husbands, and several were spinsters, with ages ranging anywhere between forty and seventy years. The largest share of the estate to which any one heir is entitled is a 147th, and the smallest is a 1178th. Three heirs each receive the last mentioned share, while ten claimants rejoice in a 560th share each. Six of the heirs have died since the suit was commenced. One fell in the fire and was burned to death, and another committed suicide. In order to completely establish the heirship of many of the claimants, monuments, tombstones, and slabs had to be carefully inspected. Many quaint epitaphs were discovered, especially in the old cemeteries near the Catskill Mountains.
