The Canada Law Journal.

VOL. XXIV. OCTOBER 16, 1888. NO. 16.

IF any one will search the old law lexicons, he will find many writs with names unknown to modern practitioners. That some of these writs should have been disused and dropped does not seem at all strange, but that the days of the Judicature Act and The Consolidated Rules should produce a new writ not known to our forefathers, and one that might be supposed to issue only after the object of it had passed away beyond the reach of sheriffs and bailiffs, does seem strange.

A sheriff of a neighbouring county lately advised the solicitors that he had duly executed the writ of *Requiescat in pace* placed in his hands. Whether the consequence of the sheriff's action was that another had to "join the majority," deponent sayeth not. The *other* name of the writ was *de nocumento amovendo.*

THE recent decision of the Chancellor in *Harrison* v. *Spencer*, 15 O. R. 692, brings out the fact that there is no statute in force in this Province which prevents a testator from tying up his property, subject to trusts, for accumulation for an indefinite time. This power, it may be remembered, having been exercised in a somewhat extraordinary way in England, many years ago, by a gentleman of the name of Thellusson, gave rise to the passage by the Imperial Parliament of what is known as the Thellusson Act (39 & 40 Geo. III. c. 9), which restrains the power of testators in this respect within reasonable limits. The provisions of that Act, as the Chancellor points out, have never been introduced or re-enacted in this Province, and perhaps no great inconvenience has been so far felt for the want of some such Act. There is, however, no telling what disposition some eccentric millionaire may hereafter make of his wealth, and to prevent such eccentricities taking this particular form, we think it would be well if the Legislature were to adopt the provisions of the Thellusson Act without further delay.

PARTIES TO ACTIONS TO ENFORCE MECHANICS' LIENS.

AN important point of practice was recently brought before Ferguson, J., for decision in *Cole* v. *Hall*. The action was to enforce a mechanic's lien, and was commenced against the owner within the ninety days allowed by sec. 23 of the Mechanics' Lien Act for commencing the action; but after the lapse of the ninety days an order was made adding as a party in the Master's office one Rogers,

who had an execution in the sheriff's hands against the owner, which, at the commencement of the action, was subsequent to the plaintiff's lien. This order adding him as a party Rogers applied to set aside, on the ground that inasmuch as he had not been made a party to the action within the ninety days, the plaintiff's lien had, under sec. 23, ceased to exist as against him. Ferguson, J., dismissed the application with costs. The learned judge bases his judgment, as we understand it, on the ground that under sec. 29, a lienholder may enforce his claim in the High Court "according to the ordinary procedure of that court," and that, as the ordinary procedure of that court in suits to enforce liens on lands is to add subsequent incumbrancers as parties in the Master's office—that, therefore, in suits to enforce liens, it is proper to add subsequent incumbrancers in the Master's office. We are not sure that this chain of reasoning is altogether perfect. It appears to be faulty in failing to take into account, that in ordinary suits to enforce liens on lands, the time limit for bringing the action is much longer than that allowed for prosecuting mechanics' liens, and that, therefore, the question whether parties added in the Master's office are added in due time does not often arise. If it could be alleged that according "to the ordinary procedure" to enforce liens, an incumbrancer, as against whom the plaintiff's right is barred by the Statute of Limitations, may nevertheless be added as a party in the Master's office, provided the action was commenced against the original defendants before the statute had run out, then we think the reasoning of the learned judge would be satisfactory. But as we think it is quite clearly established by the cases that, "according to the ordinary procedure" of the court, an action is not to be deemed to be commenced against a party added in the Master's office until the order is made adding him, it appears to us to be open to doubt whether an action to enforce a mechanics' lien can be said to be duly instituted, as against a party who is not added until after the time limited by the Mechanics' Lien Act for bringing the action has expired. The Act requires "proceedings to be instituted to realize the claim," and the court has virtually said it is sufficient that the proceedings are instituted within the prescribed time as against some of the parties interested; as against parties interested as subsequent incumbrancers, the proceedings may be instituted after the lapse of the prescribed time. This appears to us to be introducing into the statute a provision which it does not contain. In Mr. Holmested's recent work on the Mechanics' Lien Act, the point is discussed by the author, and we see that he inclines to the opinion that the action ought to be commenced against all parties within the prescribed time. We understand that an appeal has been lodged against the decision of Ferguson, J., and we presume the point will be settled by the Court of Appeal ere long. In the meantime, solicitors will have to consider whether or not it would be the safer practice to add all parties interested (other than lienholders of the same class) as original defendants. In any case, the lienholder is at present in an unfortunate dilemma—if he does add subsequent incumbrancers as original defendants, and the decision of Ferguson, J., is upheld, he may be mulcted in the extra costs thus occasioned; and if he does not add them, and the decision of Ferguson, J., is reversed, he runs the risk of

finding his lien has altogether ceased as against such subsequent incumbrancers. In considering this point the cases of *McDonald* v. *Wright*, 14 Gr. 284; *Stirling* v. *Campbell*, 1 Chy. Ch. R. 147; *Shaw* v. *Cunningham*, 12 Gr. 101; *Jusan* v. *Gardiner*, 11 Gr. 23; *Dumble* v. *Larush*, 27 Gr. 187, and *Kline* v. *Kline*, 3 Chy. Ch. R. 161, may be referred to.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The *Law Reports* for September comprise 21 Q. B. D. pp. 309-348; 13 P. D. pp. 141-156; and 38 Chy. D. pp. 305-647.

ELECTION—NOMINATION PAPER—SIGNATURE OF ELECTORS—(R. S. C. c. 81, s. 21).

Bowden v. *Besley*, 21 Q. B. D. 309, is a decision of Manisty and Stephen, JJ., upon a special case stated to determine a question which arose under the Municipal Corporations Act, 1882, which provides that every candidate for the office of councillor must be nominated in writing, and that the writing must be subscribed by two burgesses of the ward as proposer and seconder, and by eight other burgesses of the ward as assenting to the nomination. (See R. S. C. c. 8, s. 21.) A nomination paper was subscribed "Edwin J. Hooper," "W. E. Waller," "R. Turner," by three of the assenting burgesses. Upon the burgess roll were entered the names "Edwin John Hooper," "William E. Waller," and "Robert Turner," the numbers opposite their names on the burgess roll being the same as those appearing opposite the signatures of the assenting burgesses on the nomination paper. The question for the court was whether the nomination paper had been duly subscribed, and the court decided that it had.

PRACTICE—SERVICE OUT OF THE JURISDICTION—PROPER PARTIES—ORD. 11, R. 1 (ONT. R. 271 *g*.).

Massey v. *Heynes*, 21 Q. B. D. 330, is a decision of the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.). By Ord. 11, r. 1 (Ont. R. 271 *g*.), service out of the jurisdiction of a writ of summons may be allowed on any person out of the jurisdiction who is a necessary and proper party to an action properly brought against some other person duly served within the jurisdiction. In this action the plaintiffs sued the defendants residing in London for breach of warranty of authority, and it appeared that these defendants had assumed, as agents for a foreign principal, to enter into a contract to be performed out of the jurisdiction, and that there had been a breach out of the jurisdiction, the supposed principals having repudiated the contract as being made without their authority. Upon a motion to set aside an order allowing the plaintiff to issue a concurrent writ and serve notice thereof on the foreign principals, it was held by the Court of Appeal (affirming the Queen's Bench Divisional Court, Wills and Grantham, JJ.) that the order was properly made, as the foreign principals were "proper"

parties to the action. Lopes, L.J., at page 339, says: "At what time must it be determined whether a person is a 'proper party' to an action? Clearly, I think, at the time when the writ is issued. The words, 'an action properly brought against some other person,' evidently point to that. If both these parties were within the jurisdiction, it could not be contended that they were not both 'proper parties' to the action. As one of these is out of the jurisdiction, I see no reason why the rule should not apply."

"RIGHT OF BURIAL," WHAT INCLUDED IN—ERECTIONS ON GRAVE.

In *McGough* v. *The Lancaster Burial Board*, 21 Q. B. D. 323, the plaintiff had purchased from the defendants "the exclusive right of burial" in a grave space in their burial ground, and they granted him the right to erect a gravestone on the grave. He afterwards placed upon the grave a wreath, and to protect it a glass shade covered with a wire frame. It was the general rule of the defendants never to allow the placing of such glass shades on the graves in their burial ground, and they accordingly removed the glass shade and wire frame without the consent of the plaintiff. By their Act of Incorporation the defendants were empowered to sell the exclusive right of burial, the right of constructing a vault or place of burial, and also the right of erecting any monument, gravestone, tablet or monumental inscription in such burial ground; and it was held by the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) that the plaintiff had only acquired such rights as under the Act the defendants were empowered to sell, and that such rights did not include a right to place the glass shade and wire covering on the grave, and that under a provision in the Act which vested the general management, regulation and control of the burial-ground in the defendants, they were entitled to remove the shade and wire frame.

DIVORCE—ADULTERY OF HUSBAND AND WIFE—CRUELTY—COSTS.

Otway v. *Otway*, 13 P. D. 142, is deserving of notice for the principles it lays down in regard to the granting of judicial separation. A petition was filed by the wife for divorce, and a cross-petition by the husband,—the wife, in addition to adultery, alleged cruelty as a ground. Both parties were found guilty of adultery, and the husband was also found guilty of cruelty of an aggravated kind. While refusing to decree a divorce, Butt, J., the judge of first instance, granted the wife a judicial separation on the ground of cruelty, but the Court of Appeal (Cotton, Fry and Lopes L.JJ.) held that the wife, having been found guilty of adultery, had debarred herself from obtaining any relief, and the decree for judicial separation was therefore reversed. The marriage having taken place in 1879, the court held that, notwithstanding the wife's adultery, she was entitled to costs, both in the court below and of the Appeal, but they expressly guard themselves against being bound to come to the same conclusion in a case where the marriage has taken place since 1882. As to this point, Cotton, L.J., says at p. 156: "If a case comes before us where a woman has been married after the Act of 1882, it will be a very serious question for consideration how far we ought to follow the old rule, or what decision we ought to give."

TRUSTEE—BREACH OF TRUST—DUTY TO ENFORCE—PAYMENT OF TRUST FUNDS—ADMISSION OF ASSETS—PAYMENT OF LEGACY BY EXECUTORS DE BONIS PROPRIIS—RIGHT OF CREDITOR TO CALL ON LEGATEE TO REFUND.

The first case in the Chancery Division which it is necessary to notice is *In re Brogden, Billing* v. *Brogden*, 38 Chy. D. 546, in which the only point decided is that where a trustee neglects for a long period to take proceedings to recover the trust fund, he becomes personally liable to make it good, unless he can show clearly that the taking of proceedings to recover the fund would have been fruitless. In this case a trustee under a marriage settlement was entitled to £10,000 under a covenant made by a testator in his lifetime, and £10,000 as a legacy under the testator's will. These sums were not to be payable until five years after the testator's death,—applications were from time to time made for payment, but no legal proceedings were taken. The money was invested in a business in which the testator had been a partner, and which ultimately became insolvent. The trustee sought to exonerate himself from liability for the £10,000 legacy, on the ground that if the trust fund had been recovered by him he would have been liable to refund it to the unpaid creditors of the testator's estate. But Fry, L.J., says that if there had been a judgment against the executors *de bonis propriis* for the amount, the right of a creditor to recover would turn upon whether the money paid in pursuance of such a judgment was part of the assets of the testator. If it was, it could be recovered by creditors; but if it was not, it could not be so recovered. The Court of Appeal (Cotton, Fry and Lopes, L.JJ.) affirmed the decision of North, J., holding the trustee liable personally for neglect to get in the fund. The point of the decision is well summed up in the judgment of Lopes, L.J., at p. 574, where he says: "Such a trustee, in my opinion, is bound at the expiration of the specified time to demand payment of the trust funds; and, if that demand is not complied with within a reasonable time, to take active measures to enforce its payment, and, if necessary, to institute legal proceedings. I know of nothing which would excuse the right of such action on the part of a trustee, unless it be a well-founded belief that such action on his part would result in failure and be fruitless, the burden of proving the grounds of such well-founded belief lying on the trustee setting it up in his own exoneration. No consideration of delicacy, and no regard for the feelings of relatives or friends, will exonerate him from taking the course I have indicated."

It will thus be seen that the responsibility of a trustee for the trust fund arises even before it actually comes to his hands, and that if he negligently fail to take the necessary steps to get it into his hands, he may become just as much liable for its loss as if he had actually received it and made away with it himself.

PATENT—ASSIGNMENT—IMPLIED COVENANT.

In re Railway and Electric Appliances Co., 38 Chy. D. 597, is a case in which Kay, J., had to consider the doctrine of implied covenants in deeds. Two gentlemen, Gilbert and Sinclair, were possessed of a patent which had been recently brought out, and in respect of which there were certain yearly payments

of £10 to be made for renewal fees in order to keep it on foot, and the omission to make one of these payments for three months would render the patent invalid. They assigned the patent, subject to the payment of a royalty, to the *Railway and Electric Appliances Co.* by deed, dated March 1st, 1883. The company by accident neglected to make the payments of the renewal fees, and the patent was forfeited; a subsequent ineffectual attempt was made to obtain a private Act to revive the patent. The company having gone into liquidation, Gilbert and Scott preferred a claim against the company for £2,000 for damages occasioned by the company's neglect to pay the renewal fees; and for the claimants it was contended that a covenant must be implied on the part of the company to keep the patent on foot. There being no such covenant expressed in the deed, and no words therein capable of being construed into such a covenant, Kay, J., came to the conclusion that none could be implied, that the assignors believing the patent to be a valuable one, and that the company would not neglect to keep it on foot, had been content to have that to be governed by the interest the company would have in keeping the patent on foot, without asking them to enter into any contract or covenant to that effect. He, therefore, held the claim for damages could not be maintained.

MORTGAGOR AND MORTGAGEE—EXECUTOR—DEVASTAVIT—STATUTE OF LIMITATIONS—TRUSTEES—RENTS AND PROFITS—ASSETS.

In re Hyatt, Bowles v. *Hyatt*, 38 Chy. D. 609, the facts were as follows: A testator mortgaged freeholds and died in May, 1867, having devised all his real and personal estate to A and B upon certain trusts, and having appointed them his executors. The executors, without making provision for the mortgage debt, of which they had notice, applied the whole of the personalty in payment to simple contract creditors and beneficiaries. In 1869 A died, and C was appointed trustee in his place in 1871. The rents of the real estate were received by A and B, and by B and C, and after payment of the interest on the mortgage, the balance was applied in accordance with the trusts of the will. The mortgaged property became an insufficient security, and the interest having fallen in arrears, the mortgagee commenced proceedings against B and C, under which accounts of the testator's personal estate received by A and B, or by B alone, were directed, and also the usual accounts of the testator's real estate, including an account of rents received by B and C. In the accounts brought in by B and C, they claimed credit for all payments and disbursements made to simple contract creditors and beneficiaries; and further, that as to such of the payments as were made by A and B upwards of six years prior to the action, any claim on a *devastavit* was statute barred, and that as to the rents and profits they were not liable to account for them at all. Chitty, J., however, held, following *In re Marsden*, 26 Chy. D. 783, that B could not set up his own and A's wrongful payment by way of *devastavit* as a defence in order to claim the benefit of the Statute of Limitations. And that as to the rents and profits which had been received by B, or by B and C jointly, that they were under 3 & 4 Wm. IV. c. 104, assets by accretion, liable under the circumstances for payment of specialty

creditors, just as much as the real estate was assets under that statute. With regard to the first point, Chitty, J., points out at pp. 615, 616, that an executor sued as executor cannot set up his own *devastavit*, and therefore claim the benefit of the Statute of Limitations, because both at law and in equity an executor is considered to hold still in his own hands assets which he has improperly paid away or wasted. But if the executor is sued as for a *devastavit*, he may in that case plead the Statute of Limitations as a defence, because in that case the plaintiff treats the executor as his own debtor by reason of his tort or wrong doing, and in answer to such a claim the executor may set up the statute. This case would, therefore, seem to show that it is better not to sue an executor for a *devastavit* wherever there is a possibility of his pleading the statute.

CROWN—PREROGATIVE—EXECUTION FOR DEBT—DISTRESS.

Attorney-General v. *Leonard*, 38 Chy. D. 622, is another case (see *ante* p. 431) in which the claim of the Crown to priority of payment over other creditors came up, and it was held by Chitty, J., that the priority of the Crown is not limited to proceedings by extent, but equally attaches in proceedings by distress, although the distress put in by the Crown be subsequent in date to that of the subject, provided the distress put in by the subject has not been completed by actual sale. In a recent case in our own court, *Clarkson* v. *The Attorney-General*, 15 O. R. 632, we see that Armour, C.J., intimates that this prerogative right of the Crown to priority has, in this province, been abrogated by R. S. O. c. 94. It may be that that statute has that effect, though we doubt very much whether it was the intention of its framers to do more than restrict the Crown's lien upon the lands of its debtors to instruments duly registered; or, in other words, to make the claims of the Crown upon the lands of its debtors subject to the provisions of the Registry Act.

MARRIED WOMAN—RESTRAINT ON ANTICIPATION—PAYMENT OUT OF MONEY IN COURT.

In *Stewart* v. *Fletcher*, 38 Chy. D. 627, Chitty, J., was called upon to determine what was the proper frame of an order directing the payment out of court of the income of a fund to which a married woman was entitled, but subject to a restraint against anticipation, and he settled the order by directing a clause to be inserted to the following effect: "The said Marian Stewart being restrained from anticipating such dividends during her coverture, they are not to be paid to any attorney, except upon an affidavit or statutory declaration by such attorney that he receives them on behalf, and for the use, of the said Marian Stewart, and not of any other person to whom she has assigned or purported to assign them."

GENERAL POWER OF APPOINTMENT—EXERCISE BY WILL—"CONTRARY INTENTION"—WILLS ACT, 1 VICT. C. 26, S. 27 (R. S. O. C. 109 S. 29).

In re Marsh, Mason v. *Thorne*, 38 Chy. D. 630, it was held by North, J., that when a marriage settlement made in 1840 reserved to the husband a general power of appointment by will, "expressly referring to this power or the subject

thereof," and the husband, by his will, dated 15 March, 1877 (not referring to the power), gave the residue of his property to trustees on trusts differing from those declared by the settlement in default of appointment,—that the power was exercised by the will; and that in ascertaining whether a testator has shown an intention not to exercise by a residuary gift a general power of appointment reserved to him by a settlement made by himself, the will only can be looked at. The observations of Lord St. Leonards, in his book on "Powers," 8th ed., p. 806, to the effect that when the power is created by a testator himself, a different rule should prevail from that in the case when the power is created by a stranger, were dissented from.

POLICY—CANCELLATION WHEN IT MAY BE ORDERED.

In *Brooking* v. *Maudslay*, 38 Chy. D. 636, Stirling, J., held that although when a policy is liable to be completely avoided on the ground of fraud or misrepresentation, a Court of Equity has jurisdiction to order it to be delivered up to be cancelled; yet it has no jurisdiction to direct the cancellation of a policy, or to declare that there is no claim upon it, because of the existence of a good legal defence to any claim that may be made upon it. If there is danger of the evidence for the defence being lost, the remedy is not an action for cancellation, but an action to perpetuate testimony. The action which was for cancellation of the policy was, therefore, dismissed with costs.

Reviews and Notices of Books.

A Manual of Costs in the Supreme Court of Canada, High Court of Justice, Court of Appeal, County Courts, etc., with Forms of Bill of Costs under the Ontario Judicature Act. By JOHN S. EWART, Q.C. Toronto: Carswell & Co., 1888.

The second edition of this work was published in 1884. Since then extensive changes have been made, not only in the tariffs, but also in the practice, and that edition has in consequence come to be of little value. The present edition seeks to embody all the alterations and additions made necessary by the Consolidated Rules. It is, however, something more than a mere correction of the former edition to bring it down to date. Some alterations have been made in the plan of the work, and much new matter has been added. Besides the tariffs appended to the Consolidated Rules, we find here the tariff of fees payable under the Land Titles Act, the Divisional Court and Surrogate Court tariffs, the tariff of fees at the General Sessions, the Maritime Court tariff, and also the tariffs of the Supreme Court of Canada and the Exchequer Court. By the use of smaller type, the size of the book has been reduced, nothwithstanding the

increase in matter, but the print is clear and distinct, and we venture to say that no inconvenience will arise from the change of type. The editor has been assisted in the preparation of the book by Mr. R. S. Cassels, who not only aided in the preparation of the manuscript, but also revised it, and saw it through the press. To his suggestions are also due some of the changes in the plan of the work. The present edition will, we doubt not, be of even more value than the former one, a copy of which was looked upon as practically indispensable in every lawyer's office.

Index to the Consolidated Rules of Practice of the Supreme Court of Ontario. By WILLIAM FRANK SUMMERHAYS. Toronto: Rowsell & Hutchinson. Price $1.

Though the index appended to the Consolidated Rules is tolerably full, difficulty is often experienced in finding the Rule to which one wishes to refer. The re-numbering and re-arrangement of the Rules has made reference somewhat difficult, and it requires time to discover the full extent of the changes made by them. Our author seeks to facilitate reference by the preparation of a very full and complete index, comprising 88 pages, uniform in size with the Consolidated Rules. Each subject has been placed under every head to which it belongs, and both the page and the number of the rule are always given.

Text-Book Series. The Blackstone Publishing Co. have just issued a reprint of Vol. 1 of Mr. Evans' Treatise upon the Law of Principal and Agent in Contracts and Torts, with notes on American cases. This will be followed by Pollock on Contracts, which will conclude the second series. The third series commences December 1st, 1888.

Notes on Exchanges and Legal Scrap Book.

DISALLOWANCE IN QUEBEC.—A cloud of discussion has arisen upon the disallowance of the District Magistrates' Bill of last session, yet the principal point involved seems to be so clear as hardly to admit of any doubt. The Provincial Legislature may exclusively make laws in relation to the constitution, maintenance and organization of provincial courts. The Governor-General has the appointment of the judges of the superior, district and county courts. The District Magistrates' Act (subject to proclamation by lieutenant-governor-in-council) established a special court of record, and abolished the Circuit Court for the district of Montreal (in which Judges of the Superior Court have hitherto presided). But it went further, and provided for the appointment of the justices

composing the new court by the lieutenant-governor in council. In other words it divests the Superior Court of part of its jurisdiction, and the substituted judges are to be appointed by the lieutenant-governor in council. If by merely calling judges "magistrates," jurisdiction can be given up to $100 to persons appointed by the lieutenant-governor in council, similarly jurisdiction can be given to any amount to persons appointed in the same way, and the judges of the Superior Court might be left with nothing to do. So, too, the provincial Court of Appeal might be replaced by a new bench styled "magistrates sitting in appeal." The provision of the B. N. A. Act, giving the Governor-General the power to appoint judges, would thus be evaded and destroyed. But while the exercise of the veto power was necessarily called for by the manner of appointment prescribed in the Act, it would be a matter for regret if the assignment of the circuit work to special judges should not be carried out. The judges of the Superior Court, for the most part, desire to be relieved from circuit court work. It will in the end effect an economy in the administration of justice, for the judges appointed to the petty court need not be paid anything like the salaries assigned to judges of the higher courts. The only thing required to settle the difficulty is that the Bill be re-enacted, leaving the appointment of the judges in the proper hands.—*Legal News.*

CHATTEL MORTGAGES.—The Supreme Court of Indiana, in *The Muncie National Bank* v. *Brown*, reported in the *American Law Register*, held a chattel mortgage valid where a notary public had, for several years, been using a seal of his own, but, in attesting the certificate of acknowledgment to the chattel mortgage involved in this action, used a seal belonging to another person. The designs of the seal were somewhat different, one of them bearing the words, "Notary Public, Seal, Indiana," the other bearing the words, "Notary Public, Delaware Co., Ind." *Held*, that the certificate was not invalidated, and that the mortgage was entitled to be admitted to record. The mistake or wrong of a public officer, in placing a seal upon a certificate of acknowledgment, is not available under an answer of general denial, where the instrument is fair and perfect on its face. A mortgagee has a right to a personal judgment and to a decree establishing his lien, although the mortgaged property is in the hands of a receiver. A description of personal property, stating in general terms its character, and specifically stating in what building and rooms it is situated, is sufficient. Under the statutes of Indiana, fraud is a question of fact, and a chattel mortgage cannot, as matter of law, be adjudged fraudulent because it contains a provision authorizing the mortgagor to dispose of the property and account to the mortgagee. A plaintiff who takes a personal judgment for the amount of his debt, does not merge the mortgage nor lose his right to subsequently foreclose it; but he may, on a subsequent day of the term, take a decree foreclosing the mortgage. A creditor who accepts a second mortgage, which expressly recites that it is subject to a prior mortgage, is estopped to attack it on the ground that it was made to defraud creditors.

CONSPIRACY TO BOYCOTT.—The Virginia Court of Appeal, in *Crump* v. *Commonwealth*, concluded that a conspiracy to boycott is criminal. We gather the facts from the *Criminal Law Magazine*. The plaintiff in error was a member of the Richmond Typographical Union. This body sought by means of boycotting to break up the business of Baughman Bros., printers and stationers, and compel them to make their office a union office. For this purpose the plaintiff in error and the other members of the Typographical Union conspired together. They sent out circulars saying that the labour organizations had boycotted Baughman Bros., and formally notifying customers of that firm that the names of all who should persist in dealing with that firm after notice would be published weekly in the *Labour Herald*, in a black-list, and in their turn boycotted until they agreed to withdraw their patronage. The employees of the obnoxious office were mercilessly persecuted by the labour organ, which sought to prevent them obtaining board or shelter, and customers were black-listed. The community was flooded with notices to boycott Baughman Bros., and all their customers. On appeal it was contended that the indictment did not charge a conspiracy to do any unlawful act, or show that the means to be used in breaking up the business of the non-union firm was unlawful. The objection was overruled, and the conviction affirmed. Boycotting is held to be unlawful in Virginia. The judgment of Fauntleroy, J., reviews the English and American decisions affecting the question at issue with considerable fulness.

FALSE ECONOMY.—Occasionally the person who evades the clear duty of every man when in trouble about his property to consult a respectable solicitor finds that he has made an expensive mistake. An illustration of this has just been supplied by an exhibitor at the Anglo-Danish Exhibition, who had a dispute with the manager of the "space department" as to the amount of rent due at the close of the Exhibition. The exhibitor wanted his goods (show-cases, etc.) for exhibition elsewhere, but did not feel inclined to pay the full rent demanded, the Exhibition having been closed prematurely. The manager claiming a lien on the goods, the exhibitor went to a police court and invoked the aid of the sitting magistrate, who offered him a summons under section 40 of the Metropolitan Police Act, provided the value of the goods did not exceed £15. This offer the exhibitor, who was all impatience to have his property transferred from South Kensington to some remote venue in Wales, jumped at with celerity. Mark the result. The summons was heard, and on every question raised the magistrate was in favour of the complainant, who not only got an order for immediate delivery of his property, but a substantial sum for his costs. Charmed, no doubt, by Mr. D'Eyncourt's urbanity and celerity, the exhibitor went away triumphant, and forthwith appeared outside the ruins of the Exhibition with vans and horses to retake possession of his property, but to no purpose. To his horror he found that his adversary had outrun him in the race; for, when he returned next day to complain to his worship that the order of the court was set at nought, he discovered that the defendant had paid into court

the full value of the goods less the rent adjudged to be due, but plus the costs. It was in vain that he protested that he did not want the money, and only wanted his property. The answer was the production of the order made on the summons, which was in the common form, and gave the defendant his election. "I can do nothing more for you" was the valedictory remark of the learned magistrate, and the complainant had to content himself with the money in court, and went away to reflect on the danger of playing with edged tools. The words of the section are clear. "The order for delivery of the goods alleged to be detained without just cause may be absolute, or conditional on the performance of some act on the part of the claimant. But whatever the form of the order, the statute contemplates the contingency of a defendant's being unable or unwilling to obey, and provides against it by enacting that he shall forfeit to the party aggrieved the full value of such goods—not greater than £15." Clearly, a man who wants immediate possession of his property, and does not want its worth in cash, should not resort to the detention section of the Police Act. The exhibitor seems to have been fairly trapped.—*English Law Journal.*

FITNESS FOR HIS WORK.—At the convention of the American Bar Association at Saratoga Springs, in August last, the Hon. George Hoadley delivered a remarkably able and eloquent address, dealing with the baneful influence of exclusive devotion, in these modern days, to the common law. While the evils inseparable from a rigid adherence to the rules of law established in other ages, and in totally different surroundings, may be, in a large measure, overcome by the codification of the law, much will, undoubtedly, depend always upon the character and attainments of those entrusted with the practice of the law. Concerning the elevation of the legal profession, the learned lecturer gives no uncertain utterances: "There is no excuse for admitting to the practice of the law any man not adequately prepared for the work. Let law schools abound and private preceptors be treated as adjuncts. Require competent knowledge, not only of our own tongue, but also of the language which forms its basis; require a competent knowledge of the laws and systems of the great empire in which that language was in daily use; require a competent knowledge of the history of that empire, the development of its civilization, as well as of the nations speaking the English tongue, whose children we are. Widen the horizon of legal vision. Give to the lawyer before he becomes so pushed with the affairs of clients as to be debarred by the exigencies of life from study of all except the cases which happen to come to him; give to the legal student the amplest and fullest opportunities to survey, not merely the historical data which precede our age and are the basis of our system, but others which constitute the foundations of other civilizations worthy of being considered with our own. Wage implacable war against ignorance; forgive no man who attempts to come to the bar without an adequate equipment, derived not merely from study of the statutes and the laws of his own country, but from a general survey at least of those of other lands. Lift up the standard; increase the term of study, and be steadfast

in exacting from the student the bestowal of time and labour in study. 'Four things are required of all generations of American lawyers: integrity, industry, learning, faculty. The first and second of these are at the command of all: industry will bring learning, but God can only give power, faculty, genius. This seems to be allotted to every people and generation according, at least, to their deserts. We may, therefore, await the future in serene confidence that if by honest labour we do our part, He who giveth the increase, will not withhold from us and our successors that vital spark which shall animate our and their corporate work, and make it productive of blessings to generations."

BULKY REPORTS.—In regard to the practice of printing the arguments of counsel in volumes of reports the *Central Law Journal* makes the following noteworthy observations: "As to the arguments of counsel, we must confess that we cannot see upon what principle they ever were printed in books of reports. They are neither law nor facts, and the object of books of reports is to set forth what the court decides to be the law upon a given state of facts. They are not designed as illustrations of the manner in which great lawyers argue difficult questions, because the reports of appellate courts are not text-books of law schools, and sometimes the lawyers who argue the cases reported are great, and sometimes they are very insignificant; and sometimes the questions involved are of much importance, and sometimes of little moment. The arguments of counsel do not elucidate the law of the case, for the opposite sides neutralize each other. The statement of facts, if properly prepared by the court or reporter, indicates sufficiently the facts involved in the issue, and the opinion of the court applies the law to those facts. That is the lawsuit so far as it concerns any member of the profession, not an attorney of record in the cause. The only possible advantage we can see in the arguments of counsel, so profusely printed in many books of reports, is in the citation of authorities, which may probably be verified by some anxious inquirer into collateral issues, and lead him to valuable points in his own case. If, therefore, the argument of counsel should be excluded, we think the citations of authorities and a few lines indicating the points to which they are applicable might well be printed, but not one word of rhetoric or logic."

DYING DECLARATIONS.—The evidence on the strength of which the deathbed declaration of Eliza Schumacher was tendered in the case of *Regina* v. *Gloster*, tried lately at the Old Bailey, was very slight indeed. It was simply that the doctor who received it and attended her in her last moments asked her if she made it with the fear of death before her eyes, and that she replied in the affirmative. With all persons and at all times there is the expectation of death which may take the form of fear, and all that was added in the case in question was an expectation of death by the illness from which the patient suffered. If we accept the view of Lord Justice Lush in *Regina* v.

Jenkins, 38 Law J. Rep. N . 82, that "if the declarant thinks that he will die to-morrow that will not do,' the evidence was obviously not enough; but most lawyers will agree with Mr. Justice Charles that the view of Mr. Justice Willes in *Regina* v. *Peel*, that death must be thought impending within a few hours, better expresses the true test. Lawyers will also agree that the evidence in this case clearly did not answer that test. One of the reasons given by Mr. Justice Byles for the scrupulous, almost superstitious, care necessary in accepting dying declarations—namely, that the prisoner was not present—was perhaps a little unfortunate, as likely to suggest that the presence of the prisoner might make them admissible. That is, however, not the test, which is solely and simply whether the state of mind of the declarant was such that he believed he was lying in the presence of imminent death. The other question of evidence raised was the admissibility of the statements of the deceased as to her physical condition, and Mr. Justice Charles carefully excluded anything which did not relate to her then present symptoms; and again it must be pointed out that the result would have been the same if the prisoner had been present, the principle being that statements of this kind stand on the same footing as physical facts like cries of pain. *English Law Journal.*

MORTGAGEES AND INSURANCE POLICIES.—The *Albany Law Journal*, of the 8th ult., has a somewhat full examination of the law regarding the equitable lien of a mortgagee on insurance policies and insurance money. On the principle that equity considers that as done which should have been done, the covenant of a mortgagor to insure the buidings on the mortgaged premises for the security of the mortgagee, though the policy was neither issued nor assigned to him, gives him a lien on the insurance moneys. Among the American decisions on the point, there is but one adverse to this view. With this single exception, the whole weight of authority is in this direction. That the mortgage contains a provision authorizing the mortgagee to insure in case the mortgagor failed to do so, and the intention of the mortgagor in effecting the insurance, are wholly unimportant. It does not impair the lien that he does not intend to insure for the benefit of the mortgagee. In Massachusetts only has the contrary been decided, it having been held there in *Stearns* v. *Quincy Insurance Company*, 124 Mass. 61, that the intent of the mortgagor to insure for the benefit of the mortgagee is essential. All the other American decisions are adverse to this view. The equitable lien will not prevail as against the claims of another mortgagee who has secured the policy in his own name, and has had it assigned to himself. *Dunlop* v. *Avery*, 89 N. Y. 592, was a contest between two mortgagees. Each mortgage contained a covenant for insurance. The policy was taken out by the mortgagor, and was made payble to the second mortgagee. The basis of the decision was, that when the equities are equal, the legal title will prevail. It was argued that the first mortgage was notice to the second mortgagee of the first mortgagee's rights, and that he would, therefore, take subject to those rights; but the argu-

ment was held untenable. The weight of the decisions seems to be in favour of the view that a covenant to insure does not run with the land. The grantee of the mortgagor may insure without being bound by the covenant of the latter. The mortgagee acquires no lien upon the proceeds of the policy. This is the decision in *Reid* v. *McCrum*, 89 N. Y. 592. In *Nordyke* v. *Gery* (Ind.), 13 N. E. Rep. 683, the mortgagors had effected an insurance which was accepted by the mortgagee as a compliance with the covenant; and it was held that his failure to collect the money through the insolvency of the insurance company or other causes, does not give him a lien upon other insurance on the same property. But in this case the mortgagee had distinctly accepted the insurance as a compliance with the covenant. Several cases are cited in the article referred to, which show that the lien will attach to insurance existing at the time the mortgage is given. Numerous cases, also, maintain that in the absence of any agreement on the part of the morgagor to insure for the benefit of the mortgagee, the latter can lay no claim to the insurance money, but an oral agreement to that effect is sufficient.

THEFT OF LETTERS.—In *United States* v. *Denicke*, 36 Fed. Rep. 407, it was held that a decoy letter with a fictitious address, which therefore cannot be delivered, is not "intended to be conveyed by mail," within the meaning of the statute of embezzlement. Speer, J., said: "It seems to come most clearly within the decision of Judge Neuman in the case of *United States* v. *Rapp*, 30 Fed. Rep. 818. In that case a 'nixe'—that is, a letter addressed to a fictitious person, or to a place where there was no post-office—was placed in what is known as the 'nixe basket,' a receptacle for unmailable matter. This was to be forwarded to the dead-letter office. This was held by the court not to be mail matter within the meaning of sections of 5467, 5469, of the Revised Statutes. It was held distinctly not to be matter intended to be conveyed by mail, and Judge Neuman uses this language: 'I do not believe that under this section it can be held that the packet was intended to be conveyed by mail, when the proof in this case for the Government shows that there was no such intention. I must,' said the learned judge, 'construe the language of this criminal statute by a rule of law that is axiomatic, strictly in favour of the defendant. See *United States* v. *Whittier*, 5 Dill. 35, and cases cited. But considering it according to its fair and ordinary meaning, can the words 'mail matter' be held to include this package? I think not. And this last view of the matter, in my opinion, applies to both of these cases. As stated above, I think the whole of this law . . . refers to mail under the protection of the Government, or the postal authorities as such. I do not hold that what is called under the testimony in this case a 'decoy' or 'test' letter, or the contents thereof, might not, when regularly mailed, be the subject of embezzlement, and punishable under this section, but I think it should get into the mail in some of the ordinary ways provided by the postal authorities, and become fairly and reasonably part of the mail matter under the control of

the postal authorities.' A letter is a written or printed message. Now there can be no message to that which is not in existence. Besides, if the letter is intended to be conveyed by mail it must have a destination to which it can be conveyed. This letter had no such destination. In the cases cited by the district attorney the decoy letters were addressed to a real and genuine address, and were regularly mailed. No case was produced where a decoy letter to a fictitious, unreal address was considered as within the class that were intended to be conveyed by mail. In the English case of *Queen* v. *Gardner*, 1 Car. & K. 628, cited by Judge Neuman, the embezzlement of a decoy letter was held not stealing a post-letter within the statute; taking of the contents was held larceny. There is no charge in the indictment that the defendant took the contents of the letter. In the case of *Queen* v. *Rathbone*, 2 Moody Cr. Cas. 242, an inspector secretly put a letter prepared for the purpose, containing a sovereign, among some letters which a letter-carrier suspected of dishonesty was about to sort. The letter-carrier stole the sovereign. Mr. Baron Gurney held that he could not be convicted of stealing a post-letter, such letter not having been put in the post in the ordinary way, but was rightly convicted of larceny of the sovereign laid as the property of the Postmaster-General. This case was considered at a meeting of the judges at Michaelmas term, 1841, and they were unanimously of the opinion that there could be no conviction for stealing the post-letter, the statute only applying to letters sent in the ordinary way. It is observable that this letter had apparently a genuine address, and also that it was placed with the letters, all of which were in the custody of the post-office department, and which it was the duty of the carrier to sort. There can be no difference in principle between this case and Rapp's case. In both cases the letters were 'nixes,' that is, they were without mailable direction; in both cases they must have gone to the dead-letter office. This statute was not made in contemplation of letters of this character. It was made to protect the genuine mail intended to be conveyed from one person to another. It was made to protect the mail in which the people have an interest; not fictitious papers or packages fixed up like the 'nixe' in the case before Judge Neuman, or the 'nixe' in this case. A letter to be conveyed by mail must have a sender and a receiver; a a place from which it starts and a destination to which it can be conveyed. We can fully see, if this practice was permitted to stand as a part of the legalized methods of trials of this character, how very great injustice might be done. It would be possible for unscrupulous officers to prepare a trap which would convict any man, however innocent. The accused should at least have the privilege of showing, if he could, that the letter which he is charged to have embezzled reached its destination. If it has no destination, this method of defence is denied him."—*Albany Law Journal.*

DIARY FOR OCTOBER.

1. Mon....C.C. sittings for motions, except in York. Wm. D. Powell, 5th C.J. of Q.B. 1816.
2. Tues ...Co. Court non-jury sittings, except in York.
6. Sat.....Co. Court sittings for motions, except York, end.
7. Sun.....*19th Sunday after Trinity.* Henry Alcock, 3rd C.J. of Q.B. 1802.
8. Mon....Co. Court sittings for motions, in York, begin. R. A. Harrison, 11th C.J. of Q.B. 1875.
13. Sat.....Co. Court sittings for motions, in York, end. Battle of Queenston, 1812. Lord Lyndhurst died, 1863, æt. 91.
14. Sun.....*20th Sunday after Trinity.*
15. Mon....English Law introduced into Up. Canada. 1792.
18. Thur....St. Luke.
21. Sun.....*21st Sunday after Trinity.* Battle of Trafalgar, 1805.
23. Tues....Supreme Court of Canada sittings. Lord Lansdowne, G.G. 1883.
28. Sun.....*22nd Sunday after Trinity.* Simon and St. Jude.

Reports.

SURROGATE CASES.

[Reported for the CANADA LAW JOURNAL.]

SURROGATE COURT OF THE COUNTY OF YORK.

CONLIN *v.* CONLIN.

Cancellation of will, former will does not thereby revive—Declaration of intention and implication have no effect—R. S. O. c. 109, s. 24.

A. made a will in 1866. In 1876 he made a second will after the passing of the Wills Act, R. S. O. c. 109, which applied to all wills executed after the 1st day of January, 1874. The will of 1876 revoked the will of 1866. About 1880 A. caused the will of 1876 to be destroyed *animo cancellandi*, and expressing his intention to thereby revive the will of 1866, which was still in his possession,

Held, that no will made before 1st January, 1874, and revoked after that date, could be revived by any declaration of deceased or by implication, but that such revival must be effected by the observance of the formalities prescribed by sec. 24, cap. 109, R. S. O.

Held, that the deceased died intestate.

McCarthy, Q.C., for plaintiffs, who seek to establish will dated May 10th, 1866.

Lash, Q.C., for next of kin and administratrix.

Malone, for infants.

[McDOUGALL, Co. J., Toronto, Oct. 5.

The facts fully appear in the judgment of

McDOUGALL, SURR. J.—This is a surrogate issue tried at the February non-jury sittings of the County Court. The plaintiffs are suing to establish a will of their father, the late Patrick Conlin, alleged to have been executed by him on the 10th May, 1866, as his last will and testament. The will in question is produced in court, but has the signatures of the testator and the witnesses as well as the attestation clause torn off. About the year 1876, Patrick Conlin had a second will drawn; but it appears from the evidence that this will was destroyed by the testator's instructions, with the intention of cancelling it. The evidence further shows that the will of 1866 was in the testator's possession at the date of the destruction of the second will, and that he declared that this first will was the will which he intended should remain as his last will and testament.

Evidence was also given to throw some light upon the mutilation of the will of 1866. It appears that Patrick Conlin had a son John, who was dissipated, and who had been cut off by the will of 1866. It is apparent that the contents of this will were known in the family. John was in gaol at the date of his father's death for non-payment of a fine under a conviction for drunkenness. The fine was paid and he procured his liberty to attend his father's funeral. Evidence of a number of witnesses was given to show statements made by John to the effect that he had gained access to his father's papers, and deliberately torn off the signatures and seals, with a view to destroy his father's will, and so come in for a share of his father's estate, under the intestacy, which he thought would follow the destruction of the will. This statement or confession was sworn to as having been made shortly before his own death to his mother and sister. The same statement was also sworn to as having been made about the date of the funeral of his father, to his brother Philip Conlin. Two witnesses outside of the family were also called, who swore that John had made similar statements to them. These statements alleged to have been made by John to the various witnesses were strenuously objected to as being inadmissible, but I received the same (as I was trying the issue without a jury) subject to the objection.

Upon the view which, under the authorities, I am constrained to take of the law, it becomes unnecessary to discuss the question of the admissibility of these declarations of John. The important question to be decided is, Supposing the will of 1866 to be established as being duly executed by the testator, and supposing also the presumption that he had mutilated

the will himself with the intention of revoking it is also rebutted, could the will in any case be considered in law as the last will and testament of Patrick Conlin?

The execution of a second will in 1876 admittedly revoked the will of 1866. Did the destruction of the second will *animo cancellandi*, accompanied by declarations which showed that the testator supposed he had thereby revived the will of 1866, effect that purpose?

This point was not argued before me by counsel except by a mere reference to sec. 7 of the Wills Act, and no authorities on the point were submitted. I have carefully looked into the authorities, and I find the point expressly determined by several English cases.

In *Dickinson* v. *Swatman*, 4 Sw. & Tr. 205 (also reported), 6 Jur. N. S. 831 (30 L. J. P. 84), it was held under the English Wills Act 7 Wm. IV. and 1 Vict. c. 26, that where A. had made a will in 1826, and another in 1851 inconsistent with the former, the destruction of the latter with *animo cancellandi*, even when the act (as in this case) was accompanied by statements that the deceased intended thereby to revive the will of 1826, failed to do so. It was expressly held that a will could only be revived in the manner pointed out by 7 Wm. IV. and 1 Vict. c. 26, and not by declarations of the testator.

See also *Cutto* v. *Gilbert*, 9 Moore P. C. C. 131, which decided upon somewhat similar facts to those mentioned in the preceding case, that the deceased died intestate.

In the *Goods of Steele*, 1 L. R. P. & D. 575, decides that since the passage of the Wills Act, a will cannot be revived by implication. The sections of our own Wills Act are upon this point a transcript of the English statute, and these decisions fully cover the point in dispute.

To give effect to these decisions I must, therefore, find the issues herein in favour of the defendants, and find that the said will of Patrick Conlin, dated 10th May, 1866, is not his last will and testament, and that the said Patrick Conlin died intestate.

With reference to the question of costs, as the legal question upon which the case is now decided, was fully disposed of by the cases I have above referred to years before the litigation was commenced, I cannot allow them out of the estate. I therefore direct the plaintiffs to pay the costs of all the defendants.

DIVISION COURTS.

[Reported for the CANADA LAW JOURNAL.]

FOURTH DIVISION COURT OF THE COUNTY OF ONTARIO.

SMITH *v.* THE CORPORATION OF THE VILLAGE OF CANNINGTON.

Ditches and Watercourses Act—Right of engineer to recover fees—Parol evidence to vary written contract—Witness fees.

An engineer appointed under the Ditches and Watercourses Act is entitled to his fees, when the by-law appointing him is silent as to his rights, in case his award is set aside.

Parol evidence, inconsistent with the by-law of the corporation, of an agreement between members thereof and the engineer that no fees were to be charged by him in case of his award being set aside, is not admissible.

The Act applies to all municipalities, but

Semble, its powers should not be put in force unless clearly applicable, or if to do so would be oppressive or inequitable, or if the benefits ensuing are out of proportion to the cost of the work.

[DARTNELL, J.J., Whitby.

The plaintiff was the engineer appointed by the defendants under the Ditches and Watercourses Act. He made an award in a certain matter under the Act, which award was set aside by the senior judge of the county, on the ground, chiefly, that the provisions of the Act did not apply to incorporated towns and villages. The by-law appointing the plaintiff was silent as to his remuneration. The plaintiff claimed for his services, and the defence set up was that there was an agreement between the plaintiff and the reeve that there should be no charge to the corporation in case this or any award made by the plaintiff should be set aside.

DARTNELL, J.J.—It is not disputed that the services performed by the defendant were rendered, and were so rendered under the by-law, or that the amount claimed ($40) was not excessive. The question for decision is whether there was any valid agreement under which the plaintiff is precluded from recovering the amount of his claim.

I think the evidence of such an agreement is inadmissible as contradicting or varying the written contract, which must be taken as the Act, the resolution of appointment and the by-law. The two latter were silent as to any conditional agreement. The defendants' soli-

citor, before entering upon the defence, asked the plaintiff whether there was any agreement between him and the council, or any member thereof, that in the event of his award being set aside or not sustained that he was not to receive any remuneration for his services. He emphatically denied that there was any such conversation or agreement.

Upon opening the defence, it was proposed to call the defendants' reeve, to contradict the plaintiff. I rejected this evidence, and further reflection bids me believe, rightly, on the grounds: (1) That the defendants, having asked the plaintiff his version of the defence on a matter not arising out of his examination in chief, were bound by his answer, and could not call witnesses to contradict him in that respect. (2) That in any case it was parol evidence to vary or contradict the contract in writing. (3) That no agreement with any members of a corporation would bind the corporation itself; and (4) That such agreement, even if properly proved, would be void as against public policy.

I was and am of opinion that the plaintiff is entitled to recover the amount claimed. As a guide in future applications, I feel constrained to say that I do not agree with the learned senior judge that the Act does not apply to incorporated towns and villages. I have already otherwise ruled in former cases, without any doubt: where so much of the outlying territory of such municipalities consists of farming and cultivated land, to so construe the Act would manifestly circumscribe its intent and usefulness. Section 2 of the Act enacts that every municipality shall appoint by by-law an engineer. This would be meaningless if towns and villages are without its scope.

It seems to me, however, that its provisions and powers should be exercised with discretion, and should not be applied to cases where oppression or inequity would be the result. In fact, I doubt much whether the Act would apply to the circumstances under which this award was made, being a case in which the applicant sought and succeeded in charging upon the owners of a large number of vacant village lots the cost of his own house or cellar drain, which was of benefit to him alone. At the most, he should simply have been saved from the consequences of trespass in its construction.

Judgment for the plaintiff for $40 and costs.

The plaintiff, on taxation, claimed, and was allowed by the clerk, his professional fee as surveyor for attendance at court. The defendants appealed.

DARTNELL, J.:—He cannot be allowed the increased fee. He was at court not as a professional, skilled, or expert witness, but simply to prove his claim like any ordinary witness.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

[June 14.

KLOEPFER *v.* GARDNER.

Assignment for benefit of creditors—Creditor disputing deed—Right to dividend thereafter.

Where a trader had assigned all his goods in trust for the benefit of his creditors, one of the creditors having obtained judgment against such assignor, seized some of the goods so assigned, and on the trial of an interpleader issue attacked the validity of the assignment. The deed being sustained.

Held, affirming the judgment of the Court of Appeal (14 Ont. App. R. 60), that such creditor was not debarred by the said proceedings from participating in the benefits of said assignment and receiving his dividend thereunder.

Appeal dismissed with costs.

McClellan, Q.C., for the appellant.

McCarthy, Q.C., for the respondent.

[June 14.

C. A. R. *v.* TOWNSHIP OF CAMBRIDGE.

Municipal by-law—Voting on—Casting vote of returning officer—R. S. O. (1877) *c.* 174, *ss.* 152, 299.

Sec. 299 of c. 174 of the R. S. O. (1877), provides that in case of a vote being taken on a municipal by-law, the proceedings at the poll and for and incidental to the same and the purposes thereof, shall be the same, as nearly as may be, as at municipal elections, and all the provisions of secs. 116 to 169 inclusive of the Act, so far as the same are applicable, and except so far as is herein otherwise provided,

shall apply to the taking of votes at such poll, and to all matters incidental thereto.

And sec. 152, one of the sections relating to municipal elections so made applicable to the voting on a by-law, provides that "In case it appears upon the casting up of the votes as aforesaid, that two or more candidates have an equal number of votes, the clerk of the municipality, whether otherwise qualified or not, shall, at the time he declares the result of the poll, give a vote for one or more of such candidates so as to decide the election."

Held, affirming the judgment of the Court of Appeal for Ontario (14 Ont. App. R. 299), that this section 152 is not applicable to the case of a vote on a by-law, and the returning officer in case of a tie on such voting cannot give his vote in favour of the by-law.

Appeal dismissed with costs.

Chrysler, for the appellant.

O'Gara, Q.C., for the respondents.

[June 14.

BICKFORD *v.* CANADA SOUTHERN RAILWAY.

Contract for hire—Rolling stock—Agreement to purchase railway—Appeal.

B., the contractor for building the E. & H. Railway, and, practically, the owner thereof, negotiated with the solicitor of the C. S. R. for the sale to the latter of the E. & H. Railway when built. While the negotiations were pending, B. went to California, and the agent, who looked after the affairs of the E. & H. Railway in his absence, applied to the manager of the C. S. R. for some rolling stock to assist in its construction. The manager of the C. S. R. was willing to supply the rolling stock on execution of the agreement for sale of the road, which was communicated to B., who wrote a letter to the manager, in which the following passage occurred: "If from any cause our plan of handing over the road to your company should necessarily fail, you may equally depend on being paid full rates for the use of engine and cars, and any other assistance or advantage you may have given Mr. Farquier, the agent."

The negotiations for the purchase of B.'s railway by the C. S. R. having fallen through, an action was brought by the latter company against B. and the E. & H. Railway for the hire of the rolling stock, which was resisted by B. on two grounds: one that the rolling stock was supplied in pursuance of the negotiations for the sale of his road to the plaintiffs, which had fallen through by no fault of B.; and the other, that if the plaintiffs had any right of action, it was only against the E. and H. Railway, and not against him.

By consent of the parties, the matter was referred to the arbitration of a County Court Judge, with a provision in the submission that the proceedings should be the same as on a reference by order of the court, and that there should be a right of appeal from the award as under R. S. O. c. 50, s. 189.

The arbitrator gave an award in favour of the plaintiffs; the Queen's Bench Divisional Court held that there was no appeal from the award on the merits, and as it was regular on its face refused to disturb it; the Court of Appeal held that there was an appeal on the merits, but upheld the award; the defendants then appealed to the Supreme Court of Canada.

Held, affirming the judgment of the Court of Appeal, that the arbitrator was justified in awarding the amount he did to the plaintiffs, and that B. as well as the company was liable therefor.

Appeal dismissed with costs.

McCarthy, Q.C., and *Nesbitt*, for appellants.

Cattanach, for respondents.

[June 14.

HARVEY *v.* BANK OF HAMILTON.

Promissory note—Non-negotiable—Liability of maker.

H., a director of a joint stock company, signed, with other directors, a joint and several promissory note in favour of the company, and took security on a steamer of the company. The note was, in form, non-negotiable, but that fact was not observed by the officials of the Hamilton Bank, who discounted it and paid over the proceeds to the company. H. knew that the note was discounted, and before it fell due, he had, in writing, acknowledged his liability on it. In an action on the note by the Hamilton Bank against H.,

Held, affirming the judgment of the Court of Appeal, that although, in fact, the note was not negotiable, the bank, in equity, was entitled

to recover, it being shown that the note was intended by the makers to have been made negotiable, and was issued by them as such, but by mistake or inadvertence, it was not expressed to be payable to the order of the payee,

Appeal dismissed with costs.

McCarthy Q.C., and *Muir*, for the appellants.

Robinson, Q.C., and *E. Martin* for the respondents.

DOWNIE *v.* THE QUEEN.

Criminal appeal—Indictment for perjury—Evidence of special facts—Admissibility of.

D., in answering *faits et articles*, on the contestation of a *saisie-arrêt* or attachment, stated among other things: 1st, That he, D., owed nothing for his board; 2nd, that he, D., from about the beginning of 1880 to toward the end of the year 1881, had paid the board of one Francis, the rent of his room, and furnished him with all the necessaries of life with scarcely any exception; 3rd, that he, Francis, during all that time, 1880 and 1881, had no means of support whatever.

Being charged with perjury, in the assignments of perjury, and in the negative averments, the words used by D., in his answers, were distinctly negatived in the terms in which they were made.

At the trial, evidence was adduced and not objected to at the time by D. to prove that he, Francis, had paid to Downie in May or June, 1880, $42.00 for having boarded at his house in the month of May, 1880; that he had paid his board to Madam Duperrousel, and a part of his board to Francis Larin, and was held liable by the latter for part of his board during the months of September and October, 1880; that he was also held liable for part of his board at Mrs. Radford's during the months of January, February and March, 1881, and by Britain for having boarded at the Victoria Hotel in the months of April, May, June, July and August, 1881; and also, that he, D., had recieved from Francis an order on Benjamin Clements for $15, on account of which Clement had paid him, D., $7.50 in November 1880.

Held, that under the general terms of the negative averments of the assignment, it was competent for the prosecution to prove such special facts to establish the falsity of the answers given by D. in his answers on *faits et articles*, and therefore the conviction could not be set aside.

Appeal dismissed with costs.

McCarthy, Q.C., for appellant.

Hall, Q.C., for respondent.

THE CANADIAN PACIFIC RAILWAY *v.* CHALIFOUX.

Railway companies—As carriers of passengers—Measure of obligation as to latent defects—Arts. 1053-1675—C. C. P. Q.

Held, reversing the judgments of the courts below, that where the breaking of a rail is shown to be due to the severity of the climate and the suddenly great variation of the degrees of temperature, and not to any want of care or skill upon the part of the railway company in the selection, testing, laying and use of such rail, the company is not liable in damages to a passenger injured by the derailment of a train through the breaking of such rail. Fournier, J., dissenting on the ground that as the accident was caused by a latent defect in the rail in use, the company was responsible.

Appeal allowed with costs.

Abbott, Q.C., for appellants.

Geoffrion, Q.C., for respondent.

FORSYTH *v.* BURY.

Judgment in licitation—Binding on parties to it—Constitutionality of an Act of Incorporation—When its validity can be questioned, and by whom.

The Island of Anticosti held in joint ownership by a number of people, was sold by licitation for $101,000. The report of distribution allotted to respondent (plaintiff) $16,578.66 for his share as owner of one-sixth of the island acquired from the Island of Anticosti Company, who had previously acquired one-sixth from Dame C. Langan, widow of H. G. Forsyth.

The respondent's claim was disputed by the appellant, the daughter and legal representative of Dame C. Langan, alleging that the sale by Mrs. C. Langan through her attorney, W.

L. F., of said one-sixth to the Anticosti Company was a nullity, because the Act incorporating the Island of Anticosti was *ultra vires* of the Dominion Government, and that the sale by W. L. F., as attorney for his mother, to himself as representing the Anticosti Company, was not valid.

The Anticosti Company was one of the defendants in the action for licitation and the appellant an intervening party; no proceedings were taken by respondent prior to judgment attacking either the constitutionality of the Island of Anticosti Company's charter or the status of the plaintiff now respondent.

Held, affirming the judgment of the court below, Sir W. J. RITCHIE, C.J., and GWYNNE, J., dissenting, that as the said Dame C. Langan had herself recognised the existence of the Company and as the appellant the legal representative of Dame C. Langan, was a party in the suit ordering the licitation of the property, she, the appellant, could not now on a report of distribution raise the constitutional question as to the validity of the Act of the Dominion Parliament constituting the Company, and was estopped from claiming the right of setting aside a deed of sale for which her mother had received good and valuable consideration.

Kerr, Q.C., for appellant.

Laflamme, Q.C., and *David*, for respondent.

Appeal dismissed with costs.

Application for leave to appeal to the Privy Council was refused. See *Canada Gazette*, Vol. II., p. 418.

DEDRICK *v.* ASHDOWN.

Chattel mortgage—Power of sale—Exercise of possession of goods by mortgagor—Implied covenant for—Covenant not to sell goods Ordinary course of business.

D., a trader, being indebted to A., gave him a chattel mortgage of all his stock-in-trade and business effects. The mortgage contained a clause, among others, to the effect that if the mortgagor should attempt to sell or dispose of, or in any way part with the possession of the said goods and chattels, or to remove the same from his business premises, the mortgagee might take possession of and sell them, as in case of default in payment.

After the mortgage had been given and registered, A. obtained judgment in a suit previously begun against D., and issued an execution, under which the sheriff seized and sold the goods covered by the mortgage. The execution, was set aside by the court as being issued against good faith, and D. brought an action of trespass, with a count in trover, against A. for the wrongful seizure and conversion of his goods. Upon the pleas of not guilty and not possessed, the defendant in such action attempted to justify his entry and seizure of the goods under the chattel mortgage, alleging a breach of the covenant not to sell.

Held, 1. That the terms of the chattel mortgage implied an agreement that the mortgagor was to remain in possession of the goods mortgaged until default, there being no express provision to the contrary.

Held, 2. That selling or disposing of the goods as in the above provision only meant sales other than in the ordinary course of business.

Held, 3. That the defendants acted in the seizure and sale of the goods only under the execution, and could not justify for the wrongful seizure under the mortgage when the mortgagor was guilty of no default.

Judgment of court below (4 Man. L. R. 139) reversed.

Appeal allowed with costs.

Ewart, Q.C., for appellant.

Robinson, Q.C., for respondent.

[June 14.

MERCHANTS' MARINE INSURANCE CO. *v.* BARSS.

Marine insurance Interest insured Not disclosed when policy issued Right to claim on —Notice of abandonment Authority to give.

B. & Co., part owners of the barque L., cabled to V., managing owner at St. John, N.B., "Insure hull . . . on our account." The application made by V. stated that "insurance is wanted by H. B. & Co., on account of themselves," and the policy issued thereon insured the barque "on account of whom it may concern." The barque being lost, notice of abandonment was given to the insurers by V., on account of B. & Co., V. having no special authority to give such notice, B. & Co.,

who owned eight shares in the barque, claimed the insurance on behalf of themselves and other owners whom they represented, being twenty shares in all.

Held, that the insurers were not relieved on account of the valve insured not being disclosed at the time of effecting the insurance.

Held, also, that V. had authority to give the notice of abandonment under his authority to insure.

Appeal dismissed with costs.

Weldon, Q.C., and *C. A. Palmer*, for the appellants.

J. G. Forbes, for the respondents.

[June 14.

JOHN *v.* THE QUEEN.

Criminal law — Rape — Indictment — Conviction for assault with intent to commit.

An indictment for rape charged the prisoner "violently and feloniously did make an assault on her, the said R., then violently and against her will, feloniously did ravish and carnally know against the form," etc.

Held, affirming the judgment of the court below on writ of error, that on this indictment the prisoner could be convicted of assault with intent to commit rape.

Appeal dismissed with costs.

Robinson, Q.C., for the appellant.

Dr. McMichael, Q.C., for the respondent

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

MEAD *v.* O'KEEFE.

Partnership — Dissolution — Expulsion of members of firm — Good-will, right to purchase-money paid for.

J. H. M. entered into partnership with the defendant in the business of maltsters and brewers, contributing the sum of $14,071.80, as his share of the capital stock; and he and the defendant H., each paid to the defendant, O'K., $12,500 for his good-will in the business.

One of the stipulations in the partnership articles was (No. 3) to the effect that any of the partners improperly dealing with the moneys or assets of the partnership should be liable to expulsion from the firm by a simple notice from the others or other of them to the effect that the partnership was at an end, in which case the partner so acting improperly should not have any claim for good-will in the partnership.

It was clearly shown that J. H. M., during the period which the partnership had been in existence (about seventeen months), had been in the habit of lending the funds of the firm to his friends, and otherwise so improperly dealing therewith as to have fully justified his partners in giving notice expelling him from the partnership. Instead of doing so, however, they verbally notified him that their partnership must cease, and then with him signed a notice, which was duly published, that the partnership was dissolved by mutual consent.

J. H. M. at the same time executed a transfer of all his interest in the partnership business to his mother, the plaintiff, and she sued for the price paid by him to O'K. for the good-will.

The Common Pleas Division (CAMERON, C.J., dissenting) held the plaintiff entitled to recover the sum so paid; and an appeal from such finding was, owing to an equal division of the judges of this court, dismissed with costs.

Per HAGARTY, C.J.O., and Osler, J.A., while agreeing with the other members of the court that the dissolution had not been effected by the explusion of J. H. M. under the 3rd clause, the most plaintiff is entitled to is a reference to inquire what was the value of the good-will of J. H. M. in the partnership.

HIGH COURT OF JUSTICE FOR ONTARIO.

Practice.

Mr. Dalton.] [Sept. 14.

OLDFIELD *v.* BARBOUR.

Mechanics' lien—One lien against two owners Joinder of parties—Summary application in action.

Four mechanics worked with a contractor for wages upon two buildings owned by differ-

ent persons, and each registered a lien for his services on both the buildings against the contractor and against both the properties on which they worked, and against both the owners, each lien being for the amount of the whole wages claimed in respect of service as to both properties All four joined in one action against the contractor and the two owners to enforce their liens.

Upon a summary application by the contractor the mechanics' liens and writ of summons were set aside.

Allan McNabb, for the plaintiff.

W. Davidson, for the defendant Barbour.

Boyd, C.] [Sept. 19.

DONEGAN *v.* SHORT.

Arrest—Ca. re.—Breach of promise—Statement of damage—Corroboration—Discharge of defendant.

In an action for breach of promise of marriage the defendant was arrested under a *ca. re.*, the order for which was granted upon an affidavit which did not swear to any amount of damage. Upon a motion to discharge the defendant from the custody of his bail, he denied the promise of his marriage, and the plaintiff filed no affidavit corroborating her own. The intent of the defendant to leave the country rested on alleged admissions made by the defendant to the plaintiff, which he denied, and he also brought forward a strong fact against his likelihood to abscond from the province.

Held, that under these circumstances the defendant should be discharged, and the bail bond delivered up to be cancelled.

Middleton, for the plaintiff.

W. M. Douglas, for the defendant.

Armour, C. J.] [Sept. 20.

Re ONTARIO FARMERS' SUPPLY CO. AND ONTARIO AND QUEBEC R. W. C.

Railway—Land—Time—51 Vict. c. 29, s. 164 (D.).

In the computation of the ten days' previous notice necessary to be given under 51 Vict. c. 29, s. 164 (D.), to obtain a warrant for the possession of lands by a railway company, the day of the service of the notice, and the day upon which the application for the warrant is made, must both be excluded.

McMurchy, for the applicant.

S. M. Jarvis, contra.

Armour, C. J.] [Sept. 21.

WATERHOUSE *v.* MCVEIGH.

Arrest—Order for ca. sa.—Powers of County Court judge—Power of judge in court to rescind order.

The judge of a County Court has no power, either as such judge or as local judge of the High Court, to order the issue of a *ca. sa.* in an action of the High Court.

Cochrane Manufacturing Co. v. *Lamon*, 11 P. R. 351, followed.

A judge of the High Court, sitting in "single court," has power to set aside an order of a county judge for a *ca. sa.*

J. A. McCarthy, for the plaintiff.

Hewson and *Plaxton*, for the defendant.

Rose, J.] [Sept. 21.

COLTER *v.* MCPHERSON.

Discovery Malicious prosecution—Investigation of transactions between plaintiff and a third person—Action for damages.

The statement of claim set out two causes of action.

1. Falsely and maliciously, and without reasonable and probable cause preferring a charge of perjury.

2. Falsely, etc., preferring a charge of obtaining a valuable security by false pretences.

The defence averred that the plaintiff and one Jones conspired together to obtain two promissory notes from defendant by false pretences; that the plaintiff first visited the defendant, and by fraud and falsehood, induced him to enter into a contract to purchase certain hayforks, and that Jones followed him in course of time in pursuance of their fraudulent scheme, and by fraud and falsehood and false pretences obtained the notes.

Held, that upon examination of the plaintiff for discovery, the defendant should be per-

mitted to inquire into the dealings between the plaintiff and Jones fully and freely to ascertain whether Jones and the plaintiff were acting in concert, and whether any false pretence made by Jones was in fact a false pretence by the plaintiff, and for this purpose might investigate all sales of forks made by plaintiff or Jones or either of them under any agreement or arrangement, and the history of all notes received in carrying out such sales, and of all entries in the plaintiff's bill-books and all other books relating to such transaction.

Osler, Q.C., for the plaintiff.

Ermatinger, Q.C., for the defendant.

Mr. Dalton.] [Sept. 22.

BRODERICK *v.* BROATCH.

Notice of trial—Service of before defence filed —Irregularity.

Where the statement of defence was filed on the last day for giving notice of trial for the Belleville Assizes, and a joinder of issue and jury notice were filed on the same day, but after the filing of the defence.

Held, that the service of notice of trial with the joinder and jury notice, on the same day before the filing of the defence, was not an irregularity.

Affirmed by ARMOUR, C.J., September 25th.

Mahoney, for the plaintiff.

W. H. Blake, for the defendant.

Ferguson, J.] [Sept. 24.

COLE *v.* HALL.

Mechanics' lien—Priority—Execution creditor —Con. Rule 127.

The plaintiff registered a mechanics' lien on the 29th October, 1887, and commenced his action to enforce it on the 30th November, 1887.

Judgment was obtained on the 14th May, 1888, and on the reference therein ordered, the Master in Ordinary by an order of the 21st August, 1888, made one Rogers, an execution creditor whose writ had been placed in the sheriff's hands on the 3rd November, 1887, a party defendant in his office as a subsequent incumbrancer. On appeal by Rogers under Con. Rule 127,

Held, that the plaintiff's claim was prior to that of Rogers.

C. Millar, for Rogers.

Hoyles, for the plaintiff.

Ferguson, J.] [Sept. 26.

EDWARDS *v.* EDWARDS.

Costs, security for—Garnishing matter—Evidence of residence out of jurisdiction.

In an issue between a judgment creditor and a garnishee as to the liability of the latter to the judgment debtor,

Held, that there was power to order security for costs; but

Held, that the refusal of the solicitor for the judgment creditor to disclose his client's place of abode, was not sufficient evidence of his living out of the jurisdiction to support an order for security for costs.

E. R. Cameron, for the judgment creditor.

Shepley, for the garnishees.

Law Students' Department.

THE following papers were set at the Law Society Examination before Trinity Term, 1888.

FIRST INTERMEDIATE.

REAL PROPERTY.

1. What was the decision in Taltarum's case, and what was its effect?

2. What is the difference between a term of years and an estate in fee simple? Explain fully.

3. How was a mortgage regarded at common law, and how in equity? Is there any difference now? Why?

4. What is the rule in Shelley's case? Give an example of its application.

5. For how long a period must a vendor of land show title?

6. What is an estate tail?

7. What is meant by an estate in dower, and what by an estate by the courtesy?

SMITH'S COMMON LAW.

1. What is the law in regard to the liability of a tenant of premises which are destroyed by fire?

2. What are the respective rights of the creditors of a firm, and the creditors of one of the partners, as regards payment of their debts out of the effects of the firm, and of the partner respectively?

3. What is the legal relation and responsibility of a banker to his customer in regard to money deposited in the bank by the customer?

4. Explain the duty and responsibility of a person who employs a carrier to convey a dangerous article.

5. Explain the difference between a *penalty* and *liquidated damages*.

6. What will constitute *prima facie* proof of the due receipt of a letter?

7. Explain the meaning of *easement*, and give an example.

EQUITY.

1. Define a trust. Into what different heads are they divided?

2. Explain the maxim: Equality is equity, and illustrate.

3. A mortgagor, at the time of the principal becoming due, pays the same to the mortgagee's solicitor, to whom he has been in the habit of paying the interest: the solicitor appropriates the money to his own use. On whom will the loss fall, and why?

4. Explain the doctrine of satisfaction. When does it usually occur?

5. State the rules as to the appropriation of payments between debtor and creditor.

6. A trustee, resident in Toronto, has occasion to forward a sum of money to a co-trustee living in Winnipeg: the latter appropriates the money. Is the Toronto trustee liable? Explain the general law.

7. Explain the general law as to the enforcement by specific performance of contracts for the sale of lands and chattels respectively.

CONTRACTS—STATUTES.

1. State the characteristics of *Obligation*.

2. What are the different modes whereby a contract is discharged? Distinguish them.

3. Distinguish *assignability* from *negotiability*.

4. A and B agree with C to buy a Patent Right if D approves of the Patent. A, B and C sign an agreement under seal, whereby A and B agree to sell and C agrees to buy the right, nothing being said in the document about D's approval. How far is evidence allowed on A and B's behalf to show that they are not liable, D not having approved? Why?

5. What is the effect of illegality on a contract?

6. In what cases does an agent require an authority under seal?

7. A promissory note is made on 2nd May, 1888, at three months. On the 2nd August, 1888, a renewal note is made, payable ten days after date. On what day is the renewal note due?

REAL PROPERTY.

Honours.

1. What agreements and other instruments relating to land are required to be in writing?

2. What leases must be under seal in order to be valid?

3. What is meant by a general occupant, and what by a special occupant?

4. What were the principal charges made in the law of descent by the Statute of Victoria?

5. What significance had the word "grant" in a conveyance, and how has it been affected by Statute?

6. Of what use are recitals in deeds more than twenty years old? Why?

7. What is meant by saying that a use cannot be limited on a use?

SMITH'S COMMON LAW.

Honours.

1. What is the difference between tenants *in fee*, *in tail*, and *for life*, in regard to the right to *commit waste*?

2. Under what circumstances is a private person justified in arresting another without a warrant?

3. What is the law as to the *privilege* of speeches in *Parliament* and at *public meetings*, and of *reports* of such speeches in public newspapers?

4. Define who are *legitimate* children.

5. Explain the difference between *factors* and *brokers*?

6. State the exceptions to the rule which excludes *hearsay evidence*.

7. Define *dormant partner* and *nominal*

partner and explain the difference, if any, between them in regard to their liability on the contracts of the firm.

EQUITY.

Honours.

1. What is meant by the term "Marshalling of Assets?" What, if any, distinction is there with respect to the same in regard to private bequests, and those to a charity?

2. Define the equitable doctrine of election, and give an example.

3. A makes a mortgage to B for $1,000, with interest at five per cent. A proviso is inserted in the mortgage to the effect that if the interest be not punctually paid seven per cent. shall be charged. Explain the effect of such proviso.

4. Are there any cases in which mere inadequacy of consideration will constitute a ground for avoiding a contract? If so, what?

5. Define mistake, and distinguish between the relief granted in cases of mistake of law and mistake of fact respectively.

6. To what extent does the lien of a solicitor on the deeds, books and papers of his client extend?

7. A, knowing that there is a valuable coal mine on B's farm, enters into a binding contract with him for the purchase of the same at the ordinary agricultural value. B at the time is ignorant of the existence of the mine, but after the contract is signed discovers it, and seeks to have the contract set aside. Can he succeed? Explain.

CONTRACTS STATUTES.

Honours.

1. A offers B by letter a certain number of sewing machines at a certain price. B by letter accepts the offer. Is A bound to deliver the sewing machines? If not, why not?

2. A sells B a piece of plate. The plate is marked with the Hall Mark, but A knows it is not sterling silver. B pays for the plate as if it were sterling silver. He afterwards finds he has an inferior article. Is A liable? Why?

3. A puts $1,000 to B's credit in order that B, on the strength of this fictitious credit, may get goods from C, the understanding being that as soon as the goods are got the $1,000 will be returned. Before B obtains the goods A demands back his $1,000. B refuses to return the money. Can A compel him to return it? Why?

4. "An executed contract cannot be discharged by a parol waiver." Why? What exception?

5. When a contract is broken and action is brought upon it, how can we arrive at the amount which the plaintiff, if successful, ought to recover?

6. If the direct object of the parties to a contract is unlawful, but their intention innocent, how far is the contract void?

7. A verbally orders from a cabinet-maker a cabinet to cost $40. At the time the agreement is made no such cabinet is in existence, but it is made according to instructions. Then A refuses to take it. What defence has A to an action by the cabinet-maker?

Miscellaneous.

SLIGHTLY PERSONAL.—It used to be the custom for judges when on circuit, in Scotland, to march in procession with the municipal authorities to the kirk on Sunday. Lord Cockburn, in his diary, relates that when Lord Moncrieff was at Glasgow, judicially, for the first time, he went to hear his friend, the pious and venerable Dr. Brown, preach. He was unwigged, but perfectly well known in the congregation. The minister was not dreaming of this judge, or of circuits, or any modern thing of the kind, but his text began: "There was in a city a judge, which feared not God, neither regarded man." He had only announced his text when the turning of all heads made him see the learned lord, and he could hardly proceed for confusion and horror.

NEW LAW BOOKS.—The Blackstone Publishing Company, as a result of their enterprise in publishing law books at low rates, have sold 240,000 volumes of their first and second series in two years. To those who do not wish to duplicate their libraries, they now offer the privilege of selecting twelve or more volumes from the first and second series at the yearly rates. The third series will commence on December 1st, 1888. A partial list of the books recommended by the general

editor for reprinting has been received. It contains many costly works. At least four volumes by American authors will be published in the coming series. All the books reprinted will be from the very latest editions.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for the weeks ending September 29th and October 6th contain Chaucer and the Italian Renaissance, *Nineteenth Century*; My Treasure, *Blackwood's Magazine*; A Winter in Syria, *Contemporary Review*; John Ward, Preacher, by Archdeacon Farrar, *Longman's Magazine*; Mr. Forster and Ireland, *Blackwood*; The Services of Catholic Missionaries in the East to Natural Science, *Nature*; Admiral Coligny, *Quarterly Review*; The Glorified Spinster, *Macmillan's Magazine* and *The Spectator*; Military Genius, by Lord Wolseley, *Fortnightly Review*; Recollections of Mr. Forster, *National Review*; An Artist on Tour, *St. James's Gazette*; The Central-Asian Railway, *Spectator*; Shakespeare and Modern "Isms," *St. James's Gazette*; Cornish Customs of To-day, *Welcome*; the conclusion of "Nat," and poetry and miscellany. A new volume began October 1st. 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 $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

LOOK TO THE DRAINS!

Worldly Solicitor (*soliloquizes*).—Confound old Capel Court! Why can't he let the matter stand till the "Long" is over? making me come up specially from Eastbourne. I had half a mind to tell him to go to ——

Quiller.—Mr. Capel Court, sir!

W. S.—Ah! my dear sir, and how are you? Better, I sincerely trust.

Mr. C. C.—Thanks, yes, and my wife and daughter are, I am thankful to say, better; and now, sir, I mean to make it hot—very hot, sir—for that rascal who let me that house——

W. S.—Stay, stay; you must remember that at present I am scarcely in possession of the facts.

Mr. C. C.—True, quite true. Yes, yes; no doubt you wondered at my conduct, dragging you up from Eastbourne, and coming down from Scotland myself. Well, you remember the house I took last season in Kensington——

W. S.—Certainly. Did I not have the pleasure of dining with you there once or twice?

Mr. C. C.—Why, of course you did. Well, sir, that house was a cesspool, a poison trap, a—a—well, the drains were in a disgraceful state—simply disgraceful state. My poor wife and daughter were attacked, as you know, by typhoid fever. I had to send them away to my place in Scotland, and I am pleased to say they are now recovering. I then had the place inspected by a sanitary engineer; and here is his report. Read it, sir, read it (*hands over paper*).

W. S.—Truly a bad condition of affairs—as bad as can be.

Mr. C. C.—And when I took the house—you know I am very fidgety about drains—I made the most particular inquiries, and the scoundrel——

W. S.—Landlord, my dear sir, landlord.

Mr. C. C.—No, sir, scoundrel! scoundrel! he distinctly told me that he recently spent £40 on the drains, and that he could confidently think his house was the best drained house in Kensington. Now look at that report: the drains are simply brick drains, they are defective, the soil is saturated with sewage. On my own responsibility I sent him a copy of this report, and said that I should at once take steps to expose his fraud. And—

W. S.—Pardon me. Did he reply?

Mr. C. C.—Oh yes, he answered my letter with the coolest possible impudence——

W. S.—Have you that letter?

Mr. C. C.—Yes—here it is (*hands it over*).

W. S.—Ah! says he lived there himself for two years—knew they were brick drains, spent the money in having them put in order, and had reasonable grounds for believing, and did honestly believe, they were in good order; expresses deep sympathy with you in your trouble, but declines to consider himself to blame. Hum! Ah! Well, did you answer this?

Mr. C. C.—Answer it? Why, of course I did. I—I said——

W. S. Quite so, quite so! Did he answer?

Mr. C. C. There is his reply. It adds insult to injury.

W. S. (*reads*). Again expresses sorrow and sympathy—yes, yes, declines to consider himself liable—having sympathy with you in your trouble, does not desire that you should have more—eh? what? advises you to read the *Times* more regularly—refers you to a case, recent, quite recent, end of July in which dispute almost similar, and the Appeal Judges held that the landlord was not liable simply tells you this out of feelings of kindliness, and earnestly advises you to consult your lawyer.

Mr. C. C. There! What do you say to that? Is it true that there has been such an infamous—such a disgraceful decision?

W. S. Oh yes, quite true. He refers to a decision given by the Court of Appeal. (*Rings.*) Quiller, the *Times Law Reports* for July—here—stay—ah! here it is, p. 711, 25th July *Butler* v. *Goundry*. Yes, the facts quite similar—the statement, Lord Justice Lindley said, was "in fact untrue, but was honestly made." That being so there could not be said to be fraud or misrepresentation.

Mr. C. C. What, sir! do you mean to say that I may safely make a false statement if I simply think it to be true?

W. S. Most certainly. You are not making a misrepresentation if you think you are telling the truth.

Mr. C. C. And how the devil—pardon me—how is any one to know what I *think*?

W. S. Question of evidence simply. Inward thoughts are indicated by outward acts. Your landlord, you see, *did* have the drains seen to: they worked well *then*: he lived there himself, and did not have fever: clearly he was justified in thinking his house well drained.

Mr. C. C. Then are you—are you going to advise me that I have no remedy against him at all—that——

W. S. No, no, my dear sir, wait a moment. The gentleman, it is true, reads his *Times* diligently, and evidently relies on his legal knowledge; but we shall prove to him the truth of the old saying, that a man who is his own lawyer has a fool for his client. He will soon find this out when he is driven to seek his lawyer's assistance. Answer me one question. I am right in thinking that you took the house for the season *furnished*?

Mr. C. C. Certainly, certainly. Had I taken a lease I should have sought your advice. As I only took the house for six months, furnished, I allowed the house agent to carry the matter through.

W. S. Then, my dear sir, we are all right. I will bring an action against him for damages for breach of an implied warranty that the house was reasonably fit for habitation.

Mr. C. C. But can we do that?

W. S. Certainly. When a man lets a furnished house there is such a warranty, and that will, it has been decided by a well-known case, *Wilson* v. *Finch Hatton*, cover defects in drains.

Mr. C. C. Ah! but then he will be able to say he didn't know of the defect.

W. S. That in this case will be no defence.

Mr. C. C. Well, well, no doubt you are right, only—

W. S. One moment. When you sue for damages for misrepresentation you have to prove knowledge. When you sue for breach of warranty, whether the man knows or does not know is immaterial.

Mr. C. C. Oh! really! Then supposing the house had been *unfurnished*, why could we not have sued for warranty?

W. S. Because on the letting of an *unfurnished* house there is no warranty, so that you can only sue for misrepresentation. On the letting of a furnished house there is a warranty that it is reasonably fit for habitation.

Mr. C. C. Then the whole question turns on whether the house is furnished or unfurnished?

W. S. Quite so. That is *the* point.

Mr. C. C. You're quite certain about all this?

W. S. Perfectly certain, my dear sir, perfectly certain.

Mr. C. C. And supposing a man's wife and daughter catch typhoid fever in a house, why should his right of action depend on the presence or absence of furniture? The drains give them the typhoid fever, not the furniture.

W. S. Really, my dear Mr. Capel Court, you must put that conundrum to the Bench.

Mr. C. C. Well there! Never mind, the law seems intensely stupid on this point. However, according to you I shall be able to mulct

this rascal in damages, so I won't quarrel with it—take the necessary steps. And now, when are you coming to Scotland? Next week, you promised.

W. S.—It will be next week. May I write fixing the day?

Mr. C. C.—Certainly; good-bye. You return to Eastbourne?

W. S.—Yes, till next week. Good-bye.

W. S. *(soliloquizes)*—That's very true; the drains give them fever, not the furniture—that Capel Court's no foo.—yes, it's a curious rule of law.—*Law Notes.*

Appointments to Office.

ONTARIO.

MASTER OF TITLES.

District of Algoma.

Hon. Walter McCrea, of Sault Ste. Marie, local Master of Titles for the District of Algoma, *vice* H. C. Hamilton, resigned.

POLICE MAGISTRATE.

Grenville.

F. A. Tallman, of Merrickville, Police Magistrate in and for the village of Merrickville.

DIVISION COURT CLERKS.

Hastings.

H. Ashley, of Belleville, Clerk of the First Division Court of the County of Hastings, *vice* R. C. Hulme, removed from office.

Wellington.

L. R. Adams, of Drayton, Clerk of the Seventh Division Court of the County of Wellington, *vice* Geo. Allan, deceased.

DIVISION COURT BAILIFF.

District of Thunder Bay.

G. Donovan, of Port Arthur, Bailiff of the First and Third Division Courts of the District of Thunder Bay.

QUEBEC.

PUISNE JUDGE OF QUEEN'S BENCH.

Joseph G. Bossé, of the City of Quebec, Puisne Judge of the Court of Queen's Bench in the Province of Quebec, *vice* Hon. Samuel C. Monk resigned.

Law Society of Upper Canada.

CURRICULUM.

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 Society 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, four 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. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. 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.

10. 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.

11. 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.

12. 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.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with 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.

14. 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.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. 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 seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term, and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. 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.

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

21. 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.

22. No information can be given as to marks obtained at Examinations.

23. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	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

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, For 1888, 1889, and 1890.

Students-at-Law.

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

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

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

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

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.

MATHEMATICS.

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

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

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

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.

1888 / 1890 Souvestre, Un Philosophe sous le toits.
1889 Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

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

Articled Clerks.

In the years 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, 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.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

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 by Candidates who obtain 75 per cent. of the maximum number of marks.

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, 2nd edition; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour 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. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's 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 Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Trinity Term, 1887.