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WE congratulate the County of York Law Association on its success during the past year. The recommendations regarding the registry laws, contained in the annual report of the Association, which we have been compelled by pressure of other matter to hold over until our next issue, are specially deserving of the prompt and favorable consideration of the Provincial Legislature. The officers elected for the current year are:—President, Christopher Robinson, Q.C.; Vice-President, John Hoskin, Q.C.; Treasurer, Walter Barwick; Curator, E. D. Armour; Secretary, Frank Drake; Trustees, Messrs. Lash, Q.C., J. H. Macdonald, Q.C., N. G. Bigelow, Nicol Kingsmill, and W. Macdonald; Auditors, J. T. Small, Alan Cassels.

THE decision of the Chancellor in *Prittie* v. *Crawford*, to which we referred in a former issue (p. 1), was not, we are informed, a considered judgment of his lordship. The case was one in which the purchaser was anxious to complete his bargain, and the decision of the Court being asked, under the Vendors and Purchasers Act, was consequently virtually *ex parte*, because the only persons really interested adversely to the vendor were the execution creditors, and they of course were not parties to the proceedings. An off-hand judgment given under these circumstances can hardly be entitled to the same weight as one pronounced after full argument, and after due deliberation. The short point decided was that an execution against lands does not bind the interest of the debtor in lands under an agreement to purchase. We do not ourselves feel quite satisfied that this decision can be made to square with the provisions of sec. 25 of the Execution Act, which does not appear to have been brought to the learned Chancellor's attention. That section says: "Any estate, right, title or interest in lands which, under sec. 9 of the Act Respecting the Transfer of Real Property, may be conveyed or assigned by any person, *or over which he has any disposing power which he may, without the assent of any other person, exercise for his own benefit, shall be liable to seizure and sale under execution* against such person," etc., etc. This section seems to us to deal with two classes of property—first, estates and interests which can be conveyed under sec. 9 of the Act Respecting the Transfer of Real Property, viz.: "a contingent, an executory and a future interest, and a possibility coupled with an interest in land, whether the object of the gift, or limitation of such interest or possibility be, or be not, ascertained, also a right of entry, whether immediate or future, and whether vested or contingent in to or upon, land"; and, secondly, with those interests over which the debtor has any disposing power which he can exercise for his own benefit without the assent of

any other person. The interest of a purchaser in land, under an agreement to purchase, we should have thought would clearly come under the last head, and if our construction of the Execution Act is correct, it would be unsafe in practice to act upon the decision in *Prittie* v. *Crawford*.

Before concluding these remarks, we may observe that practitioners seem disposed to think that a decision under the Vendors and Purchasers Acts is a sufficient indemnity against adverse claims, and cases are not unfrequently presented to the Court with little, if any, argument, both parties being desirous that the point raised should be decided in favor of the vendor's title. We think this is a great mistake, because third parties whose rights come in question are not bound by the decision, and therefore the purchaser on all such applications, instead of being supine, should put himself in the place of the person entitled to the supposed adverse claim, and should present every argument to the Court that might reasonably be urged in a suit between hostile parties. The decision of the Court under the Vendors and Purchasers Act so obtained may prove some sort of protection, but otherwise, we fear, in many cases it will prove but a delusion and a snare.

REMEDIES OF INDIVIDUAL CREDITOR OF A PARTNER OF A FIRM.

THE branch of the law dealing with the enforcement of a judgment by a judgment creditor of a single partner in a firm in respect to an individual liability, against the interest of his debtor in the firm, is stated by Lord Justice Lindley (Law of Partnership, 5th ed., p. 362) to be in a most unsatisfactory condition, and requiring to be put on an entirely new footing. At the part of his work above referred to, Lord Justice Lindley deals at length with the mode in which a share in firm property is taken in execution for the separate debts of its owner. To sum up what he there states in words found in the recent case of *Helmore* v. *Smith*, 35 Chy. D., at p. 447: "What the sheriff has got to sell is not the share and interest of the execution debtor in the partnership, but the share and interest of the execution debtor in such of the chattels of the partnership as are seizable under *fi. fa.* The unfortunate purchaser from the sheriff has to find out what he has really had assigned to him, and that he can only do by a partnership account; there is no other mode of proceeding. That does involve practically a dissolution of the whole concern." The levy and subsequent sale to a stranger thus amounts to a dissolution: *Partridge* v. *McIntosh*, 1 Gr., at p. 54; *Flintoff* v. *Dickson*, 10 U.C.R., at p. 431; but *Helmore* v. *Smith* shows that the mere fact of the levy being made does not *ipso facto* work a dissolution. Moreover the sheriff may not take the goods out of the possession of the other partners, who have a lien on them for the satisfaction of the partnership debt: *Ovens* v. *Bull*, 1 A.R. 62; *Sanborn* v *Roger*, 21 Am. Law Reg., 799, and notes; Story's Eq. Jurisp., secs. 677, 678.

The question how far the partners of a firm who are anxious to avoid a dissolution and a winding up of the partnership, can prevent this result in the event of a judgment creditor of an individual partner for an individual liability not being satisfied out of the private estate of his judgment debtor, but seeking realization by reason of his judgment debtor's interest in the firm, does not appear to be treated of in Lord Justice Lindley's work. We have seen that if the sheriff sells to a stranger the interest of the judgment debtor in the firm chattels, this gives the purchaser a right to an account of the partnership, for it is necessary that he should have one to ascertain and realize the value of that which he has bought, and the sale to him operates as a dissolution. Now, *Helmore* v. *Smith*, 35 Chy. D., 436, shows that if the other partners, instead of letting a stranger buy, buy in at the sheriff's sale with funds of the partnership, then there is no dissolution.

In many cases, it must be remembered, the other partners would come to the Court directly the sheriff levied, and would in their own interest obtain an order dissolving the partnership, directing the sheriff to withdraw, directing the accounts to be taken, and the value of the execution debtor's interest in the property seized by the sheriff ascertained, and appointing a receiver. And in Churchill on Sheriffs, 2nd ed., p. 220, it is said that on a levy being made the partners of the execution debtor "*should*" obtain such an order, apparently overlooking the fact that there might be a case where an immediate dissolution of the firm would mean bankruptcy, owing to firm liabilities, and where consequently the judgment debtor's interest would at the time be worth nothing, and yet where, if time was allowed for the firm to continue undisturbed, there might be great likelihood of its business reviving and its again becoming solvent. In such a case the judgment creditor of the separate partner, though aware that the firm was insolvent, might yet press for a winding up in the hope that to avert catastrophe some means would be found by the other partners to pay him off.

According to American decisions, for which, however, there does not appear to be English or Canadian authority, the separate creditors may at any time after a levy by the sheriff, and before sale, file a petition against the other partners for an account of the joint business: 14 Rep. 617; Bates' Law of Partnership, sec. 928. And if the firm is solvent this would appear reasonable enough, because a purchaser at a sheriff's sale of the interest of one partner in the partnership assets must necessarily buy in the dark, since, till the accounts are taken, the value of that interest must remain unascertained.

It would, however, appear monstrous to contend that a dissolution of the firm and a winding up and taking of the account must always be decreed if a separate judgment creditor, or even his purchaser at a sheriff's sale, insists upon it, when it would mean bankruptcy to the firm, great injury to the firm creditors, and no benefit to the separate creditors. Nowhere does there seem to have been a reported case of this kind in England or Canada; but in America it appears to have been held that where an attachment or execution has been levied upon the interest of a partner in favor of his separate creditor, and an injunction has been allowed on behalf of the other partners to determine what, if any, is his

interest, an accounting *without dissolution has been granted: Cropper* v. *Coburn*, 2 Curt. C.C. 465; Bates on the Law of Partnership, sec. 916. The reason given is that otherwise any creditor of a partner could force a dissolution. This, then, appears exactly on the point, and is the only precedent found after considerable search, but is one which seems so in accordance with common sense and justice, that it may perhaps be presumed that it would be followed in other Courts.

In any event, without having made a levy under a writ, it would not seem that a separate creditor would have any *locus standi* to come to the Court and ask for an account to be taken for his benefit. The matter does not appear to be specifically dealt with by Lord Justice Lindley, but at p. 493 of his Law of Partnership (5th ed.), speaking of who has a right to have an account, he says: "If a partner's share is taken in execution, the purchaser from the sheriff is entitled to an account from the solvent partner, as is, also, the execution debtor himself." A separate creditor is not spoken of as having such a right in any event. The learned text-writer speaks as though the question of the right of a separate creditor to an account only arose on the death of a partner, *when:* "in the absence of special circumstances, they have no *locus standi* against the surviving partners, but only against the legal personal representative of the deceased partner:" *Ib.* p. 494. See also *Burn* v. *Burn*, 8 O. R., 237.

A. H. F. LEFROY.

FRAUDULENT PREFERENCES AND LEGAL ETHICS.

THE recent decision of the Chancery Divisional Court in *Gibbons* v. *Wilson*, in which judgment was given on January 8th, is one of considerable interest on account both of its practical and its ethical aspects. The case involves an account of a very simple method by which an ingenious solicitor procured payment in full to certain clients of his, who were creditors of an insolvent debtor, in spite of the statutes directed against preferences. The plan of action was this: An authority was taken from the insolvent debtor to the solicitor to procure a loan upon the debtor's stock in trade, and to pay over the moneys to be advanced to the creditors sought to be preferred; an innocent lender was then found who advanced the requisite money, which was forthwith paid over to the creditors in question. The action was by a subsequent assignee in trust for creditors to set aside the mortgage to the lender, and the Court decided that as there was a present actual *bona fide* advance of money, the mortgage was valid under R.S.O. c. 124, sec. 3. The principle on which the decision is based is that the fraudulent act of an agent (in this case, the solicitor,) does not bind the principal unless it is done for the benefit of the principal, and unless the principal knows of or assents to it, or takes an advantage by reason of it. Here the lender knew nothing of the purpose for which the loan was asked, and it was no benefit to him that the creditor in question should be preferred. One of the learned judges laments that the arm of the law is not long enough to reach such a case, and

suggests fresh legislation. In the meanwhile, the practical result of the decision seems to be to establish a simple and valid method of securing payment in full of certain creditors of an insolvent debtor to the prejudice of others.

Now, as to the ethical aspects of the case. There may have been special circumstances to explain words in the judgments condemnatory of the conduct of the solicitor who carried out this scheme, but on the general question it seems to us a matter inviting enquiry and consideration, how far a solicitor can properly go in seeking to secure a preference for his client over other creditors. The law speaks of "fraudulent" preference, but the fraudulent element in the matter is, we imagine, entirely on the side of the insolvent debtor giving the preference, not on the side of the creditor obtaining it, or of the solicitor who acts for him. No one, we should suppose, would call it fraudulent for a man to try and get his own debt paid, even though the result is not to leave enough to pay others. The condition of human life is, speaking generally, one of competition directed towards securing an advantage over others seeking to share in the same benefits at which we are aiming; and we should probably soon arrive at some startling conclusions if we started from the proposition that it is morally wrong to secure a preference for one's self or one's client, if by legally valid means it can be done. However, we do not wish to dogmatize one way or the other, but shall be glad to open our columns to discussion.

HISTORY AND MISCHIEF OF THE QUEBEC JESUIT ACT.

It is not often that we have occasion to comment on any legislation in the Province of Quebec. The subject of this article, although not of much technical interest, except in so far as it touches on the interesting question of escheat, is of so much importance in connection with constitutional questions affecting the whole Dominion, and necessarily, therefore, all its provinces, that it is desirable to discuss it at some length from a constitutional and historical point of view. We have nothing to do with party politics, and for this reason we refrain from discussing the much debated question as to the expediency of disallowance by the Dominion Government of provincial Acts like the Jesuit Act; our readers can form their own opinion on the subject after a careful consideration of this most important subject. As to the competency of that government to disallow such legislation, we think there can be no doubt.

Five and twenty years ago, when the Clergy Reserves of Upper Canada, held by as indefeasible a title as it was possible for any crown-granted lands to be held, were diverted from their original purpose and applied to secular objects, it was thought that the question of the state-endowment of ecclesiastical bodies was settled for ever; and among those who voted for the secularization of the reserves were the representatives of French-Canadian Roman Catholic constituencies, who, in support of the principle then established, ranged themselves side

by side with the voluntaries of the upper province. It now appears, either that the long and fierce agitation which set aside the grants of George the Third was all in vain, or else that the rule which is valid as against the endowment of a Protestant clergy by a British Monarch does not apply to the pious designs of a king who, in his zeal for the Roman Catholic faith, ordained that upon the shores of New France no Protestant should set his foot.

In the proposed endowment of the Jesuits by the recent legislation of the Province of Quebec, we find ourselves face to face with the old dispute, and under conditions which preclude the contention that the question, as it now arises, is one altogether of provincial interest, or to be settled by purely provincial considerations; and the conditions which present themselves make every objection which may be urged against religious endowments in general apply with tenfold force to this one in particular.

Into the general question we need not enter. As we stated at the outset, that question has been settled, and to justify this particular exception from the principle established, it clearly devolves upon its advocates to show upon what grounds that justification is based. This, we are bound to say, M. Mercier has done his best to accomplish. In the preamble to his bill he gives us all the evidence, and all the facts, or assumptions of fact, upon which his action rests, and it must be admitted that the address and plausibility with which he sets about his task, are worthy of the object in view.

Having by a previous Act given incorporation to the Society of Jesus, M. Mercier, in the preamble to his Act, dwells upon the "uneasiness" felt with regard to the Jesuits' estates, and this view he supports by reference to various demands which certain ecclesiastics have, from time to time, made for a settlement of the question of the ownership of the property—a property to which, as he subsequently admits, the claimants have only a *moral* right, but for which *they are entitled to compensation.* He then proceeds to clear the way by stating that "on the occasion of the settlement of this delicate question certain Protestant educational institutions will receive a fair allowance proportionate to the numerical importance of the minority in this province." Having thus provided for the possible opposition of the "Protestant minority," the astute premier goes on to overcome the hostility which, as is well known, a large part of the majority, clerical as well as lay, entertained to his proposal; and for the purpose he, the responsible minister of a British province, not only appeals to the Pope of Rome for leave to deal with a property which, according to the law of the land, had duly escheated to the Crown for want of any legal owners, but publishes *in extenso,* in the preamble of his bill, the whole correspondence between himself as Premier of Quebec, the Procurator of the Jesuits, and the "Prefect of the Sacred College of the Propaganda," who writes as directly representing the Pope. And a very remarkable correspondence it is, in spirit as well as in letter, bringing home to us more fully than anything published in the English language has hitherto done, the sort of religious and political Frankenstein which our forefathers unwittingly created at the capitulation of Quebec, and which now, in so many ways, blocks the path of progress for this Dominion.

In his first communication, M. Mercier, after asking whether His Eminence sees "any serious objection to the Government selling the property," says that the Government would "look upon the proceeds of the sale as a special deposit to be disposed of hereafter in accordance with the agreements to be entered into between the parties interested *with the sanction of the Holy See*," and then he goes on to say that "as it will *perhaps* be necessary upon this matter to consult the Legislature of the province, etc.," he wishes an immediate reply. It is quite evident that the sanction of the Holy See was much more important for the carrying out of M. Mercier's designs than that of the Legislature of the province. In reply, his Holiness the Pope graciously grants permission for the sale of the property, "upon the express condition, however, that the sum to be received be deposited and left at the *free disposal of the Holy See*." This condition was too much, even for the Quebec Premier, who insists on his previous terms. These are conceded in the next letter in the following words: "The Pope *allows the Government* to retain the proceeds of the sale as a special deposit to be disposed of hereafter with the sanction of the Holy See." In the next document quoted authority is given by His Holiness to the "fathers of the Society of Jesus" to deal in the matter directly with the Government of Quebec, leaving, however, full *liberty to the Holy See to dispose of the property as it sees fit.* These preliminaries settled, M. Mercier then addresses the procurator of the Jesuits for the purpose of fixing the basis of settlement. He is, in the first place, very particular to specify that properly authenticated evidence of the foregoing particulars is placed in his hands, and then goes on to say that, in consenting to treat, "the Government does not recognize any *civil* obligation, but merely a moral obligation"; that the compensation given shall be expended exclusively in the province; that the Society shall grant a complete concession of all property, and a renunciation of all rights, which may have belonged to the old Society; that any agreement made shall be binding only so far as *ratified by the Pope and Legislature;* that the compensation fixed shall remain as a special deposit in the hands of the Government till the pleasure of the Pope with regard to it is made known, and that upon it the Society shall, in the meantime, receive four per cent. interest; and "finally, that the statute ratifying such agreement shall contain a clause enacting that when such settlement is arrived at, the Protestant minority will receive a grant in proportion to its population in favour of its educational work."

To all of this, clause by clause, the Procurator graciously assents, till he comes to the last, when he very properly remarks that as this clause (that relating to the Protestant minority) does not touch the question at issue, he asks to be dispensed from replying thereto. Even the Procurator of the Jesuits will not accept M. Mercier's invitation to legislate for the "Protestant minority," a degree of moderation for which the said Protestant minority should be duly grateful. Upon this correspondence, in which the leader of the Government in the Province of Quebec so openly lays himself and the Legislature of Quebec at the disposal of the Holy See, comment is needless. The unconstitutionality

of the Act resulting therefrom is, however, pointed out in another place to which we refer the reader.

Then comes the settlement of the amount of compensation, which is interesting only as showing the playful fence with which the Procurator, first estimating the value of the property at two millions of dollars, and modestly saying that he will be satisfied with half that amount, finally accepts the four hundred thousand which is offered as compensation for a property which belonged, not to the Jesuits, but to the Province of Quebec. It is hard not to believe that all this was arranged beforehand so as to display the care taken by M. Mercier to protect the interests of the Province, and the extreme moderation of the Jesuits in accepting a fifth of what, according to their contention, was really their right. The remaining documents given in the preamble are purely formal, and inserted in the bill merely to show that His Holiness and the Society of Jesus had really given their assent to the agreement.

The historical facts relating to this matter are briefly as follows: For more than a century prior to the conquest of New France the Society of the Jesuits had been established there, and had undertaken two great works—the conversion of the Indians, and the education of the people. To enable them to carry on these undertakings they had become endowed with certain lands derived from three sources: Grants from the Crown; gifts from private individuals; and purchases made from various funds at their disposal. All these grants and gifts were expressly made in trust for the objects already mentioned; besides which it must be remembered that, according to their vow of poverty, the Jesuits, neither individually nor collectively, could hold property for personal profit or emolument. We shall not stay to enquire how these trusts were executed. That is a matter of history, and is not pertinent to the present issue.

At the capitulation of Quebec article thirty-four provided that "all the communities and all the priests shall preserve their movables, the property and revenue of the Seigniories, and other estates which they possess in the colony, of what nature soever they be. And the same estates shall be preserved in their privileges, rights, honors and exemptions." With that regard for its plighted faith which the British Government has always maintained, this article was kept inviolate; and for fourteen years the Jesuits remained undisturbed in the possession of their properties.

But whilst under the British flag against which they had so often intrigued, and under the protection of the British Government which they had so often assailed, the Jesuits enjoyed peace, it was not so with them in the countries of Roman Catholic Europe. Two years after the conquest of Quebec they were suppressed in France, where the exposure of their constitution and method of acting, consequent upon the failure of Lavalette's commercial enterprises, made their presence intolerable. Five years later they were altogether expelled from the dominions of His Most Catholic Majesty, their properties sequestrated, their colleges closed and their teachings forbidden. In 1767 they were suppressed in Spain, the most Roman Catholic country in Europe and the land of their birth, but where their poli-

tical intrigues and social interference had set all parties against them. A year later saw them meet the same fate in Naples. Finally, in 1773, while still enjoying in New France, under a Protestant Government, that which was denied them in Old France under a Roman Catholic sovereign, Pope Clement XIV., acting at the desire of all those European Powers who had been suffering from the machinations of the Society, absolutely suppressed and abolished it. His reasons for doing so, as stated in the Bull which decreed its suppression were—the acts of its members in defiance of their own constitution, which forbade them to meddle in politics; the injury caused by their quarrels with local religious authorities, and other religious orders; their conformity to heathen usages in China and other Eastern lands; and the disturbances they had made in Roman Catholic countries, which caused the sovereigns thereof, of the same religion, to expel them from their dominions. And so the Bull goes on to say that seeing the Society had ceased to fulfil the intention of its institution, the Pope declares it necessary, for the peace of the Church, that it should be suppressed, extinguished, abolished, and abrogated forever, with all its rites, houses, colleges, schools and hospitals. Provision was further made for taking over and administering the property of the Society and for the conduct of its members.

Such, then, was the position of affairs in 1774, when the British Government, recognizing the fact that by the highest authority known to the Roman Church, and admitted by it as having absolute control, the Society had ceased to exist as a corporate or ecclesiastical body, gave instructions to the Governor-General of Canada to assume possession of its property as escheated to the Crown. In this the British Government violated no pledge—broke no contract. It simply took official notice of an event which had happened—of the demise of a society which left no heirs nor successors, as they might of the demise of an individual similarly situated. The property passed to the Crown as a matter of law, and of right. It could pass only to the Crown, whatever its ultimate destination might be, for there was no one else to receive it.

The manner in which the British Government exercised its rights was in perfect keeping with the good faith with which it had observed its treaty obligations throughout. Having assumed the property which had devolved upon it by the dissolution of the Society, it permitted those of the Jesuits who chose to remain to continue in possession till 1800, when the death of the survivor took place; and then it recognized the trusts attaching to the property, and, as far as circumstances permitted, it executed them. It received with favor the petitions of the Quebec House of Assembly, who, first in 1793, and on subsequent occasions, asked that the Jesuit estates should form a fund for the purpose of education, and finally, in 1831, Lord Goderich fully admitted the principle, and directed that the estates should be applied inviolably and exclusively for promoting education, as, in fact, they had been applied for many years previously. For that purpose the Government handed them over to the Province, in whose possession they have remained, and for whose benefit they have been used

ever since, and mainly, too, for the promotion of the Roman Catholic faith.*

Now, in view of these facts, what, we may ask, becomes of the fictions and assumptions stated in the preamble of the Act? Whence is derived the *moral* right of the present Society of Jesus to the estates forfeited by a former one, (which was dissolved, not by the judgment of any Protestant tribunal, but by that of the Pope of Rome, its superior and infallible head.) Where is the ground for compensation? M. Mercier admits that it rests on no legal right; and as the trusts attaching to the property have been carried out, where is the equitable or moral right? And how has he met the objections to his proceedings based on the principle which his predecessors helped to establish when they voted for the secularization of the Clergy Reserves? What is there in the case of the Jesuits to exempt them from the operation of that principle? Is it that their ethics are superior to those of the Church of England, whose endowments were taken from them? Is it the superior morality of their members? Is it the fact that they own no allegiance to the sovereign of these realms—that they are, in the extremest sense of the terms, foreigners and aliens, not to say enemies, to the commonwealth? Is it that on the testimony of professors of their own creed they have been everywhere political intriguers, disturbers of the public peace, destroyers of domestic happiness and domestic ties? Is it that with all their talent for organization, the self sacrifice and self devotion of individual members, their great missionary efforts (those bright pages in their history) have been failures—failures as vast as were the efforts they made? For we know that, despite the heroism and talents of a Francois Xavier, the martyrdom of a Brebeuf or a Lallemand, and of hundreds of kindred spirits whose bones lie scattered over North and South America, India, China and Japan, the sum of their work, so far as the elevation or advancement of the human race is concerned, is everywhere and always failure—failure, absolute and complete. What justification has the Premier of Quebec shown for his illegal and possibly treasonable invitation to the Pope of Rome to exercise jurisdiction over property in this Dominion? And, finally, what right has he shown to take from the Province of Quebec, either from the Roman Catholic majority or the Protestant minority, any sum of money, great or small, to endow any religious corporation at the expense of either one or the other? The property in question is the property of the whole Province, given to it, and held by it for nearly a century, for the purpose of education. To apply it, or any portion of it, to endow any religious body, is a direct robbing of the people, and especially of the Protestant minority, even though the latter are offered a bribe for their acquiescence, to be raised by a tax laid upon themselves.

* How differently might the British Government have acted had they taken into account the past history and the previous conduct of those with whom they were dealing—had they remembered the Jesuit plots against Queen Elizabeth, the Gunpowder Plot, and the incessant intrigues of later years—had they paid heed to the dark rumors which associated the Jesuits with the assassination of Henry the Fourth, the massacre of St. Bartholomew, the murder of William the Silent, and even the death of Pope Clement, by whom they had been suppressed; or even if, discarding all these as idle tales, they had judged the Society by its own maxim, the admitted rule of all its policy—"*Cum finis est licitus etiam media sunt licita*"—the frightful and horribly demoralizing principle that "the end justifies the means!"

But it is contended that this is a Provincial matter entirely within the jurisdiction of the Provincial Legislature, which has a right to incorporate, and if it pleases, to endow from its own resources, any society that it chooses, and that being so no *one* outside that Province has a right to interfere. Whether it would be right for the Dominion Government to interfere, or whether or not such interference, as a matter of policy, is desirable (matters into which we do not propose to enter), the subject is one which the public of the Dominion have clearly the right to discuss. They have the right to protest against the endowment, in any portion of the Dominion, of a purely religious body, contrary to the general policy of the Dominion. They have the right to protest against this official recognition of the secret religio-political society of the Jesuits as a body corporate, civil or ecclesiastical. They have the right to say that in no part of the Dominion should special privileges and powers be given to a society which, under the guise of religion, has pursued its own ends in defiance alike of morality and Christianity, has violated its own rules, and disregarded the laws of every country in which it has existed; which has been the instigator, if not the perpetrator, of private assassination and public massacre; which has stirred up war and rebellion among nations, and destroyed the domestic peace of families; which subverts every idea of mental and moral independence, and makes a blind and unreasoning obedience to human authority take the place of the dictates of conscience and the teaching of Scripture. They have the right to protest, also, against the Pope of Rome or any other foreign ecclesiastic, of any denomination, or any alien power whatever, civil or ecclesiastical, interfering in any way, directly or indirectly, in the affairs of this Dominion, or of any Province within it, to the subversion and undermining of the just rights and pre-eminence of our Sovereign in her own dominions, and more especially when such interference is exercised on behalf of a society which professes no allegiance to any temporal sovereign, and whose avowed aim, at the present moment, is to use every means to subvert religions which conflict with its own, and to secure that absolute supremacy in temporal and spiritual affairs for the head of the Church of Rome which the British nation has for centuries been resisting. They have the right to protest against a disloyal society, the existence of which is a menace to the integrity of the British Empire, and whose members are said to be bound by an oath to aid in extirpating the "damnable doctrines" of the Church of England, and other Protestants, solemnly renouncing all allegiance to all heretical kings and governments, and binding themselves when called on to "depose" them, and if necessary, "destroy" them. And it need not be stated here that the kingdom of Great Britain and Ireland is by its constitution a Protestant power. The Dominion of Canada is a part of that great empire, and owes allegiance to a sovereign who by the law of the land must be a Protestant.

Happily there is in this matter no issue between Protestant and Roman Catholic. By none has the mischievous and meddlesome policy of the Jesuits been so resented as by other Roman Catholic bodies whose rights it has interfered with, whose operations it has hindered, and whose independence it has subverted.

By none have its character and its principles been more fiercely assailed, and more vehemently denounced, than by men of the Roman Catholic faith. By no governments has it been so harshly dealt with, and so absolutely suppressed, as by the governments of such supremely Roman Catholic countries as Spain, France and Italy. And it is only by its success in the cause of Ultramontanism, and the destruction of the Gallican and other national churches, that it owes the favor it now enjoys. In conclusion, we venture to say, by none will the action of M. Mercier be more bitterly regretted in time to come than by the Roman Catholics of the Province of Quebec.

THE CONSTITUTIONALITY OF THE QUEBEC JESUIT ACT.

THIS Act appears to give authority to the Pope to sanction or ratify the distribution of the legislative grant of $400,000. The enacting clause provides that the money is to be payable "under the conditions mentioned in the documents" cited in the preamble. This delegation of authority to the Pope, a foreign potentate or sovereign, brings up the question whether the Act is constitutional, and also whether it infringes the express provisions of Imperial statutes prohibiting foreign potentates exercising jurisdiction in the dominions of the Crown, which are in force in Canada.

It will, we think, be conceded, apart from any provisions in Imperial statutes, that it is *ultra vires* the constitutional power of a colonial legislature to confer on or delegate to any foreign sovereign, potentate, or tribunal, lawful jurisdiction or authority to determine or ratify the distribution of the moneys or properties of the Crown, or how money grants to the subjects of the Crown, within its colonial jurisdiction, are to be distributed.

The Imperial Crown may in any proper case agree with another crown or nation to refer to a sovereign, or to arbitrators mutually agreed upon, questions affecting its belligerent or territorial rights or claims; but this regality of the Imperial Crown is not possessed, nor can it be exercised, by a colonial government or legislature. If it would be *ultra vires* of the Legislature of Ontario to delegate authority to a foreign power—say to the President of the United States—to distribute, or to ratify the distribution of public moneys legally voted (the Clergy Reserve moneys, for instance) it follows that this delegation of authority to the Pope by the Legislature of Quebec must also be *ultra vires.* What would be unconstitutional in Ontario must be equally unconstitutional in Quebec. No State of the American Union, though "sovereign" in a limited sense, can treat with foreign potentates, or give them jurisdiction to dispose of the moneys or territorial properties of the State. Nor can any provision similar to that in this Quebec Act be found in the legislation of any civilized nation.

The Imperial Parliament has from the earliest days made it a criminal offence for subjects of the Crown to procure judgments or determinations from the See of Rome or from any other foreign powers or potentates out of the realm; and

no Act can be found in the Parliamentary annals of England delegating to a foreign potentate authority to determine how grants of money to subjects of the Crown should be disposed of.

In the 25th, 27th and 38th years of Edward III., and the 13th and 16th years of Richard II., this prohibitory legislation against the Pope's jurisdiction in England commenced. The statute, 24 Henry VIII., c. 12, prohibits any foreign inhibitions, appeals, sentences, judgments or any other process, etc., from the See of Rome or any other foreign courts or potentates, and prescribes penalties against persons within the realm, *or within any of the King's dominions*, attempting to procure any such from the See of Rome or from any foreign court or potentate.

Another statute of the same year (c. 21) prohibits the King, his heirs, and successors, Kings of the realm, and all subjects of the realm, *or of the dominions of the Crown*, from suing for licenses, dispensations, compositions, faculties, grants, rescripts, *delegations*, or any other instruments in writing from the Bishop of Rome, "called the Pope," or from any person or persons having or pretending to have any authority by the same. "The King, his heirs and successors," being expressly named in the Act, the reigning Sovereign is bound by the prohibition *Coke's. Inst.* 169); and it is not within the constitutional power of a colonial legislature or governor to absolve the Crown from its provisions, or to enact or assent to any Bill violating this or any other Imperial Statute in force in the colony The Crown can only be relieved from the prohibitions of the Act by the power that imposed them, namely, the Imperial Parliament.

But the statutes of Elizabeth are more precise and emphatic, and in express words abolish "the usurped power and jurisdiction of the Bishop of Rome, heretofore unlawfull claimed and usurped within this realm, *and other the dominions to the Queen's Majesty belonging:*" 13 Elizabeth, c. 2; 1 Elizabeth, c. 1. Neither the treaty surrendering Canada to England, nor the Quebec Act of 1774, altered these statutory prohibitions against the foreign jurisdiction of the Pope. Both granted to the French-Canadian subjects of the Crown liberty to profess the Roman Catholic religion "so far as the laws of Great Britain permit," and in "subjection to the Crown and parliament of Great Britain."

"The conditions mentioned in the documents" cited in the preamble of the Act, import into the Act the assertion that "*the Holy Father reserved to himself the right of settling the question of the Jesuits' estates in Canada*," and provide that the proceeds of sale are to be disposed of under agreements "*with the sanction of the Pope*," and that "the amount of the compensation fixed [$400,000] shall remain in the hands of the government of the province, as a special deposit, *until the Pope has ratified the said settlement and made known his wishes respecting the distribution of such amount in this country*."

These extracts clearly show an intent to confer upon the Pope—a foreign potentate—a jurisdiction to determine how the Crown's grant of money is to be distributed in Canada. In view of the constitutional questions and statutory provisions referred to above, we are inclined to think that the question of the validity or disallowance of the Jesuit Estates Act of Quebec, has not yet been settled.

COMMENTS ON CURRENT ENGLISH DECISIONS.

TRUSTEE ACT, 1850 (13 & 14 VICT., c. 60), SS. 3, 5—APPOINTMENT OF NEW TRUSTEE IN PLACE OF LUNATIC TRUSTEE AND PERSON OUT OF JURISDICTION—VESTING ORDER.

In re Baths, 39 Chy. D., 189, was an application under the Trustee Act, 1850, for the appointment of new trustees. The trust property consisted of money lent upon a mortgage of freeholds vested in the two surviving trustees, and a sum of consols standing in their names. One of the trustees was a lunatic, and the other was resident out of the jurisdiction; and under a power in the settlement two persons were appointed new trustees in their places. Upon a petition by these two new trustees and by all the beneficiaries praying for an order reappointing the new trustees as trustees of the settlement, and vesting the trust property in them, the Court of Appeal (Cotton and Fry, L.JJ.) refused to reappoint the new trustees, but under sec. 3 of the Trustee Act, 1850, vested the lands subject to the mortgage in the new trustees, and under sec. 5 of the same Act vested the mortgage debt, and the right to call for a transfer of the consols, in the trustee of sound mind resident out of the jurisdiction, and, it appearing that he was out of the jurisdiction, vested the mortgage debt and the right to call for a transfer in the new trustees, which seems rather a circuitous process of arriving at the desired end.

STRIKING OUT STATEMENT OF CLAIM—FRIVOLOUS AND OPPRESSIVE ACTION—STATUTE OF LIMITATIONS (3 & 4 W. 4, c. 27) s 26 (R. S. O., c. 111, s 31).

Lawrence v. *Norreys*, 39 Chy. D., 213, is a case which arises out of the celebrated mare's nest so well known on this continent as the "Lawrence-Townley Estate," in which untold millions are supposed to be awaiting eager and expectant heirs. This effort to recover the estates has proved abortive, having been as it were nipped in the bud by a cruel and relentless Court of Appeal. The plaintiff sued to recover the estates in question as heir-at-law of Jonathan Lawrence the younger, who was alleged to have died seized, in 1816. The plaintiff alleged that on Jonathan Lawrence's death, John Townley wrongfully took possession; that the solicitors of the deceased Jonathan, whose names were not given, knew of the address of the heir-at-law, who resided in America, and were about to communicate with him, but that John Townley dissuaded them from so doing, and procured them to deliver to him the deeds and evidences of Jonathan's title, which he destroyed, and that by reason of the premises the persons claiming under Jonathan remained ignorant until 1886, and that the fraud could not with reasonable diligence have been sooner discovered.

The plaintiff had previously commenced an action in the Queen's Bench Division to recover the same estate, in which he merely alleged his title as heir-at-law, but made no allegations of fraud to take the case out of the Statute of Limitations. The defendants had applied to strike out the statement of claim, as showing no cause of action. The plaintiffs then applied to amend by alleging

fraud. But the Queen's Bench Division refused leave to amend, and struck out the statement of claim as showing no cause of action. The plaintiff then commenced the present action, and the allegations of fraud in the present action were similar to those he had sought to introduce by amendment in the action in the Queen's Bench Division. Stirling, J., held that the inducing the solicitors to deliver up the deeds to John Townley was a concealed fraud, which would prevent the operation of the Statute of Limitations, and not being satisfied that the allegations of fraud were fictitious, he thought the action ought to be allowed to proceed. But the Court of Appeal (Cotton, Bowen & Fry, L.JJ.) took a different view of the matter, and held that the proper conclusion to be drawn from the materials before the Court was, that the allegations of fraud were made without reasonable ground, and that the statement of claim ought to be struck out and the action dismissed as an abuse of the process of the Court.

MORTGAGE—PRIORITY—NOTICE—NEGLIGENCE—POSSESSION OF TITLE DEEDS—EQUAL EQUITIES.

Union Bank of London v. *Kent*, 39 Chy. D. 238, is an illustration of the equity maxim, that where the equities are equal, priority of time prevails. A company held under a building agreement from the Corporation of London, under which separate leases of the houses were to be granted as they were built. In April, 1883, the company borrowed money from the plaintiffs, and covenanted to mortgage the houses by demise when the leases were granted, and that in the meantime the premises comprised in the building agreement should be security to the plaintiffs. The building agreement was handed to the plaintiffs, but no notice of their charge was given to the Corporation of London. In 1886, leases of two of the houses were granted by the Corporation to the company, and immediately afterwards the company deposited the leases with Janson & Co. by way of equitable mortgage. The plaintiffs claimed priority over Janson & Co., who contended that by reason of their possession of the leases and the failure of the plaintiffs to give notice to the Corporation of their claim, the plaintiffs were postponed. But it was held by Chitty, J., that the equities of both parties were equal, and that the plaintiffs being prior in point of date, were entitled to priority over Janson & Co. This decision was affirmed by the Court of Appeal (Cotton, Bowen & Fry, L.JJ.), Cotton, L.J., pointing out that notice is not necessary to perfect an equitable charge on land, and that notice not being necessary to perfect the security, the omission to give notice was not negligence on the part of the plaintiffs, even though the omission to give notice enabled the company to take possession of the houses.

DISCRETIONARY TRUST FOR MAINTENANCE—ASSIGNABLE INTEREST—DISCRETION OF TRUSTEES.

In re Colman Henry v. *Strong*, 39 Chy. D. 443, presents some features in common with *Fiskin* v. *Brooke*, 4 App., R. 8. A testator directed his trustees after the death of his wife to apply the income of his estate "in and towards the maintenance, education and advancement of my children in such

manner as they shall seem most expedient, until the youngest of my said children attains the age of twenty-one years," and on the happening of that event he directed then to divide his estate equally among all his children then living. The testator left four children, of whom, at the death of his widow, two were minors, the youngest being in his seventh year. The trustees paid each of the adult children one fourth of the income, and applied the other two fourths for the benefit of the minors equally until 1886, when one of the adult children assigned all his interest under the will to the plaintiff, Henry. The trustees declined to pay one fourth of the income to Henry, whereupon he applied to the Court for the construction of the will. And it was held by the Court of Appeal (Cotton, Fry & Lopes, L.JJ.), affirming North, J., that none of the children had any absolute right to any part of the income prior to the attainment of twenty-one by the youngest child; but that the trustees had an absolute discretion to apply the income for the maintenance, education or advancement of all of the children as they should see fit: but whereas, North, J., held that none of the children had an assignable interest, the Court of Appeal held, that although if the trustees paid a third party to supply the child who had assigned, with goods, that that would not be property that would pass by the asignment, yet if they were to pay or deliver money or goods to him, or appropriate money or goods to be paid or delivered to him, such money or goods would pass by the assignment.

PRACTICE—FORECLOSURE—ORDER FOR POSSESSION—(C.R. 341 *a*.)

In *Keith* v. *Day*, 39 Chy. D. 452, a final order for foreclosure having been made without any direction as to the delivery of possession, the plaintiff moved for an order for delivery of possession, and it was held by the Court of Appeal that the plaintiff was entitled to the order and ought not to be put to bring a new action to recover possession.

MORTGAGOR AND MORTGAGEE—AGREEMENT FOR LEASE BY MORTGAGOR—RIGHT OF TENANT TO REDEEM.

In *Tarn* v. *Turner*, 39 Chy. D. 456, a mortgagor, without the consent or concurrence of the mortgagee, contracted in writing to grant a lease of the mortgaged premises to the plaintiff, who entered into possession under the contract, and subsequently on notice from the mortgagor, paid rent to him. The mortgagee having refused to concur in the lease to the plaintiff, the latter brought an action to redeem the mortgage. The mortgagee contended that a tenant for years had not such an interest in the equity of redemption as entitled him to redeem, and it is somewhat curious that no case could be found in the books in which the right of a tenant for years to redeem had been expressly adjudicated on; but it was held by Kekewich, J., and affirmed by the Court of Appeal (Cotton, Fry & Lopes, L.JJ.) that the tenant was entitled to redeem as being an assignee in part of the equity of redemption.

HUSBAND AND WIFE—LEGACY TO WIFE—HUSBAND'S DEBT—RETAINER—EQUITY TO A SETTLEMENT.

In re Briant, Poulter v. *Shackel*, 39 Chy. D. 471, Kay, J., determined that the wife's equity to a settlement was entitled to prevail over the right of an executor to retain out of a legacy due to the wife, a debt due by her husband to the testator's estate. The case was one that did not come within the Married Women's Property Act, 1882, which very materially modifies the right of retainer under such circumstances, if it does not altogether abolish it.

MARRIED WOMAN—GENERAL POWER OF APPOINTMENT—APPOINTED FUND HOW FAR ASSETS—MARRIED WOMEN'S PROPERTY ACT, 1882, s. 1, s.s. 4 (R.S.O. c. 132, s. 3, s s. 4).

In re Roper, Roper v. *Doncaster*, 39 Chy. D. 482, a question arose as to how far property appointed by a married woman under a general power of appointment, became assets to satisfy her debts; and it was held by Kay, J., that the property appointed would not be assets to satisfy any debts or obligations incurred before the Married Women's Property Act of 1882 came into force, because prior to that Act it had been determined in *Pike* v. *Fitzgibbon*, 17 Chy. D. 454, that the only separate estate of a married woman which could be made liable for her engagements was such as she had "at the time of contracting the debt or engagement."

SALE OF BUILDING MATERIALS—INTEREST IN LAND—STATUTE OF FRAUDS, SS. 4, 17—SPECIFIC PERFORMANCE—DAMAGES.

In *Lowery* v. *Pursell*, 39 Chy. D. 508, a contract was made for the sale of "building materials" of a house with a condition that all materials were to be cleared off the ground within two months, "after which date any materials then not cleared off will be deemed a trespass, and become forfeited, and the purchaser's right of access to the ground shall absolutely cease;" and it was held by Chitty, J., that this was a contract for the sale of an interest in land within sec. 4 of the Statute of Frauds, and owing to the absence of any sufficient description of the vendor in the contract, it was void. He also held that the contract having from lapse of time become at the hearing incapable of specific performance, the equitable doctrine of part performance as avoiding the operation of the Statute of Frauds, did not enable the plaintiff to obtain relief in damages. At p. 514 Chitty, J., draws the distinction between the cases of a sale of "building materials" where the vendor is to pull down the house and where the vendee is to do so. In the former case he seems to agree that the contract would be within sec. 17, whereas in the latter case it comes under sec. 4. The learned Judge appears to have found some difficulty in reconciling his decision with *Marshall* v. *Green*, 1 C.P.D. 35, where a sale of standing timber, to be cut by the vendee, was held not to be within the 4th section. As regards the other point, he says, on p. 519, that damages can only be given where specific performance could have been decreed, and that it was a substitute for specific performance: See, however, R.S.O. c. 44, s. 53, s.s. 9, which provides that damages may be awarded in addition to, or substitution for, specific performance.

AGREEMENT IN RESTRAINT OF TRADE.

Baker v. *Hedgecock*, 39 Chy. D. 520, was an action to restrain the defendant from violating an agreement entered into by the defendant with the plaintiff, on entering his service for the term of three years as a tailor,—not to enter the service or employ of any other person, or enter into any engagement or be concerned or interested in carrying on his own account or otherwise, "any business whatever within the distance of one mile from——during the continuance of the time or within two years of the term or within two years thereafter," without the plaintiff's consent in writing. The action was to restrain the defendant setting up as a tailor within the prescribed limit. But it was held by Chitty, J., that the agreement was void, because of the general restraint of all trade, and that effect could not be given to it by rejecting the general restraint, and limiting the agreement to the business of a tailor.

ADMINISTRATION—ANNUITY CHARGED ON REAL ESTATE TENANT FOR LIFE AND REMAINDERMAN CORPUS.

In re Moffatt, Jones, and Mason, 39 Chy. D. 534, a testator had died entitled to certain real estate, charged with an annuity which he had covenanted to pay—a contest arose as to how this charge should be borne by the tenant for life, and remaindermen, to whom the testator had devised the property. It was held by Chitty, J. that the annuity must be capitalized and the burthen borne by the tenant for life and remaindermen, in proportion to their respective interests.

PARTNERSHIP—DISSOLUTION—RECEIVER AND MANAGER—SALE OF PARTNERSHIP BUSINESS [A]S GOING CONCERN.

In *Taylor* v. *Neate*, 39 Chy. D. 539, it was held by Chitty, J., that notwithstanding articles of partnership provide that on a dissolution of the firm there shall be a division of the assets, the Court has, nevertheless, jurisdiction to direct [s]ale of the business as a going concern, and will do so where that is the most [ben]eficial mode of realization, and for that purpose will, after dissolution, appoint a receiver and manager until a sale of the business, for the purpose of preserving the assets by carrying into effect existing contracts, and entering into such new ones as are necessary for carrying on the business in the ordinary way, but so as not to impose by speculative dealing or otherwise, onerous liabilities on the partners.

COMPANY—DIRECTORS—MEETING—NOTICE.

In re Homer District Gold Co., 39 Chy. D. 546, application having been invited by a company for 106,000 preference shares, at a meeting of the directors, five in number, it was resolved not to allot any of the shares till 14,000 were applied for. Subsequently, two of the directors (a quorum) called a meeting to be held the same day as the notice was given, and without specifying the business to be transacted. The meeting was held at two o'clock, on a five hours' notice to two of the other directors who did not attend, of whom one did not receive his notice till the next day, and the other gave notice he could not attend till

three o'clock; the fifth director was aboard, and no notice was sent to him. The meeting was held by the two directors who had given the notice. The previous resolution of the board of directors was rescinded, and a resolution passed that the shares applied for, about 3,000, should be allotted. On the application of some of the allottees of shares, it was held by North, J., that the meeting had not been properly called, and was irregular, and that the allotments under the resolution passed thereat were void.

MORTGAGEE IN POSSESSION—PUBLIC HOUSE—ACCOUNT—TRADE PROFIT.

White v. *City of London Brewery Co.*, 39 Chy. D. 559, was a redemption action brought by a mortgagor against a mortgagee in possession. The mortgaged premises consisted of a public house, which the mortgagees had leased with a restriction that the tenant should take beer of the mortgagee's brewing and none other. It was held by North, J., that the mortgagees must account for such additional rent as might have been got if the premises had been let without the restriction; but not for profit made by the sale of beer to the tenant.

Reviews and Notices of Books.

THE following have been received and will be noticed hereafter:—

The Lives of the Judges of Upper Canada and Ontario. By D. B. Read, Q.C. Toronto: Rowsell & Hutcheson.

Manual of Evidence in Civil Cases. By R. E. Kingsford, M.A., L.L.B. Toronto: William Briggs.

Digest of Insurance Cases Decided in the United States in the Year 1888. By John A. Finch, Indianapolis, U.S.

Joint Stock Companies' Manual (3rd Edition.) By J. D. Warde, of the Provincial Secretary's Department. Toronto: Hunter, Rose & Co.

DIARY FOR FEBRUARY.

1. Fri......County Court Non-Jury Sittings in York. Sir Edw. Coke born 1552.
4. Mon....Hilary Term commences. High Court of Justice Sittings begin.
5. Tue....Maritime Court sits. W. H. Draper, 2nd C. J. of C. P., 1856.
10. Sun....*Fifth Sunday after Epiphany.* Canada ceded to G. B. 1763. Union of U. and L. C. 1841.
11. Mon....T. Robertson appointed to Chy Div. 1887.
16. Sat.....Hilary Term and High Court Justice Sittings end. Last day for notices for call for Easter Term.
17. Sun....*Septuagesima Sunday.*
19. Tue....Supreme Court of Canada sits.
21. Thur...Chancery Division High Court of Justice sits.
24. Sun....*Sexagesima Sunday. St. Matthias.*

Early Notes of Canadian Cases.

THE EXCHEQUER COURT OF CANADA.

BURBIDGE, J.] [June 30, 1888.

BOURGET *v.* REGINA.

Compensation and damages—Dedication of highway—Similarity of the law of England and of the Province of Quebec respecting the doctrine of dedication or destination.

This was a claim for $681, for 2,724 square feet of land in the village of Lauzon, county of Levis, P. Q., expropriated by the Crown for the purposes of the St. Charles branch of the Intercolonial Railway, and for $1,350 for damages to other lands of the claimant caused by the construction thereof.

Some time not later than the year 1877, the claimant being possessed of property in the village mentioned, divided it into forty-one lots. Through these lots a street was laid out, known by the name of Couillard street, and which connected St. Joseph street with Port Jolliette, a small cove or harbor on the River St. Lawrence. The plan of this division of the claimant's lands was duly recorded in the Registry Office for the county of Levis.

In the construction of the railway, the Crown diverted Couillard street, purchasing for that purpose one of the forty-one lots in the aforesaid division of the claimant's lands. The village corporation had never taken any steps to declare Couillard street a public way. It was, however, used as such; was open at both ends, and formed a means of communication between St. Joseph street and Port Jolliette, and work had been done and repairs made thereon under the direction of the village inspector of streets. The village council had also at one time passed a resolution for the construction of a sidewalk on the street, but nothing was done thereunder.

Upon the hearing of the claim the claimant contended that Couillard street, at the time of the expropriation, was not a highway or public road within the meaning of "The Government Railways Act" (44 Vict., c. 25), but was her private property, and that she was entitled to compensation for its expropriation.

The Crown's contention was, that at the date of the expropriation Couillard street was a highway or public road within the meaning of "The Government Railway Act" (44 Vict., c. 25), and that the Crown had satisfied the provisions of s. 5, s.s. 8, and s. 49 thereof, by substituting a convenient road in lieu of the portion of street so diverted, and that the claimant was therefore not entitled to compensation.

Held, (1) That the question was one of dedication rather than of prescription; that the evidence showed that the claimant had dedicated the street to the public, and that it was not necessary for the Crown to prove user by the public for any particular time.

(2) That the law of the Province of Quebec relating to the doctrine of dedication or destination is the same as the law of England.

Semble, That 18 Vict., c. 100, s. 41, s.s. 9, (Can.), is a temporary provision having reference to roads in existence on July 1st, 1855, which had been left open and used as such by the public without contestation during a period of ten years or upwards. See *Myrand* v. *Legare*, 6 Q.L.R. 120, and *Guy* v. *City of Montreal*, 25 L.C.J. 132.

Claim dismissed with costs.

Drouin, Q.C., and *Angers*, for Crown.

I. N. Belleau, Q.C., for claimant.

BURBIDGE, J.] [Dec. 13, 1888.

REGINA *v.* POULIOT, *et al.*

Information—Statutory defence—Demurrer—Illegality of contract—Dominion Elections Act, 1874—Crown rights—Interpretation of statutes.

This was an action at the suit of the Crown

to recover $352.20 from the defendants due upon a contract for the carriage of passengers between certain stations on the Intercolonial Railway, which is owned and operated by the Government of Canada. The defendants, by their pleas, admitted the contract and its performance by the Crown, but sought to avoid their liability by alleging (1) That the passengers were carried on *bons*, and that the action should have been brought upon such *bons*, and not upon the agreement set out in the information; (2) That the contract was for the carriage of voters to attend the nomination proceedings at an election then pending, with intent to corruptly influence such voters at such election, and was illegal and void under the provisions of secs. 100 and 122 of the Dominion Elections Act, 1874. A demurrer to these pleas was filed on behalf of the Crown.

Held, (1) That the defendants having admitted the breach of contract, their liability was not in any way affected by the fact that the passengers were carried on *bons* signed by one, and not by all, of the defendants; and that the cause of action was properly averred in the information.

(2) That the Crown is not bound by sec. 100 of "The Dominion Elections Act," 1874 (37 Vic., c. 9), which avoids every executory contract, promise or undertaking in any way referring to, arising out of, or depending upon any election under the Act, even for the payment of lawful expenses, or the doing of some lawful act; or by sec. 122 thereof, which enacts that *all persons* who have any bills, charges or claims upon any candidate for or in respect of any election, shall send in such bills, charges or claims within one month after the day of the declaration of the election to the agent of the candidate, otherwise such persons shall be barred of their right to recover such claims.

(3) That the language of the 46th clause of the 7th section of the Interpretation Act (R.S.C. c. 1), which enacts that "no provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, Her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby," is not to be construed by reading into the Act the exception to the common law rule that the Crown is not bound by a statute unless expressly mentioned, which exception is laid down by Lord Coke in the Magdalen College case (II. Rep., 74 b.), viz: "that the King is impliedly bound by statutes passed for the general good; the relief of the poor; the general advancement of learning, religion and justice; or to prevent fraud, injury or wrong."

Quære, does the clause in the Interpretation Act (R.S.C. c. 1, clause 46, s. 7) preclude the Crown from being bound by a statute in which it is included by necessary implication only?

Demurrer allowed.

O'Connor and *Hogg*, for Crown.

Gormully and *Sinclair*, for defendants.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

JENNINGS *v.* GRAND TRUNK R. W. CO.

Compensation for death caused by accident—R.S.O. (1887), *c.* 135—*Measure of damages—Life policy—Setting off insurance against damages—Administration—R.S.O. c.* 46—*R.S.O.* (1887), *c.* 50—*Express messengers—Duty to carry—Common employment.*

Although the right to recover damages for the death of a relative occasioned by the wrongful act, neglect or default of another, is, under the R.S.O. (1887) c. 135, limited to the actual pecuniary loss sustained by the plaintiff, the amount of a policy falling in by the death is not necessarily to be allowed or disallowed in computing the damages. It is merely a circumstance to be taken into consideration by the jury on reviewing the whole question of pecuniary loss or gain in consequence of the death.

The deceased was a resident of Buffalo, N.Y., being at the time of his death, which occurred in the County of Lincoln, Ont., not possessed of any real or personal property in the province, and the plaintiff (his widow) obtained letters of administration from the Surrogate Court of York.

Held, the grant of letters by the Surrogate of York was valid and effectual, and

Semble, that even if the deceased had left real or personal estate in some other county the administration obtained in York had effect over the personal estate of the deceased in all parts of Ontario until revoked: R.S.O. (1877) c. 46.

Deceased was an express messenger, and as such was being carried on the defendants' train at the time of his death, without a ticket or payment of fare, under a contract between the defendants and the express company:

Held, that the deceased being lawfully on the train the defendants were under a duty to carry him safely, and were liable for negligence in causing his death.

Held, also, that the deceased was the servant of the express company, and was not in any sense engaged in any common employment with the servants of the railway company.

CONNELL *v.* HICKOCK.

Chattel Mortgage and Bills of Sale Act—Marriage settlement of personal property—Description of property settled—Interpleader issue—Equitable title—Possession.

By an ante-nuptial settlement executed 25th March, 1885, made between James Connell of the first part, Mary Harrington (the plaintiff), his intended wife, of the second part, and one Malone of the third part, in consideration of the intended marriage, certain lands and the goods in question, consisting of horses, cows, and several articles of household furniture, described as being in and upon and around the premises and apartments used and occupied by the said James Connell, and being city number, etc., were conveyed into and assigned to Malone to hold to the use of James Connell until the marriage, and thereafter to the use of the plaintiff, her heirs, executors, administrators and assigns.

The marriage took place on the 27th of March. Within five days from the execution of the assignment it was only registered in the proper office as a bill of sale. The affidavit of bona fides was made by the plaintiff after the marriage, being described therein as the bargainee.

The goods were afterwards seized by an execution creditor of the husband; the plaintiff claimed them, and an interpleader issue was directed by the High Court to be tried in the County Court.

At the trial it was objected that the trustee should have been the claimant and plaintiff in the issue, and on this ground judgment was given for the defendant.

Held, [reversing the judgment of the Court below] that the plaintiff's beneficial interest in and possession of the property was sufficient to enable her to maintain her claim in the issue. *Schrœder* v. *Harnett*, 28 L.T.N.S., 702, followed.

(2) That the settlement was a sale of personal property within the meaning of the Act, and that the plaintiff was a person who, as a bargainee, might properly make the affidavit of bona fides.

(3) That the goods were sufficiently described and identified.

Semble, per HAGARTY, C.J.O., and OSLER, J.A., that a marriage contract or settlement, in the form of the instrument in question, was not a sale of personal property within the Act, and that registration therefore was not necessary.

Per PATTERSON, J.A., (1) That the transaction was within the statute, and (2) that the legal title to the goods was in the plaintiff.

Whiting v. *Hovey*, 12 A.R., 119; *Dominion Bank* v. *Davidson*, 12 A.R., 90, referred to.

[Dec. 22, 1888.

ARCHBOLD *v.* THE BUILDING & LOAN ASSOCIATION.

Mortgagor and Mortgagee — Redemption—Six months' notice or six months' interest after default.

This was an appeal by the plaintiff from the judgment of the Queen's Bench Division, reported 15 O.R. 357, and came on to be heard before this Court (BURTON and OSLER, JJ.A., ROSE and MCMAHON, JJ.) on the 21st September, 1888.

The Court allowed the appeal with costs, holding that upon the evidence the parties, after the maturity of the mortgage, continued to deal upon the terms therein contained as far as applicable, and therefore that the option to pay off at any time the moneys

secured by the mortgage still operated after maturity in favor of the plaintiff.

S. H. Blake, Q.C., and *Foy*, Q.C., for the appellant.

Alan Cassells, for the respondents.

[Dec. 22, 1888.

DUNCAN *v.* ROGERS.

Way—Easement appurtenant to land conveyed—Agreement, construction of by Court.

This was an appeal by the plaintiff from the judgment of the Common Pleas Division, reported 15 O.R. 699, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER and MACLENNAN, JJ.A.) on the 21st November, 1888.

The Court allowed the appeal with costs, being unanimously of opinion that upon the evidence it was clear a defined right of way existed at the time of the grant to the plaintiff, and that under the terms of the grant it passed to him. The Court were also of opinion that the finding of the jury as to the location of the extension of the lane should not have been disturbed, the written agreement in regard to this extension being ambiguous, and both parties having given evidence as to its real meaning and allowed the question to be submitted to the jury.

Fullerton and *W. Nesbitt*, for the appellant.

Tilt, Q.C., for the respondent.

[Dec. 22, 1888.

ADAMS *v.* THE WATSON MANUFACTURING CO. (Limited.)

Amendment—Adding parties—O.J.A.M.R. 103 *—Costs.*

This was an appeal by the plaintiff from the judgment of the Queen's Bench Division, reported 15 O.R. 218, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER and MACLENNAN, JJ.A.) on the 23rd November, 1888.

The Court dismissed the appeal with costs, being unanimously of opinion that under the circumstances set out in the report of the case in the Court below, the terms as to payment of costs imposed as a condition precedent to being allowed to amend, were proper.

G. T. Blackstock, for the appellant.

John Crerar, for the respondents.

[Dec. 22, 1888.

GREEN *v.* THE CORPORATION OF THE TOWNSHIP OF ORFORD.

Municipal corporation—Drainage—Work done in excess of contract—Necessary work—Liability of corporation.

This was an appeal by the defendants from the judgment of the Common Pleas Division, reported 15 O.R. 506, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER and MACLENNAN JJ.A.,) on the 30th November, 1888.

The Court allowed the appeal with costs, being of opinion that the work in question was work that the plaintiff was bound to perform under the contract itself.

Quære, whether the work in question was in any event "necessary" in such a sense as to impose liability for payment therefor upon a municipal corporation without express contract. The correctness of the decision of the Court below upon this point doubted.

W. R. Meredith, Q.C., and *Douglas*, Q.C., for the appellants.

Moss, Q.C., and *Shoebotham*, for the respondent.

[Dec. 22, 1888.

Re THE OAKWOOD HIGH SCHOOL AND THE CORPORATION OF THE TOWNSHIP OF MARIPOSA.

High Schools—Application for municipal grant —R.S.O. c. 226, *ss.* 25, 35.

Held, that the words "maintenance, accommodation and other necessary expenses," in sub-sec. 6 of sec. 25 R.S.O., c. 226, include the purposes mentioned in sec. 35 (1), and consequently that an application under sec. 35 (1) must be made before the first day of August.

Held, also, that an application under sec. 35 (1.) must be the corporate act of the School Board, not merely the verbal request (however unanimous) of the individuals composing it, and must specify the purposes for which the money is required.

Held, also [MACLENNAN, J.A., dissenting], that to come within the provisions of sec. 35 an application must be an independent application for purposes mentioned in that section, and that an application combining other pur-

poses with these purposes may be rejected by a simple majority vote.

Held, also, that an application under sec. 35 may be rejected by the council, although no formal by-law relating to the purposes of the application is before the council, and the meeting at which the rejection takes place has not been called for the special purpose of considering such a by-law.

Per MACLENNAN, J.A. *Quære*, whether a township comes within the Act.

Decision of BOYD, C., reversed.

Moss, Q.C., and *D. J. McIntyre*, for the appellants.

Hudspeth, Q.C., and *Watson*, for the respondents.

[Dec. 22, 1888.

Re CLARK AND THE CORPORATION OF THE TOWNSHIP OF HOWARD.

Municipal corporations — Drainage Acts—By-law for repair of old drain—Assessing land benefited.

On the 21st September, 1868, a by-law was passed by the Township Council under the provisions of the Municipal Act of 1866 (29 & 30 Vic., c. 51, ss. 261, 282) for the construction of (among other drains) the M. drain, and the drain was thereupon constructed. On the 11th December, 1883, the Township Council passed a by-law for repairing and cleaning this drain, and directed that the amount required for this purpose should be assessed and levied on the lands assessed for the original construction of the drain. On the 21st September, 1880, another by-law was passed to change, in accordance with the report of an engineer, the assessment made for the original construction of the M. drain, so as to enable the assessment for repairing and cleaning the drain to be made more equitably, and the assessment for repairing the drain was adopted. This assessment for repairing and cleaning the drain was limited to the lands assessed for the original construction of the drain, although the engineer in his report pointed out that large tracts of land not assessed for the original construction of the drain were now benefited by it.

Held, that the provisions of the Act of 1869 (32 Vict., c. 45, s. 17), as to maintenance and repair (now R.S.O., c, 184, s. 583 (1), are not retroactive, and do not apply to drains constructed before the date of that enactment, and that therefore the Township Council had no power to pass the by-law in question.

Decision of ROBERTSON, J., affirmed on other grounds.

Pegley and *Mills*, for the appellants.

Wilson, for the respondents.

[Dec. 22, 1888.

THE CORPORATION OF THE TOWNSHIP OF NOTTAWASAGA *v.* THE HAMILTON AND NORTH-WESTERN RAILWAY COMPANY.

Railways—Agreement to erect and establish stations—Admissibility of oral representations to vary written agreement—Res adjudicata.

By agreement bearing date the 19th day of May, 1873, the defendants, in consideration of a bonus of $300,000 granted to them by a section of the county of Simcoe, of which the township of Nottawasaga forms a part, covenanted with the plaintiffs to (among other things) "erect, build and complete good and sufficient and suitable station buildings for passengers and freight," at five certain places within the township; to "establish at each of the places hereinbefore mentioned regular way stations;" and to "well and sufficiently keep and maintain the said five stations above mentioned with all such suitable, necessary and proper buildings as the business done, or capable of being done, at the said stations respectively may require for seven years after the trains shall have commenced to run on the said road, and (to) undertake to do the passenger and freight business of the county at said stations."

By a further agreement, bearing date the 25th day of May, 1878, the defendants, in consideration of a bonus of $20,000 granted to them by the plaintiffs, covenanted with the plaintiffs to "erect, build and complete good and sufficient and suitable station buildings for passengers and freight on the line of the said railway at the several places following in the said township"—the places being specified—and to "establish at each of such places regular way stations." This agreement provided that the route of the line of the railway through the township, as defined in the former agreement, might be deviated from to such an extent as to admit of the stations

being located at the points mentioned in the second agreement, and provided further that it should not be incumbent on the defendants to erect stations at the places mentioned in the former agreement, "but that the places herein defined for stations shall be taken to be in substitution for the places mentioned in such former agreement."

The defendants erected stations at the points specified, three of these stations being respectively called A. G. and N. Trains commenced to run on the line in the year 1878.

In 1880, the plaintiffs being dissatisfied with the mode in which the stations at G. and N. were being maintained, brought an action against the defendants for specific performance of the agreements. In this action a consent decree was pronounced and an injunction granted, restraining the defendants from ceasing to maintain the stations except in a certain manner in the decree specified. The decree contained no limitation or other provision as to the time during which the stations were to be maintained, though this question had been raised at the hearing of the action.

In 1885, after the expiration of the seven years, the defendants make changes in their mode of maintaining the station at A. The plaintiffs were dissatisfied, and this action was thereupon brought by them to compel specific performance.

Held, reversing the judgment of ROBERTSON, J., that the word "establish" does not in itself mean "maintain and use for ever"; that the seven years limitation applied to the substituted stations, and that the defendants were not bound to maintain them after the expiration of that time.

Bickford v. *The Town of Chatham*, 14 A.R. 32, and in the Supreme Court (not reported), *Jessup* v. *Grand Trunk Railway*, 7 A.R. 128, and *Geauyeau* v. *The Great Western Railway*, 3 A.R. 412, considered. *Wallace* v. *Great Western Railway*, 3 A.R. 44, distinguished.

Held, also, that the decree in the former action did not constitute the question of the seven years' limitation *res adjudicata*, there being no adjudication on that question, and in any event an adjudication on that question being unnecessary at the date of the former action. *Concha* v. *Concha* 11 App. Cas. 541 considered and followed.

At the trial evidence was admitted on behalf of the plaintiffs of representations made by directors of the defendant company, at meetings held to consider the question of granting the second bonus, to the effect that by the second agreement the defendants would be bound to maintain the stations for all time.

Held, that this evidence was clearly inadmissible.

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

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

[Dec. 22, 1888.

JONES *v.* THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Negligence—Carelessness contributing to accident—Railways—Approach to station.

To reach, from the highway, the station of the defendants at Point Edward, it is necessary to go through the railway yard and cross eleven railway tracks, and a planked way runs across these tracks, extending from the street to the east end of the station platform. The planked way is unfenced and unguarded. J., the husband of the plaintiff, who was familiar with the locality, while hurrying to the station before daylight, left this planked way upon reaching the track nearest the platform, in order to walk around the rear of a train that was coming in from the east on that track and was still in motion. While some twenty feet from the planked way, walking between the tracks and near the rails of the track second from the platform, J. was struck by the buffer beam of a shunting engine and killed. This shunting engine had been standing some 150 feet to the west of the planked way and was passing slowly to the east for the purpose of being switched on to the track nearest the platform, and then aiding in placing in the ferry boat the cars of the train that had just come in. The shunting engine had been standing to the west of the planked way for the purpose of convenience in giving orders to the engineer; its head-light was burning and as it moved its bell was ringing. There was ample space between the two tracks for a person to stand in safety, and the approach of the shunting engine could easily be noticed.

Held. [HAGARTY, C.J.O., dissenting], reversing the decision of the Chancery Division, that the accident was due to the carelessness of the deceased and not to the negligence of the defendants, and that the plaintiff could not recover.

The extent of the duty of railway companies in providing safe access to their stations considered.

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

W. R. Meredith, Q.C., and *R. M. Meredith*, for the respondents.

PRATT v. THE MUNICIPAL CORPORATION OF THE CITY OF STRATFORD.

Municipal Corporation—Jurisdiction over streets—Changing level of street—Damage to adjacent owners—Absence of by-law—Remedy by action or arbitration.

Held. [BURTON, J.A., dissenting], affirming the decision of BOYD, C., that a municipal corporation can exercise and perform their statutable powers and duties in repairing highways or bridges, or erecting a new bridge instead of an old and unsafe one without passing a by-law therefor, and that the plaintiff, whose premises were "injuriously affected" by the level of the street on which they fronted being raised in order to construct a proper approach to a bridge that the defendants were lawfully re-building, could not maintain an action against the defendants, but must, in the absence of any negligent construction, proceed under the arbitration clauses of the Municipal Act R.S.O. c. 184, notwithstanding the absence of any by-law for the prosecution of the work.

Per BURTON, J.A. There was no obligation cast upon the defendants to re-build the bridge at such a height as to necessitate a change in the level of the street, and therefore the defendants could not lawfully change the level of the street without passing a proper by-law or that purpose.

Yeomans v. *The County of Wellington*, 4 A.R. 301, followed. *McGarvey* v. *The Town of Strathroy*, 10 A.R. 636, and *Adams* v. *The City of Toronto* 12 O.R. 243, discussed. *Van Egmond* v. *The Town of Seaforth*, 6 O.R. 610, distinguished.

W. Cassels, Q.C., for the appellant.

Idington, Q.C., for the respondents.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

MACMAHON, J.] [Dec. 31, 1888.

REGINA v. WARREN.

Criminal law—Keeping house of ill-fame—Husband and wife—Joint conviction.

There may be a joint conviction against husband and wife for keeping a house of ill-fame; the keeping has nothing to do with the ownership of the house, but with the management of it.

Rex v. *Williams*, 10 Mod. 63, and *Rex* v. *Dixon*, ib. 335, followed.

Badgerow, for the Crown.

W. G. Murdoch, for the prisoner.

Div'l. Ct.] [Dec. 22, 1888.

MCDIARMID v. HUGHES.

Company—Power to hold lands—Statutes of mortmain—Constitutional law—Powers of Dominion Parliament—Statute of limitations—Defendant setting up—Estopped by assenting to conveyance.

A conveyance of lands to a corporation not empowered by statute to hold lands, is voidable only and not void, under the statutes of mortmain, and the lands can be forfeited by the Crown only.

Where, too, a corporation is empowered by statute to hold lands for a definite period, and holds beyond the period, only the Crown can take advantage of it, and it is not a defence to an action of ejectment that the lands were acquired by the plaintiff from the corporation after the period fixed by the statute.

Semble, the Dominion Parliament has power to enact that a license from the Crown sh not be necessary to enable corporations to hold lands within the Dominion; and Dominion Act enabling a Quebec Corporation to hold lands in Ontario would operate as a license.

By an arrangement made within ten years before this action of ejectment was begun, the

land in question was conveyed by the owners of the legal estate to D., through whom the plaintiff claimed. One of the terms of the conveyance and a part of the consideration was that D. should, and he did thereby, release a debt which he held against the defendant and others. The defendant did not execute the conveyance, but he was an assenting party to the whole transaction, and was aware that the conveyance was being executed, and that D. was releasing his liability.

Held, that he was estopped from setting up a prior adverse possession in himself as effectually as if he had been a conveying party.

Per ARMOUR, C.J. At all events, upon the evidence, the possession of the defendant at the date of the conveyance, if any, was a tenant at will to the owners of the legal estate; and there was also evidence of an entry by D. sufficient to prevent the setting up by the defendant of any possession prior thereto.

W. H. Walker, for the plaintiff.

Aylesworth and *Wyld*, for the defendant.

ROSE, J.] [Dec. 31, 1888.

CONMEE *v.* CANADIAN PACIFIC R.W. CO.
(FOUR ACTIONS.)

Arbitrator—Disqualification—Offer by party of solicitorship pending reference—Subsequent acceptance—Order of reference, construction of—Judicature Act, 1881, *s* 48—*C.L.P. Act, ss.* 189, 209—9 *&* 10 *Wm.* III *c.* 15—*Interim finding of facts—Time for moving against—Waiver of objections to.*

By an order made at *nisi prius* on the 4th November, 1886, upon the application of the defendants, and without the consent of the plaintiffs, the actions and all matters in question therein were referred to the award of the persons named, who were given all the powers therein of a Judge of the High Court of Justice sitting for the trial of an action. By clause 2 of the order the referees were directed to make and publish their award in writing, on or before the 3rd January, 1887, or such other day as they should appoint. By clause 6 it was provided that there should be the right of appeal in the same way as if the order was made under s. 189 of the C.L.P. Act; and by clause 8, that the reference should be considered as made in pursuance of s. 48 of the Judicature Act, 1881, and also, in so far as the same is applicable, as under the provisions of s. 189 of the C.L.P. Act.

Held, that the reference was a compulsory one, so far as the plaintiffs were concerned, and that it was not a reference under 9 & 10 Wm. III, c. 15, but under s. 48 of the Judicature Act and s. 189 of the C.L.P. Act.

During the reference it was agreed between the parties that the arbitrators should proceed to the ground and ascertain by their own examination the quantities of material moved (as to which the dispute was), and certify their findings, and all other questions in the actions and reference were to remain open; and pursuant to this agreement the arbitrators proceeded to the ground, and ascertained certain facts, and on 23rd August, 1887, reported: "We do hereby find and certify that the plaintiffs moved the respective quantities hereinafter mentioned," etc.

Held, that this finding and certificate was not the award which clause 2 of the order of reference directed the referees to publish; nor was it an award within the meaning of s. 209 of the C.L.P. Act; but was merely a finding of facts pending the reference, to enable the arbitrators to make their award; and apart from the question of waiver, the parties were not bound to make any motion as to the finding until the making of the award; and therefore the objection that a motion against the finding made on the 29th May, 1888, was too late, failed.

Held, also, upon the evidence, that there was no waiver of the objections to the finding; and that, although the finding was not an award, the motion made against it by the plaintiffs was a convenient and proper one.

The finding and certificate was set aside, because, pending the reference and before the finding, one of the arbitrators had received an offer of the solicitorship of the defendant's Company, and had after the finding accepted it, and was thus disqualified from acting.

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

Robinson, Q.C., and *S. H. Blake*, Q.C., for the defendants.

STREET, J.] [Dec. 31, 1888.

REGINA *ex rel.* JOHNS *v.* STEWART.

Municipal elections—Corrupt practices—Bribery by agents—Presumption as to candidate's intention—Gifts by candidate—Payments to canvassers.

A candidate for a municipal office, though not required by law to make his payments through a special agent, is not absolved from keeping a vigilant watch upon his expenditure; and a candidate who, on the eve of a hotly contested election, places a considerable sum of money in the hands of an agent capable of keeping part of it for himself and of spending the rest improperly or corruptly, who never asks for an account of it, gives no directions as to it, and exercises no control over it, must be held personally responsible if it is improperly expended. And where money given to agents by the candidate was, in fact, used in bribery,

Held, that the presumption that the candidate intended the money to be used as it was used became conclusive in the absence of denial on his part.

Gifts by a candidate to one who is at the time exerting his influence in the candidate's behalf are naturally and properly open to suspicion; and in the absence of any explanation such gifts must be regarded as having been made for the purpose of securing, or making more secure, the friendship and influence of the donee.

In the election in question every member of certain committees was paid a uniform sum of $2, nominally for his services as a canvasser, but apparently without regard to the time he devoted to the work, and without inquiry as to whether he had in fact canvassed at all.

Held, that these payments were corruptly made and constituted the offence of bribery as defined by ss. 2 of s. 209 of the Municipal Act.

Under the circumstances above referred to, and other circumstances of the case, the defendant was found personally guilty of acts of bribery, and to have forfeited his seat as mayor of the city of Ottawa.

Aylesworth, for the relater.
Chrysler, for the defendant.

Chancery Division.

Div'l Ct.] [Dec. 14, 1888.

WEBBER *v.* MCLEOD.

Malicious arrest—Unlawful and malicious injury—Findings of jury—Reasonable and probable cause—R.S.C., c. 168, *s.* 59.

Plaintiff was in occupation of a house on a farm of the defendant's, and cut off the ends of some logs used in the construction of a small building, which logs were so old and rotten that they had fallen out of their places in the building and the ends rested on the ground. Defendant had plaintiff arrested and imprisoned on a charge of "unlawful and malicious injury to his property," but the magistrate dismissed the case.

In an action for malicious prosecution the jury found, in answer to questions submitted by the Judge, that defendant did not have reasonable ground for believing that plaintiff had unlawfully and maliciously injured the property, and did not take care to inform himself as to the facts, and was actuated by other motives than the vindication of the law in laying the information, and assessed the damages at $100.

On motion to set aside the verdict the application was dismissed.

Per BOYD, C. It was open to the jury to find that the wood was of no value, and that the injury was of too trifling a character to justify the defendant in setting the criminal law in motion, and that was evidently the meaning of their answers to the questions. If there was no actual positive damage proved the plaintiff was not chargeable under R.S.C., c. 168, s. 59.

Held, also, that it was proper to leave the whole case to the jury, and the questions were sufficient for that purpose, and the jury having found a want of reasonable care on the part of defendant to inform himself of the true state of the case, that was a sufficient justification for holding that there was want of reasonable and probable cause.

Per FERGUSON, J. The jury virtually found that the property said to be injured was of no appreciable value, and, that being the case,

such facts and circumstances did not exist as are necessary to constitute reasonable and probable cause for the prosecution.

Moss, Q.C., for the motion.

W. Nesbitt, contra.

Full Court] Dec. 14, 1888.

HUTCHISON *v.* CANADA PACIFIC RAILWAY.

Railways — Negligence — Contributing Negligence — Travelling by freight Train.

The plaintiff was going from Ingersoll to Montreal by train in charge of cattle. At Toronto the train on which he had come from Ingersoll was partly broken up, to be re-made with some cars which were standing on another track at Toronto. While at the station at Toronto, plaintiff went into the caboose at the end of the cars which were to be added to the portion of the train which had come from Ingersoll, and though the plaintiff knew there would be a shock when the connection was made between these two parts of the intended train, he stood up in the caboose, and was washing his hands when the connection was made, and the resulting shock caused the injury. The evidence did not show that the defendants knew he was in the caboose at all, nor did the plaintiff prove negligence in any other way than as above.

Held, affirming the decision of Rose, J., that the mere fact of the accident happening to him was not in itself sufficient evidence of negligence, and the action must be dismissed.

Held, also, that there was evidence of contributory negligence in that the plaintiff knew he was in a freight train, where there would not be so much care shown, and yet stood up, instead of setting down as he might have done, while the connection was being made.

W. Nesbitt, for plaintiff.

Aylesworth, for the defendants.

Full Court.] [Dec. 22, 1888.

YOUNG *v.* SPIERS.

Assignment for creditors—Filing of claim—Right to rank—Collateral securities.

Wardlaw made an assignment to trustees for the benefit of his creditors prior to 1884. In July, 1884, Harvey filed a claim against the estate, claiming (1) upon two mortgages on land; (2) upon an open account and certain notes made by Wardlaw; (3) upon certain notes made by Turnbull in favor of Wardlaw, and endorsed over by Wardlaw to him, which were made by Turnbull for Wardlaw's accommodation, and were delivered to Harvey as a general collateral security for Wardlaw's indebtedness to Harvey. Since filing the claim the mortgage debts had been paid to Harvey, who had thereupon assigned the mortgages, and the Turnbull notes had been paid by Turnbull to Harvey, and Turnbull had thereupon filed a claim in respect to them against Wardlaw's estate. The mortgages had been given to secure payment of entirely separate and isolated debts from Wardlaw to Harvey. Harvey afterwards made an assignment to trustees for his creditors, and these latter now brought this action, claiming that notwithstanding all the above circumstances they were still entitled to rank on and receive a dividend from the Wardlaw estate on the whole of the above indebtedness, and on Harvey's claim as originally filed.

Held, that as to the mortgage debts they were not entitled to receive a dividend, these being separate and distinct debts, but that as to the Turnbull notes they were still entitled to rank, on the authority of *Eastman* v. *Bank of Montreal*, 10 O.R. 79, provided that they did not in all receive more than 100 cents on the dollar; and this did not prevent Turnbull also ranking in respect to the sum he had paid as accommodation maker.

Crerar, for the plaintiffs.

Creelman, for the defendants.

BOYD, C.] [Jan. 9, 1889.

THE CORPORATION OF THE VILLAGE OF EAST TORONTO, *et al.*, *v.* THE CORPORATION OF THE TOWNSHIP OF YORK.

Erection of new municipality—Division of assets—School fund.

On the erection of two village municipalities out of a township,

Held, that the moneys derived from "The Ontario Municipalities Fund," which had some years before been by by-law appropriated to the school purposes of the township,

were assets properly divisible between the township and the new village municipalities.

Re Albemarle, etc., 45 U.C.R., 133, referred to and distinguished.

E. D. Armour, for the plaintiffs.

J. K. Kerr, Q.C., for the defendants.

Practice.

ROBERTSON, J.] [Jan. 9, 1889.

MOSES v. MOSES.

Costs—Scale of—Jurisdiction of Division Court—Ascertainment of amount.

The defendant signed a writing in these words: "Brantford, Oct. 9th, 1886. If anything happens to me sudden, this is to insure my son Joseph (the plaintiff) to take $100 from his sister Hannah's share, to repay money lent to her. If I live until this time next year I will settle it with him."

Held, that this was not a sufficient ascertainment of the amount due, by the signature of the defendant, within the meaning of R.S.O., c. 51, s. 70, to allow of a claim upon it and other items (amount to about $60), being joined in a Division Court action.

McDermid v. *McDermid*, 15 A.R. 287, followed.

Re Graham v. *Tomlinson*, 12 P.R. 367, referred to.

Aylesworth, for plaintiff.

Fullerton, for defendant.

ROBERTSON, J.] [Jan. 9, 1889.

ODELL v. BENNETT.

Counter-claim—Slander—Mortgage action—Inconvenience—Delay—Rule 374.

A counter claim for damages by reason of false and depreciatory statements with regard to the value of the mortgaged premises having been set up by the defendants in an ordinary mortgage action, an order striking it out under Rule 374 was affirmed, as well on the ground of inconvenience in trying the action and counter claim together, as on the ground that the counter claim was filed for delay.

McLean v. *Hamilton Street Railway Co.*, II. P.R. 193, and *Central Bank* v. *Osborne*, 12 P.R. 160, followed.

E. T. English, for the plaintiff.

Hoyles, for the defendants.

BOYD C.] [Jan. 10, 1889.

NIAGARA FALLS PARK COMMISSIONERS v. HOWARD.

Discovery—Particulars—Title—Form of order—Disclosing evidence relied on.

The practice in ordering particulars depends in this Province on the inherent jurisdiction of the Court to prevent injustice being done, the rules in force in England not having been adopted here.

In an action of trespass to land, the defendants pleaded a lease from the Dominion Government, and that the lands had been vested in the Government as ordnance lands. This was pleaded in an unexceptionable manner, and no affidavit was filed by the plaintiffs to show that they were unable to reply without further disclosure: yet an order was made by the Master in Chambers for particulars of the facts and means by which, and the time at which, the lands became ordnance lands. It did not appear that the defendants had any special means of information as to the matter of title, not open to the plaintiffs.

Held, that the order was wrong in form; the utmost should have been to declare that the defendants should not be allowed to give evidence in support of this part of their defence, except in so far as they furnished particulars.

But even such an order as indicated should not have been made in this case; for a party is not obliged to disclose upon what evidence he relies, or by what means he is going to prove his contention.

Irving, Q.C., for the plaintiffs.

H. Symons, for the defendants.

STREET, J.] [Jan. 11, 1889.

RE PRITTIE TRUSTS.

Trustees—Remuneration—Exchange of securities—Collection of rents.

Trustees under a marriage settlement exchanged an investment of the estate in Manitoba lands into the stock of a land company. Nothing by way of income had ever been realized from either land or stock, and it was stated that both were valueless. The responsibility of making the exchange was taken away by the consent of the persons interested.

Held, that a percentage upon the nominal value of the stock was not the way to arrive

at the trustees' remuneration, but that they should be allowed a sum to cover their trouble in making the exchange; and the allowance made by a referee was reduced from $162.50 to $50.

Certain rents were collected by the trustees through an agent, whom they paid by commission.

Held, that they were justified in employing an agent to make the actual collections for them, but were bound to look after the agent, and for their own care, trouble and responsibility were entitled to an allowance of two and a half per cent. upon the rents collected.

Moss, Q.C., for the trustees.

W. H. C. Kerr, for the *cestui que trust*.

BOYD, C.] [Jan. 14, 1889

In re ANDERSON AND BARBER.

Interpleader—Intercepting rent—Action for rent in County Court—Application by tenant to High Court for interpleader order—Entitling of affidavits—Garnishment by Division Court creditors—Charging order—Rules 1141 et seq., 1162 et seq.—Costs.

Rent being due by A. to B., A. was served as garnishee with Division Court summonses by E. and G., each claiming part of the rent. A. refusing to pay his rent unless he was protected from these claims, he was sued by B. for the full amount of the rent in a County Court. Before this action was begun G. presented to A. an order upon him signed by B. for part of the rent due.

A. applied to a Judge of the High Court of Justice in Chambers for an interpleader order. The affidavits on which he moved were entitled "In the H.C.J., Chy. Div., between A., applicant, and B. and others, claimants."

Held, that A. was entitled to be relieved by calling on the rival parties to interplead, under the procedure indicated by Rules 1141 *et seq.*; and an objection to the manner of entitling the affidavits was overruled. There was no jurisdiction in the County Court to give relief by way of interpleader in the action brought by B.; the jurisdiction in that Court being limited by Con. Rules 1162 *et seq.* to proceedings against absconding debtors, and after judgment when execution has issued. G's. claim might have been litigated in the County Court, and would not have been the subject of interpleader proceedings; but the order made being for a stay of the County Court action and payment into Court by A. of the rent, G's claim should be the subject of inquiry in the High Court.

Held, also, that A's. costs of the application should be borne by E. and G., who submitted to have their claims barred, and also had been the cause of the expense and delay, and that there should be no costs to either party of the County Court action.

Justin, for the applicant.

W. R. Meredith, Q.C., *Hoyles*, *F. R. Powell*, and *Robinette*, for the respective claimants.

STREET, J.] [Jan. 11, 1889

HYNE *v.* BROWN.

Infant—Defendant in action of tort—Appointment of guardian—Rule 261.

In an action of seduction brought against an infant, the defendant was served personally and entered an appearance in person.

Held, that the common law practice referred to in Rule 261 meant the practice of by which a real guardian and not a fictitious one was appointed; and an order was made requiring the defendant to appear by guardian within six days, and in default for the plaintiff to be at liberty to appoint a guardian for him, the consent of such guardian being shown and that he had no interest adverse to the defendant.

Kappele, for plaintiff.

STREET, J.] [Jan. 23, 1889.

JOHNSON *v.* KENYON.

Costs—Scale of—Action for damages for failure to return promissory note—Recovery of $314—Ascertainment of amount—Jurisdiction of County Court—Offer of costs, effect of.

The plaintiff held the defendant's note for $300, and gave it back to the defendant to hold until he should be free from a certain liability as surety. After he became freed he refused to give up the note, and destroyed it, and this action was brought for damages for breach of his contract to return the note. The action was referred to a referee, who found the plaintiff entitled to $314 damages, being the amount of the note and interest.

Held, that as soon as the facts relating to the note had been arrived at, the quantum of damages was a fixed amount, ascertained by calculating the amount of the defendant's

liability upon the note; and therefore the claim was within the jurisdiction of the County Court, under R.S.O. c. 47, s. 19, ss. 2; and the plaintiff was entitled to costs upon the County Court scale only. The defendant was entitled to set off the difference between County Court and High Court costs of his defence.

Before a motion for costs was made, the defendant offered to pay the plaintiff's costs upon the County Court scale.

Held, that this was not an offer which the plaintiff was bound to accept, and the plaintiff was entitled to the costs of the motion in the County Court scale.

J. B. Clarke, for the plaintiff.

Aylesworth, for the defendant.

Miscellaneous.

SPRING SITTINGS, CHANCERY DIVISION, 1889.

THE HON. MR. JUSTICE ROBERTSON.

Toronto..........Monday..........8th April.

THE HON. THE CHANCELLOR.

Chatham..........Wednesday....6th March.
Sandwich ....Tuesday......12th March.
London...........Monday......18th March.
Walkerton........Thursday......11th April.
Goderich ....Wednesday.....17th April.
Sarnia............Thursday......25th April.
St. Thomas........Wednesday......1st May.

THE HON. MR. JUSTICE PROUDFOOT.

Brantford........Wednesday ...6th March.
Simcoe...........Wednesday.....13th March.
Owen Sound.......Monday..........1st April.
Hamilton.........Monday ....20th May.
Guelph...........Thursday........30th May.
St. Catharines....Thursday........6th June.

THE HON. MR. JUSTICE FERGUSON.

Belleville..........Thursday......21st March.
Cornwall.........Monday.........15th April.
Ottawa...........Monday........22nd April.
Kingston.........Wednesday......22nd May.
Brockville. ...Tuesday.........28th May.
Cobourg....... ..Thursday........6th June.

THE HON. MR. JUSTICE ROBERTSON.

Lindsay..........Monday.......11th March.
Peterborough......Friday ....15th March.
Woodstock........Wednesday....20th March.
Stratford.........Wednesday ......3rd April.
Whitby..........Tuesday..........7th May.
Barrie............Monday.........13th May.

SPRING CIRCUITS, 1889.

THE HON. CHIEF JUSTICE ARMOUR.

Stratford.........Tuesday......12th March.
Guelph...........Tuesday.......19th March.
Berlin............Tuesday......26th March.
Brantford........Wednesday.......3rd April.
Simcoe...........Monday.........8th April.
Cayuga..........Thursday.......11th April.
Welland..........Monday........15th April.
Hamilton.........Tuesday........23rd April.

THE HON. MR. JUSTICE ROSE.

Milton...........Monday.......11th March.
Brampton........Thursday......14th March.
Orangeville.......Monday.........29th April.
St. Catharines....Monday......... 6th May.

THE HON. MR. JUSTICE FALCONBRIDGE.

Cornwall.........Tuesday......12th March.
Whitby..........Monday.......18th March.
Napanee....... ..Monday.......25th March.
Kingston ....Monday.........1st April.
Brockville........Tuesday........9th April.
Picton............Tuesday.........16th April.
Belleville.........Monday.......22nd April.
Cobourg..... .....Monday..........6th May.

THE HON. MR. JUSTICE STREET.

Walkerton........Tuesday........12th March.
Goderich ....Tuesday......19th March.
Sarnia...........Tuesday......26th March.
St. Thomas.......Monday..........1st April.
Chatham..........Monday..........8th April.
Sandwich........Wednesday.....17th April.
Woodstock........Wednesday.....24th April.
London...........Monday...........6th May.

THE HON. MR. JUSTICE MACMAHON.

Ottawa..........Tuesday.......12th March.
L'Orignal.........Monday......25th March.
Perth............Thursday......28th March.
Pembroke.........Tuesday.. ......2nd April.
Barrie............Monday.........8th April.
Peterborough......Monday........22nd April.
Lindsay..........Monday.........29th April.
Owen Sound......Monday..........6th May.

THE HON. MR. JUSTICE ROSE.

Toronto.

Civil Court......Monday.......18th March.
Criminal Court...Monday.........15th April.

IN our last number at page 64, in *Colton v. Schell*, "ignoring" should be "issuing," and in *Furness v. Gilchrist*, on the same page, "covered by" should be "bound by"