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A BILL, introduced by the Attorney-General, now before the Legislative Assembly, contains a provision for the appointment of a second Junior Judge for the County of York, and also enables the concurrent sittings of the County Court, Court of General Sessions, and the Division Courts. It is also provided that there shall be weekly sittings throughout the year, with the exception of the month of August, of the First and Tenth Division Courts; monthly sittings of the same for the hearing of judgment summonses, and bi-monthly sittings for jury cases. The Senior and either of the Junior Judges together, as also the Lieut.-Governor, shall have authority to appoint other sittings for any of the above purposes. The necessity for more frequent sittings of the "Poor Man's Court" has been so long felt, that this measure affords but tardy justice. That a large increase in the number of suits may be expected can be inferred from the undoubted fact that many just claims are not now pressed owing to the delay so often met with by the debtor being served just "too late for this court," which means the delay of a month before the trial of the case. The change intended by this Act has been long required and demanded by both the profession and the public, and we have good authority for believing that the appointment will be made without delay.

IT is too often a characteristic of diseases affecting the mind that they leave the unhappy victim altogether unconscious of the terrible deterioration that is going on; and what is patent to all the world is too often, perhaps in mercy, hidden from the sufferer himself. The comments which have lately appeared in several English papers in reference to one of the English Judges, indicate that the Judge in question has arrived at such a mental condition that he has become quite unfit to discharge his judicial duties, and yet that he is himself, apparently, altogether unconscious of the fact. The tenure by which the Judges hold their office frees them in a large measure from the control of the executive, and this is necessarily so in order to secure their independence; but it also renders it an extremely difficult matter to remove a Judge who has become mentally incompetent to perform his duty. He may, as in the present case, refuse to resign, and unless he commit some positive wrong, amounting to a breach of good behavior, he cannot be removed, except upon an address of both Houses of Parliament, and it is hard both on the public and the Judge himself that he should be exposed to this cruel alternative.

The possibility of a Judge becoming insane, or imbecile, has not been taken into account, but it is obviously a very important contingency to be guarded against, and it is possible that legislation will be found necessary in order to provide for such unfortunate cases. We observe that a recent capital case, which would in ordinary course have come up for trial before the Judge referred to, was, by some judicial engineering, transferred to another sittings. The spectacle of a man being put in peril of his life before a Judge who has become lunatic, or imbecile, would be a mockery of justice too dreadful to contemplate. It is bad enough that suitors in civil proceedings should be exposed to having their rights determined before such a tribunal.

THE unlawful imposition of taxes on Her Majesty's liege subjects is, as we all know, a very serious offence; it was the moving cause of one unfortunate monarch losing his head; and, therefore, when the highest personage in the realm has suffered so severe a penalty, it is somewhat extraordinary to find that much smaller fry should dare to venture on so rash a course.

We learn from the pages of a contemporary that the Registrars of the High Court of Justice have embarked on this hazardous enterprise, and we are naturally led to tremble for their safety. It appears that in agreeing that the 50c. fee imposed by the tariff for setting down appeals from Chambers should in cases in the Q. B. and C. P. Division hereafter be paid to the Clerk in Chambers instead of to the Clerk of Records and Writs, as provided by *Rule* 545, they have, in effect, imposed a new and unlawful tax on a much suffering profession. The point is a very fine one, so fine that some stupid people will hardly be able to see it; but it is all the better for that from a legal point of view.

Now is the time for some chivalrous Hampden to step forward and resist to the death this constitutional iniquity. Unfortunately, in this prosaic age the Bench are not at all up to the mark on great constitutional questions of this kind. We remember once hearing that in the great case of *Jackson* v. *Richards* (we think it was) the Clerk of the Court had demanded a fee, which counsel objected to pay. When the case came before the Court, the great question as to the lawfulness of the Clerk's demand was about to be solemnly argued, when the learned Chief Justice, who at that time swayed the Court of Common Pleas, inquired of the Clerk how much the fee in dispute might be—we think it was 50c. He then beckoned the usher to approach, and having dived into his pocket he produced the necessary coin, with which he directed the stamp in question to be procured and applied to the document which was considered to be in need of that adornment, and then blandly asked the learned counsel to proceed with the merits of his case, if it had any. Such, alas, is the way great constitutional questions are burked by an unimaginative bench in these degenerate days!

UNLICENSED CONVEYANCERS.

We call attention to the letter of "Fair Play," on this subject, which will be found in another place. It is scarcely necessary to reproduce the advertisements referred to by our correspondent; it may, however, shortly be said that they contain, as usual, statements that the advertiser "makes out deeds, mortgages, wills, and aggreements *(sic)*, for one dollar, lends money on low interests, buys good mortgages, acts as assignee in trust, collects debts, probates wills, closes mortgages for one half the usual price." He also describes himself in the advertisement of a mortgage sale as "vendor's attorney." In a third advertisement he says that "Every assignment in trust for the benefit of creditors should be made to —— (that is, the advertiser), if experience, care, promptness, security, economy, personal attention, and the best results are desired; wills, probates, and all necessary papers prepared for administrators. All kinds of blank forms for sale."

It is nothing new for us to bring this system of piracy by unlicensed conveyancers to the notice of the profession and the Law Society. The supineness of the latter, and the exigencies of party politics, have left the profession a prey to the class referred to. It is idle to abuse the latter or to remonstrate with them; they see their way to making a living in that direction, and those who should be the protectors of the profession apparently "love to have it so." The Provincial Government, at the head of which is a professional man of high standing and repute, with a Cabinet in which are several lawyers, takes no notice. The leader of the Opposition, also a lawyer, with lawyers in his following, also takes no notice. It has been said that the fact of there being several Division Court agents and unlicensed conveyancers, members on both sides of the House, and that a large army of them, outside the House, are political partizans and wirepullers through the country, is sufficient explanation why the Legislature makes no effort to protect the legal profession. This protection is claimed by the profession at large, *not as a matter of favor, but as a matter of right and honesty;* and protection of a similar character is accorded to and enforced by every other profession in this country.

So far as the Law Society is concerned, we can quite understand that leading counsel, who are the moving spirits in the Law Society, do not, owing to the position they occupy, comprehend the situation, nor appreciate the position in which practitioners are placed by this want of protection. Spasmodic efforts are made from time to time, when Benchers are being elected, to introduce into the governing body of the Law Society those who understand the difficulty and feel the pressure. So far, however, this has come to nothing. We have endeavored to do our part in the matter, and cannot but feel a sense of disappointment that no result has followed from any of the exertions put forth as well by ourselves as by others who understand the situation and appreciate the gross injustice perpetrated. Like them, we have a deep sense of the wrong done. It would be strange if there were not on the part of those interested a sense of astonishment at the lack of interest on the part of our governing body, as well as contempt for those in authority, whose position demands that they should do justice in the premises, and who could easily do it if they would, but who have so far neglected their duty.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for March comprise (1891) 1 Q.B., pp. 317-430; (1891) P., pp. 129-162; (1891) 1 Ch., pp. 201-398; and (1891) A.C., pp. 1-80.

BAILOR AND BAILEE—ESTOPPEL—JUS TERTII.

Rogers v. *Lambert* (1891), 1 Q.B. 318, was an action of detinue by bailors against their bailees for the goods bailed, which consisted of a quantity of copper. It was admitted that the plaintiffs before action had sold the copper to a firm of Morrison & Co., who had paid the price of it, and that the plaintiff had indorsed the delivery orders to Morrison & Co., but before action the plaintiffs had notified the defendants not to deliver the copper to any one but themselves. The defendants did not profess to be defending the action for, or by the authority of, Morrison & Co., but they admitted that they were defending it in their own interest. By an order of the Court the copper was sold, and the proceeds paid into Court. Day, J., before whom the action was tried, held, on the above state of facts, that the plaintiffs had no interest, and gave judgment for the defendants, and ordered the money to be paid out to them, which was done; but, on appeal, the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) came to the conclusion that the law on the subject had been correctly laid down by Blackburn, J. ("a judge who knew more about these matters than any one else," as Lord Esher remarks) in *Biddle* v. *Bond*, 6 B. & S. 225, viz., that as between a bailor and bailee, under an ordinary contract of bailment, the bailee must, if he desires to defend an action for the non-delivery of the goods upon the demand of the bailor, show that he has already delivered them upon a delivery order authorized by the bailor, or he may ask for an interpleader order, or he may at his own risk, as regards the plaintiff, say, "I defend this action on behalf of A.B., and I say that he is the person really entitled to the goods," and if he takes the latter course he must not only allege the title of the third party but must prove it, and if he does not prove it he has no defence. To use the language of Pollock, C.B., in *Thorn* v. *Tilbury*, 3 H. & N. 537, a bailee can set up the title of another only "if he defends upon the right and title, and by the authority of," that person. The judgment of Day, J., therefore, was reversed, and the plaintiffs not objecting, the money was ordered to be repaid into Court, and liberty was given to any person claiming the copper to apply for its payment as if he were a party to the action, and the defendants were directed to serve notice of the order upon Morrison & Co., and all persons known by them to claim any interest in the copper or money.

PRACTICE—NEW TRIAL—STAY OF EXECUTION.

In *Monk* v. *Bartram* (1891), 1 Q.B. 346, the action had been tried by Grantham, J., with a jury, and judgment given in favor of the plaintiff; a stay of execution had been applied for and refused. The defendant now applied to the Court of Appeal to stay the execution pending an appeal to that Court, but that Court (Lord Esher, M.R., Bowen and Fry, L.JJ.) held that to warrant the granting of

the application special circumstances must be shown; and that allegations that there had been misdirection, and that the verdict was against evidence or the weight of evidence, were not sufficient ground for granting the stay.

PRACTICE—APPEAL—EXTENSION OF TIME FOR ENTERING THE APPEAL.

In *Cusack* v. *London & N.W. Railway Co.* (1891), 1 Q.B. 347, the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) may be said to have given the finishing blow to the practice laid down by that Court in the time of Sir George Jessel, as to the principles upon which leave to appeal after the time has expired may be granted. The notion that a judgment gave a party "a vested interest," which could not be disturbed unless the opposite party proceeded strictly according to the *Rules*, has now been pretty well demolished, and may, we presume, now be consigned to the limbo of discarded judicial opinions. In this case application was made for leave to appeal in a County Court case after the time had expired, and the Divisional Court (Pollock, B., and Charles, J.) refused the application, considering that they were bound by the view expressed by the Court of Appeal in *Collins* v. *Paddington*, 5 Q.B.D. 368, that there is a distinction in the practice as to granting an extension of time according to whether the application is made before or after judgment; but Bowen, L.J., stated that that case "belonged to a period in which stricter views on this point were held," and that since that time eminent judges had one and all come round to the conclusion that in such a matter no hard and fast line could be laid down, but that each case must be considered solely on its merits. Here the slip was accidental on the part of the appellants' solicitor, and the leave was granted.

CRIMINAL LAW—CONCOCTION OF FALSE EVIDENCE TO BE USED ON AN ARBITRATION—ATTEMPT TO PERVERT THE COURSE OF JUSTICE.

The Queen v. *Vreanes* (1891), 1 Q.B. 360, was a case reserved for the Court for Crown Cases Reserved. The prisoner was indicted for having abstracted from a bag a certain sample of wheat and substituted in its place another of a better quality, with a view to its being produced in evidence before arbitrators in case any should be appointed under the contract for the sale and purchase of the wheat of which the bag in question purported to contain a sample. The Court (Lord Coleridge, C.J., and Pollock, B., Stephen, Charles, and Laurance, JJ.) were agreed that this was an attempt to pervert the course of justice, and was a fraud or cheat at common law which constituted an indictable offence, notwithstanding that the piece of evidence was not in fact used before the arbitrators; and the conviction of the prisoner was therefore confirmed.

MARINE INSURANCE—MUTUAL INSURANCE ASSOCIATION—ACTION BY PERSON BENEFICIALLY INTERESTED, BUT NOT A PARTY TO POLICY.

In *Montgomerie* v. *United Kingdom Mutual Steamship Association* (1891), 1 Q.B. 370, the plaintiffs were part-owners of a vessel which had been insured by another part-owner in his own name with a mutual insurance association of which he was a member, and which association, according to the terms of the memorandum of association, was formed for the purpose of insuring ships of members,

and ships which members might be authorized to insure in their own names. The policy was in favor of the part-owner by whom the insurance was effected, and the rights of the plaintiffs as part-owners were not disclosed. The action was brought by the plaintiffs against the association to recover for a loss on the policy; but Wright, J., held that the action could not be maintained, thus establishing the converse of the rule laid down by the Court of Appeal in *United Kingdom Mutual Steamship Association* v. *Nevill*, 19 Q.B. 110 (see *ante* vol. 23, p. 291), where it was held that a person not a member of the association could not be sued for the assessments needed to make good losses, on the ground of his being an undisclosed principal for whose benefit an insurance was effected.

SPECIAL STATUTORY REMEDY FOR RECOVERY OF MONEY—PROCEEDINGS UNDER SPECIAL ACT, BAR TO CIVIL ACTION.

In *Vernon* v. *Watson* (1891), 1 Q.B. 400, Pollock, B., and Charles, J., following *Knight* v. *Whitmore*, 53 L.T.N.S. 400, held that where a statute gave a special remedy for the recovery of money misappropriated, including imprisonment, if the money were not paid, and the special remedy had been pursued, but had proved ineffectual to recover the money, that nevertheless a civil action for the money was barred.

INSURANCE—ACCIDENT—CONSTRUCTION OF POLICY—TIME, COMPUTATION OF—INSURANCE "FROM" A DATE—"ANY ONE ACCIDENT."

In *The South Staffordshire Tramways Co.* v. *The Sickness & Accident Assurance Association* (1891), 1 Q.B. 402, two points of construction were decided. The action was on a policy of insurance against "claims for personal injury in respect of accidents caused by vehicles for twelve calendar months from November 24, 1887," to the amount of "£250 in respect of any one accident." On 24th Nov., 1888, one of the plaintiffs' tram-cars was overturned, and forty persons were injured, and the plaintiffs became liable to pay claims which, in the aggregate, amounted to £833. The first question was whether the accident had happened within the period insured. Day and Laurance, JJ., held that it had, that the expression "from" excluded the 24th November, 1887, but included the 24th November, 1888. The other point raised was whether the accident was "one accident," and whether, therefore, the defendant's liability was limited to £250; or whether the injury to each of the forty persons was a separate accident, and their liability extended to the aggregate amount of the several claims. Day, J., held that it was but one accident, and the plaintiffs were only entitled to £250, but Laurance, J., was of a contrary opinion; and the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) were unanimous in agreeing with Laurance, J., that, according to the true intention of the policy, the injury to each person constituted a separate accident, and, therefore, that the plaintiffs were entitled to recover the whole £833.

BILL OF EXCHANGE—INFANT—NECESSARIES—BILL OF EXCHANGE ACT, (53 VICT., c. 33, s. 22, c.).

In re Soltykoff (1891), 1 Q.B. 413, the Court of Appeal (Lord Esher, M.R., and Bowen and Lopes, L.JJ.) held that an infant cannot give a valid bill of exchange or promissory note, even for necessaries.

LANDLORD AND TENANT—BREACH OF COVENANT NOT TO UNDERLET WITHOUT CONSENT OF LESSOR—FORFEITURE—RELIEF AGAINST FORFEITURE.

In *Barrow* v. *Isaacs* (1891), 1 Q.B. 417, the plaintiff, as lessor, claimed to recover the demised premises from the lessees, on the ground that the latter had forfeited the lease by breach of covenant not to underlet without the lessor's consent. The lease provided that this consent should not be arbitrarily withheld in the case of a respectable and responsible person. The lessees, in forgetfulness of this term in the lease, had underlet to very respectable and responsible parties, but without having asked the lessor's consent; and the Court was of opinion that if it had been asked, it could not have been reasonably withheld. The defendants claimed to be relieved from the forfeiture, but the Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.), affirming Day, J., held that the plaintiff was entitled to recover, and that the Court ought no to relieve from the forfeiture. This case is interesting for the exposition which is to be found in the judgment of Kay, J., of the equitable doctrine of mistake as a ground for relief against forfeiture; mere ignorance on the part of the party claiming to be relieved, of facts which he might have known had he used reasonable diligence, does not constitute any ground for relief. He cites the language of the Lord Chancellor in *Earl Beauchamp* v. *Winn*, 6 H.L. 223: "The cases in which equity interferes to set aside contracts are those in which either there has been *mutual* mistake or ignorance in both parties affecting the essence of the contract, or a fact is known to one party and unknown to the other, and there is some fraud or surprise upon the ignorant party"; and the same principle would appear to apply where relief against a forfeiture is claimed on the ground of mistake, except in those cases where the forfeiture is occasioned by the non-payment of rent a sum of money, or by non-observance of a covenant to insure in a lease; as to which see Ont. Jud. Act, s. 25.

CHARTER-PARTY—CONSTRUCTION.

The Curfew (1891), p. 131, though a decision on the construction of a charter-party, affords instruction on the law of contract which it may be well to note. By the charter-party in question it was agreed between the plaintiffs (ship-owners) and the defendants (charterers) that the plaintiffs' steamer should proceed to the defendants' sailing berth and there load, "always afloat," a full and complete cargo—lighterage, if any, necessary to enable the steamer to complete loading, to be at defendants' risk and expense. The ship proceeded to the defendants' berth and commenced to load, but though "always afloat" in the dock, yet the state of the tide was such that if she took in her full cargo at the defendants' dock, she would have been unable to get over the sill of the dock, and have been delayed thereby a week. The steamer was, therefore, after being partially loaded at defendants' dock, removed to another dock, and the rest of her cargo was there taken in. The plaintiffs sued for freight, and the defendants counter-claimed for the expense of moving a part of the freight from their dock to that at which the loading was completed; and the Court (Hannen, P., and Butt, J.) decided they were entitled to recover, because the fear of the detention

of the vessel did not justify the plaintiffs' removal of the steamer from the defendants' dock. To use the words of the Court, "It did not render the steamer unable to complete her loading while afloat in the dock; it only rendered the performance of the contract by the plaintiffs more onerous to them by reason of the loss of the use of the vessel during the neap tides."

SHIP—DAMAGE TO CARGO—BILL OF LADING, EXCEPTIONS—PERILS OF THE SEA—NEGLIGENCE OF MASTER—CONDITION AS TO CERTIFICATE OF SURVEYOR—DUNNAGE INSUFFICIENT.

The Cressington (1891), P. 152, was an admiralty action for damages to cargo, brought by the consignee against the shipowner. The charter-party and bill of lading excepted "perils of the sea . . . and other accidents of navigation, even when occasioned by the negligence . . . of the . . . master." The bill of lading also contained the words, "all other conditions as per charter-party," and the latter contained the condition, "Vessel to be properly stowed and dunnaged, and certificate thereof, and of good general condition, draft of water and ventilation to be furnished to charterers from H. H. Watson, surveyor." Under this condition a certificate was furnished by the surveyor, which did not mention specially dunnage, but stated that the vessel "is entitled to full confidence, can carry a dry and perishable cargo." Two points arose in the case. During heavy weather a rivet worked loose and occasioned a leak, which occasioned damage to the cargo. After the weather improved the master negligently omitted to stop the leak; it was nevertheless held that this was a "peril of the sea," and an accident of navigation, and that the negligence of the master in respect of it was covered by the exception. The other point arose from the fact that, owing to the vessel not being properly dunnaged, some of the cargo was damaged by the water in the water-ways. For this damage the defendants were held liable, the certificate of the surveyor not being conclusive.

Notes on Exchanges and Legal Scrap Book.

LEADING QUESTIONS.—Leading questions are such as instruct a witness how to answer on *material points*.

In cross-examination they are allowed. They are not allowed in the examination-in-chief except by leave of the Judge, in case the witness appears to be hostile to the party calling him, or in the interest of the opposite party, or unwilling to give evidence, and a more searching mode of examining him is necessary to elicit the truth.

Questions are objectionable, as leading, not only when they directly suggest the answer which is desired, but also when they embody a material fact, and admit of an answer by a simple negative or affirmative, though neither the one nor the other is directly suggested. In this case, as well as those where direct leading questions are put, the evidence, so drawn from the witness, is not his

genuine unassisted testimony, but a statement artfully contrived, shaped and colored by professional skill, with a complete knowledge of the facts which the party seeks to establish.

Questions which are intended merely as introductory, and which, whether answered in the affirmative or in the negative, would not be conclusive in any of the points in the case, are not liable to the objection of leading. If it were not allowed to approach the points in issue by such questions, the examination of witnesses would run to an immoderate length. For example, if two defendants are charged as partners, a witness may be properly asked such a question as this: whether the one defendant has interfered in the business of the other?

Although leading questions are permitted in the cross-examination of a witness, yet, even in cross-examination, while you may lead the witness to bring him directly to the point upon which he has to answer, you cannot go the length of putting into the witness's mouth the very words which he is to echo back again.

On the other hand, when an omission is caused by want of memory, a suggestion may be permitted to assist it, even on the examination-in-chief. Thus when a witness stated that he could not recollect the names of the members of a firm, but thought he might possibly recognise them if suggested, this was permitted to be done. So, for the purpose of identification, the witness may be directed to look at a particular person, and say whether he is the man. So, where a witness is called to contradict another respecting the contents of a lost letter, and cannot, off-hand, recollect all its contents, the particular passage may be suggested to him, at least after his unaided memory has been exhausted. So, where a witness is called to contradict another, who has denied having used certain expressions, counsel are sometimes permitted to ask whether the particular words denied were not in fact uttered. Again, the Court will sometimes allow a pointed or leading question to be put to a witness of tender years, whose attention cannot otherwise be called to the matter under investigation. There are other cases in which some suggestion may be allowed to be given to a witness, as, where he is called to prove a delivery of goods, consisting of various items, or delivered at various times. Such cases evidently do not fall within the principle which prohibits leading questions. And it must always be remembered that the Judge has a discretionary power of relaxing the general rule, under any circumstances, and to whatever extent he may think fit, so far as the purposes of justice require. On the other hand, under a rule of the Supreme Court, first made in 1883 (Q. 36, r. 37), the Judge may now, in all cases, disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter. There is no distinction recognised by the law between questions which are, and questions which are not, leading. To object to a question as leading is only another mode of saying that the examination is being conducted unfairly. It is entirely a question for the Judge whether or not the examination is being fairly conducted. The objections to leading questions do not by any means apply with equal force to all witnesses or to all parts of an

inquiry. Some witnesses will adopt anything that is put to them, whilst others scrupulously weigh every answer. Moreover, innumerable questions are put for a merely formal purpose, the facts not really being in dispute, or simply in order to lead the mind of the witness to the real point of inquiry. As a great saving of time is effected by leading a witness, it would be extremely undesirable to stop it where it is otherwise unobjectionable. A question is objectionable as leading when it suggests the *answer*, not when it merely directs the attention of the witness to the *subject* respecting which he is questioned. It should never be forgotten that "leading" is a relative, not an absolute term. There is no such thing as "leading" in the abstract. The identical words which would be leading of the grossest kind in one case or state of facts, would be not only unobjectionable, but the very fittest mode of interrogation in another. On all matters which are merely introductory, and form no part of the substance of the inquiry, it is both allowable and proper for a party to lead his own witnesses, as otherwise much time would be wasted to no purpose; and although the not leading one's own witness when allowable is by no means so bad a fault as leading improperly, still it is a fault; for it wastes the time of the Court, has a tendency to confuse the witness, and betrays a want of expertness in the advocate.

Very unfounded objections are constantly taken on the ground that the questions objected to are leading questions. Lord Ellenborough, in a reported case, said: "I wish that objections to questions as leading might be a little better considered before they are made. It is necessary, to a certain extent, to lead the mind of the witness to the subject of inquiry. If questions are asked, to which the answer 'Yes' or 'No' would be conclusive, they would certainly be objectionable, but in general no objections are more frivolous than those which are made to questions as leading ones." (*Nicholls* v. *Dowding*, 1 Stark, 81.) What Lord Ellenborough thus said in 1815 is equally true in 1891.—*Law Gazette.*

EVADING THE LAW.—Queen Elizabeth, in one of her trenchant speeches, roundly rated the lawyers for standing more upon form than matter, more upon syllables than the sense of the law. Had the subjects of the royal censure dared to answer her outspoken Majesty, they might have retorted that all manner of men, if it suited their interest, were apt to do the like, and hold by the letter rather than the spirit. When Pope Innocent put England under an interdict, condemning its fertile fields to barrenness, the people might have starved but for some beneficent hair-splitters opportunely discovering that the interdict could only affect land under tillage at the time of its imposition, and therefore that crops might be raised upon the waste lands, commons, and fields hitherto unploughed. Necessity begets casuistry. The old knight whose sacrilegious deeds earned him many an unheeded anathema, as he lay waiting the coming of death, remembered that he was an excommunicated man, sentenced to be damned, whether buried within the church or without the church. Although the contumatious reprobate had never found himself much the worse for ecclesiastical

curses, he thought it advisable to be on the safe side; so, directing his body to be buried neither within the church nor without the church, but in a hole cut in the outer wall, he died in that happy conviction.

Once upon a time the governor of a city issued an order of the night, commanding every person walking about after dark to carry a lantern. Sundry citizens were arrested for non-obedience, whereupon they produced their lanterns, and being asked what had become of the candles, replied that they were not aware that candles were required. An amended order now appeared; but night-strollers wandered about as much in the dark as before, and it was not until he commanded the candles to be lighted ones that the governor got things done to his mind. In 1418 a civil proclamation was issued in London, directing that every honest person dwelling within the city limits should hang out "a lantern with a candle in it, to burn so long as it might endure;" from which it might be inferred that the Londoners had hitherto lit their candles only to blow them out again, so that they were quite capable of poking fun at the authorities. Indeed, the latter would seem to have been inclined to jocularity themselves, humorously insisting only upon honest folk lighting up—a limitation calculated, however, to insure a general illumination.

There was sense as well as humor in the defence made by the precise Parisian charged with allowing his dog to be at large without a muzzle: "The regulations do not say where the muzzle is to be put, and thinking my dog would like to be able to breathe a little fresh air, I put the muzzle on his tail!" A similar omission in an English Act requiring owners of common stage-carts to have their names painted upon them, led to the object of the law being defeated in various odd ways. Some painted the name where no one could see it, others scattered it all over the cart, a letter on a panel, and one ingenious fellow's vehicle bore the inscription, "A most odd act on a stage-cart"—a clever anagrammatic arrangement of "Amos Todd, Acton, a stage-cart."

Shrewd folks have sometimes managed to get the weather-gauge of the law, by simply shifting the responsibility. When abducting an heiress was a criminal offence, gentlemen taking a trip over the border with a well-dowered damsel were careful to make it appear the lady was the abductor. Upon the happy pair reaching Carlisle, the post-horses for the last stage were ordered by the bride expectant, her companion becoming *non est* for the moment; and the goal attained, the lady paid the postilions, sent for the forger of the matrimonial bonds, and when he had done his office, satisfied his demands out of her own purse. A female toll-taker, sued by the turnpike trustees for money she held belonging to them, and ordered to pay up, induced a travelling tinker to make her his wife, and when summoned for contempt produced her marriage certificate, and pleaded that the trustees must look to her husband for payment of the debt, owning, at the same time, that she did not know, or want to know, what had become of him.

The truth of the saying, "Where there's a will, there's a way," was exemplified in a comical way by a tramp who was refused a night's lodging at a police-station in Maine, the officer on duty explaining, "We only lodge prisoners;

you've got to steal something, or assault somebody, or something of that kind." "Oh, I've got to assault somebody, have I?" remarked the vagabond, and knocked one of the police-officers off his stool; and when the astonished victim had picked himself up, quietly said, "Give me as good a bed as you can, mister, 'cause I don't feel very well to-night."

Shortly after the revision of the United States tariff, resulting in the imposition of heavy duty upon lead, and the freeing of imported works of art from taxation, twenty-four grotesque-looking leaden effigies of Lord Brougham were to be seen, standing all in a row on one of the wharfs in New York. They had been consigned to a merchant by an English firm as works of art—a description the custom-house officials refused to indorse, insisting that they were mere blocks of lead. The question was referred to the lawyers; and when, after three months' consideration, the courts pronounced in favor of their artistic origin, collectors of curiosities bought the hideous statues at prices far beyond their metallic value to preserve them in remembrance of the Britishers having for once proved too cunning for their cousins.

Experience teaches that legislation running counter to public opinion is so much legislation wasted. Wherever the Maine Liquor Law has been established, successful tactics have been resorted to to evade it. A traveller in Colorado wishing to get some whiskey as an antidote against possible snake-bites, not a drop was to be had; but he was told he would find spirits of ammonia, to be obtained at any drug store, quite as efficacious. Determined to be prepared for any amount of snake-poison, he had his quart flask filled, as advised; and tasting it out of curiosity, declared, if he had not known better, he could have sworn it was Bourbon whiskey.

Mr. Ward's kangaroo was not such a profitable "cuss" to him as the half-starved wolf, constituting the entire menagerie of a travelling showman, owning not else, save a dirty tent and a mysterious-looking keg. Upon arriving at a likely "pitch," the showman announced that the wolf was on view at the charge of six cents a head. After one or two sight-seers had seen what was to be seen patrons poured rapidly in, to come out wiping their lips, apparently satisfied with having had their money's worth. One man developed an unsuspected interest in natural history, looking in eight times in the course of an afternoon; then he made a start homeward, but after going a few steps, stopped, turned over his pockets, turned round, walked back to the tent, and as he paid the entrance fee, stuttered out, "I b—b—lieve I'll take another look at that wolf!"

Yankee smartness has been displayed in evading other laws, besides that especially admired by the advocates of permissive prohibition. The suppression of the game of ninepins was met by the invention of tenpins. When the selling of clocks by travelling traders was forbidden in Alabama, the Yankee clock-makers let them on lease for nine hundred and ninety-nine years. Ordered to close their bars at midnight, the San Francisco liquor-sellers shut their doors as the clock struck twelve, and opened them five minutes later for the next day's business.—*All the Year Round.*

SOME EARLY BREACH OF PROMISE CASES.—There are among the Early Chancery Proceedings, formerly in the Tower of London, a considerable number of Bills of Complaint, grounded on an alleged breach of promise, or rather breach of *contract*, of marriage, some of which date back as far as the middle of the fifteenth century. At that period, and indeed till the passing of the Marriage Act of 26 George II., the solemnization of matrimony, according to the laws of Holy Church, appears to have been altogether subsidiary to the civil contracts, or espousals, which often preceded the actual marriage by a considerable period. A pre-contract of this kind was, to the thirty-second year of Henry VIII., and again after 2 and 3 Edward VI., considered an impediment to marry with any other person; and until the statute of 26 George II., above referred to, a suit might be brought in the Ecclesiastical Courts to compel a marriage in consequence of such contract.

If a formal betrothal of this kind, to be duly committed to writing and attested, were at the present time declared to be the only legal basis on which an action for breach of promise could rest, a great saving of time to the judicial bench would ensue, and the public would be spared the recital of much of the amorous nonsense with which more or less facetious counsel endeavor to influence a sympathetic jury in assessing the amount of damage, from a pecuniary point of view, done to the outraged feelings of many a too seductive or too enterprising damsel. The law reports, would, however, then be deprived of one of their most amusing features; one on which the ordinary newspaper reader seizes with avidity.

That the courts of the fifteenth and sixteenth centuries were not altogether without their sensational trials of a somewhat similar kind, appears from curious records now under review. I have before me copies of four documents, all apparently bearing date between the years 1452 and 1515, which are peculiarly interesting as illustrative of the social life of that period. They show, in fact, that then, as now, amongst a certain class of persons, marriage was regarded principally in the light of a commercial speculation, the bargains made in some of the cases being specified with a minuteness of detail as amusing as it is unromantic. The first of these is a complaint preferred to the Cardinal Archbishop of Canterbury, Chancellor of England, between the years 1452 and 1454, by Margaret Gardyner and Alice Gardyner (presumably her daughter), against one "John Keche, of Yppeswych," who appears to have been in considerable demand amongst the fair sex, as, according to their own statement, the said Margaret and Alice agreed to pay him the sum of twenty-two marks on condition of his taking the said Alice to wife; but the faithless "Keche," after receiving ten marks from the said Margaret and twelve marks from the said Alice, "meyning but craft and discyt," went and took to wife one Joan, the daughter of Thomas Bloys, *to whom he had been previously assured*, "to the gret discyt of the said suppliants and ageyne all good reason and conscience;" and although at divers times required by the said suppliants to refund the twenty-two marks, he persistently refuses so to do; whereupon they pray for a writ directing him to appear before the King in his Chancery, to answer to the premises, which is granted to them accordingly.

The plaintiffs in this suit appear to have regarded the matter purely from a business point of view, for they seek only to recover the money fraudulently obtained from them by the defaulting "Keche," without making any claim for compensation to the lady whose affections had been so cruelly and wantonly disappointed.

In the next instance before us it is the gentleman who is the victim of a too implicit confidence. In this case, the complainant, John Auger, states that he, "of the grett confydence and trust that he bare to one Anne Kent, syngle-woman, entendyng by the mediacion of her friends to have married the said Anne," and upon a full communication and agreement between himself and the said Anne that a marriage should take place betwee' them, "sufferid the same Anne *to come and resort and abide in his house;*" after remaining in which fo the space of a month and more, she departed therefrom without the knowledge of the plaintiff, taking with her "dyvers evydences, mynyments, and chartres concernyng the seid house, and also dyvers juells of the value of *iiijli*," of which, "although oftyntimes requyred" by the plaintiff, she refuses to make restitution; wherefore he prays a writ commanding her to appear on a certain day before the King in his Chancery, etc. Here the parties to the suit appear to have discounted the actual marriage by setting up an experimental household immediately after the conclusion of the marriage contract. Apparently some "incompatibility of temper," or perhaps the innate fickleness of the "said Anne," induced her to bring the experiment to an abrupt conclusion; in carrying her resolution into effect, however, she committed the mistake of endeavoring to indemnify herself for the error into which she had fallen, or perhaps to vent her displeasure on her quasi-husband, by carrying off with her all the valuables she could lay her hands on. This the quasi-husband appears to have strongly objected to, although he does not make any sentimental grievance of her desertion, and, so long as he recovered his property, was evidently prepared to consider himself well rid of his bargain.

The complaint of "Maister Walter Leinster, Doctour of Phisik," which follows, discloses a very curious story, and affords a striking example of pertinacity in following up an absconding suitor. The primary motive, however, in this, as in the preceding instances, seems to have been merely the recovery of moneys actually expended, although the lady's distress of mind and the consequent injury to her health form a moderate item in the schedule of expenses incurred by the unlucky doctor. In his bill of complaint, addressed to "The right reverend fader in God, the Archbishop of York and Chancellor of England," the worthy doctor alleges that, one Maister Richard Narborough, Doctor of Law Sivile, in the moneth of May, in the IX. yere of the reigne of the Kyng oure Soveraigne Lord (Edward IV.) att Cambrigge, in the countie of Cambrigge, in the presens of your said oratour" affianced one Lucy Brampton, the daughter-in-lawe of the said plaintiff, to have her to wife, and the said Lucy affianced the said Richard to have him to her husband; immediately after which affiance the said Richard informed the plaintiff and the said Lucy that he would "depart over the see unto Padowe, there to applie his stodye for the space of *ij* yeres,

at the end of which time he promised to return to England, and to "espouse the said Lucy according to the law of Holy Chirche," at the same time especially desiring the plaintiff *to maintain the said Lucy and a maidservant to attend upon her*, providing them with meat, drink, and clothing, and all things necessary, until his return from beyond the sea, when he promised faithfully to repay to the plaintiff all the costs and charges which he had incurred in that behalf; to which the plaintiff agreed, "giffying full trust and confidence to the promises of the said Maister Richard." The latter, however, departed to "Padowe," and there and in other places absented himself from England for the space of ten years, "to the full grete hurt and hevynes" both of the plaintiff and the said Lucy, who, together with her maid, was provided by the plaintiff during the whole of that time with meat, drink, clothing, and all other necessaries. After the expiration of the ten years, "Maister Richard" returned to England, and being required by the plaintiff to fulfil the contract of marriage between himself and the said Lucy, and also to reimburse him for the maintenance of her and her maid during his protracted absence, with other "grevous hurtez, costez, and charges" incurred by him, utterly refused to do either, "which is not only to the greate hurte and hevynes of your said besecher, but also to the *greate perell and iopardy of soule of he same Maister Richard;*" which sums of money, with other "reasonable considerations," which ought to be paid to the said plaintiff, are set out in a schedule annexed to the plaintiff's bill.

In the foregoing proceedings it is worthy of remark that the plaintiff, having affianced his daughter-in-law to an eligible suitor, considers himself thereby relieved from the duty of maintaining her to the same extent as if she were already the wife of the defaulting law-student, which in effect she was. Unjustifiable as the defendant's conduct seems to have been, the claim for damages to the unfortunate Lucy, as appears by an item in the schedule, represents only the sum actually expended on her in consequence of "hir sore and gret sekenes" caused by his "onkyndnes and chaungeablenes," and makes no pretence to compensation for her shattered hopes and wounded feelings, which in a modern suit of this kind would have been assessed at no inconsiderable figure.

In the fourth of these curious actions, the date of which appears to have been between the years 1504 and 1515, the gentleman is again the plaintiff, and seems, according to his own statement, like the defaulting swain first referred to, to have been considerably sought after; both the lady's father and her uncle having used "gret instaunce and labor" to induce him to take her to his affections, although they seem, for some unexplained reason, to have afterwards changed their minds; not, however, before the plaintiff had bestowed on the chosen lady many tokens of affection, which, matter-of-fact man that he is, he now seeks to recover, *together with his expenses in going to visit her.*

The plaintiff in this case, one John James, who appears, curiously enough, to have also been a "law-student," alleges that one Thomas Morgan, of Northampton, scribe there to the Commissary of the Bishop of Lincoln, and Robert Morgan, his brother, "instantly labored your said besecher to take to wyfe one Elizabeth Morgan, daughter to the said Robert Morgan, with whom your said

besecher *suld have in hand by ther promes* 100 *marks in redy money*," upon which "*promes, gret instaunce and labor*," made to him by the defendants, the plaintiff "resorted to the said Elizabeth to his gret costs and charges." And "thorow and desaveabull comforde as weil as of the said Thomas and Robert Morgan as of the said Elizabeth," delivered to her many tokens—namely, "a ryng of gold set with certen stones lyke to a dragone's hede;" "a ryng of gold called a serjeaunt's ryng;" "a crosse of gold with a crucyfyx;" "a ryall in gold;" "a nobull in gold;" "thre pomaunders;" "a rebon of sylke;" "a pyncase of cloth of gold;" with other many small tokens to the value of ten marks and more; "and also was at *gret costs and charges thorow his manyfold journeys taken in that behalf:*" which he estimates at other ten marks. But now the said Thomas and Robert have "by ther crafty and falce meane" caused the said Elizabeth to take to husband one John Maurice, since which time the plaintiff hath many times demanded his said tokens, *with his costs and charges*, as well of the said Robert and Thomas, as of the said Elizabeth, which "they and every of them at all times hath denayed and yit doth denay, contrary to right and good conscience," and therefore he prays a writ, etc.

From the documents above quoted, which are fair specimens of a tolerably numerous class, the action for breach of promise of marriage as we understand it at the present day—that is to say, an action seeking substantial damages as the result of a favorable verdict, appears to have been almost unknown to our ancestors. The specific fulfilment of a contract, formally entered into at the betrothal, might, however, as has been stated, be compelled in certain cases by an appeal to the Ecclesiastical Courts.—*The Antiquary.*

Reviews and Notices of Books.

A Manual on the Taxation of Costs in the High Court of Justice, with chapters on costs in alimony actions, and costs in interpleader proceedings. By Charles Howard Widdifield, of Osgoode Hall, Barrister-at-Law. Toronto: Carswell & Co., 1891.

The author has, in 13- pages, grouped most of the Ontario and many of the English decisions affecting the costs properly allowable on taxation. The work is a digest of the decisions merely, without any reference to the *ratio decidendi*, which would have been impossible in a book of such small compass; but the decisions are succinctly quoted and carefully collated from the reports, and each is given under the various headings applicable to it, facilitating a reference to any point. The chapter on costs in interpleader will be found especially useful, embodying, as it does, all the more important decisions.

Reports of the Exchequer Court of Canada. Reported by Charles Morse, LL B., Barrister-at-Law, and published under authority by L. A. Audette, LL.B., Advocate, Registrar of the Court.

Volume I., which is now published, contains all the leading unreported cases from the foundation of the court in the year 1875, up to October 1887, and also an appendix of all Exchequer cases previously reported in the reports of the Supreme Court.

Part 1 of the second volume is also now ready. In it will be found the leading cases decided since October, 1887, and also such general orders regulating the practice of the court as have been made since that date. The price of each volume is $4.00, and the reports will be sent (post-paid) direct.

The British versus The American System of National Government. By A. H. F. Lefroy, M.A. (Oxon), Barrister-at-Law. Toronto: Williamson & Co., Publishers, 1891.

We have perused with great pleasure this pamphlet, which is a re-publication of a paper read before the Toronto Branch of the Imperial Federation League last December. The author expresses very clearly his own views in favor of the British system, quoting largely from the standard constitutional writers on both sides of the question.

His object, as he states, is to concentrate attention on the different relations which exist between the President and Secretaries of State on the one hand, and the Premier and the members of the Cabinet on the other. The consequences of the difference of the two systems are far-reaching, and it is well that all those who take an interest in the future of this country should thoroughly understand the different systems and the respective inevitable results flowing from their administration.

It certainly seems strange, as is the fact, that in monarchial England there is vastly greater freedom of discussion and greater scope for the expression of the will of the people than there is in the Republic of the United States.

A perusal of Mr. Lefroy's admirable pamphlet should convince any unprejudiced person "how foolish should we be if we ever allowed the good ship Canada to forsake that noble British squadron that, led by the flagship of Old England, passes down the stream of history under the Union Jack. Very foolish should we be if we ever allowed any inducements to draw this country away from the broad current of British liberty and progressive development."

We strongly urge our readers to procure this pamphlet from the publishers and see the argument for themselves. The price is only 25c.

The recent lawless event in New Orleans indicates very clearly that we have little to learn from our neighbors either in the way of government theoretically, or its administration practically, and much would be lost by joining them.

A Treatise on Extradition and Interstate Rendition, with Appendices containing the Treaties and Statutes relating to Extradition; the Treaties relating to the Desertion of Seamen; and the Statutes, Rules of Practice, and Forms in force in the several States and Territories relating to Interstate Rendition. By John Bassett Moore, Third Assistant Secretary of State of the United States. Author of a work on "Extra-Territorial Crime," etc. In two volumes. Boston: The Boston Book Company, 1891.

In a carefully prepared, exhaustive, and yet compendious work, although of fifteen hundred pages, the author presents to us the law of extradition in all its phases. The official position of the author has enabled him to have access to state papers and original documents denied to other writers, no matter how painstaking they may be. Apart from this the index of publications cited shows how exhaustive his researches have been. The work of Dr. S. T. Spear, published some thirteen years ago, has not the same practical value as the work before us, which aims at being, before everything, a practical exposition of, and guide to the law. Throughout the volumes will be found in their proper place the suitable and necessary forms, ignorance of which has so often defeated justice.

We cannot, however, but be more especially interested in the seventy pages which the author devotes to the extradition law of Canada, looking upon it first from an historical point of view, and then tracing the law from the period when no treaty existed to the present time. Some useful pages on practice follow, to which are appended the more important decisions, illustrating the question of evidence. The subject of forgery, and the important cases bearing thereon, are specially noted. Our Inter-Provincial Law is also referred to briefly. These pages alone will make the book invaluable to all who require a knowledge of the law in the ever-increasing field of extradition. The method, scientific and explanatory, by which each important case is criticised and analysed, and where leading principles have been misapplied the true principle is distinguished, gives an intrinsic merit to the book apart from its great practical value.

The second volume is devoted to Interstate Rendition, which term the author applies to what is generally known by the inconvenient and unsuitable term of Interstate Extradition, on which the author says, "Law writers have been led to consult the principles of international law, and to apply them to a subject which they do not govern. The transfer of an accused person from one part of a country to another, having a common supreme government, does not bring into operation the principles of international law." In a word, we feel that Mr. Moore's book will be the standard work on this subject for many years to come and that it will be long before any other author will have the courage to face the amount of research required in the production of the volume before us.

Correspondence.

UNLICENSED CONVEYANCERS.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Herewith I send you three advertisements, clipped from the issue of the *Ridgetown Plaindealer* of the 5th inst., which will speak for themselves, and I ask you to give them publicity in your valuable paper. As a lover of my chosen profession, I deem it a duty I owe to my professional brethren in particular, and to the public generally, to show them, as far as I can, the encroachments that are being made upon legal practice, and the audacity that is being acquired by the horde of unlicensed conveyancers with which this province has become infested, who pay no fees and are wholly irresponsible.

We, the younger practitioners in the smaller towns and villages, are prejudicially affected by the business done by the class of men in question to a far greater extent than are our professional brethren elsewhere; but every member of the profession, wherever he carries on his practice, has just cause for complaint. It is a fact that in this western peninsula those branches of the profession on which the young practitioner, without means or influence, is dependent to give him a start in his professional career (I refer to conveyancing, collection of debts, non-contentions, Surrogate Court work, Division Court practice, etc.), are almost wholly monopolized by the unlicensed conveyancer. I think it high time that the legal profession in this province be accorded at least that degree of protection that the members of every other profession at present enjoy.

I might add that as solicitors and members of the Law Society we cannot, and I am happy to say have no desire to, advertise in such a way as to compete with the class of men in question, but if we sever our connection with the Law Society it seems we can do as we like.

I am, yours, etc., FAIR PLAY.

[See comments on p. 163.—ED. L.J.]

EXTRA-JUDICIAL OATHS.

To the Editor of THE CANADA LAW JOURNAL:

DEAR SIR,—It does not seem to have been generally noticed by the profession that at the last session of the Dominion Parliament an Act was passed amending the "Act respecting Extra-judicial Oaths." Theretofore, the right of commissioners to take statutory declarations had been disputed, but this sets the matter finally at rest. An Act passed by the Ontario Legislature at its last session

was thought by some to give commissioners powers which they now possess under the Dominion Act. In a letter to your journal last May, I stated what seemed to be the effect of the Ontario Statute, namely that it enabled commissioners to take declarations under the various provincial statutes in force; but not to take declarations under the "Act respecting Extra-judicial Oaths." At the time of writing that letter, the Dominion Statute, above referred to, had been passed, so that it was not necessary to construe the Ontario Act to affect any declarations but those taken under Ontario Statutes.

It is noticeable that the amendment to the "Extra-judicial Oaths Act," contained in 53 Victoria, cap. 37, entitled, "An Act further to amend the Criminal Law," omits notaries public from the list of those authorized to take statutory declarations. The wording of the amending section (s. 41) reads: "Any Judge, Justice of the Peace, Police or Stipendary Magistrate, Recorder, Commissioner authorized to take affidavits to be used either in Provincial or Dominion Courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration," etc. The words "or any other functionary authorized by law to administer an oath" occurred in the statute as it stood before it was amended, and were held not to include a commissioner for taking affidavits.

Although it may be contended that inasmuch as a notary's powers are wider than those of a commissioner, the former is by implication included in the list of those who are authorized to take statutory declarations; still it seems by no means clear that a notary public may now take a statutory declaration. The amending section, then, ought itself to be amended by inserting "public notary" after "Justice of the Peace" in the first line.

J. E. J.

Toronto, March 12th, 1891.

DIARY FOR APRIL.

1. Wed.....Prince Bismarck born, 1815.
5. Sun.....*1st Sunday after Easter.* Canada discovered, 1499.
6. Mon.....County Ct. Sittings for Motions. Supreme Ct. Sittings.
7. Tues.....County Ct. Non-Jury Sittings, except in York. Great fire in Toronto, 1847.
8. Wed.....Hudson Bay Co. founded, 1692.
12. Sun.....*2nd Sunday after Easter.*
13. Mon.....County Court Non-Jury Sittings in York.
14. Tues.....Princess Beatrice born, 1857.
15. Wed.....President Lincoln assassinated, 1865.
17. Fri.....Ben. Franklin died, 1790.
18. Sat.....First Newspaper in America, 1704.
19. Sun.....*3rd Sunday after Easter.*
20. Mon.....Last day for Call and Admission notices.
23. Thur.....St. George's Day.
24. Fri.....Earl Cathcart Governor-General, 1846.
25. Sun.....St. Mark.
26. Sun.....*4th Sunday after Easter.*
27. Mon.....Toronto captured (Battle of York), 1813.

Reports.

ONTARIO.

FIRST DIVISION COURT OF THE COUNTY OF ONTARIO.

[Reported for THE CANADA LAW JOURNAL.]

LUKE *v.* KERR AND THE MUNICIPALITY OF EAST WHITBY.

R.S.O., chs. 157, 175, 176, 193, and 237—Cemeteries and burial grounds—Assessment therefor.

The lands of a Cemetery Company, incorporated under the Joint Stock Companies' Letters Patent Act, R.S.O., c. 157, not actually laid out in plots or in use for burial purposes, but leased or used as farming lands, are not exempt from local taxation, either under the Cemeteries' Act (R.S.O., c. 175), or the Cemeteries' Letters Patent Act (R.S.O., c. 176), or under the Assessment Act (R.S.O., c. 193, ss. 3, s. 7)

Semble, that the words "burying ground" in the latter sections apply to a site for a burial ground acquired under R.S.O., c. 237, "respecting the property of religious institutions" and cognate Acts.

Held, also, that the Company in question, having elected to become incorporated as a trading or commercial company, is affected with all the incidents attached thereto, including taxation for local purposes.

Distinctions between "cemeteries" and "churchyard or burial ground" pointed out and discussed.

[Whitby, February 17. 1891.

The plaintiff is the sexton and caretaker of the Ontario Union Cemetery Co., incorporated under the Joint Stock Companies' Letters Patent Act, (R.S.O., 157). The Letters Patent of incorporation are dated February 23rd, 1875.

The plaintiff's father was subsequently appointed the caretaker and sexton of the cemetery, and on his death his son succeeded in his position and duties. No written document or resolution appears to have existed, but the sexton's duties appear to have been confined to keeping the grounds and graves in decent order, dig graves, or attend funerals when required, and perform such other functions appertaining to his position as might be designated by the Managing Committee. He was paid no salary, but was entitled to receive for his own use the burial fees (other than the cost of the plot), and any other perquisites derived from the care of graves. He was also allowed the privilege of cutting the hay off the seventeen acres out of the twenty-five acres of which the cemetery consists, not laid out or used for burials, paying the company $40 per year therefor.

Of late years the plaintiff broke up these seventeen acres and cropped them like any farm lands. The assessor of the corporation assessed the plaintiff in 1889 for the first time, and the taxes for that year were paid under protest by the Cemetery Company. He was again assessed for 1890, and, refusing to pay, the collector, the defendant Kerr, seized for the amount of the taxes and costs amounting to $6.58. The plaintiff thereupon brought this action for illegal seizure. It was also admitted that he appealed to the Court of Revision, but, not appearing thereat, the appeal was dismissed.

The real plaintiffs, the Ontario Union Cemetery Company, claimed that under sec. 13 of R.S.O., c. 175, these lands assessed are exempt from taxation.

The defendants contended that they are not so exempt, on the ground that the company, by leasing or otherwise parting with the temporary use of the lands for burial purposes, at once became liable to assessment for, and payment of, taxes; and that, in any event, the matter was *res judicata* by the Court of Revision.

The reply to the first objection was that the use of the land at a reduced or nominal rent was really part of the plaintiff's remuneration; and to the second, that the lands being totally exempt from taxation under sec. 13 of R.S.O., 175, the Court of Revision had no jurisdiction; under the authority of *Rowse* v. *G.W. Ry. Co.*, 15 Q.B 168., and *Nickle* v. *Douglas*, 37 Q.B. 67.

C. A. Jones, Oshawa, for the plaintiff.

J. E. Farewell, Q.C, Whitby, for the defendants.

DARTNELL, JJ. At the date of the plaintiff's incorporation by Letters Patent, there was only one way of obtaining incorporation of a cemetery company as such, viz., by R.S.O. (1887), c. 175, formerly R.S.O. (1877), c. 170, again derived from C.S.U.C., c. 67. The statute enabling cemetery companies under that name and for burial purposes to become incorporated by Letters Patent (R.S.O., c. 176, formerly 43 Vict., c. 23) was not passed until after the organization of the real plaintiffs herein.

It cannot be contended that the Joint Stock Companies' Letters Patent Act, under which they derive their corporate existence, contains any provisions exempting any property of such Company from taxation.

I cannot find any authority, statutory or otherwise, incorporating the provisions of R.S.O., 175 or 176, into the charter of any Company organized under the "Joint Stock Companies' Act." The real plaintiffs could have become incorporated under the Cemetery Act existing at the date of their incorporation, and would then be entitled to claim the exemption from taxation they now put forward; but by choosing another form of corporate existence and acquiring the privilege of a commercial rather than a benevolent body, I conceive that they cannot be heard to claim the benefit of an Act whose provisions they either practically abnegated, or at least declined to take advantage of. It is an inference fairly to be deduced, that, having elected to become incorporated in the way they did, this Company have expressly renounced any privileges incident to the Cemeteries' Act, and subjected themselves to all the obligations of a Joint Stock Company, including taxation.

The judgment will be for the defendants. There will be no costs, provided the amount claimed by the defendants be paid forthwith, otherwise judgment for the defendants with costs.

After handing out the above judgment, I was asked to take into consideration the further contention on the plaintiff's part, that even if the Company's cemetery be one incorporated under either ch. 175 or 176, R.S.O., the words of ss. 3 of s. 6 of the Assessment Act, R.S.O., c. 193, are broad enough to exempt their lands from taxation. This sub-section reads, "Every place of worship and land used in connection therewith, churchyard and burial ground."

Upon this Chief Justice Harrison makes the following comments: "Whether the exemption extends to all burying-grounds, or only those used in connection with the place of worship, is a question not yet determined." *Harrison Mun. Man. p. 714 (5th ed.).*

It will be seen that the question is now to be considered without reference to any authority, and must be decided on reasoning and analogy. The Act respecting the Property of Religious Institutions, R.S.O., c. 237, and also the various Acts respecting the Church of England in Canada, empowers any religious society or congregation to acquire, among other things, "a site for a burial ground." Probably it was the burial grounds acquired under these Acts that the Legislature had in view when providing for the class of exceptions set out in the sub-section quoted.

The word "cemetery" is of Greek derivation, signifying "a sleeping place," and was adopted by the early Christians as the name for the place of burial for their dead. These places were always extra-mural. The custom of using the church or churchyard as places of sepulture did not begin to prevail until the seventh or eighth century of the Christian era. The difference between a cemetery and a churchyard or burial ground appears to be that in the latter a grave or burial plot cannot be obtained in perpetuity, while in the former it can. The freehold is vested in the vicar or rector. The distinction is thus expressed in Wharton's Legal Lexicon: "A cemetery differs from a churchyard by its locality and incidents; by its locality as it is separate and apart from any sacred building, used for the performance of divine service; by its incidents, that inasmuch as no vault or burying-place in an ordinary churchyard can be purchased for a perpetuity—in a cemetery, or permanent burying-place, it can be obtained."

Under the Cemeteries' Acts, R.S.O., c. 175, a Company incorporated under its provisions is specially exempt from taxes.

It is unaffected by the Registry laws and cannot be sold or mortgaged or become liable to any judgment or execution, and in fact their lands are dedicated in perpetuity to burial purposes.

In this case the Company, being a mere commercial corporation, I submit could sell or mortgage such portions of their lands as are not needed for cemetery purposes, and are not laid out or used therefor. Or they might wind up,

and sell the surplus and divide the proceeds among the stockholders.

The charter of the company states explicitly that the land is "to be used exclusively for cemetery purposes." That portion which has been laid out in burial plots, as per plan, has not been assessed. I think that the defendants' contention, that the remaining eighteen acres, when cultivated as a farm and used directly or indirectly as such, and providing remuneration for their sexton or caretaker, is liable to assessment, is a reasonable one, and that it has ceased to be, or rather never became a burial ground, and is liable to municipal taxation. The plaintiff is a tenant, either at will or from year to year. A plot could not be sold or a grave opened in any part of the eighteen acres without his consent. In fact, the land (temporarily, it may be) is withdrawn from use as a burial ground. The managing director of the Company states that it would be willing to allow burial in any part of these eighteen acres, if asked for; but he can only speak for himself, and might be overruled by his co-directors or by a by-law or resolution of his Company.

I think it is a matter for comment, that if the Legislature thought the words of the Assessment Act were broad enough to cover the case of cemeteries, they would not have deemed it necessary to place on record the express exemption given by sec. 13 of R.S.O., c. 175. I give no weight to the objection that the cemetery is unnecessarily extensive. The whole land consists of twenty-five acres, and that is the minimum quantity permitted by R.S.O., c. 176, s. 3. I am of opinion that the eighteen acres was properly assessed, and to the plaintiff as the occupant of land not used for burial purposes, but the contrary; and if this be right, the dismissal of the appeal by the Court of Revision is an effectual bar.

In *Reg.* v. *St. Marys Abbotts*, 12 A. & E., 824, it was held that a cemetery company were liable to be assessed for county rates, not only for the unused portion of their land but even for the burial plots sold, on the ground that they were still occupiers of the land used for burial, their conveyance being only grants of easements in perpetuity. This present Company does not pretend to convey the plots, but only to confer an easement, as appears by their certificates.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Exchequer Court.] [Dec. 10.

THE QUEEN *v.* MCGREEVY.

Claim for extra and additional work due under Intercolonial Railway contract—31 Vict., c. 13., ss. 16, 17, 18; and 37 Vict., c. 15—Change of chief engineer before final certificate given—Reference of suppliant's claim to said engineer—Report or certificate by chief engineer recommending payment of a certain sum—Effect of—Approval by commissioners or minister necessary.

Upon a claim made by the respondent for the sum of $120,371 as being due to him for extra work, etc., beyond what was included in his contract for building a section of the Intercolonial Railway, and which sum he alleged had been certified to by F.S., as the chief engineer of the Intercolonial Railway, in his final and closing certificate given in accordance with clause 2 of the respondent's contract, a statement of admission was agreed upon by both parties, and the following question was submitted to the Exchequer Court: "Is the suppliant entitled to recover on the report or certificate of F.S.?" The report was never approved of by the Intercolonial Railway Commissioners, or by the Minister of Railways and Canals, and 31 Vict., c. 13, s. 18, enacts: "No money shall be paid to any contractor until the chief engineer shall have certified that the work for, or on account of which, the same shall be claimed has been duty executed, not until such certificate has been approved of by the commissioners."

Held, 1st, per RITCHIE, C.J., and GWYNNE. J., reversing the judgment of the Exchequer Court, that the report of F.S., assuming him to have been the chief engineer to give the final certificate under the contract, cannot be construed to be a certificate of the chief engineer which does or can entitle the contractor to recover any sum as remaining due and payable to him under the terms of his contract, nor can any legal claim whatever against the Government be founded thereon.

2nd, per RITCHIE, C.J., that the contractor was not entitled to be paid anything until the final certificate of the chief engineer was approved of by the commissioners or Minister of Railways and Canals. 31 Vict., c. 13, s. 18, and 37 Vict. c. 15; *Jones* v. *Queen*, 7 Can. S.C.R. 57.

3rd, per PATTERSON, J., that although F.S. way fully appointed chief engineer of the Intercolonial Railway, and that his report on suppliant's claim may be held to be the final and closing certificate to which he was entitled under the 11th clause of the contract, yet as it is provided by the 4th clause of the contract that any allowance for increased work is to be decided by the commissioners, the suppliant is not entitled to recover on F.S.'s certificate.

Per STRONG and TASCHEREAU, JJ. (dissenting), that F.S. was the chief engineer, and as such had power under the 11th clause of the contract to deal with the suppliant's claim, and that his report was "a final and closing certificate" entitling the respondent to the amount found by the Exchequer Court on the case submitted.

Per STRONG, TASCHEREAU, and PATTERSON, JJ., that the office of commissioners having been abolished by 37 Vict., c. 15, and their duties and powers transferred generally to the Minister of Railways and Canals, the approval of the certificate was not a condition precedent to entitle the suppliant to claim the amount awarded to him by the final certificate of the chief engineer.

Appeal allowed with costs.

Robinson, Q.C., and *Hogg*, Q.C., for appellant.

Girouard, Q.C., and *Ferguson*, Q.C., for respondent.

COSSETTE *v.* DUNN ET AL.

Quebec.] [Dec. 9

Appeal—Jurisdiction—Amount in controversy—Supreme and Exchequer Courts Act, s. 29—Mercantile agency—Responsibility for communicating to a subscriber an incorrect report concerning the standing of a person in business—Damages—Discretion of Judge in the court of first instance.

The plaintiff, in an action for $10,000 for damages, obtained a judgment of $2000. The defendant appealed to the Court of Queen's Bench, where the judgment was reduced to $500. The plaintiff appealed to the Supreme Court, and the defendant filed a cross appeal.

Held, that the case was appealable to the Supreme Court, the matter in controversy being the judgment of the Superior Court for $2000, which the plaintiff seeks to have restored. (TASCHEREAU, and PATTERSON, JJ., dissenting.)

Held, also, per RITCHIE, C.J., and FOURNIER and GWYNNE, JJ., 1st, that persons carrying on a mercantile agency are responsible for the damages caused to a person in business by an incorrect report concerning his standing, though the report be only communicated to a subscriber to the agency on his application for information. 2nd, reversing the judgment of the court below, that the amount of damages awarded by the Judge in his discretion in the court of first instance, there being no error or partiality shown, should not have been interfered with by the Court of Appeal. *Levi* v. *Reed*, 6 Can. S.C.R. 482; and *Gingras* v. *Desilets*, Cassels' Digest 117, followed.

Appeal allowed with costs.

Belcourt for appellant.

Lash, Q.C., and *Girouard*, Q.C., for respondents.

RAPHAEL *v.* MCFARLANE.

Shares subscribed for by father "in trust" for minor child—Arts. 297, 298, 299, c.c.

Where the father of a minor, who is not her tutor, invested monies belonging to her in shares of a joint stock company "in trust" and afterwards sold them without complying with the provisions of Arts. 297, 298, 299, C.C., to a person who had perfect knowlege of the trust, but pays full value, a tutor subsequently appointed has the right to recover the value of such shares from the purchaser. TASCHEREAU, J., dissenting. *Sweeny* v. *Bank of Montreal* (12 App. Cas. 617) followed.

Appeal allowed with costs.

MacLennan for appellant.

Geoffrion, Q.C., and *Smith*, for respondent.

[Feb. 26.

CORPORATION OF THE CITY OF SHERBROOKE *v.* MCMANAMY.

Appeal—Validity of by-law—Supreme and Exchequer Courts Act—Ss. 30, 24 (g)—S. 29 (a) and (b)—Constitutional question—When not matter in controversy.

The plaintiff sued the defendants to recover the sum of $150, being the amount of two business taxes, one of $100 as compounders, and the other of $50 as a wholesale dealer under the authority of a municipal by-law. The defendants pleaded that the by-law was illegal and *ultra vires* of the municipal council, and also that the statute 47 Vict., c. 84 (P.Q.), was *ultra vires* of the Legislature of the Province of Quebec. The Superior Court held that both the statute and the by-law were *intra vires*, and condemned the defendant to pay the amount claimed. On an appeal to the Court of Queen's Bench by the defendant (present respondent), the court confirmed the judgment of the Superior Court as regards the validity of the statute, but set aside the tax of $100 as not being authorized. The plaintiff thereupon appealed to the Supreme Court, complaining of that part of the judgment which declares the business tax of $100 invalid. There was no cross appeal. On motion to quash for want of jurisdiction,

Held, that s. 24 (*g*) of the Supreme and Exchequer Courts Act was not applicable, and that as neither parties on the present appeal attacked the constitutionality of the statute 47 Vict., c. 84 (P.Q.), the case was not appealable under s. 29 (*a*) of the Supreme and Exchequer Courts Act. STRONG, J., dissenting.

Appeal quashed with costs.

Brown, Q.C., for the appellant.

Belanger for respondent.

MOLSON *v.* BARNARD.

Appeal—Judgment ordering a petition to quash seizure before judgment to be dealt with at the same time as the merits of the main action not final—Not appealable.

A judgment of the Court of Queen's Bench for Lower Canada (appeal side), reversing a judgment of the Superior Court, quashing on petition a seizure before judgment and ordering that the hearing of the petition contesting the seizure should be proceeded with in the Superior Court at the same time as the hearing of the main action, is not a final judgment appealable to the Supreme Court. STRONG, J., dissenting.

Appeal quashed with costs.

Laflamme, Q.C., for appellant.

Doherty, Q.C., for respondent.

THE ACCIDENT INSURANCE CO. *v.* MCLACHLAN.

Appeal—New trial ordered by Court of Queen's Bench suo motu—Not final judgment—Not appealable—Supreme and Exchequer Courts Act.

In an action tried by a Judge and jury, the judgment of the Superior Court in review dismissed the plaintiff's motion for judgment and granted the defendant's motion to dismiss the action. On appeal to the Court of Queen's Bench, the judgment of the Superior Court was reversed, and the Court set aside the assignment of facts to the jury, and all subsequent proceedings and ordered, *suo motu*, a *venire de novo*, on the ground that the assignment of facts was defective and insufficient, and the answers of the jury were insufficient and contradictory.

On appeal to the Supreme Court,

Held, that the order of the Court of Queen's Bench was not a final judgment, and that the judgment does not come within the exceptions allowing an appeal in certain cases of new trials, and therefore the case is not appealable.

Appeal quashed with costs.

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

Greenshields, Q.C., and *Abbott*, Q.C., for respondents.

BACHFORD *v.* MCBEAN.

Appeal—Title to land in controversy—Supreme and Exchequer Courts Act, s. 29 (b).

In an action brought before the Superior Court with seizure in recaption under Arts. 857 and 887, C.C.P., and Art. 1624, C.C., the defendant pleaded that he had held the property (valued at over $2000) since the expiration of his lease under some verbal agreement of sale. The judgment appealed from, reversing the judgment of the Court of Review,

Held, that the action ought to have been instituted in the Circuit Court.

On appeal to the Supreme Court,

Held, that as the case was originally instituted in the Superior Court, and that upon the face of the proceedings the right to the possession and property of an immovable property is involved an appeal lies. Supreme and Exchequer Courts Acts, s. 29 (*b*), and ss. 28 and 24. STRONG, J., dissenting.

Motion to quash dismissed with costs.

Archibald, Q.C., for appellent.

Duclos for respondent.

LANGEVIN *v.* THE SCHOOL COMMISSIONERS OF THE MUNICIPALITY OF ST. MARK.

Mandamus—Judgment on demurrer not final—Appeal—Supreme and Exchequer Courts Act, s. 24 (g)—ss. 28, 29, 30.

A judgment of the Court of Queen's Bench for Lower Canada (Appeal side) reversed an interlocutory judgment of the Superior Court which had maintained the petitioner's demurrer to a certain portion of the respondent's pleas in proceedings for and upon a writ of mandamus.

Held, that interlocutory judgments upon proceedings for or upon a writ of mandamus or habeas corpus are not appealable to the Supreme Court under s. 24 (*g*) of the Supreme and Exchequer Courts Act. The words "the judgment" mean "the final judgment in the case." STRONG and PATTERSON, JJ., dissenting.

Appeal quashed with costs.

Cornellier, Q.C., and *Geoffrion*, Q.C., for respondents.

Lacoste, Q.C., for appellants.

THE ROYAL INSTITUTION FOR THE ADVANCEMENT OF LEARNING, ET AL, *v.* THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY.

Appeal—Order for new trial—When not appealable—Supreme and Exchequer Courts Act, ss. 24 (g), 30 and 61.

Where a new trial has been ordered upon the ground that the answer given by the jury to one of the questions is insufficient to enable the court to dispose of the interests of the parties on the findings of the jury as a whole, such error is not a final judgment, and cannot be held to come within the exceptions provided for by the Supreme and Exchequer Courts Act in relation to appeals in cases of new trials. See Supreme and Exchequer Courts Act, ss. 24 (*g*), 30, 61.

Appeal quashed with costs.

Doherty, Q.C., and *M. Kavannagh* for respondents.

Trenholme, Q.C., for appellants.

Ontario.] [Dec. 10.

HOBBS *v.* ONTARIO LOAN & DEBENTURE CO.

Mortgage—Re-demise clause—Creation of tenancy — Rent reserved—Tenancy at will—Agreement for lease—Specific performance—Excessive rent—Intention.

A mortgage of real estate provided that the money secured thereby, $20,000 with interest at 7 per cent., should be paid as follows: $500 on December 1st, 1883, and on the first days of June and December in each of the years 1884, 1885, 1886, 1887, and $15,500 on June 1st, 1888. The mortgage contained the following clause:

"And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured, undisturbed by the mortgagees or their assigns, he, the mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively according to the said proviso, without any deduction."

The goods of the mortgagor having been seized under execution the mortgagees claimed payment as landlord, under the said clause, of a year's rent out of the proceeds of the sale of the goods under the Statute of Anne.

Held, that it is competent for mortgagee and mortgagor to create by agreement the relation of landlord and tenant between them.

Held, per STRONG, GWYNNE, and PATTERSON, JJ., affirming the decision of the Court of Appeal (16 Ont. App. R. 225), RITCHIE, C.J., and TASCHEREAU, J., contra, that such relationship did not exist under the re-demise clause of the mortgage in this case the amount purporting to be reserved as rent under such

clause being so largely in excess of the rental value of the premises as to indicate a want of intention in the parties to create such relationship.

Per STRONG, J., that no tenancy at will was created by agreement, but such a tenancy could be held to exist by operation of the Statute of Frauds, the alleged lease being for a period of more than three years and not signed by the mortgagee. The Imperial Statute, 8 & 9 Vict., c. 106, requiring leases for over three years to be made by deed (of which the Ontario Act is a re-enactment) does not repeal the Statute of Frauds, but merely substitutes a deed for the writing required by the latter statute.

Held, per GWYNNE and PATTERSON, JJ., that no tenancy at will, by agreement or otherwise, was created by the re-demise clause.

Held, per STRONG, J., GWYNNE, and PATTERSON, JJ., contra, that the demise clause might be construed as containing an agreement for a lease capable of being enforced in equity and, since the Judicature Act, to be treated by common law courts exercising the functions of Courts of Equity, to be treated as a lease.

Per GWYNNE, J., that the clause could only be regarded as an agreement for the creation of a tenancy in the future if the parties so desired, such agreement to be carried out by the execution of the mortgage by the mortgagees.

Held, per STRONG, GWYNNE, and PATTERSON, JJ., that the demise clause could only be construed as purporting to create a tenancy for the entire term of five years, and it could not be held a good lease for four and a half years, at a rent reserved of $1000 a year, and void for the remaining half year.

Appeal dismissed with costs.

Gibbons for appellants.

Moss, Q.C., for respondents.

MOLSONS BANK *v.* HALTER.

Preference—Defeating or delaying creditors—R.S.O. (1887) c. 124, s. 2—Construction of statute—Effect of words "or which has such effect"—Assignment by trustee to co-trustee—Pressure.

W., a trader, was one of the executors of an estate, and had used the estate funds in his private business; having become insolvent, he gave a second mortgage on certain real estate to his co-executor as security for the money so appropriated. In a suit by a creditor to set aside the mortgage as void under R.S.O. (1887) c. 124, s. 2,

Held, affirming the judgment of the Court of Appeal for Ontario (16 Ont. App. R. 323), PATTERSON, J., dissenting, that the mortgage was not void under the said statute, the co-executor not being a creditor of W. within the meaning of the said section.

2. That the words "or which has such effect," in the section referred to, only apply to the clause immediately preceding, that is, to the case of giving one or more of the creditors of the transferor a preference over others, and do not apply to the case of defeating, delaying, or prejudicing creditors.

3. That the preference mentioned in the statute as avoiding a conveyance must be a voluntary preference, and would not include a conveyance obtained by pressure on the transferer.

Held, per STRONG, J., that W., by misappropriating the funds of the estate of which he was executor, was guilty of a criminal offence, and the fear of penal consequences was sufficient pressure to take from the transaction the character of a voluntary conveyance.

Appeal dismissed with costs.

Bowlby, Q.C., for the appellants.

Aylesworth-Finlay and *Du Vernet* for respondents.

PEOPLE'S LOAN CO. *v.* GRANT.

Mortgage—Rate of interest—"Until principal is fully paid and satisfied"—Effect of provision—Rate after principal is due.

G. mortgaged certain real estate to the C. L. Ins. Co., giving certain policies of insurance on his life as collateral security. He afterwards made a declaration under the Ontario statute that the said policies should be payable to his wife, and in case of her dying before him, to his children. After this declaration was made he mortgaged the same property to the P. L. Co., giving the same policies as collateral, and the first mortgage was assigned to the P. L. Co., and was in fact, paid off with the proceeds of the second loan. The mortgage to the P. L. Co. contained a provision that it was to be void on payment at a certain time of the principal and interest thereon at the rate of 10 per cent. per annum "until fully paid and satisfied." In an action to have the assignment of the policies cancelled,

Held, that the P. L. Co. could only hold the policies as collateral security for the mortgage to the C. L. Ins. Co., and not as security for their own mortgage.

Held, further, that the mortgage to the P. L. Co. only carried interest at the rate of 10 per cent. until the principal was payable, and after that date the statutory rate governed.

Rykert v. *St. John* (10 Can. S.C.R. 278) followed.

Appeal dismissed with costs.

Delamere, Q.C., for appellants.

Beck for respondent.

Quebec.] [Dec. 9.

MORIN *v.* THE QUEEN.

Error—Writ of—On what founded—Right of Crown to stand aside jurors when panel of jurors has been gone through—Question of law not reserved at trial—Criminal Procedure Act—R.S.C., c. 174, ss. 164, 256, 266.

Where a panel had been gone through and a full jury had not been obtained, the counsel for the prisoner on the second calling over the jury list objected to the Crown ordering certain jurors to stand aside a second time without cause, and the Judge presiding at the trial did not reserve, or refuse to reserve, the objection, but ordered the jurors to stand aside again, and after conviction and judgment a writ of error was issued.

Held, per TASCHEREAU, GWYNNE and PATTERSON, JJ. (affirming the judgment of the court below), that the question was founded on a question of law arising *on the trial* which could have been reserved under sec. 256 of c. 174, R.S.C., and as the Judge *at the trial* had not reserved, or refused to reserve, the question, the writ of error should be quashed. S. 266, c. 174, R.S.C.

Per RITCHIE, C.J., and STRONG, FOURNIER, and PATTERSON, JJ., that in the present case the Crown could not, without showing cause for challenge, direct a juror to stand aside a second time. S. 164, c. 174, R.S.C. (*Morin* v. *Lacombe*, 13 L.C.J. 259, overruled).

Per TASCHEREAU, J., that the learned Judge at the trial was justified in ruling according to *Morin* v. *Lacombe*, 13 L.C.J. 259, and the jurisprudence of the Province of Quebec.

Per GWYNNE, J., that all the prisoner could complain of was a mere irregularity in procedure, which could not constitute a mis-trial.

Per RITCHIE, C.J., and STRONG and FOURNIER, JJ., that as the question arose *before the trial* commenced it could not have been reserved, and as the error of law appeared on the face of the record, the remedy, by a writ of error was applicable. (See *Brisebois* v. *Queen*, 15 Can. S.C.R. 421.)

Appeal dismissed.

Langelier, Q.C., for appellant.

Dunbar, Q.C., for respondent.

Nova Scotia.] [Nov. 10.

ARCHIBALD *v.* HUBLEY.

Bill of sale—Affidavit of bona fides—Form of jurat—Omission of date and words "before me"—Writ of execution—Signature of prothonotary.

The Nova Scotia Bills of Sale Act, R.S., N.S., 5th ser., c. 92, s. 4, provides that a bill of sale or chattel mortgage shall be void unless accompanied by an affidavit that the same was made in good faith for a debt due to the grantee, etc. By s. 10 the expression "bill of sale" does not include an assignment for the general benefit of creditors. One E. assigned his property to A. in trust, to sell the same and apply the proceeds to the payment of debts due certain named creditors of the assignor. The affidavit accompanying this instrument omitted from the jurat the date of swearing and the words "before me."

Held, reversing the judgment of the Supreme Court of Nova Scotia, GWYNNE, J., dissenting, that this instrument was not an assignment for the general benefit of creditors, and was a bill of sale within the above section of the Act.

Held, also, that the affidavit required by said section must have all the requirements of affidavits used in judicial proceedings. Therefore the omission of the words "before me" from the jurat made the affidavit void and the defect could not be cured by parol evidence in proceedings by an execution creditior of the assignor to have the mortgaged goods taken to satisfy his execution.

Held per GWYNNE, J., that it is only when an affidavit is necessary to give the court jurisdiction to deal with a matter before it that defects of form will invalidate it. In a case like this the affidavit is only an incident in the proceedings and the defect could be cured by evidence.

Held, also, per GWYNNE, J., that an assignment of property absolute in its form and upon trust to sell the property assigned is not affected by said section 4 of the Act, which deals only with bills of sale by way of chattel mortgage.

The goods assigned by E. were seized by the sheriff under an execution, and in an action against the sheriff the execution produced was not signed by the prothonotary of the court out of which it was issued.

Held, that it is the seal of the court which gives validity to such writs and not the signature of the officer, and the want of such signature did not affect the validity of the execution.

Appeal allowed with costs.

W. B. Ross for the appellant.

Eaton, Q.C., for the respondent.

North-West Terr.] [March 11.

MARTIN *v.* MOORE.

Appeal Jurisdiction—Service of writ out of jurisdiction—Order of Judge—Final judgment Practice.

A writ of summons, in the ordinary form of writs for service within the jurisdiction, was issued out of the division for the District of Alberta of the Supreme Court of the North-West Territories, and a Judge's order was afterwards obtained for leave to serve it out of the jurisdiction The writ having been served in England the defendant moved before a Judge of the court below to set aside the service, alleging that the cause of action arose in England and he was, therefore, not subject to the jurisdiction of the courts in the Territories; also, assuming the court had jurisdiction, that the writ was defective, as the practice required that a Judge's order should have been obtained before it issued. The motion was refused, and the decision of the Judge refusing it was affirmed by the full court. The defendant then sought to appeal to the Supreme Court of Canada.

Held, GWYNNE, J., *hesitante*, that the judgment sought to be appealed from was not a final judgment in an action, suit, cause, matter, or other judicial proceeding within the meaning of The Supreme Court Act, and the court had no jurisdiction to hear the appeal.

Appeal quashed with costs.

Chrysler, Q.C., for the appellant.

Moss, Q.C., for the respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

FALCONBRIDGE, J.] [Jan. 16.

IN RE WILSON AND TORONTO INCANDESCENT ELECTRIC LIGHT CO.

Husband and wife—Conveyance to, in 1874—Tenants in common—Devolution of Estates Act—Conveyance of land by administrator—Debts.

Land was conveyed in 1874 to a husband and wife, who were married in 1864,

Held, that they took, not by entireties, but as tenants in common, just like strangers.

Held, also, that the husband could by virtue of the Devolution of Estates Act, as administrator of the wife, and in his own right, make a valid conveyance of the whole of the land, although there were no debts of the wife to pay.

Martin v. *Magee*, 19 O.R. 705, distinguished.

A. Paterson for the company.

Beverley Jones for Wm. Wilson.

Div'l Court.] [Feb. 2.

KENT *v.* KENT.

Husband and wife—Conveyance of land to wife directly—Equitable estate in wife—Husband trustee of legal estate—Devise of land by wife to infant children—Possession by husband—Natural guardian—Statute of Limitations.

A conveyance of lands from a husband to his wife directly was made in 1870, was expressed to be in consideration of "respect and of one dollar," was in the usual statutory short form, and was duly registered. The marriage was in 1854.

Held, affirming the decision of BOYD, C., *ante* p. 158, that the conveyance had the effect of conveying the equitable estate in the lands to the wife, leaving the legal estate in the husband as trustee thereof for the wife. A gift from a husband to a wife is not an incomplete gift by reason of the incapacity of the wife at law to take a gift from her husband.

Re Breton's Estate, 17 Ch. D. 416, commented upon.

The wife died in 1872, having made a will leaving her real estate to the two daughters of herself and husband, who were then aged respectively seventeen and twelve. The husband remained in possession during the wife's life, and from her death till his own death in 1890. This action was begun in 1890 by the younger daughter and the son of the elder, to recover possession from the devisee of the husband.

Held, reversing the decision of BOYD, C., that the Real Property Limitation Act did not apply so as to extinguish the rights of the plaintiffs to recover; it was to be presumed that the husband, after conveying to his wife, was in possession of the lands and in receipt of the rents and profits for and on behalf of his wife; and that, upon his wife's death, he entered into possession and receipt for and on behalf of his infant children and as their natural guardian; and, his being so, his possession and receipt were the possession and receipt of his wife, and, after her death, of his children and those claiming under them; and the statute, therefore, never began to run.

Wall v. *Stanwick*, 34 Ch. D. 763; *In re Hobbs*, 36 Ch. D. 553; *Lyell* v. *Kennedy*, 14 App. Cas. 437, followed.

Hickey v. *Stover*, 11 O.R. 106; *Clark* v. *McDonnell*, an unreported decision of the Common Pleas Divisional Court, not followed.

Gibbons, Q.C., for the plaintiffs.

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

Div'l Court.] [Feb. 2.

TAYLOR v. MASSEY.

Defamation—Libel—Resolution passed at meeting—Letter published in newspapers—Accusation of conspiracy—Innuendo—Plaintiff not named—Surrounding circumstances—Excessive damages—Evidence of occurrences at meeting—Admissibility—Privilege.

The plaintiff, who was employed by a manufacturing company of which the defendant was president, brought an action for the seduction of his daughter against the superintendent of the company. Some particulars in regard to the alleged seduction having appeared in public newspapers, a meeting of some of the members and servants of the company was held, at which the defendant presided, and a resolution was passed expressing confidence in the innocence of the superintendent of the alleged seduction. A letter was then or immediately afterwards drawn up and signed by a number of the persons present, including the defendant, handed to a reporter for publication, and was published in several newspapers, without any objection on the defendant's part.

The letter was addressed to the superintendent, referred to the charges against him which had appeared in the newspapers, declared the belief of the signers in his innocence, and concluded, "We believe you are the victim of a conspiracy as base and ungrateful as was ever sprung on an innocent man, and we pledge ourselves to stand by you until your innocence shall have been clearly established, or until—which we are confident will never be—you are shown to be the monster depicted in the public press." The plaintiff was not named in the letter.

The plaintiff sued the defendant for libel in consequence of the publication of this letter. The innuendo was that the plaintiff was guilty of the offence of conspiring and agreeing with his daughter to defame and slander or otherwise injure the reputation and character of the superintendent. The whole question of libel or no libel was left to the jury, who found for the plaintiff with $1,500 damages.

Held, that it was not necessary to decide whether the letter could be construed as supporting the innuendo of a criminal conspiracy; the question really was whether the defendant had libelled the plaintiff, and this question had been determined by the jury.

2. That the surrounding circumstances were admissible in evidence for the purpose of showing that persons conversant with those circumstances might naturally conclude that the plaintiff was the person aimed at by the letter; and it was enough that the circumstances and the libel taken together pointed to some one, and that the jury found the plaintiff to have been the person intended.

3. That the verdict of the jury could not be interfered with on the ground that the damages were excessive.

4. That evidence of what took place at the meeting was admissible as proof that the plaintiff was the person intended by the resolution passed at it, the defendant having been present, and that a witness who was present at the meet-

ing and took notes, which were afterwards printed, could refer to the printed copy, after the destruction of the original notes, to show exactly what did take place.

5. That the occasion was not one of privilege or qualified privilege.

Osler, Q.C., and *Ryckman*, for the defendants.
James A. Macdonald for the plaintiff.

Chancery Division.

Full Court.] [Feb. 18.

BICKERTON v. DAKIN.

Lien - Mechanics' lien—Partnership—Claim of lien registered in name of, after dissolution—R.S.O., c. 126, ss. 16, 19—"Claimant"—"Person entitled to the lien"—53 Vict., c. 37, O.—Jurisdiction of High Court—Joining liens—Statements of claim under 53 Vict., c. 37, s. 2, O.—Amendment.

Judgment of BOYD, C., reported, 20 O.R. 192, affirmed on all points.

Aylesworth, Q.C., for the defendant Nesbitt.
Masten for the plaintiffs.

Full Court.] [Feb. 18.

TOWN OF MEAFORD *v.* LANG ET AL.

Principal and surety—Official bond—Collector of taxes—Municipal corporation—Release of sureties—Non-disclosure—Constructive fraud.

Decision of MACMAHON, J., reported, 20 O.R. 42, affirmed.

W. Cassels, Q.C., for the plaintiff.
J. K. Kerr, Q.C., for the defendants.

Practice.

ROSE, J.] [Feb. 13.

LANGMAN *v.* HUDSON.

Partnership—Defendants sued in firm name—Pleading—Rule 288.

In an action against two partners sued as a firm in the firm name, though after dissolution, one of the partners appeared in his individual name and afterwards delivered a statement of defence and counter-claim, also in his individual name. The other partner did not appear.

By Rule 288, "Where partners are sued in the name of their firm, they shall appear individually in their own names; but all subsequent proceedings shall, nevertheless, continue in the name of the firm."

Held, that the words "subsequent proceedings" should be confined to proceedings by the plaintiff; and a motion to set aside the pleading was dismissed.

H. Cassels for the plaintiff.
W. M. Douglas for the defendant Hudson.

C.P. Div'l Court.]
MACMAHON, J.] [Feb. 14.

MCLEAN *v.* BRUCE.

Attachment of debts—Judgment for costs only—Rule 935—Parties—Assignee of judgment—Amount attached unascertained—Residuary legatee and executor—Administration—Receiver—Equitable execution.

Under Rule 935 an order to attach debts may be founded on a judgment for costs only.

Troutman v. *Fisken*, 13 P.R. 153, distinguished.

Under Rule 935 an assignee of a judgment, though not a party to the action, may apply to enforce the judgment by attachment. An order may be made attaching the amount, if any, coming to a judgment debtor as residuary legatee under a will, although it is undetermined whether anything, and, if anything, how much, is due to him. Upon an inquiry as to whether anything is due to a judgment debtor as residuary legatee, where he also has the character of executor, the legatees and creditors ought to be before the court, and the way to bring them before the court is by administration proceedings.

Quære, whether the assignee of the judgment would be entitled to administration.

The assignee of a judgment appointed receiver by way of equitable execution to receive whatever interest the judgment debtor might have as residuary legatee.

Hoyles, Q.C., for the assignee.
H. Cassels for the judgment debtor.

BOYD, C.] [March 5.

CHAPMAN *v.* NEWELL.

Costs—Partnership action—Assets.

In actions between parties, in the absence of special circumstances such as misconduct or negligence, the assets will be directed to be

applied, first, in payment of creditors ; next, in payment of the sum found due the successful party ; and lastly, in payment of the costs of both parties.

Hainer v. *Giles*, 11 Ch. 942, followed.

The fact of a balance being found due by one partner to the other is no reason for departing from the ordinary rule as to costs.

John Greer for the plaintiff.

Hislop for the defendant.

C.P. Div'l Court.] [March 6.

CAMPBELL *v.* SCOTT.

Discovery—Examination of defendant before statement of claim—Slander—Rule 566.

In actions of slander when the court is satisfied of the *bona fides* of the plaintiff, and is convinced that he cannot state fully and with sufficient particularity his various grounds of complaint, and when the knowledge required is within the possession and control of the defendant, an examination for discovery before statement of claim will be ordered, under Rule 566 ; but in such case a further examination after pleading will not be allowed except upon special grounds.

Fisken v. *Chamberlain*, 9 P.R. 283 ; *Gordon* v. *Phillips*, 11 P.R. 540 ; *McLean* v. *Barber*, 13 P.R. 500, followed.

Aylesworth, Q.C., for the plaintiff.

Shepley, Q.C., for the defendant.

STREET, J.] [March 13.

FLETT *v.* WAY.

Set-off—Rule 375—Rule 1205—Solicitor's lien—Counter-claim.

This was an action brought by a tenant against his landlord (W.), a contractor (S.), who had made alterations in the premises formerly occupied by the tenant, and the agent (L.), who collected the rent, for $1,000 damages for wrongful entry, etc., and was tried by STREET, J., and a jury.

A verdict was rendered on the claim against W. only, for $104 damages, and on W.'s counter-claim against the plaintiff for $104 overdue rent.

The entry of judgment was deferred till this day, when counsel for the defendant W. moved to set off the debt recovered on the counter-claim against the damages recovered on the claim, relying on Consolidated Rule 375. The plaintiff was admitted to be worthless. His counsel contended that Rule 375 must be read with Rule 1205, and was limited by it, and objected that the Court had no jurisdiction to direct a set-off, the effect of which would be to prejudice the lien of the plaintiff's solicitors for costs, and cited the English cases, and also read an affidavit of the plaintiff's solicitor claiming a lien. Counsel for the defendant replied that all the cases referred to as having been decided under Rule 1205 were cases in which a set-off had not been directed, and decided only that in construing a judgment where a set-off had not been directed the same would not be allowed to the prejudice of the solicitor's lien, and cited the dictum of OSLER, J., in *Brown* v. *Nelson*, 11 P.R., at p. 125.

Held, that the damages recovered by the plaintiff be set-off against the debt recovered by the defendant W., and that no execution be issued by either party against the other for such damages or debt.

W. D. McPherson for defendant W. for the motion.

F. E. Titus for the plaintiff, contra.

SIXTH DIVISION COURT, COUNTY OF ONTARIO.

DARTNELL, JJ.] [March 19.

GATTIE *v.* OVEREND.

Poundkeeper—Running at large—R.S.O., c. 215, s. 3.

To justify a sale of animals under a pound by-law, they must be "unlawfully running at large," and also "delivered to the poundkeeper for the purpose of impounding." Where, therefore, two sheep, found in the highway, were driven to the yard of the defendant, who was an innkeeper and also a poundkeeper, on the supposition that they belonged to a cattle-dealer accustomed to use the yard for the purpose of herding, and were, on discovering that they belonged to the plaintiff, held by the defendant as poundkeeper, and subsequently sold

Held, that the animals were not "unlawfully running at large," nor were they "delivered to the poundkeeper for the purpose of impounding" within the meaning of R.S.O., c. 215, s. 3; that they were detained by the defendant in the capacity of a gratuitous bailee and not as a poundkeeper; that the sale was illegal, and, under all the circumstances, that the poundkeeper acted maliciously.