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WE would call the attention of our readers to the full report to be found in the *Albany Law Journal*, vol. 44, p. 86, of a case defining the law of easements in regard to companies utilizing electricity and operating in the public streets, which we have noted *post* p. 479.

AMONG the Acts passed at the last session of the British Parliament was that known as the Slander of Women Bill, which enacts that an imputation on a woman's chastity is actionable without proof of special damage. This is one of the numerous instances in which our legislatures are in advance of the old land's. The matter of this bill became law with us by c. 14 of 52 Vict. (Ont.). Our Act is a little wider, and provides for the giving of security for costs and for examination of parties immediately after the delivery of the statement of claim, provisions which do not occur in the English Act.

DOWER IN MORTGAGED ESTATES.

In the late case of *Pratt* v. *Bunnell*, 21 Ont. 1, Street, J., in delivering the judgment of the Divisional Court, says that the decision arrived at is opposed to the view taken by Patterson, J.A., in *Martindale* v. *Clarkson*, 6 A.R. 1; by the Chancellor in *Re Croskery*, 16 Ont. 207; and by Ferguson, J., in *Re Hague*, 14 Ont. 660. We are, however, somewhat inclined to doubt whether there is really any such judicial conflict of opinion.

In *Pratt* v. *Bunnell* a mortgage had been given for purchase money, and the wife of the mortgagor had joined in the mortgage to bar her dower; and the question the court had to decide was whether, after payment of the mortgage debt, the wife's dower was to be calculated on one-third of the whole value of the land, or only on one-third of the surplus remaining after payment of the mortgage.

The Court came to the conclusion that the wife was only dowable in that case out of the surplus; which conclusion, if confined to the case of mortgages for purchase money, we believe to be a perfectly correct exposition of the statute; but if it be intended to apply that rule to other cases than mortgages for purchase money, we think it open to doubt, and in that case it certainly would be opposed to the previous decisions above referred to. The *obiter dictum* of Patterson, J.A., in *Martindale* v. *Clarkson*, referred to by Street, J., does not appear to be maintainable as a general proposition applicable to all cases. Speaking of the new right conferred on dowresses by the Act of 1879, he says, "To such dower the Legislature applies the rule adopted by the Court of Chancery in *Robertson* v.

Robertson, 25 Gr. 486, estimating it upon the whole value of the land and not on the surplus over the incumbrance." Applied to the case in hand, viz., a mortgage given to secure an advance and not for purchase money, the statement is perfectly correct; but there is nothing in the case to indicate that the learned judge had the case of a mortgage for purchase money in mind, or that he would have held that the same rule applied to such mortgages. In neither of the other cases, *Re Croskery* and *Re Hague*, were the mortgages in question given for purchase money—nor do we find anything in these cases to indicate that the learned judges who decided them had in view the case of mortgages for purchase money.

As Street, J., points out, there was a clear distinction before the Act of 1879 in the rights of a wife to dower in land subject to mortgage where the mortgage was given to secure the purchase money of the mortgaged land, and where the mortgage was given to secure a loan or a debt other than purchase money. *Campbell* v. *Royal Canadian Bank*, 19 Gr. 334, had settled that in the case of a mortgage for purchase money the dower was to be calculated only on the value of the equity of redemption; whereas, where the mortgage was not given to secure purchase money, *Doan* v. *Davis*, 23 Gr. 207, and *Robertson* v. *Robertson*, 25 Gr. 486, had settled that the wife's dower was to be calculated on the basis of the whole value of the land. This distinction the Act of 1879 does not appear to us to be intended to disturb, and notwithstanding the verbal criticism which Street, J., has applied to s. 6, we are disposed to think it is framed for the very purpose of preserving this distinction. That section provides that in the event of the sale of the mortgaged land, the dowress is to be "entitled to dower in any surplus of the purchase money arising from such sale which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land from which the surplus purchase money shall be derived had the same not been sold."

The words "to the same extent" appear to us to indicate that the Legislature had in view the fact that the extent to which a widow in the then state of the law was entitled to dower in mortgaged land was not in all cases the same, but varied according to the nature of the purpose for which the mortgage had been given, and the use of these words seems to us plainly to show that it was not intended to interfere with that distinction. Had it been intended to lay down a rule to be applied to all cases, irrespective of the previously well-established distinction, we are disposed to think that the language would have been different. The draughtsman probably had in view when using the words "had the same not been sold" a case of administration where, without a sale of the mortgaged land, it becomes necessary to adjust the rights of the parties, and to determine to what extent and for what amount the dowress is entitled to dower.

The dower, on whatever basis it is calculated, can, in the event of a sale, only be payable out of the surplus; but if it were intended in all cases to confine the dowress' claim to one-third of the surplus, it was certainly easier to say so than to use the phraseology actually adopted, which, to our mind, plainly enough implies that the Legislature contemplated the fact that the extent to which a widow is entitled to dower depends on the circumstances of each case.

In our view of the case, *Pratt* v. *Bunnell* is not in conflict with the previous decisions (except that of *Calvert* v. *Black*, 8 P.R. 255), but merely establishes an exception to the general rule, which existed before the Act of 1879, and which was not, as we venture to think, intended to be in any way interfered with by that Act.

LEGAL STATISTICS FOR 1890.

The Report of the Inspector of Legal Offices for the year 1890 shows that there was a sensible diminution in the volume of litigation compared with the previous year so far as the number of suits is concerned. In 1889 the total number of writs issued was 7067, while in 1890 the figure reached is only 6940. But while the number of writs is considerably smaller, the amount sued for seems to have been very considerably larger: thus in 1889 the writs were indorsed for $7,550,422.07, and in 1890 for $9,288,656.44.

The number of judgments entered without trial in the outer counties in 1889 was 1822, and the amount recovered thereby $1,942,567.39; while in 1890 the number of judgments fell to 1240, and the amount of them to $1,235,603.06. In 1890 the number of judgments entered in the High Court in the outer counties, after trial, was 406, as against 623 in 1889, and the amount of such judgments in 1889 was $498,816.95, against $141,827.82 in 1890. These figures, it will be observed, do not include the city of Toronto; it is therefore impossible to institute a comparison between the total number of suits commenced and the number of judgments recovered. So far as the outer counties are concerned, of the sum of $9,288,656.44 for which writs were issued only $1,377,430.88 was recovered by judgments entered in the outer counties. Is it to be supposed that judgments in respect of the other eight millions of dollars of claims were recovered in Toronto? Unfortunately the Inspector's duties do not extend to the Toronto offices, and his report, therefore, furnishes very few *data* for a comparison between the legal business transacted in the outer counties and in Toronto respectively.

It is a very curious fact that notwithstanding the enormous sums for which actions are commenced in the course of a year, a comparatively very small portion of it is recovered under execution or by sales under other legal process. Thus although executions were issued against goods in the High Court of Justice during 1890 for $3,135,751.93, only the sum of $40,377.70 was actually realized by the sheriffs by sales, and the sum of $54,329.09 without sales, making the total realized under executions only $94,706.79, or not quite $\frac{1}{31}$ part of the amount required to be levied. It is to be hoped that this does not represent the actual fruit of the litigation. The amounts realized by sales in the Masters' offices do not account by any means for the difference between the amount sued for and the amount recovered. In 1889 $390,974 was realized in this way, and in 1890 $416,914.84.

The profession will be interested to learn that the proportion between the taxed fees and disbursements is about equal, and for every dollar of profit costs

a solicitor can earn in a litigated suit he must be prepared to disburse another dollar. This is certainly a very heavy outlay, and it is doubtful whether any other professional business is carried on on such disadvantageous terms.

Some interesting figures are to be gathered from the Surrogate Court returns, from which we learn that during the past year the value of the personalty devolving aggregated $15,435,107.13, as against $12,299,582.15 in 1889; and the value of the realty devolving under the Devolution of Estates Act aggregated $4,679,177.56, as against $3,773,939.47 in 1889; there being in both classes of property a very considerable increase in amount during the past year. We find that there were only 14 estates where the personalty was over $100,000.

As an almost necessary result of the practical operation of the Devolution of Estates Act, the number of administration actions is dwindling away by degrees. In 1885 we find that in the outer counties 55 administration orders were made upon summary applications; in 1886 there were 62; in 1887 there were 50; in 1888, 42; in 1889 there were 33; and in 1890, 25. These returns of course do not include the city of Toronto, and therefore we are unable to see what has been the full extent of the falling off of this class of actions. The change in the law which has been effected by the Devolution of Estates Act we believe has been beneficial both to the profession and the public; and it is not often that it can be said of any legislation that it is beneficial to both the lay and professional classes of the community. It does not follow that because it is now possible to wind up estates without the necessity of an administration action that therefore the services of the lawyer can be dispensed with: his aid is almost invariably sought, and instead of having to lay out a dollar for every dollar he earns, he is able to earn just as much without having to lay out in disbursements anything like the same amount of money, and at the same time he has the satisfaction of presenting a much less heavy bill of costs to his client than he would have in the case of litigation.

Notwithstanding these crumbs of comfort, the fact cannot but occasionally present itself to the mind of the practitioner that, by reason of the constant influx of at least 100 new members every year into the ranks of the profession, the competition for business is constantly increasing, and its increase in bulk does not by any means keep pace with the increase in the numbers of the competitors.

JUDICIAL SALARIES.

We are glad that the leader of the Government has announced his intention of bringing in a measure next session to increase the salaries of the judges. It is to be hoped that he means business. There is no question as to what his own views are, but he sees difficulties in the way which his predecessor was unable to overcome. We trust Mr. Abbott may be more successful. We reproduce his remarks *in extenso*:

He says: "The subject of this discussion is certainly well worthy of the time that has been taken up, and the Government is very sensible, and has been for some time, of its importance and of the necessity of dealing with it.

It has already made a serious effort within the last two or three years to do so, unsuccessfully, in consequence of the great difference of opinion which appears to exist in the representative body as to the position the judges should hold with regard to salary. It appears to me that the discussion which has taken place here affords a very excellent object lesson as to the extent of these difficulties. While almost every hon. gentleman thinks the salaries of the judges should be increased, the views as to the extent and nature of that increase are as numerous as the number of gentlemen who spoke on the subject. It is this kind of difference of opinion—and, in fact, there are many kinds of differences of opinion about this subject—which renders it so exceedingly difficult to deal with. In the House of Commons, where a measure was introduced for the purpose of increasing the salaries, the diversity of opinion was so strong, and finally the opposition was so strong, that it was found impossible to proceed with the Bill. Now, to-day my hon. friend on my left thinks evidently that the salaries are large enough, that there were as good judges in his province at $2,400 a year as there are now at $4,000 a year, and I think that is very probable. For I remember, at a shorter date probably than my hon. friend himself could remember, when a man could live in this country for one-half the amount he can live on now—when the fortunes which judges, in attempting to maintain their social rank, had to compete with were not one-tenth or one-hundredth part of what they are now. It is not so long ago when the sight of a millionaire would have attracted crowds in the street; now there is not a town in the country where you could not find men who are several times millionaires. The cost of living is greater. Men threaten a change of dynasty or a reconstruction of society because they do not get the same price for eggs as they got last year. But eggs this year were three or four times as costly as they were in those years. And so with regard to other articles of food, and to clothing. It may be that in some respects the necessaries of life have not increased, but the requisites for maintaining one's social position have increased tenfold, and it is impossible, as hon. gentlemen concur in saying, for the best men in the country to be induced to take positions on the bench at the rates which we now pay in the larger centres of business and trade. My hon. friend from Ottawa appears to compare to some extent the rate of payment which we give our judges with the salaries paid on the other side of the line. In some respects my hon. friend is quite right. The salaries paid there to judges of the courts in certain centres of business are three or four times as much, in some instances, as those paid to judges in some of the important centres of this country. But there are many reasons for that, not the least of which is the very high rate of living which is rendered necessary on the other side of the line in consequence of the enormous taxation. There, the cost of everything required for living is much greater than it is here; and the other reasons to which I have alluded prevail even more strongly there than here. There the fortunes are enormous, and in the competition for social position there, even with the liberal salaries allowed the judges, they are practically nowhere. However, in a moderate way there is no doubt whatever that an increase in the salaries of our judges is necessary. Whether it shall be particu-

larly in favor of one class of judges or another class of judges, or what the amount of increase shall be, are questions which, of course, will have to be dealt with in detail. It is the intention of this Government next session to attempt to deal with the subject in a manner which they hope will be satisfactory to the country; but I must say this, that without some little compromise of views, and some little sacrifice of personal ideas about judges, we should have difficulty in passing the most admirable measure in the world even in this House, where the easiness of the circumstances of its members and their independent position renders them more unlikely to criticize a liberal payment to judges than perhaps members might do in another place. Such a measure as the Government, with the most careful consideration of the question, can prepare, they propose to bring down next session."

Several members in the House of Commons have already put themselves on record against any increase. That is to be expected. There are always those who think it desirable to pander to an ignorant and foolish prejudice against lawyers, as a class, and who are unable to see the immense injury done to the public by inferior men being placed in judicial positions. It requires no intelligence to see that this must be the necessary result of not providing adequate remuneration for those who ought to occupy seats on the bench. Those in authority who refuse to see this and act accordingly assume a grave responsibility and do grievous wrong to their constituents and their country.

COMMENTS ON CURRENT ENGLISH DECISIONS.

SOLICITOR—TAXATION OF COSTS—TAXATION AFTER PAYMENT—"SPECIAL CIRCUMSTANCES"—6 & 7 VICT., c. 73, ss. 38, 41. (R.S.O., c. 147, ss. 43, 46).

In re Cheesman (1891), 2 Ch. 289, the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.) declined to interfere with the discretion of Kekewich, J., in granting an order for taxation of a solicitor's bill after payment, under the following circumstances: The solicitor was acting for a mortgagee; the mortgagor had sold the property, and the purchasers were pressing for completion; the solicitor refused to deliver up the deeds unless his costs were paid; the mortgagor objected to the amount, but in order to get the sale completed paid, under protest, the sum the solicitor agreed to accept, and within a month applied for taxation of the bill. Both Lindley and Kay, L.JJ., however, expressed doubts whether they themselves would have granted the order in the first instance, but they considered there were "special circumstances," and it was for the judge of first instance to say whether they were sufficient.

LIBEL—INTERLOCUTORY INJUNCTION.

Salomons v. *Knight* (1891), 2 Ch. 294, is another case in which an application was made for an interlocutory injunction to restrain the publication of a libel. In this case the defendant had previously published a libel against the plaintiff, for which he had been sued and judgment given against him for £1000 damages, which the plaintiff had been unable to recover. The defendant continued to

publish documents repeating the same charges, but inasmuch as the plaintiff failed to make out that there was any reason to apprehend any immediate danger of injury to the plaintiff in person or property, North, J., declined to grant an interlocutory injunction, and his decision was affirmed by the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.).

INFANT—GUARDIAN—RELIGIOUS EDUCATION—ANTE-NUPTIAL AGREEMENT AS TO RELIGION OF THE CHILDREN—WISHES OF DECEASED PARENTS—COSTS.

In re Nevin (1891), 2 Ch. 299, was an application for the appointment of a guardian to a penniless infant in which two questions were raised: first, who should be appointed guardian, and, second, in what religion the child should be brought up. The father was a Protestant who had married a Roman Catholic, and by an ante-nuptial agreement had agreed that the children of the marriage should be brought up Roman Catholics. The child was the only issue and had been baptized by a Roman Catholic priest. When the child was three years old the father, who was in destitution, died at the house of Miss Martin, a Protestant cousin of the wife. The father on his death-bed had commended his wife and child to Miss Martin, but had appointed no guardian. Soon after his death the child, with the consent of the mother, who was statutory guardian, went to live with and was maintained by Miss Martin, with whom she remained until she was seven, and there was a strong attachment between them. The mother then died without appointing a guardian, and after her death her brother, who was a Roman Catholic, took the child away from Miss Martin by force and sent her to America, whence she was brought back under *habeas corpus* proceedings instituted by a Protestant brother of the father. Nothing had been said to Miss Martin by either father or mother as to the religious education of the child. The Court of Appeal (Lindley, Bowen, and Kay, L.JJ.) held (affirming Chitty, J.) that, as the child had no guardian, the Court had only to consider what was best for the child's welfare, having due regard to the wishes of the father as to her religious education; that the ante-nuptial agreement was not binding on the father, and though he acted in his life on the view that the child was to be brought up a Roman Catholic he was at liberty to change his mind, and that it could not be inferred in the events that had happened that he would have wished the child to be removed from Miss Martin's care to be brought up a Roman Catholic—a course which, in the opinion of the Court, would not be for the child's benefit. Miss Martin was therefore appointed guardian, with power to bring up the child as a Protestant.

COMPANY—WINDING UP—RESERVE FUNDS—UNDRAWN PROFITS—SURPLUS ASSETS OF COMPANY, DIVISION OF—CONTRIBUTORIES, RIGHTS OF, INTER SE—CAPITAL—INCOME.

In re Bridgewater Navigation Co. (1891), 2 Ch. 317, the question as to when undrawn profits can be treated as capital is discussed by the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.), and the decision of North, J., (1891), 1 Ch. 155 (see *ante* p. 136), was varied. The question arose on the winding-up of a canal company. Pursuant to the articles of association, the directors had from time to time set apart out of the profits divers sums which had been placed to

the credit of reserve funds to meet (*a*) depreciation of steamers (*b*) insurance, and (*c*) canal improvements. These reserve funds were not represented by any separate or specific investments, but were merely bookkeeping entries. The company's undertaking had been sold and a voluntary winding up agreed to, and at the date of the sale three funds representing these reserve funds were standing in the company's books. North, J., it may be remembered, held that only the fund standing to the credit of the canal improvements was divisible as "profits," and that the other two funds did not represent "profits," and were divisible as capital between both the ordinary and preference shareholders. There was also the further question, whether for the broken period between the last dividend day and the completion of the sale of the undertaking the ordinary shareholders were only entitled to the actual profits made, or also to the difference between the actual value of the company's assets and the value at which they had been estimated in the company's last balance sheet, as being undrawn profits. North, J., held that they were only entitled to the actual profits made. The Court of Appeal differed from him on both points, being of opinion that all three reserve funds were undrawn profits and divisible as such, and also that the difference between the actual and the estimated value of the assets was also to be treated as undrawn profits.

HUSBAND AND WIFE—WIFE'S EQUITY TO A SETTLEMENT—ASSIGNMENT BY HUSBAND OF FUND—RIGHTS OF ASSIGNEE OF HUSBAND AS AGAINST WIFE.

In *Roberts* v. *Cooper* (1891), 2 Ch. 335, a married woman was entitled to a reversionary interest in two sums of £500 under the will of her father and grandfather respectively. In 1864 these interests were put up for sale and sold to a purchaser for £170, which was paid to the wife: the husband and wife executed an assignment to the purchaser, and it was acknowledged by the wife before commissioners, but the assignment by the wife was nugatory. The assignee neglected to notify the trustees of the will of the grandfather, and they having no notice of the assignment paid the £500 due under this will to the husband and wife, and it was expended by the husband in the maintenance of his family. The other £500 was in Court and was claimed by the assignee, the wife claiming to be entitled to a settlement, her husband being in poor circumstances and she having no other means. Kekewich, J., ordered the whole fund to be settled: but the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.) thought he had gone too far, and though the assignment was invalid as against the wife it was valid as to her husband's interest, and that under the circumstances their receipt of the £500 under the grandfather's will was a special circumstance to be taken into account in determining what part of the fund in question should be settled; and the assignee assenting to one-half of it being settled, they varied the order of Kekewich, J., accordingly.

PRACTICE—PARTIES—ADMINISTRATION ACTION—RULES 133, 170 (ONT. RULES 324, 329).

In re Harrison, Smith v. *Allen* (1891), 2 Ch. 349, at the hearing of the action, which was for a general account against a surviving executor and trustee, it was objected by the defendant that the account could not be directed because the

representative of a deceased executor and trustee was not made a party; but Chitty, J., held that it was not necessary for the plaintiff to make him a party, and that if the defendant desired to have him made a defendant, he should have proceeded under Rules 133, 170 (Ont. Rules 324, 329).

ADMINISTRATION ACTION—SOLICITOR TRUSTEE—JURISDICTION.

In re Thorpe, Vipont v. *Radcliffe* (1891), 2 Ch. 360, was an action against tw executors and trustees for administration of their testator's estate. One of the defendants was a solicitor who had assigned his business to other solicitors who acted for the defendants in the action and taxed costs, and under an arrangement with the solicitor trustee paid half the profit costs to him. The party having the conduct of the action applied on motion to compel the solicitor trustee to account for the half of the profit costs so received by him; but North, J., though thinking the defendant liable to account for the moneys so received if an action were brought against him, considered that he had no jurisdiction to make the order asked upon motion in the administration action.

COSTS—REDEMPTION ACTION—SOLICITOR MORTGAGEE, RIGHT OF TO COSTS.

In *Stone* v. *Lickorish* (1891), 2 Ch. 363, Stirling, J., held that in a redemption action against a solicitor mortgagee who defends in person the solicitor is entitled to costs out of pocket, but not to remuneration for personal trouble, and that the objection need not be taken at the hearing, but may be taken on the taxation, after judgment in the usual form containing the common order to tax costs. In this latter point he followed *Cradock* v. *Piper*, 1 Mc. & G. 664, in preference to *Price* v. *McBeth*, 33 L.J. Ch. 460.

NUISANCE—NOISE—WATER COMPANY—NEGLIGENCE INJUNCTION.

Harrison v. *Southwark & Vauxhall Water Co.* (1891), 2 Ch. 409, was an action brought by the plaintiff for an injunction and damages. The defendants were a water company, and in pursuance of their statutory powers had sunk a shaft on land adjoining the plaintiff's, and for this purpose employed lift pumps, which caused considerable noise and interfered with the plaintiff's comfort. These pumps were kept in use day and night for three weeks. The defendants might have used a pump which would have created less noise, but it was not usual to do so, and it would have been inconvenient for the purpose at the early stage of the work, but they substituted the less noisy kind of pump after that stage had been passed. Vaughan Williams, J., before whom the action was tried, refused the plaintiff the relief claimed, holding that the annoyance, being temporary and for a lawful object, did not amount to a nuisance at law, and also that the authority conferred on the defendants to sink the shaft enabled them to do all things reasonably necessary for the execution of the work. The action was therefore dismissed.

BILL OF EXCHANGE—NEGLIGENCE—BANKER—FORGERY OF NAME OF PAYEE—PAYEE "A FICTITIOUS OR NON-EXISTING PERSON"—BILLS OF EXCHANGE ACT (45 & 46 VICT., C. 61), S. 7, S-S. 3 (53 VICT., C. 33, S. 7, S-S. 3, (D.).

The most important case in the appeal cases is *The Bank of England* v. *Vagliano* (1891), A.C. 107, which we have noticed in its previous stages, *ante*

vol. xxv., pp. 146, 464. The case has presented a singular conflict of judicial opinion. Charles, J., and an exceptionally numerous Court of Appeal (viz., Cotton, Lindley, Bowen, Fry, and Lopes, L.JJ.) were in favor of Vagliano, and with them agreed Lords Bramwell and Field, in the House of Lords; but Lord Halsbury, L.C., and Lords Selborne, Watson, Herschell, and Morris agreed with Lord Esher, M.R., and decided in favor of the defendants, although their reasons for so doing are by no means identical. The case, it may be remembered, was one in which the Bank of England had paid a number of documents which purported to be bills of exchange, and which though actually accepted by the plaintiffs Vagliano were forged, so far as the names of the pretended drawers and payees were concerned, and the question was whether the Bank or the plaintiffs were to bear the loss. How far the Bills of Exchange Act could be applied to documents which were not in fact bills of exchange became therefore a material question. There was also another element in the case which had a material bearing on the result: not only had the plaintiffs actually accepted the fraudulent documents, but the forger had also induced them from time to time to sign notices to the Bank advising them of the time when the pretended bills would become payable. Although the documents were not in fact bills of exchange, yet the House of Lords decided that the provisions of the Bills of Exchange Act applied to them, and applying the provisions of the Act they held that the payees were fictitious persons within the meaning of the Act, notwithstanding that there were in fact persons and firms in existence of the same names, because it was never intended that the actual persons or firms should have, nor did they have, any connection with the documents, and they also held that it was not necessary that the payees should be fictitious to the knowledge of the acceptors. Lords Bramwell and Field, however, took the view that the Bank could not charge the plaintiffs with the sums in question, because the person to whom the pretended bills were paid had no right of action against the acceptors. They also considered that the payees were not fictitious persons, and therefore that the pretended bills could not be treated as payable to bearer.

ADMINISTRATION—EXECUTORS CARRYING ON BUSINESS OF TESTATOR—EXECUTORS' RIGHT TO INDEMNITY—CREDITORS OF TESTATOR, AND CREDITORS OF EXECUTORS, RIGHTS OF.

Dowse v. *Gorton* (1891), A.C. 190, is an appeal to the House of Lords from the decision of the Court of Appeal, 40 Ch.D. 536 (noted *ante* vol. xxv. p. 301). The point in controversy arose out of the executors of a deceased person having, pursuant to a power in his will in that behalf, carried on the testator's business for three years with the assent of the testator's creditors, and in their interest, as well as that of the beneficiaries: the business was properly carried on. The Court of Appeal had held that the executors were entitled to indemnity for liabilities incurred in carrying on the business, in priority to the testator's creditors, only as to those assets acquired in carrying on the business; but the House of Lords (Lords Herschel, Macnaghten, and Hannen) decided that the executors' right to indemnity extended to the whole estate, and was prior to the claims of the testator's creditors, and the judgment of the Court of Appeal was affirmed

with this variation. We think the conclusion their Lordships have arrived at is more satisfactory than that of the Court of Appeal, which certainly placed the executors in the very awkward dilemma of either refusing to carry out the express directions of the testator, or doing so at the risk of incurring a serious liability.

PRACTICE—REFUSAL OF LEAVE TO APPEAL—"ORDER OR JUDGMENT."

In *I ane* v. *Esdaile* (1891), A.C. 210, the House of Lords determined that no appeal lies from the refusal of the Court of Appeal to give leave to appeal because such refusal is not "an order or judgment" of the Court of Appeal.

TRADE MARK—INJUNCTION—FRAUDULENT USE OF NAMES—INTENTION TO DECEIVE PUBLIC.

In *Montgomery* v. *Thompson* (1891), A.C. 217, the House of Lords affirmed the decision of the Court of Appeal, 41 Ch.D. 35 (noted *ante* vol. xxv., p. 363), granting a perpetual injunction against the defendant's using the words "Stone Ale" in the description of ale made by him at a place called "Stone," the Court being of opinion that the plaintiff by usage had acquired the right to use the words "Stone Ale," and that the defendant was fraudulently endeavoring to deceive the public and to pass off his goods as the plaintiff's.

TORRENS TITLE—FORGED TRANSFER—FICTITIOUS TRANSFEREE—FORGED MORTGAGE—EFFECT OF REGISTRATION—COMPENSATION.

Gibbs v. *Messer* (1891), A.C. 248, is an appeal from the Supreme Court of Victoria, and is a case deserving of attention, as it is a decision under what is known as the Torrens Act, which has been partially adopted in Ontario. The case is of considerable importance and was twice argued before the Privy Council. The facts of the case were that the plaintiff, who resided in Scotland, was registered owner of land in Victoria, free from incumbrances. Her certificate of title was left in the hands of a solicitor named Creswell, who also had possession of a power of attorney whereby Mrs. Messer authorized her husband to sell the land. During the absence of Mr. and Mrs. Messer, Creswell forged a transfer by Mr. Messer as his wife's attorney to Hugh Cameron, of North Hamilton, grazier, there being no such person in existence. Creswell then represented himself as agent for Cameron, produced the transfer to the registrar, and also Mrs. Messer's certificate, and the latter was cancelled and Cameron registered as owner. Still professing to be Cameron's agent, Creswell obtained a loan from McIntyre of £3000 upon a mortgage purporting to be executed by Cameron, but really forged, and of which Creswell was the subscribing witness. This mortgage was registered against the land. The frauds were subsequently discovered, and Mrs. Messer then applied to be restored to the register as the owner of the land, and to cancel the transfer to Cameron and the mortgage to McIntyre. The Registrar of titles, the McIntyres, and Creswell, were defendants. The colonial Court affirmed the validity of the mortgage as against Mrs. Messer, and gave her leave to redeem on payment of the amount due with costs, to be repaid to her out of the land titles assurance fund. From this the Registrar of titles appealed. Their Lordships, while holding that if Hugh Cameron had been a real

person and had actually signed the mortgage to the McIntyres, the latter would have been entitled to hold the mortgage as against Mrs. Messer; yet as there was no such person, and Hugh Cameron was a mere "myth," they held that the mortgage was absolutely invalid and gave the mortgagees no right to be indemnified either by Mrs. Messer or out of the assurance fund. Although the reasoning of the Privy Council may be more logical than that of the colonial Court, we are inclined, nevertheless, to think that the decision of the latter was probably a better practical conclusion, and more in accordance with the spirit of the Torrens system of registration of titles, which, we take it, is intended to indemnify persons honestly acquiring registered interests in registered land. The advocates of the system have claimed that a person *bonâ fide* advancing his money for the purchase, or by way of loan on the security, of registered land, and procuring himself to be registered as owner or mortgagee, is absolutely protected from loss; but the present decision shows that even under this system risks have to be run by purchasers and mortgagees, and the mere fact that the Registrar registers them as owners or mortgagees is not sufficient to secure them from loss.

MARRIAGE SETTLEMENT—LIMITATION IN FAVOR OF ILLEGITIMATE CHILD—SUBSEQUENT CONVEYANCE BY SETTLOR.

In *DeMestre* v. *West* (1891), A.C. 264, the effect of a limitation in a marriage settlement in favor of an illegitimate child of the settlor, and the power of a settlor to defeat it by a subsequent conveyance to a purchaser for value, is discussed by the Judicial Committee of the Privy Council, on appeal from the Supreme Court of New South Wales. Their Lordships held that the law was clear that an illegitimate child was in the position of a mere volunteer, and that a subsequent conveyance would defeat the limitation in the absence of any special circumstances to take the case out of the rule, unless such result would have the effect of defeating other limitations within the marriage consideration. A special agreement of the parties to the settlement in favor of the limitation, and acceptance by one of the parties of different interests in the settled property from those which the law would have given, and the omission to provide in the settlement for all or some of the issue of the marriage, were held not to be circumstances sufficient to take the case out of the general rule. Their Lordships followed the decision of *Mackie* v. *Herbertson*, 9 App. Cas. 303, and dissented from *Clarke* v. *Wright*, 6 H. & N. 849.

ALIEN CAPITATION TAX—EXCLUSION OF ALIENS—PAYMENT OF ALIEN TAX.

Musgrove v. *Chun Teeong Toy* (1891), A.C. 272, raises a question which may ere long be of interest in Canada. By the Victorian Chinese Act, a Chinese immigrant has no right to land in the colony until a sum of £10 has been paid for him. The master of a vessel had committed an offence under the Act by bringing a greater number of Chinese immigrants (among whom was the plaintiff) into a port of the colony than the Act allows. The master tendered payment of £10 for the plaintiff to the collector of customs, but this the officer refused to receive. The action was brought to test whether the colonial government, as representing Her Majesty, had power to prevent the plaintiff from landing on

the shores of the colony under the circumstances. Their Lordships held, overruling the colonial Court, that the collector of customs was under no obligation to accept payment tendered by the master for any of the immigrants so illegally brought into port by him, whether tendered for such immigrants collectively or individually; and further, that altogether apart from the Act an alien friend has not a legal right, enforcible by action, to enter British territory.

The Law Reports for August comprise (1891) 2 Q.B., pp. 109-369, (1891) P., pp. 293-301, and (1891) 2 Ch., pp. 413-605.

STATUTE—CONSTRUCTION—"STREETS"—"PASSAGES."

The Queen v. *Goole* (1891), 2 Q.B. 212, was a case in which the construction of a statute was in question. A municipal body having power under a statute to pass by-laws regulating the width of new "streets," which term was by the Act defined to include "any passage, whether a thoroughfare or not," passed a by-law that all new streets should be not less than 10 ft. wide. Plans were submitted to the municipal body showing passage ways 6 ft. wide, which were primarily intended to be used for clearing out rubbish and ash-pits in the rear of houses, but the ways were such as the public might acquire a right of passage over. The municipal body refused to approve of the plans, and an application for a mandamus was then made to compel their approval; and it was held that the ways in question were "passages," and therefore within the definition of streets, and consequently, being less than 10 ft. in width, were contrary to the by-law, and the application was therefore dismissed by Day and Lawrance, JJ.

SHERIFF, NOTICE TO—SHERIFF'S BAILIFF IN POSSESSION.

Bellyse v. *McGinn* (1891), 2 Q.B. 227, although a bankruptcy case, may nevertheless be briefly noticed here. In this case the question was whether due notice had been given to the sheriff of a bankruptcy petition, the notice having been given to a man in possession under an execution in the sheriff's hands, and Mathew and V. Williams, JJ., following *ex parte Warren*, 15 Q.B.D. 48, held that a bailiff in possession is not his agent for the purpose of receiving notices of that kind, and therefore notice to him was not notice to the sheriff.

PRACTICE—NON-APPEARANCE OF PLAINTIFF AT TRIAL—JUDGMENT, FORM OF, WHERE PLAINTIFF DOES NOT APPEAR AT TRIAL—RULE 456 (ONT. RULE 673).

In *Armour* v. *Bate* (1891), 2 Q.B. 233, the plaintiff failed to appear at the trial, and the question was, what was the proper form of judgment in such a case. The action was to recover £300 deposited by the plaintiff with the defendant, who was his employer. The defendant admitted the deposit, but alleged it had been made in lieu of a fidelity bond and as an indemnity to the defendant, and the defendant alleged dishonesty or negligence by the plaintiff, entitling the defendant to indemnify himself out of the sum deposited; there was also a counter-claim, which the defendant abandoned. At the trial the judge gave judgment for the defendant, from which the plaintiff appealed, and the Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.) held that the

judgment was wrong in point of form; and while dismissing the appeal with costs, they ordered the judgment to be amended so that it might appear thereby that the action was dismissed for default of appearance by the plaintiff at the trial, and so as to correspond with the terms of the Rule 456 (Ont. Rule 673).

PRACTICE—OFFICIAL REFEREE, JURISDICTION OF—COMMISSION TO EXAMINE WITNESSES, POWER OF REFEREE TO ORDER—RULES 472, 473, 474 (ONT. RULES 34, 36, 37)—JURISDICTION OF JUDGE.

In *Hayward* v. *Mutual Reserve Association* (1891), 2 Q.B. 236, Denman and Wills, JJ., decided that an official referee to whom an action is referred for trial has under Rules 472-4 (Ont. Rules 34, 36, 37) power to order the issue of a commission to examine witnesses abroad, and that a judge-in-chambers may review his decision either granting or refusing such an order, because he is an officer of the Court, and as such is subject to its control.

ERRATUM.—*Ante* page 425, in *The Queen* v. *Marsden*, for "R.S.C., c. 162, s. 39, the age is ten years," read "53 Vict., c. 37, s. 12, the age is fourteen years."

Notes on Exchanges and Legal Scrap Book.

REFUSAL TO GRANT DEGREE.—The New York Supreme Court holds that a college cannot arbitrarily refuse a degree to a student from whom it has received fees and who has spent the prescribed time and taken the prescribed examinations; that it is not a question of an exercise of their discretion which would be proper, but a wilful violation of the duties they have assumed.—*Cecil* v. *Bellevue, etc., Medical College.*

CARRIERS OF PASSENGERS—REFUSAL TO ACCEPT TICKET.—The Supreme Court of Mississippi holds that where the conductor of a railroad train returns to a passenger the wrong portion of a return ticket, and another conductor on the return trip refuses to accept it after the mistake is explained to him, and ejects the passenger from the train, the railroad company is liable.—*Kansas, etc., Ry. Co.* v. *Riley*, 9 South. Rep. 443.

LIBEL CASES.—The number of libel and slander actions in the Queen's Bench list is certainly remarkable. No less than four were reported on Wednesday morning. The result of *Malan* v. *Young* must prove financially disastrous to everybody concerned, the plaintiff getting a judgment for a shilling on each of two slanders, and no costs, whilst the defendant had, of course, to bear his own costs. Some occupations must be much more remunerative than the law which can admit of such luxuries in litigation.—*London Law Times.*

RELEASE OF DRAWER OF CHEQUE BY CERTIFICATION.—The decisions are now substantially unanimous upon the effect of certification of a cheque as a release of the drawer. The established propositions are:—

1. If the holder of a cheque, after delivery by the drawer, obtains certification instead of payment, the drawer is discharged (*Metropolitan Nat. Bank* v. *Jones*, Supreme Court of Illinois).

2. But if the drawer himself has it certified before delivery—which is frequently done to make it acceptable to his creditor—the certification does not operate as a release.

—*Banking Law Journal.*

A POINT IN GERMAN LAW.—A new palace of justice has been in course of erection at Frankfort-on-the-Maine, and, being duly completed, the various documents and muniments have had to be removed from the old law courts to the new ones. During the process of this removal a bag was discovered containing a bundle of letters, 175 in all, and bearing each one the date 1585. After careful examination, it transpired that the letters were written in Italian, and the superscription of each showed they were intended for persons living in the Netherlands. Considering their age, their preservation has been wonderful, for though the ink has naturally lost much color, and the style of writing is antiquated, yet they can be easily read. In some of the letters, however, remittances for large sums of money were enclosed, and it is with regard to this money that some doubt has arisen. Is the money to be returned to the descendants of the persons who remitted it, or must it be handed over to the heirs of the deceased and departed Dutchmen to whom the money had been forwarded? Possibly the Crown might lay a claim to it, and the acceptance by it of the treasure would certainly be the easiest way out of the difficulty, if not altogether the most equitable.—*The Legal News.*

CHURCH BELLS.—*The Law Journal*, referring to letters in the English press complaining of the noise of church bells, says: "Have they (the writers) any and what remedy at law? The point is one singularly bare of authority. The well-known case of *De Soltau* v. *Held*, 21 Law J. Rep. Chanc. 153, in which both damages were recovered and an injunction granted, is, we believe, the only one to be found in the books on the subject. But in that case the offending bells belonged to a Roman Catholic chapel, and Vice-Chancellor Kindersley appears to have drawn a great distinction between the bells of such a chapel and the bells of a 'church in law,' to which 'bells are an appendage recognised by law, the special property in which is vested in the churchwardens for the benefit of the parishioners at large.' We cannot think, however, that the bells even of a parish church might legally be rung to excess. The churchwardens, we should imagine, could only authorise a reasonable user of them." As we have no state church in this country, our prospects of relief from what is, in many places, a very great annoyance ought to be good. Especially in cities is this intolerable nuisance—for we cannot speak of it otherwise—most felt. It is with a feeling of gratitude that we observe often that the bells of one church are made use of to summon the congregations of several.

PRESUMPTION OF SURVIVORSHIP.—The great difficulty of knowing the exact date of the death of a person drowned, or supposed to be drowned, in some ship-

ping disaster has before now given rise to no little speculation in the realms both of probabilities and of law. Sometimes it is important from the point of view of interest which accrues *de die in diem*, sometimes from that of survivorship. A husband and wife, for instance, start for America in a ship which founders, each having left to the other all his (or her) fortune. Which was the survivor? The husband is the stronger, and is more likely to be able to swim well; but, on the other hand, the chivalry which animates men so often at the point of a tragic death may have secured for the wife a place in a boat or on a plank which would save her awhile from a watery grave. The House of Lords in *Wing* v. *Angrave, Tulley and others*, 30 Law J. Rep. Chanc. 65; 8 H.L. Cas. 183, decided that there was no presumption in the English law from age, sex, or other circumstances, as to the survivorship of one out of several persons who are destroyed by the same calamity. In that case the husband left his property to W. in case his wife should die in his lifetime, and the wife left hers to W. in case her husband should die in her lifetime. Since there was no legal presumption as to which died in the other's lifetime, poor W. took under neither. Conveyancers should guard against the possibility of both dying by the same disaster when a person wants a gift over to take effect in the event of another person not being alive to enjoy it. Would not these words be sufficient: "If the said H. shall not survive or be presumed to have survived me"? *In the goods of James Henry Kirkbride* (Notes of Cases, p. 96), where there was an application to the Court to presume the death of a man supposed to have been lost at sea, Mr. Justice Jeune intimated that it was the established practice to give notice of such application to any assurance office in which the deceased was insured. In "Browne on Probate" (rev. edit., p. 429) it is laid down that "it is desirable to show on affidavit whether or not the life of the deceased was insured," and a *dictum* of Lord (then Sir James) Hannen is cited to the effect that this should be done in every case. So that the practice on such applications will be to show on the affidavit the fact of the existence of the policy, and also to give notice to the office in which that policy was taken out.—*The Law Journal.*

LEGAL DIFFICULTIES IN INDIA.—Curious instances might be collected from the records of Indian law courts illustrative of the Old World beliefs of the people, which are brought at times into such strange collision with the legal forms of procedure established by our modern lawyers. A man was once being tried for murder, when he put forward a plea such as could only have occurred to an Oriental, and to a believer in the transmigration of souls. He did not deny having killed the man—on the contrary, he described in detail the particulars of the murder—but he stated in justification that his victim and he had been acquainted in a previous state of existence, when the now murdered man had murdered him, in proof of which he showed a great seam across his side, which had been the swordcut that had ended his previous existence. He further said that when he heard he was again to be sent into this world, he entreated his master to excuse him from coming, as he had a presentiment that he should

meet his murderer, and that harm would come of it. All this he stated in perfect earnestness and simplicity, and with evident conviction of its truth and force—a conviction shared by a large number of those in court.

Trial by jury is attended wi' peculiar difficulties in India, an instance of which I remember as having occurred. In that case, also, a man was on his trial for the murder of another. He had been caught red-handed, and there was no possible room for doubt in the matter. The murdered man had succumbed almost immediately to his wound, living only long enough, after being discovered, to ask for some water to drink. Some surprise was felt at the time taken by the jury in considering their verdict; but when at length they returned and recorded it, the astonishment of all in the court was unbounded when it proved to be one of not guilty. So extraordinary a verdict could not pass unchallenged, and the judge inquired by what process of reasoning they had arrived at their decision; if the accused had not murdered the man, who had? "Your lordship, we are of opinion that the injuries were not the cause of the man's death. It has been proved that he drank water shortly before his death, and we are of the opinion that it was drinking the water that killed him." The explanation of this remarkable verdict—the more remarkable when it is remembered that the men who brought it in never drank anything but water themselves—was that on the jury was a high-caste Brahmin, to whom the very idea of being a party to taking away a man's life was so abhorrent that no earthly persuasion could have induced him to agree to a verdict that would have hanged the prisoner; and the earnestness of his horror had exercised a influence over the rest of the jury so powerful as to make them return the verdict which so staggered the court.—*Notes and Queries.*

PROMISSORY NOTE—PAROL EVIDENCE AS TO INDORSEMENT—In *Kingsland* v. *Kueppe*, in the Supreme Court of Illinois (28 Northeastern Reporter, 48), the distinction between an indorsement by the payee of a note and by a stranger to it, as regards the admissibility of parol evidence to explain the actual contract, is discussed.

The Court said in part: "Where the payee of a note indorses it by placing his name on the back of the instrument, a contract of indorsement is created; the liability assumed by the payee being established by the writing. Parol evidence to change or vary the terms or conditions of a contract is not admissible (*Mason* v. *Burton*, 54 Ill., 353; *Johnson* v. *Glover*, 121 Ill., 283, 12 N.E. Rep., 257; *Jones* v. *Albee*, 70 Ill., 34; *Woodward* v. *Foster*, 18 Grat., 200). But where a person who is not the payee of a promissory note, but a third party, places his name on the back thereof, a different question arises. In such case the rule long established in this State is that it may be shown by parol evidence what liability was intended to be assumed. In an early case (*Cushman* v. *Dement*, 3 Scam., 497), where a third party wrote his name across the back of a note, it was held that the indorsement was *prima facie* evidence of a liability in the capacity of a guarantor, but the legal presumption was liable to be rebutted by parol proof. In

Boynton v. *Pierce* (79 Ill., 145), where the obligation of a guarantor arose, it was expressly held that the presumption that a party, not the payee, who places his name on the back of a note is a guarantor may be rebutted by parol evidence. In *Stowell* v. *Raymond* (83 Ill., 120), where the question again arose, the same rule was declared. The question again arose in *Eberhart* v. *Page* (89 Ill., 550), and in deciding the case it is said: 'The indorsement of a note in blank by a third party raises a presumption only that it is intended thereby to assume the liability of guarantor, which may be rebutted by proof that the real agreement between the parties was different.'

"From the cases cited it is apparent that this Court is fully committed to the doctrine that, when a third party writes his name across the back of a promissory note, the presumption from the indorsement is that he assumed the liability of guarantor; yet parol evidence may be introduced to prove what liability was in fact assumed. It is conceded in the argument of appellants that the cases cited fully establish the rule indicated; but it is insisted that these cases were virtually overruled by *Johnson* v. *Glover* (121 Ill., 283, 12 N.E. Rep., 257). This is a misapprehension of the force and effect of that decision. In that case, Johnson, who was the payee of a note, indorsed it in blank, and the note subsequently fell into the hands of Glover, who sued Johnson as a guarantor; and it was held that he was not a guarantor, but an indorser, and that parol evidence was not admissible to vary or change the character of the liability he had assumed. It is there said: 'The general rule is that the name of the payee appearing on the back of the instrument is evidence that he is indorser, and proves that he has assumed the liability of indorser as fully as if the agreement were written out in words (citing authorities). Parol evidence is no more admissible to contradict or vary this contract than any other written contract.' What was decided in this case, and what was said, had reference solely to a payee of a promissory note who had indorsed the note in blank, and had no bearing whatever upon the rights or obligations of a third party who had placed his name on the back of a note. Moreover, it is manifest that there was no intention to overrule or modify the doctrine announced in *Boynton* v. *Pierce* (79 Ill., 145), *Stowell* v. *Raymond* (83 Ill., 120), and *Eberhart* v. *Page* (89 Ill., 550)—from the ruling in *Bank* v. *Nixon* (125 Ill., 618, 18 N.E. Rep., 203). This case was heard and decided some time after *Johnson* v. *Glover* had been decided, and the doctrine of *Boynton*, *Stowell* and *Eberhardt* was approved, and those cases were cited as sustaining the rule announced. We think, therefore, that the ruling of the Circuit Court in the admission of evidence, that the defendants might resort to parol evidence to prove what contract was made between the parties, was correct. The signature of the defendants written on the back of the notes was *prima facie* evidence that the defendants assumed the liability of guarantors; but whether the evidence introduced was sufficient to remove the legal presumption of guaranty was a question of fact for the trial Court, who heard the cause without a jury, which does not arise here, and upon which we express no opinion."—*New York Law Journal.*

LIABILITIES OF DESERTED HUSBANDS.—Mr. Walter Austin's name is principally known in relation to children, but it was in connection with another branch of the "Law of Domestic Relations," as Mr. Eversley expressed it, that he appeared before the magistrate at Greenwich on Friday last. We do not propose to discuss here the details of his attempt to recover possession of a house from a lady whom he claims as his wife, while she, it appears, repudiates that character; but in these days when the mutual rights of husband and wife are more and more coming to the front, it may be useful to be possessed of clear ideas on the points on which he and Mr. Marsham, the magistrate, exchanged question and answer. Mr. Austin alleges that he is a deserted husband, his wife having left him without saying where she was going, but, having returned in three months' time, got possession of his house and barred it against him; and he desired to know whether he was bound to support a woman who went in another name and denied being his wife. Mr. Marsham informed him that he must support her if she was his wife, and if he could not prove that she had committed adultery. Mr. Austin said that he had recently offered her a home but she refused to go to it, whereupon the magistrate advised him that if she became chargeable no doubt the guardians would come upon him to pay for her support, and probably from his statement he would have to pay. If she would not live with him, the husband—or the *soi-disant* husband—inquired what was he to do? for which the magistrate replied, "Perhaps you had better let her become chargeable." On Mr. Austin, however, remarking that she had committed no end of assaults upon him, and that he was better without her, the magistrate, by sequence of ideas which is not apparent upon the surface, departed from this advice, and told him that he had better allow her sufficient to prevent her becoming chargeable: whether as a mark of gratitude for the assaults she had committed or for the kindness she had done in taking herself off was left to the imagination.

With the precise state of the actual facts between Mr. Walter Austin and the lady who may be entitled to, but does not rejoice in, the designation of Mrs. Walter Austin, we are not acquainted, nor, indeed, concerned; but it is legitimate subject for concern whether the law is as the magistrate considers it to be. Is it the fact either that a husband whose wife has voluntarily deserted him must still support her unless she has committed adultery, or that in case of her becoming chargeable to the parish the guardians can recover against him the cost of her maintenance? It is, of course, clearly settled that the wife's desertion, if coupled with adultery, relieves the husband not only from his common law liability to those who may have supplied her with necessaries, but also from his criminal liability under the Vagrant Act (*R.* v. *Flentau*, 1 B. and Ad. 227), and from his liability under the Poor Law Act of 1868, to pay towards her support (*Cullen* v. *Charman*, 7 Q.B.D. 89), but is her adultery a necessary condition of his relief from liability?

The language of Mr. Eversley in his work on the "Law of Domestic Relations," though somewhat obscure, would suggest the conclusion that it was necessary. "If," he says, "the wife leave the husband at her own instance and

through her own fault, as where she elopes from him and lives in adultery, he is not liable for debts and contracts made by her during the separation, for her adultery (to be proved at the trial) when living apart from him destroys her implied agency to pledge his credit" (p. 278). Here at first sight the words "as where she elopes from him and lives in adultery" would seem to be used merely as an illustration—the strongest case, no doubt, of such a departure by the wife as will relieve the husband, but still only one case—but the subsequent clause shows that this is not the author's meaning, for he affirms it to be the adultery, and not the desertion, which destroys her implied agency, and clearly suggests that if sued on her contracts made after she has quitted him, he will be liable unless he can substantiate the fact of her adultery. Five cases are cited for this proposition, but three of them were cases of adultery. In another, *Hardie* v. *Guest*, the tradesman who gave credit to the wife did so after notice from the husband that he charged the wife with adultery, and the remaining case, *Emmet* v. *Norton*, though in it there was no proof of adultery, is yet no authority that the deserted husband is liable, for he had by his pleading admitted liability to some extent, and merely raised a question as to the amount.

It appears to us that reason, as well as authority, are against this extended view of the husband's liability. A wife living with her husband is ostensibly his agent in contracting: a wife living apart is either trusted on the supposition that she is a *femme sole*, or else the trader has tolerably clear notice that the relations between her and her husband are not the normal relations. The presumption appears to be naturally against her being any longer his agent, and the burden of proof ought reasonably to be on the person supplying her to show that she is living apart under such circumstances as give her an implied authority to bind him. Indeed, the law is so laid down elsewhere (p. 277) by Mr. Eversley himself. Similarly, in *Johnston* v. *Sumner* (3 H. & N. 261), Chief Baron Pollock declares: "If she leaves without her husband's consent, it is clear she has no authority. She has none of the ordinary authorities of a wife, for she is not in the ordinary case of a wife, viz., living with her husband; she has no necessary authority, because she has brought her condition on herself and can return": and in *Eastland* v. *Burchell* (3 Q.B.D. 432) Mr. Justice Lush observes: "If she leaves him without cause and without consent, she carries no implied authority with her to maintain herself at his expense." Both these passages, indeed, may be said to be mere *dicta*, and not essential for a decision of the cases actually in hand. *Hindley* v. *Marquis of Westmeath* (6 B. & C. 200), however, appears to be more strictly in point: for although the parties there were living apart under a separation deed, yet as it was a void one the case was practically as if there were none; and as the husband had always been willing, and, indeed, was desirous, to have his wife back at home, it was held that she could not make him liable for her debts.

Of course, if the wife, after deserting her husband, should wish to return and he should refuse to receive her, she would no longer be living apart without his consent, and it is probable that his liability would therefore revive. It might even in the present day be not without peril for him to give so grudging a con-

sent to her return as the defendant in *Child* v. *Hardyman* (Str. 875), who said she could never sit at the upper end of his table again or have the management of his children, but should live in a garret. Such treatment was considered by Chief Justice Raymond to be as good as she deserved, and as a home was thus open to her she could not make him liable on her contracts. At the present day, however, we apprehend that such a case must be read with a *sed quære*.

If, then, subject to this condition, the erratic but not criminal spouse bears with her no authority to make her husband liable to creditors, can she make him liable to the parish? It would probably be scarcely contended that he would be subject to criminal liability as a rogue and vagabond for not maintaining her. It is true that she so far differs from an adulterous wife that the words which in *R.* v. *Flentau* are used about the latter could not be applied to her. "If," says Mr. Justice Littledale, "the husband is not obliged to answer for the wife's contracts, or to receive her into his house, it cannot be said that he is legally bound to maintain her." The chaste wife he is no doubt bound to receive into his house, and will make himself liable on her contracts if he refuses to do so; he is, therefore, to that extent "legally bound" to maintain her; it does not appear, however, that he "refuses or neglects" to do so if the necessaries of life are there for her in his house if she chooses to come and enjoy them. The practical question would be whether he is liable under the Act of 1868 to have an order made upon him to contribute to her maintenance. *Cullen* v. *Charman* establishes that there are cases in which the husband is not liable, and that the case of an adulterous wife is one of such cases, but it does not, of course, decide that it is the only case, and *Reg.* v. *Fordham* (5 Times, L.R., 27) supports the view that it is not. It was there decided that where a wife had left her husband but the husband was willing to receive her back, a maintenance order could not be properly made unless the magistrate found that there were such facts as justified the wife in declining to avail herself of the proposed shelter. That there may be such facts is, of course, perfectly plain, and *Thomas* v. *Alsop* (5 L.R.Q.B. 151) is an authority that a husband who by his ill-treatment of his wife has caused her to leave him, and whose conduct justifies her in remaining apart, cannot escape from liability to the parish for her maintenance by an offer to receive her again into his home. With such cases as this we are not here concerned; we are considering only the liability of a husband whose wife has wantonly departed from him, and we submit—*pace* Mr. Marsham—that the theory of the law does not confer on such a woman the power of subjecting her unfortunate husband, as long as he is prepared to give her a home, either to the demands of individual creditors or to the claims of the parochial authorities.—*Law Gazette.*

Reviews and Notices of Books.

Alphabetical Digest of Cases relating to Crown Lands and cognate matters. By George Kennedy, M.A., LL.D., Law Clerk to the Department of Crown Lands for Ontario. Toronto: Warwick & Sons, 1891.

A collection of the various points touched upon in the more important decisions relating to the Crown lands, under their respective heads, alphabetically arranged, and with copious cross references. A very useful compilation.

A Treatise on the Law relating to the Custody of Infants, including Practice and Forms. By Lewis Hochheimer, of the Baltimore Bar. Second edition. Baltimore: Harold B. Scrimger, 1891.

A concise statement of the law in the United States respecting the custody of infants, under all circumstances, with a comparison of the law of England, and numerous references to both English and American cases.

The Corporation Problem: The public phases of Corporations, their uses, abuses, benefits, dangers, wealth, and power: with a discussion of the social, industrial, economic, and political questions to which they have given rise. By William W. Cook, of the New York Bar, author of "A Treatise on Stock and Stockholders, etc." New York and London: G. P. Putnam's Sons, 1891.

The author discusses, in their various phases as enumerated in the title, the many social, political, industrial, and economic questions that have arisen in connection with corporations. The various controversies to which corporations have given rise, their privileges and monopolies, with their appropriate remedies, with a special reference to railroads and trusts, are successively treated in an able and masterful manner.

The Jurisprudence of the Privy Council. By J. J. Beauchamp, B.C.L., Advocate. Montreal: A. Periard, Law Publisher, 1891.

The Liquor License Act of the Province of Ontario. By His Honor J. S. Sinclair, Judge of the County Court of the County of Wentworth, etc., and Edwin Ernest Seager. Hamilton: Times Printing Company, 1891.

The two works lastly above mentioned have been received, and will be reviewed in our next number.

Correspondence.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Would it not be better, as a rule, to appoint County Court judges from outside the local bar. It is inevitable that a lawyer in considerable practice will make many enemies in his neighborhood, and disproportionate friendships.

One chosen from an outside bar could not be charged with either bias or prejudice, and such a choice would more nearly approximate the condition of things in the superior courts.

Yours,

LEX.

[We shall refer to this matter hereafter. In the meantime we should be glad to hear from some of our readers on the subject.—ED. L.J.]

To the Editor of THE CANADA LAW JOURNAL:

SIR,—I have been making a special study for the past month or so of the mining rights of the Crown in the provinces. I have been writing up some papers to show that the clause in the Quebec Mining Acts imposing a royalty on *all* minerals in the soil, heretofore granted or to be granted, is *ultra vires* of the Provincial Legislature.

Whilst investigating the matter, it occurred to me what right has the Province of Ontario to legislate concerning base metals and minerals? Why does not the common law of England prevail there in regard to them? I should be very glad if you would open up your columns to my reply, should you think favorably of it.

Yours truly,

F. S.

Montreal, Sept. 2, 1891.

[The question of our correspondent is disposed of by s. 109 of the B. N. A. Act: "All lands, mines, minerals, and royalties, belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick, at the union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same." This section is very fully reviewed by the Judicial Committee of the Privy Council in *Attorney General of Ontario* v. *Mercer*, 8 App. Cas. 767, and especially the expression, "mines and minerals," on pp. 777-779.—ED. L.J.]

To the Editor of THE CANADA LAW JOURNAL:

Though I date from Ottawa, I am not going to tell of any new scandal, and no more are wanted:

> "Enough of boodlers to the law shall yield
> In the full harvest of the *Tarteau* field."

In the phrase of the day, enough official heads are taken or to be taken off, and, curiously enough, there is, and has been for some time, posted at an employment bureau in the immediate neighborhood of the Parliament buildings a notice informing us that seventy-five head-choppers are wanted. It is not stated to whom candidates are to apply. As remedies for the epidemic, an article in the lay press suggests higher pay for M.P.'s, a suggestion probably founded on the absolute absence of bribery and boodling across the border, where the remedy is applied! A board of control has been mentioned, but who shall control the controllers? The Auditor-General's department has been attacked, and even the Count of the Holy Roman Empire has not escaped!

Of bills for amending the law, there are but few: the Commons so amended the Anti-Combines Act as to make it effective, but the Senate has so modified the amendment as to make the Act a chip in porridge; for would not a combine causing "detriment to the public" be a conspiracy to commit a crime and punishable without the Act?

At last, ten years after the English bill, 43 & 44 Vict., c. 9, for the like purpose, we have a bill for meeting the difficulty arising out of rapidity of travel by railroad, introduced by Mr. Tupper, the Minister of Marine. It is understood that the bill is not intended to pass in the present session, and that it is printed for the consideration of members and the public, and, therefore, it is a proper subject for you and your readers to deal with, which I hope you and they will do. The preamble refers to the international conference at Washington in 1884, which recommended the meridian of Greenwich as the prime meridian common to all nations, at which Canada was ably represented by Mr. Sandford Fleming, and to which all English-speaking peoples are indebted for its decision, and then mentions what is called the "Hour Zone System" of reckoning time as having been adopted with great advantage to the public by railway companies in America and many other countries, including Canada, and the doubts that its adoption has occasioned as to its legal effect in the latter: for though there is no doubt that the legal civil time in the Dominion is mean solar time as heretofore, and no power but the legislature could make it otherwise, many people believe the time adopted by the railway companies, and which they call standard time, has been substituted for it. The enacting clauses of the bill do not sanction this belief, or adopt the fifteen degree hour zone system, as defined in the original scheme of the railway companies in the bill introduced by Mr. Evarts in the United States Senate, and more especially in the amusing and instructive article by Mr. Fleming in the *American Engineering Magazine* for May, 1891, but makes

time-zones of provinces and territories without referring to their longitude, following in this respect the principle of the English Act. But under that Act the greatest difference between the statutory time and mean solar time would be twenty-four minutes, and in the time-zones as defined in Mr. Fleming's article, thirty minutes; while under Mr. Tupper's it would be more than two hours in Quebec and Ontario. This would, I think, be a very great inconvenience, though a difference of half an hour might, in England, be counterbalanced by certain advantages. The hour zone system has never been made legal in the United States, except in the District of Washington (ten miles square), and it appears that elsewhere the subject is one for the State legislatures. The advantage of zone time would seem to be limited to zones comprised in one country or tract under the same civil jurisdiction. Boundaries by meridians would be difficult to find and use, and the extent of Quebec and Ontario from east to west is over 30°, or two hours of time. When the question first arose, the opinion of the gentlemen of the Washington Observatory was that the best plan for America would be to have one *Railway Time* (that of 90° west) across the continent, leaving solar time for the ordinary purposes of civil life. I believe this would be the best for Canada, and that Mr. Tupper's bill (with a provision that its time clauses should apply only to contracts and agreements, oral or in writing, in which expressions of time are declared to mean and refer to *Railway Time*, but should in them be binding in law), would be unexceptionable; though it would perhaps be still better if one *Railway Time* were enacted for the whole Dominion; legal civil time for other purposes remaining, as heretofore, the mean solar time of each locality. The twenty-four hour day is very good; it is and has long been used in Italy and other countries.

Ottawa, Sept. 22, 1891. W.

DIARY FOR OCTOBER.

1. Thur.....Wm. D. Powell, 5th C.J. of Q.B., 1816. Meredith, J., Ch. Div., 1890.
4. Sun.....*19th Sunday after Trinity.*
5. Mon.....Civil Assizes at Toronto. County Ct. Sittings for Motions, except in York. Surrogate Court sits.
6. Tues.....County Ct. Non-Jury Sitgs., except in York.
7. Wed.....Henry Alcock, 3rd C.J. of Q.B., 1852.
8. Thur.....Sir W. B. Richards, C.J. Supreme Court, 1875. R. A. Harrison, 11th C.J. of Q.B., 1876.
9. Fri.....De la Barre, Governor, 1682.
11. Sun.....*20th Sunday after Trinity.* Guy Carleton, Governor, 1774.
12. Mon.....County Court Sittings for Motions in York. Surrogate Ct. Sittings. America discovered, 1492. Battle of Queenston Heights, 1812.
15. Thur.....English Law introduced into Upper Canada, 1791.
18. Sun.....*21st Sunday after Trinity.* St. Luke.
19. Mon.....County Court Non-Jury Sittings in York. Last day for Call and Admission notices.
21. Wed.....Battle of Trafalgar, 1805.
23. Fri.....Lord Lansdowne, Governor-General, 1883.
24. Sat.....Sir J. H. Craig, Governor-General, 1807.
25. Sun.....*22nd Sunday after Trinity.*
27. Tues.....Supreme Court sits. C. S. Paterson, J. of Supreme Court, 1888. James Maclennan, J., Court of Appeal, 1888.
29. Thur.....Battle of Fort Erie, 1813.
31. Sat.....All Hallows Eve.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

STREET, J.] [May 28.

IN RE DWYER AND TOWN OF PORT ARTHUR.

Assessment and taxes—R.S.O., c. 193, s. 52—"May," meaning of.

By s. 52 of the Assessment Act, R.S.O., c. 193, where the assessment in cities, towns, etc., is made, by virtue of a by-law passed under that section, in the latter part of the year, such assessment may be adopted by the council of the following year.

Held, that "may," as used here, is permissive only, and that the council of the following year are given the option of having a new assessment.

Overwhelmingly strong reasons of convenience in favor of having one assessment instead of two might justify the court in giving to "may" the force of "must."

Aylesworth, Q.C., and *H. Symons*, for the applicant.

Delamere, Q.C., for the corporation.

STREET, J.] [July 28.

ELLIS v. CLEMENS.

Waters and Watercourses—Riparian proprietors—Use of stream—Reasonable user—Prescriptive right—Maintenance of dam for twenty years—Changed conditions—Right of action.

Riparian proprietors are entitled to make a reasonable use of the water of a stream, to detain it and retard it within certain limits; but any user which inflicts positive, repeated, and sensible injury upon a proprietor, above or below, is not to be considered reasonable.

And where the defendant and his predecessor, by discontinuing the use of the water during the hard frosts, might have prevented the damage complained of by the plaintiff, but did not so discontinue, though requested to do so by the plaintiff,

Held, that they were making an unreasonable use of the water and were liable for the damage done.

The fact that the defendant and his predecessors had maintained their dam, mill, and race-way in the same position for upwards of forty years, and had, during all that time, used the water as the necessity of their business required, did not give the defendant a right to use the water to the prejudice of the plaintiff; the defendant could not insist that he had gained a prescriptive right to injure the plaintiff without proving that he and his predecessors had for twenty years been making an unreasonable use of the water, to the injury of the plaintiff; the use which had formerly been reasonable, becoming unreasonable, because of changed conditions, there arose for the first time a grievance which gave the plaintiff a right to complain, and he was not barred of that right by reason of his making no complaint until he began to be injured.

W. R. Meredith, Q.C., and *E. P. Clement* for the plaintiff.

Moss, Q.C., and *Alexander Millar*, Q.C., for the defendant.

Chancery Division.

Div'l. Court] [March 26.

BEATTY *v.* RUMBLE ET AL.

False Arrest—Malicious prosecution—R.S.C., c. 164, s. 50—Larceny—R.S.C., c. 174, s. 25—Apprehension without warrant—Finding of jury.

Plaintiff, who was acting as a bailiff under a landlord's warrant to distrain for rent, attempted to remove some grain which had been seized by a sheriff under an execution, and, while in the act, was arrested by the sheriff's officer who happened to be a county constable. He was committed for trial and tried, but acquitted.

In an action for false arrest and malicious prosecution, it was

Held, that the grain was property under lawful seizure and in the custody of the law, and that by R.S.C., c. 164, s. 50, any one taking it away without lawful authority was guilty of larceny, and that by R.S.C., c. 174, s. 25, any one found committing such an offence might be apprehended without a warrant and forthwith taken before a justice of the peace, and that the finding of the jury that the defendant acted as a sheriff's bailiff and not as a constable was immaterial, as it was incumbent on any bystander to do as he did, and the action was dismissed with costs.

John Macgregor for the plaintiff.

Lount, Q.C., and *Milligan*, for defendants.

ROBERTSON, J.] [June 30.

MOOT *v.* GIBSON.

Covenant—Joint—Right to enforce—Receiver—Appointment of.

G., being the owner of certain property, conveyed it to B. in consideration of the assignment by B. to her three sons of certain interests he had in lands in Assiniboia, part of the bargain being that the three sons should secure to her (G.), by a mortgage on the property assigned to them, an annuity of $150 a year for her life. The arrangement was evidenced by an agreement in writing between G., her three sons, and B., in which G. and her sons all joined in a covenant with B. to give the mortgage to secure the annuity, but there was no agreement with her as a promisee that the annuity should be paid or the mortgage given.

On a motion by the judgment creditor to have a receiver appointed to receive the annuity, in which it was contended that because G. was a covenanting party with the sons there was no agreement which she could enforce against them, and consequently nothing receivable from them, it was

Held, following *Gandy* v. *Gandy*, 30 Ch.D., at p. 69, that the true construction of the agreement was to give G. a right to a mortgage as security for the payment of her annuity and to maintain an action in her own name against her three sons for the enforcement of the covenant.

Held, also, that the conveyance of her property was the consideration for the payment by the sons of the annuity as evidenced by the agreement, and that even if they did not give the mortgage to secure it as agreed she would be entitled to maintain an action to enforce payment.

And a receiver was appointed.

Collier for the plaintiff.

Marsh, Q.C., for the defendant.

MACMAHON, J.] [Aug. 15.

STOTT *v.* LANCASHIRE FIRE INSURANCE CO.

Insurance—Conditions—Material to the risk.

Action on interim receipts of the defendants.

The application, signed by the agent of the insured, contained the question :

13. Have you ever had any property destroyed or damaged by fire? If so, when and where?

The answer was, No.

This was, in fact, untrue, as the insured had suffered from fires to other properties of his; and on the matter being referred to them, the jury found that the answer was material to the risk.

Held, that this matter was to be regarded with reference to R.S.O., 1887, c. 167, s. 11 s-s. 1; and that it was for the judge to say, whether or not, in the light of the condition then set out, the above answer was material to the risk; and *held*, that it was not.

D. McCarthy, Q.C., and *Wyld*, for the plaintiff.

J. K. Kerr, Q.C., and *McLean*, for the defendants.

ROBERTSON, J.] [Sept. 1.

WATERLOO ELECTION PETITION.

KNELL *v.* BOWMAN.

Controverted election—Election petition—Unqualified petitioner—Voters' list—Substituting new petition.

Held, that although the name of the petitioner in this case was on the voters' list in force, and being used at the election in question, the respondent was nevertheless entitled to show in these proceedings that the petitioner was not "a person who had a right to vote at the election to which the petition relates."

Held, nevertheless, that though the present petitioner was disqualified, it was within the jurisdiction of the court to order another elector duly qualified to be substituted as petitioner.

It is clear the intention of Parliament is that the petition, when once presented, shall be proceeded with if an elector duly qualified manifests his willingness to be substituted for the purpose of presenting the petition.

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

Aylesworth, Q.C., for the respondent.

ROBERTSON, J.] [Sept. 1.

MITCHELL *v.* LISTER.

Partnership action—Costs—Partner surreptitiously engaging in private business—Right to account.

Motion on further directions in a partnership action.

Held, that the fact that the only dispute between the partners was as to a certain item in the accounts, in which dispute the plaintiff succeeded, was not sufficient to entitle the plaintiff to his costs against the defendant.

Chapman v. Newell, 14 P.R. 208, followed.

It appeared that after notice of dissolution of the partnership had been given, the plaintiff took certain orders in connection with the business, and had not accounted to the defendant for his share of the profits therefrom.

The articles of partnership contained a clause that "each of the partners shall be just and true to each other in all matters of the said business, and will devote their whole time diligently and faithfully to the concerns of the same, and will not at any time during their copartnership engage in any other business whatever outside of that already existing."

Held, that, nevertheless, the defendant was not entitled to judgment for half of the estimated profits of the orders taken by the plaintiff and his travellers.

Dean v. Macdowall, 8 Chy. D. 345, specially referred to.

Worrell, Q.C., for the plaintiff.

Armour, Q.C., for the defendant.

Full Court.] [Sept. 5.

FERGUSON, J.]

MEREDITH, J.]

VERNON *v.* CORPORATION OF SMITH'S FALLS.

Municipal Corporation — Chief constable — Wrongful dismissal — Tenure of Office — R.S.O., c. 184, s. 445.

Action for wrongful dismissal. The plaintiff was appointed by by-law chief constable of the defendants' corporation for a period of one year.

Held, that nevertheless, by virtue of s. 445, the plaintiff must be deemed to have held his office during the pleasure of the defendants, and they had the right to dismiss him without assigning cause at any time.

Britton, Q.C., for the defendants.

Watson, Q.C., for the plaintiff.

Full Court.] [Sept. 5.

MCARTHUR *v.* DEANS.

Locatees—Right to sell pine—Patentees—R.S.O., c. 25, ss. 10, 11.

Held, that a locatee of land whose rights are governed by R.S.O., 1887, c. 25, s. 10, or a patentee whose rights are governed by *ib.*, s. 11, though he may really intend to clear a parcel of land, cannot simply point out such parcel to a purchaser before anything is done in the way of clearing it for cultivation and make a good sale to such purchaser of the pine timber standing and growing upon such parcel.

The right or liberty is only to cut and dispose of trees during the process of actually clearing the land for cultivation, when it appears to be and requisite that the trees should for the purposes of such clearing be removed.

Per MEREDITH, J. The act seems to contemplate the work of clearing and cultivation being done by the settler.

W. Nesbitt for the plaintiff.

Aylesworth, Q.C., for the defendant.

Full Court.] [Sept. 5.
FERGUSON, J.]
ROBERTSON, J.]

MARTIN *v.* HUTCHINSON.

Action for malicious prosecution—Clandestine removal of goods by tenants—Reasonable and probable cause—11 Geo. 2, c. 19—Counsel's advice.

In an action for malicious prosecution, the jury having found upon facts in dispute, the question of reasonable and probable cause is for the judge.

Where there has been a clandestine removal of goods by a tenant, a landlord cannot prosecute for such removal under 11 Geo. 2, c. 19, unless the goods were the goods of the tenant; neither can goods which are not the tenant's be distrained off the premises.

Where a prosecutor has *bona fide* taken and acted upon the opinion of counsel in the proceedings taken by him, this is itself evidence to prove reasonable and probable cause.

Per ROBERTSON, J. The defendant should satisfy the jury that he himself did not of his own knowledge know the law on the point, and that he was relying entirely upon counsel's advice.

McCullough for the plaintiff.
Reeve, Q.C., for the defendant.

Div'l. Court.] [Sept. 5.

BAIN *v.* ÆTNA LIFE INSURANCE CO.

Insurance—Divisible surplus—Divisible profits—Discretion of directors of company to retain profits to provide for contingencies.

On an appeal to the Divisional Court, the judgment of FALCONBRIDGE, J., reported, was affirmed.

Per BOYD, C. The representation made that participating policies "would receive their equitable share of the divisible surplus" points to the exercise of the discretion of the managers of the company; and the expression "divisible surplus" is one that refers to something less than the entire profits claimed by the plaintiff. Before divisible profits can be ascertained, it would seem to be essential for the security of policy holders to keep such resources in hand as will cover the whole liabilities of the company, having regard to the uncertain chances of mortality, rate of interest, expenses etc.

Per MEREDITH, J. There is no express covenant in the policy to pay the plaintiff any profits. Divisible profits are what remains to be divided after certain deductions are made, and the bargain was to pay the plaintiff a fair and equal share of the "divisible profits"; that is, the profits which the company might, after making in good faith all reasonable and proper provision for its safety, divide among policy holders.

Bain, Q.C. (in person), and *Laidlaw*, Q.C., for the appeal.

S. H. Blake, Q.C., and *Maclaren*, Q.C., contra.

ROBERTSON, J.] [Sept. 17.

THE ACME SILVER CO. *v.* THE STACEY HARDWARE, ETC., CO.

Libel—False and malicious publication—Allegation of special damage—Demurrer.

In an action of libel, plaintiff's statement of claim alleged that the defendants falsely and maliciously published of and concerning the plaintiff's goods. . . . "We do not keep acme or common plate," and also alleged special damage,

Held, on demurrer, that as the allegation was that the defendants "falsely and maliciously" published of and concerning the plaintiffs, etc., and as special damage was alleged in direct terms (following *The Western Counties Manure Co. v. The Lawes Chemical Manure Co.*, L.R. 9 Ex. 218), if the plaintiffs were able to prove that allegation, they would be entitled to judgment and the demurrer was overruled.

John A. Robinson for the demurrer.
S. King contra.

Practice.

BOYD, C.] [Sept. 8.

SIMPSON *v.* HALL.

Writ of summons—Service out of the jurisdiction—Rule 271 (g)—Allowance of service—Joint conspiracy—Bona fides—Undertaking to prove cause of action.

Where the alleged cause of action was a joint conspiracy by the defendants, two of whom re-

sided in the jurisdiction, and a third, who was a foreigner, was implicated, service on the foreigner out of the jurisdiction of a notice in lieu of the writ of summons was

Held, properly allowed under Rule 271 (g).

Massey v. *Heynes*, 21 Q.B.D., at pp. 334, 335; and *Indigo Co.* v. *Ogilvy* (1891), 2 Ch. 13, specially referred to.

Such an order should not be made unless the judge is reasonably satisfied as to the *bona fides* of the plaintiff in joining the foreign defendant; and as an evidence of such *bona fides* the plaintiff in this action was required to undertake to submit to a non-suit if he failed to prove a joint cause of action at the trial as against the foreign defendant.

Perkins v. *Mississippi, etc., Co.*, 10 P.R. 198, not followed.

Thomas v. *Hamilton*, 17 Q.B.D., at p. 597, specially referred to.

A. McLean Macdonell for the plaintiff.

H. S. Osler for the defendant Rogers.

BOYD, C.] [Sept. 8.

HENDERSON *v.* BLAIN.

Discovery—Action by shareholders of insolvent bank against directors for misfeasance—Joining bank as parties—Examination of liquidator by plaintiff before statement of claim—Rule 566.

An official liquidator cannot, as an officer of the Court, be called upon to make discovery unless he is representatively in the position of an adverse litigant to the party requiring the discovery.

Where certain shareholders of an insolvent bank were suing the directors for negligence and misfeasance, and had made the bank defendants for conformity without asking any relief against them, an application by the plaintiffs under Rule 566 for leave to examine one of the liquidators for discovery before statement of claim was refused.

W. R. Smyth for the plaintiffs.

Hilton for the liquidators.

Shepley, Q.C., *F. E. Hodgins*, and *W. B. Raymond*, for the other defendants.

MANITOBA.

COURT OF QUEEN'S BENCH.

CASE MACHINE CO. *v.* LAIRD.

BAIN, J.] [July 27.

Parol evidence—Admissibility of, in collateral agreements.

Demurrer to plaintiffs' replication.

The facts appear from the

Judgment—

The rule that parol testimony cannot be received to add to, vary, or contradict a written instrument does not prevent parties to a written agreement, even if it be under seal, from proving that what is called a collateral agreement was made by parol in consideration that one of the parties would enter into the written agreement. The contention of the plaintiffs is that the agreement alleged in the defendant's pleas and counter-claim is not a collateral agreement, but that it contradicts and varies, and so is inconsistent with, the deed alleged in the declaration, and that, therefore, the defendant cannot rely on it unless it be by deed.

The agreement under seal that the plaintiffs declare on is, that the defendant is to pay $915 on the delivery of the machine, or, in lieu of such payment, to pay $300 on delivery and to give his three notes for $200, $200, and $215, payable with interest in January, 1891, '92, and '93 respectively, and that "failing to pay said money or execute and deliver said notes, this order shall stand as his written obligation and have the same force and effect as his note for all sums not paid in cash." The agreement alleged by the defendant is, in effect, that, in consideration that the defendant would enter into the agreement declared on and would make the cash payment and would deliver the three notes, the plaintiffs would take from the defendant a second-hand separator at the price of $200, and would give the defendant credit for the price on the note for $200 falling due in January, 1891.

I am of opinion that this agreement is one that is distinct from and collateral to the agreement under seal, and that the defendant is at liberty to prove it, if he can, though it be not under seal. Such an agreement does not seem to be in any way inconsistent with the principal

agreement; and it does not contradict or vary any of its terms. The defendant has to perform all the stipulations of his contract with the plaintiffs exactly as the contract provides; he is to make the cash payment and give the notes, and pay the notes on the days appointed. But by a separate and distinct transaction, the plaintiffs are to take this second-hand separator from the defendant, and, instead of paying him the price of it, they are to apply it toward the payment of the first of the $200 notes.

I think, therefore, the demurrer to the plaintiffs' replication should be allowed with costs.

Mulock, Q.C., for plaintiffs.

Howell, Q.C., for defendant.

MASSEY CO. *v.* HANNA.

KILLAM, J.] [July 30.

Practice—Prohibition—Grounds for—Cost of.

Plaintiffs issued writ in a county court. Defendant filed dispute note objecting to jurisdiction, and obtained rule for a prohibition. Before the filing of dispute note and the motion for rule, plaintiffs discovered their error and notified the clerk of county court not to proceed with the action, and, on being served with the rule, notified defendant that they did not intend to proceed, and undertook to withdraw and pay costs of county court action.

On the return of the rule,

Patterson, for the plaintiffs, submitted to the prohibition, but argued that under such circumstances no costs should be allowed to the applicant.

Mulock, Q.C., in reply.

Held: From the decisions in *Rex* v. *Keating*, 1 Dowl. 440; *Pewtress* v. *Harvey*, 1 B. & Ad. 154; and *Ex parte the Overseers of Everton*, L. R. 10, C. P. 245, it appears that the statute 1 W. 4, c. 21, s. 1, providing that "the party in whose favor judgment shall be given" in prohibition "shall be entitled to the costs of attending the application and subsequent proceedings" does not apply when there are no pleadings in prohibition. See also *Wallace* v. *Allen*, L. R. 6 C. P. 245, and *Nerlick* v. *Clifford*, 6 P. R. 212, in the latter of which costs were refused where the question had not been raised in the lower court.

"It is clear upon the authorities cited in *Nerlick* v. *Clifford* that there is no absolute right to prohibition where the defect does not appear on the face of the proceedings and the party applies before he has an opportunity of raising the question in the court below. If the applicant had waited until the plaintiff had learned of the objection to the jurisdiction being taken, he would have found that an application would be unnecessary.

"I think that, in the absence of special circumstances, as to which I say nothing, the old practice should be followed when no cause is shown and the application is made without giving the court below an opportunity of deciding the point. Encouragement should not be given to parties to come to this court unnecessarily in reference to small claims which the county courts are established to deal with." *Brisebois* v. *Poudrier*, 1 M. R. 29; *Wright* v. *Arnold*, 6 M. R. 1; *Watson* v. *Lillico*, 6 M. R. 29; *Montreal* v. *Poyner*, 7 M. R. 270; *Mitchell* v. *Saver*, 20 Ont. 17; and *Field* v. *Rice*, 20 Ont. 309, considered.

Rule absolute without costs.

Notes of United States Cases.

ALABAMA SUPREME COURT.

MORRIS *v.* BIRMINGHAM NATIONAL BANK.

Accommodation note—Liability of indorser.

In an action by the indorsee of a note against the administrator of a deceased indorser, it was shown that the note was made for the accommodation of the indorser and discounted for him by the indorsee.

Held, that the indorser of a note, made for his accommodation, is not discharged from liability by the failure of the holder to demand payment of the maker and to give such indorser notice of non-payment.

OHIO SUPREME COURT.

CINCINNATI, ETC., RY. CO. *v.* CITY, ETC. TELEPHONE ASSO'N.

Electric street railways—Ground circuit—Rights of telephone companies.

The dominant purpose for which streets in a municipality are dedicated and opened is to facilitate public travel and transportation, and,

in that view, new and improved modes of conveyance by street railways are by law authorized to be constructed, and a franchise granted to a telephone company of constructing and operating its lines along and upon such streets is subordinate to the rights of the public in the streets for the purpose of travel and transportation. See *Cumberland Telephone, etc., Co.* v. *United Electric Ry. Co.*, 42 Fed. Rep. 273; 42 Alb. L.J. 88.

The fact that a telephone company acquired and entered upon the exercise of a franchise to erect and maintain its telephone poles and wires upon the streets of a city prior to the operation of an electric railway thereon will not give the telephone company, in the use of the streets, a right paramount to the easement of the public to adopt and use the best and most approved mode of travel thereon; and if the operation of the street railway by electricity as the motive power tends to disturb the working of the telephone system, the remedy of the telephone company will be to readjust its methods to meet the condition created by the introduction of electro-motive power upon the street railway.

Where a telephone company, under authority derived from the statute, places its poles and wires in the streets of a municipality, and, in order to make a complete electric circuit for the transmission of telephonic messages, uses the earth, or what is known as the "ground circuit," for a return current of electricity, and where an electric street railway, afterward constructed upon the same streets, is operated with the "single trolley overhead system," so called, of which the ground circuit is a constituent part, if the use of the ground circuit in the operation of the street railway interferes with telephone communication, the telephone company, as against the street railway, will not have a vested interest and exclusive right in and to the use of the ground circuit as a part of the telephone system.

VERMONT SUPREME COURT.

GIFFORD *v.* RUTLAND SAVINGS BANK.

Savings Bank—Payment to wrong person—Liability.

1. Though the by-laws of savings banks require that depositors shall subscribe their names in a book, and thereby be considered as assenting to all the by-laws, such assent may be implied, and will be where a depositor living at a distance and receiving a deposit book by mail with the by-laws printed in it leaves the deposit and keeps the book for several years without going to the bank and leaving his signature.

2. The brother of a depositor in defendant bank, neither of whom was known to the bank officers, presented the deposit book for payment, representing himself as the owner; and, when asked how the deposit had been made, he correctly replied that it was by letter from a third person. In signing the name, he formed an initial so obscurely that it caused comment from the president. Notice of the loss of the book, required by the by-laws to be given defendant as a guard against wrong payment, and as a prerequisite for defendant's liability therefor, was not given.

Held, that defendant used reasonable care in making payment and was not liable.

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Latest additions:

Bligh (H.), and Todd (W.), Dominion Law Index, Toronto, 1891.

Canada Gazettes, 1869-1886.

Leith (Alex.), Real Property Statutes, Toronto, 1869.

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Sedgwick (Theo.), The Measure of Damages, 8th ed., 3 vols., New York, 1891.

Sinclair (J.S.), The Liquor License Act of Ontario, Hamilton, 1891.

Talbot (G.J.), and Fort, (H.), Index of Cases Judicially Noticed, 1865-1890, London, 1891.

Flotsam and Jetsam.

ASSISTING THE JURY.—"Gentlemen of the jury," said a Minnesota judge, "murder is where a man is murderously killed. The killer in such a case is a murderer. Now, murder by poison is just as much murder as murder with a gun, pistol, or knife. It is the simple act of murdering that constitutes murder in the eye of the law. Don't let the idea of murder and manslaughter confound you. Murder is one thing, manslaughter is quite another."