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THE fact that the Lord Chancellor has recently appointed two members of locals Bars to County Court judgeships in their own counties is commented on in English legal journals as a noteworthy exception to the general rule. The practice in this country is, of course, quite the reverse. We have already expressed a doubt as to the wisdom of our practice, and would prefer that that which is with us the exception should become the rule.

WE are glad to observe that steps are at last being taken to preserve the iron fence at Osgoode Hall from utter destruction. We have on two or three former occasions drawn attention to the state of ruin into which it was falling from want of paint. It is safe to say that the expense of the repairs will prove a good deal more costly than the timely expenditure of the necessary paint would have been. It is only another instance, however, of the truth of the old saying, "Penny wise and pound foolish."

THE Recorder of London, at the opening of the Criminal Court in the Old Bailey, remarked in his charge to the grand jury that the administration of flogging in addition to imprisonment had materially diminished the crime of highway robbery with violence. There are those who apparently cannot understand that some men are so constituted that they can only take an idea in through their hides. The mere imprisonment for a few days would be to some persons a terrible punishment; to

others it would simply mean a comfortable holiday. The latter require a touch of the "cat" to make them realize that the intention is to punish them. This embodies a truth which should be more considered by those whose duty it is to apportion the punishment due for offences coming within the criminal law.

THE *Law Times* draws a comparison between mathematics or classics as the best training for success in the law; and comes to the conclusion that mathematics seem to have the greater affinity for law. They discipline the mind, they teach concentration, they form habits of close reasoning, and yet, when we look at the names of the present and recent occupants of the Bench, we find far more distinguished as scholars than as mathematicians. On the one side we have Lord Justice Bowen, and Chief Justice Coleridge, and Lord Chancellor Selborne, and Lords Davey and Macnaghten, and Justices Denman, Kennedy, Wright, and Chitty, and, on the other side—trained in mathematics—Justices Romer and Stirling and Lord Justice Rigby—eminent judges, but numerically few.

MR. COMMISSIONER KERR, who presides over some of the "drunks and disorderlies" in England, frequently embellishes his judgments with observations which are said to be generally irrelevant, frequently unbecoming to his judicial position, but sometimes rather to the point. His last tirade seems to combine the above three qualities. The *Law Journal* thus remarks "In sentencing an habitual criminal to three years' penal servitude, he sagely remarked that 'it would have been cheaper for the country to set the prisoner up in business or given him a pension of thirty shillings a week.' 'But,' he added, 'every one talks about these things, but nobody does anything. The legislature is nothing but a mere talking-shop.' It has, at any rate, a powerful rival in the court in which the learned commissioner is accustomed to display his powers of speech."

In reference to the doctrine of *ejusdem generis* recently discussed in these pages, a learned correspondent has obligingly furnished us with a note of two cases bearing upon the matter to which we think it desirable to draw the attention of our readers, because they are very liable to escape attention. The first is *Warnock* v. *Kloeffer*, 15 Ont. App. 324, which, owing to the fact that it does not appear in the digest under any heading indicating that it deals with the doctrine in question, might very easily be overlooked; and the other case is *Re Phœnix Bessemer Co.*, 44 L.J. Ch. 683, 685, which is not to be found in the regular reports. Our readers will kindly correct an error which occurred on p. 188, line 27, by reading "they were" instead of "it did."

THE PROFESSION AND THE PUBLIC.

It is not necessary to remind our readers that there is a necessity that the interests of the liberal professions should, in these democratic days, be conserved, and the standards of efficiency maintained, not merely for the benefit of the members of these professions themselves, but also, and more particularly, for the benefit of the public. The recent session of the Ontario Legislature has shown that the spirit which is abroad will, if not checked, prove disastrous to the best interests of the country. The object of attack this time was the Medical Act; those who made it seeking to open unduly wide the gates of the medical profession. The determined onslaught on this body by the new political party known as "the Patrons" was defeated by a wise combination of the two great parties, for which they are much to be commended. It was expected that there would be a somewhat similar attack made upon the legal profession, but this seems to have been headed off by the Attorney-General bringing in a measure which, as it adopted some of the suggested changes, was apparently considered a sufficient "sop for Cerberus," at least for the time being.

It is necessary to look this matter in the face. The members of the legal fraternity have never united for mutual protection to the extent that their medical brethren have. If the safeguards and privileges of the latter are necessary for the protection of the public, equally so are those of the former. Nothing could be

more disastrous to any country than a defectively educated legal profession, combined with a low standard as to the duty such a body owes to the public and to itself. The standard in England and in this country has been, we are glad to know, up to the present time, a high one. Any step in the direction of lowering that standard would be a retrograde movement, and would result in the most serious evils. We owe it to the country, as well as to ourselves, to make every effort to check the levelling spirit which all thinking men feel to be a serious menace to good and stable government.

As we have already said, our profession suffers from want of cohesion. Our interests, in which is bound up the welfare of the public, are not properly protected, and cannot be unless the members act together as a whole. The Law School should be a factor in this direction. Its main function, no doubt, is the due maintenance of that high standard to which we have referred in all that pertains to legal education, and we are persuaded that we shall not look in vain to those who are in charge of it for the inculcation of the high principles which have hitherto been the honourable heritage of our profession. But it might, in addition to this, contribute greatly to the cultivation of a proper *esprit de corps* by partaking somewhat of the nature of a club, where the men, meeting together in a social manner, would become more one in thought, and, ceasing to be disjointed units, would become a strong and compact phalanx for the promotion of the best interests of both the profession and the public.

Various suggestions may perhaps be made in connection with the thought above expressed. We have one which, though it may seem to some to be unimportant, is really not so, and we are sure it will commend itself to the students, as well as to those in charge of them, and to the Benchers. We all realize the necessity of a *mens sana*, but some do not sufficiently appreciate the *in corpore sano*. We would suggest, to begin with, that the students should be provided with a sufficient, but not necessarily expensive, gymnasium, which they could use after lecture hours, or at other convenient times. There is ample accommodation for this on the floor above the library, and in the first floor lecture room, while the basement could, with very little expense, be fitted up with necessary bathrooms and other accommodation. The writer does not speak without some considerable experience of

the desirability of providing young men with healthful, manly exercise, and he would confidently affirm that nothing helps more to unite men together, and to keep them straight and out of temptation t[illegible]f, and away from places of questionable desirability, which are good neither for body, soul, nor brains, than to give them a common interest in things pertaining to manly sports. Though the suggestion now thrown out may be said to be a minor matter, its adoption would, nevertheless, be a step in the right direction, and we trust it will meet with approval at headquarters.

CURRENT ENGLISH CASES.

The Law Reports for March comprise (1895) 1 Q.B., pp. 345-535; (1895) P., pp. 69-120; (1895) 1 Ch., pp. 233-421; and (1895) A.C., pp. 1-116, and we observe that Sir Frederick Pollock's name appears as editor for the first time.

INTERNATIONAL COPYRIGHT—PICTURE—INFRINGEMENT—REGISTRATION OF PICTURE—PUBLICATION.

Hanfstaengl v. *The American Tobacco Co.*, (1895) 1 Q.B. 347; 14 R. Feb. 310, was an action for the infringement of the plaintiff's copyright in a picture painted in Italy, and subsequently sold to a dealer in Munich, the copyright in which was assigned to the plaintiff at Munich. Two or three questions arose upon the construction of the International Copyright Act, 1886 (49 & 50 Vict., c. 33), ss. 4, 11. First, whether it is necessary, in order to entitle the owner of a copyright in a foreign picture to sue for infringement, that he should first register and deliver copies of [illegible] subject of the copyright pursuant to the provisions of the Fine Arts Copyright Act, 1862 (25 & 26 Vict., c. 68), ss. 4, 12. This turned upon the proper construction of s. 4 of the International Copyright Act, which provides "where an order (in council) respecting any foreign country is made under the International Copyright Acts, the provisions of those Acts with respect to the registry and delivery of copies of works shall not apply to works produced in such country, except so far as provided by the order." The Order in Council of 28th Nov., 1887, adopting the Berne convention of 5th Sept., 1887, contains no

provision with respect to the registry and delivery of copies of works produced in a foreign country, and it was therefore held that registration under the Fine Arts Copyright Act, 1862, is not necessary to entitle the owner of the English copyright on a foreign painting to sue for infringement. Another question was, what was the meaning of "produced" in the International Copyright Act? By s. 11 of the International Copyright Act, "The expression 'produced' means, as the case requires, published or made, or performed or represented." This question was important, because the Berne convention defines "the country of origin" to be the place where the work is first published, and provides, in substance, that authors shall have the same rights of copyright in foreign countries which they have in their own. By the law of Italy there would be no copyright in a picture unless registered under the Italian law, and the picture in question had not been registered in Italy, but in Germany no registration is requisite, and consequently the case turned on whether Italy or Germany was the country where the picture was "first published." The Court of Appeal (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) considered that Germany was the place where it was first published, and that the word "published" was applicable to a painting. The argument on behalf of the defendant was that the word "published" in s. 11 was to be confined to literary works, and that the word "made" was intended to be applicable to pictures and other works of art, and thus, construing the word "produced" as meaning "made," the place of "first publication" was Italy. But to this argument the court refused to accede. The judgment of Pollock, B., at the trial was reversed.

MORTGAGE—ATTORNMENT CLAUSE—DEATH OF MORTGAGOR—OCCUPATION, AND PAYMENT OF INTEREST BY HEIR OF MORTGAGOR—TENANCY—DISTRESS.

In *Scobie* v. *Collins*, (1894) 1 Q.B. 375; 15 R. Jan. 362, the question of the validity of a distress under an attornment clause in a mortgage was in question. The mortgagor had attorned tenant to the mortgagees, and during his life paid interest on the mortgage. He died, and his heir went into occupation of the mortgaged premises, and continued to pay interest on the mortgage until he became bankrupt in November, 1893. In October, 1893, the mortgagees distrained for arrears of interest, and the

trustee in bankruptcy now claimed the proceeds of the distress, and Williams, J., held that he was entitled to them, because the tenancy of the mortgagor had expired on his death, and no new tenancy had been created between the mortgagees and his heir; and there having been no express attornment as tenant, the payment of interest could not be regarded as referable to a tenancy other than a tenancy on sufferance. One would infer from what Williams, J., says that if the mortgagees had accepted, and given receipts for, the interest as rent, that that might have been sufficient evidence of a tenancy to support the distress.

LANDLORD AND TENANT—YEARLY TENANCY — NOTICE TO QUIT "ON" OR "FROM" THE DAY SPECIFIED— AGREEMENT NOT TO BE PERFORMED WITHIN A YEAR—STATUTE OF FRAUDS, S. 4.

Sidebotham v. *Holland*, (1895) 1 Q.B. 378; 14 R. March 217, was an action by a landlord against his tenant to recover possession of the demised premises in which it became necessary to determine the sufficiency of a notice to quit. The defendant was a yearly tenant, the term "commencing on the 19th May, 1890," an apportioned part of the rent up to June 24th next was to be paid at once, and thereafter the future rent was to be paid quarterly on the usual quarterly days. Notice was given on 17th November, 1893 to quit on the 19th May following. The defendant, besides disputing the validity of the notice, set up an oral agreement made in December, 1892, that the tenancy should not be terminated until November, 1895, as to which latter defence the plaintiff pleaded the Statute of Frauds, s. 4. The Court of Appeal (Lord Halsbury, and Lindley and Smith, L.JJ.), dissenting from Bruce, J., held that notwithstanding the arrangement as to the payment of the first instalment of rent the tenancy commenced on the 19th May, and not on the 24th June, although if there had not been an express stipulation that the term was to commence on the 19th May it might have been held to commence on 24th June, and the Court of Appeal also held that the day mentioned in a demise as the commencement of the tenancy is the first day of the term, whether the expression used be "on" or "from" such day, and consequently that a notice to quit on the 18th May would have been good, and that the notice to quit on the 19th May, being the anniversary of the commencement of the term, was also good, though on this

latter point Smith, L.J., expresses some doubt. The court was unanimous that Bruce, J., was right in holding that the oral agreement for the extension of the term beyond the year was invalid under the Statute of Frauds. Smith, L.J., points out that the plaintiff's difficulty in regard to the notice to quit was occasioned by his having omitted to insert the usual words in the notice, "or at the expiration of the year of your tenancy, which shall expire next after the end of one-half year from the service of this notice."

EVIDENCE—ADMISSION—PRESUMPTION OF CONTINUANCE OF FACTS ADMITTED.

Brown v. *Wren*, (1895) 1 Q.B. 390, is a case which involves a somewhat curious point in the law of evidence. The action was for the price of goods supplied to a firm, and it became necessary to prove that William Wren was a member of the firm at the time the goods were sold at various dates between June, 1893, and February, 1894. The only evidence offered on this point was a letter written by William Wren on January 2nd, 1893, to a third person (a banker), in which he stated, "I have not banked any money for the last eight months, as I have dissolved partnership with my brother last April." The County Court judge who tried the action ruled that the letter must be taken as a whole, and that the implied admission that William Wren had once been a partner could not be separated from the statement that the partnership had terminated before the goods were supplied. The Divisional Court (Wills and Wright, JJ.), however, unanimously reached an opposite conclusion. They held that the letter contained an admission that William Wren was a partner in the firm in April, 1892, and it must be presumed that the partnership continued unless the contrary were proved; and that though the statement that it had been then dissolved was evidence in the defendant's favour, yet it was a question for the jury to say what weight was to be attached to it; and a new trial was therefore directed.

MISTAKE—MONEY PAID UNDER COMPULSION OF LEGAL PROCESS—ACTION FOR RECOVERY OF MONEY PAID UNDER COMPULSION OF LAW.

In *Moore* v. *Fulham*, (1894) 1 Q.B. 399, the plaintiff unsuccessfully sought to recover money paid under mistake, under pressure of legal proceedings. The defendants had issued a summons to recover a certain proportion of certain street

improvement expenses which they alleged to be due from the plaintiff as owner of premises abutting on the street improved. The plaintiff paid the money pending an adjournment of the summons, but subsequently discovered that he was not really liable to the demand, because his premises did not, in fact, abut on the street in question, and he then applied to the defendants to refund, which they declined to do, but said they would withdraw the summons, which they did, the plaintiff not objecting. Counsel for the plaintiff contended that it was only where money was paid under a judgment that it was irrecoverable, but the Court of Appeal (Lord Halsbury, and Lindley and Smith, L.JJ.) were of opinion that the cases were clear that any payment made under compulsion of legal process, even though before judgment, stood on the same footing, and could not thereafter be recovered.

PRACTICE—THIRD PARTY PROCEDURE—DEFENDANT CLAIMING INDEMNITY AGAINST CO-DEFENDANT—SETTING ASIDE NOTICE—ORD. XVI., RR. 52, 53—(ONT. RULE 332).

Baxter v. *France*, (1895) 1 Q.B. 455; 14 R. Mar. 294, was a motion by a defendant, on whom a co-defendant had served a notice claiming indemnity, to set aside the notice on the ground that the claim of the defendant serving the notice was not a claim for indemnity within the meaning of the Rule. Day, J., refused to set aside the notice, and, on appeal, the Court of Appeal (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) held that the proper time to raise the question was on the application for directions (see Ont. Rule 332). We learn from the *Law Times* of February 16th, 1895, that an application was subsequently made in this case for directions, and that Day, J., refused to make any order, which, on a further appeal being had, the Court of Appeal held to be equivalent to a dismissal of the defendant as a third party, leaving him simply, as before, a defendant in the action. The court is also reported to have held that in every case in which all questions in dispute as regards the transaction in question cannot be finally decided in the action between all the parties, but a subsequent action will be necessary, the judge will rightly exercise his discretion if he refuses to make any order for directions. In a recent case before the Chancery Divisional Court of *Heintzman* v. *Doyle* a different course was fol-

lowed, and the attempt there made by the judge at the trial to administer partial relief between the co-defendants can hardly be said to have been a satisfactory disposition of the case in any point of view.

LANDLORD AND TENANT—DISTRESS—NEW TENANCY—8 ANNE, C. 14, SS. 6, 7.

Wilkinson v. *Peel*, (1895) 1 Q.B. 516; 15 R. Mar. 403, was an action in which the plaintiff claimed damages for a wrongful distress. The plaintiff's husband had for many years been tenant of a farm known as Brickkiln Farm, which consisted of 412 acres. He gave notice to quit on April 5th, 1893. Prior to the expiration of the notice he agreed with his landlords to continue to occupy, and the landlords agreed to let to him 48 acres of the farm at a rent to be payable half-yearly, and he continued accordingly to occupy the 48 acres till his death, having, on 5th April, 1893, given up possession of all the rest of the Brickkiln Farm. The plaintiff, after his death, continued to occupy the 48 acres as his administratrix. The defendants distrained on the 48 acres for rent due by the plaintiff's husband in respect of the Brickkiln Farm at the time of his death. The Divisional Court (Lawrance and Kennedy, JJ.) were of opinion that the distress was illegal, and unwarranted by the statute of Anne, c. 14, ss. 6, 7, which they hold does not apply where the tenant remains in possession, not simply as an overholding tenant, but by virtue of a new tenancy created by agreement.

BAILOR AND BAILEE—WAREHOUSEMAN—ESTOPPEL—PROPERTY IN GOODS OBTAINED BY FRAUD—JUS TERTII—TROVER—DAMAGES.

In *Henderson* v. *Williams*, (1895) 1 Q.B. 521, the plaintiffs sued for the conversion of goods under the following peculiar circumstances. The defendants were warehousemen who held 150 bags of sugar to the order of Grey & Co. One Fletcher, pretending that he was Robinson, negotiated with Grey & Co. for the purchase of the 150 bags, and Grey & Co., thinking they were selling them to Robinson, directed the defendants to hold them subject to Fletcher's order. Fletcher then agreed to sell the 150 bags to the plaintiffs, who had no notice of the fraud, and who, before completing the purchase, inquired of and was informed by the defendants that they held them to the order of Fletcher, and agreed to transfer them to the plaintiffs on re-

ceipt of his transfer in their favour, and subsequently agreed to hold the 150 bags to the plaintiffs' order; whereupon the plaintiffs completed the purchase and paid the price, less the amount of a debt then owing to them by Fletcher. Grey & Co., having discovered Fletcher's fraud then induced the defendants to retain the 150 bags, and they refused to deliver them to the plaintiffs. Cave, J., held that the defendants could not set up the title of Grey & Co. as against the plaintiffs, but that the measure of damages was only the amount actually paid, and that the amount of Fletcher's debt, which had been deducted from the price agreed to be paid, could not be recovered. Both plaintiffs and defendants appealed, the former on the ground of the inadequacy of the damages, and the latter on the ground that the plaintiffs were not entitled to succeed at all. The Court of Appeal (Lord Halsbury, and Lindley and Smith, L.JJ.) were of opinion that the plaintiffs were entitled to succeed on the ground that Grey & Co. had, by their conduct, enabled Fletcher to hold himself out as the true owner of the 150 bags of sugar, and the defendants were estopped by having attorned to the plaintiffs from impeaching their title, or setting up the *jus tertii* of Grey & Co., and that their refusal to deliver the goods was a conversion, and that the true measure of damages was the market value of the goods at the date of the conversion, which was fixed at the price the plaintiffs had agreed to pay therefor, for the full amount of which they gave judgment in favour of the plaintiffs, holding that no deduction should be made in respect of the debt of Fletcher to the plaintiffs which had been set off against the price.

PRACTICE—PROBATE ACTION—RES INTER ALIAS ACTA—WILL, VALIDITY OF.

Young v. *Holloway*, (1895) P. 87, was an action for the revocation of a probate, in which the defendants applied to dismiss the action as frivolous, on the ground that in a previous proceeding the validity of the will had been attacked and had been held valid, and the plaintiff was cognizant of those proceedings, and might have intervened. It appeared that the plaintiff was cognizant of the former proceedings, and had assisted the plaintiff therein, but according to his affidavit he did not know then that he had any interest in the suit or was entitled to intervene. The ground of his present action was that the will, which had been declared valid, was, in fact, a forgery, and that he was a legatee under a former valid will, which there had been a con-

spiracy to suppress, and that these facts had only come to his knowledge since the former action. It appeared that the plaintiff would have no interest except under the alleged former will, and that he would not likely be able to produce this alleged earlier will. Jeune, P.P.D., declined to dismiss the action, holding that the plaintiff was not bound by the result of the former action, because, though he was cognizant of it, he did not then know he had any right which would entitle him to intervene.

SOLICITOR—FIRM OF SOLICITORS—LIABILITY OF PARTNERS FOR FRAUD OF CO-PARTNER—DEPOSIT OF SECURITIES PAYABLE TO BEARER—SCOPE OF PARTNERSHIP—FRAUD—MORTGAGOR AND MORTGAGEE—AGENT EXCEEDING AUTHORITY.

Rhodes v. *Moules*, (1895) 1 Ch. 236; 12 R. Jan. 96, was an action for redemption by a mortgagor against his mortgagees and a firm of solicitors to redeem a mortgage, and also to make the defendants answerable for certain collateral securities which had been fraudulently misappropriated by a member of the firm. Rew, one of the firm of solicitors, on being applied to by the plaintiff to obtain a loan on a mortgage of real estate, obtained the loan from a client of his firm; he informed the plaintiff, without any authority from the mortgagees, that collateral security would be required as well as the mortgage. A mortgage of the real estate was executed, which, however, contained no mention of the collateral securities, and the plaintiff also, without the knowledge of Rew's partners or of the mortgagees, deposited with Rew a number of share warrants payable to bearer; these Rew sold, and misappropriated the proceeds thereof. On two previous occasions the plaintiff deposited the share warrants with Rew for the purpose of raising temporary loans, of which transactions a record appeared in the firm's books, and it also appeared that the firm were in the habit of holding securities payable to bearer, and also sums of money for their clients. The question at issue was whether, under these circumstances, Rew's partners, the mortgagees, or either of them, were liable for the warrants misappropriated. Kekewich, J., negatived the liability of both mortgagees and the partners. He exonerated the latter from liability on the ground that the transaction was not within the ordinary scope of the partnership; but on this point the Court of Appeal (Lord Herschell, L.C., and Lindley and Smith, L.JJ.) came to a different conclusion, and reversed his decision. He held that the mortgagees were not liable because they had given no

instructions to Rew to obtain collateral security, and were ignorant of the deposit of the warrants; therefore he held he was not their agent in receiving them, and, consequently, they were not responsible for their loss, and with this decision the Court of Appeal agreed. As Lord Herschell remarks, this is one of those painful cases in which, whatever judgment is pronounced, the loss must fall upon some innocent person who has not, by act or default, contributed to it. On principles of abstract justice, it may well be doubted whether the decision of Kekewich, J., was not, on the whole, more satisfactory than that of the Court of Appeal, but the law is clearly embodied in the English Partnership Act, 1890, s. 11, and when once it is found that a partner is acting within the scope of his apparent authority his partners are liable for his default or misfeasance. It was on the ground that in *Cleather* v. *Twisden*, 28 Ch.D. 340, the partner was not acting within the scope of his apparent authority that the Court of Appeal distinguishes that case from this.

The reader will kindly correct the following typographical errors which the proof-reader has overlooked: at p. 122, line 20, for "action" read "option" and on p. 125, line 8, for "their" read "the."

Notes and Selections.

LEASE OR MORTAGE, OR WHICH?—Mortgage companies have taken a new method in Manitoba to secure principal and interest in arrear. They take a lease for one year for the whole sum due. When the crop is harvested they take steps to distrain and claim exemptions for rent as landlords. A well-known country solicitor states the case as follows: A mortgagor is in arrears, security is demanded by a loan company, a paper is signed—to the poor farmer as intelligible as an Egyptian tablet. The paper is practically a quit-claim deed and a lease for one year at a certain rental, presumably the amount of interest in arrear. The rent is not paid and the loan company steps into possession and the farmer is on the road. It is true that courts of law will continue to hold that a farmer is as capable of construing an implement contract as a lawyer, but the legislature has taken steps to prevent the obtaining of a mortgage under the guise of an agreement

to buy a threshing machine. Whether or not the loan company acts harshly or improperly is a question for the legislature to consider. It is not a way of securing a chattel mortgage on next year's crop without registration?—*Western Law Times.*

COPYRIGHT IN SERMONS.—The Rev. Joseph Parker writes complaining of the theft committed by newspaper reporters in reporting sermons, and he winds up his letter by saying that he wants to know "whether a preacher can legally protect his sermons; or, failing this, whether the moral sentiment of the public cannot be roused to resent a piracy which is made the more infamous by working under the plea of pious interest in the spread of religion." With the latter part of his question we need not deal, beyond saying that we quite agree that there ought to be protection for sermons just as much as for any other productions of men's brains. The question we wish to consider is, Can a preacher legally protect his sermons from reproduction in a paper or other publication? The point has been recently remarked on in the case of *Caird* v. *Sime*, 57 Law J. Rep. P.C. 2; L.R. 12 App. Cas. 326. Mr. Scrutton's "Law of Copyright," 2nd edit., p. 65, lays down that at common law the author of any literary composition has the right to prevent its publication until he himself has made it public; and the right will not be destroyed by the fact that the author communicates such a composition to a limited number of persons under express or implied conditions restraining them from publishing it themselves. A preacher, therefore, as a lecturer, will, until he has published his composition, be entitled at common law to prevent publication of it by others. In *Caird* v. *Sime* it was held that a professor of a university who delivers orally in his class-room lectures which are his own literary composition does not communicate such lectures to the whole world so as to entitle any one to republish them without the permission of the author. Professor Caird, of the University of Glasgow, delivered lectures in his class-room, as part of his ordinary course, to students of the university, who were admitted on payment of the prescribed fees. And it was held that such delivery of the lectures was not equivalent to a communication of them to the public at large, and that Professor Caird was entitled to restrain other persons from publishing

them. But in thus deciding Lord Chancellor Halsbury expressly distinguished the case of sermons: "It is intelligible," he says, "that when a person speaks a speech to which all the world is invited, either expressly or impliedly, to listen, or preaches a sermon in a church, the doors of which are thrown open to all mankind, the mode and manner of publication negative, as it appears to me, any limitation." Mr. Copinger, in the "Law of Copyright," 3rd edit., p. 59, states that under the Act 5 & 6 Wm. IV., c. 65, which specially protects lectures, except those delivered in any university or public school or college, or on any public foundation, or by any individual in virtue of, or according to, any gift, endowment, or foundation, it would appear that sermons preached by clergymen of the Church of England in endowed places of public worship are deemed public property. The Act in question does not in any way alter the law as to sermons in general, which must be dealt with under the common law. In accordance, then, with Lord Halsbury's statement, it seems that a sermon preached in a parish church, or in any clerical building to which the public are admitted freely, is thereby published, and the author can no longer restrain publication of it. But if the church is fenced round with restrictions and the public are not admitted freely, but only on condition that they undertake not to republish what they hear, and if express notice is given to this effect to every person entering, it seems to us possible that in this case a right of protection might still be retained. The point is, of course, a difficult one. In the old case of *Abernethy* v. *Hutchinson*, 3 Law J. Rep. (o.s.) Chanc. 209, 217, Lord Chancellor Eldon says: "I should be very sorry if I thought that anything which had fallen from me would be considered to go to the length of this—that persons who attend lectures or sermons and take notes are to be at liberty to carry into print those notes for their own or others' profit. I have very little difficulty on that point. But that doctrine must apply either to contract or breach of trust." Mr. Parker's only remedy, therefore, till the law is altered, seems to be to make a contract with his audience that they will not republish his sermons. We should be very glad to see a decision of the L. on the important point he raises, and invite him, as a public-spirited man, to assist, by bringing an action, towards an elucidation of it.—*Ex.*

PERSONAL PROPERTY.—The Supreme Court of Justice of Belgium has just been called upon to decide a novel and extraordinary question. One of the leading surgeons of Brussels had occasion, about a year ago, to amputate the right leg of a young married lady belonging to the highest circles of the aristocracy. The operator was so pleased with the job that he preserved the leg in a jar of spirits of wine and placed it on exhibition in his consulting room, a card being affixed to the jar giving the patient's name and the details concerning the circumstances which had rendered the operation necessary. On hearing this, the husband of the lady demanded the immediate discontinuance of the exhibition and the return of the severed member as being his property. To this the surgeon demurred. He admitted that the plaintiff had property rights in the leg while it formed part of his wife, but argued that the leg in its present condition was the result of his (defendant's) skill and the work of his own hands, and that he was clearly entitled to keep it. The court seemed rather staggered by this line of argument, and after taking a fortnight to consider the question has finally decided against the doctor and in favour of the husband's claim to the possession of the amputated leg of his better half.—*Central Law Journal.*

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

HILARY TERM.

Monday, February 4th, 1895.

Present, between ten and eleven a.m., the Treasurer, and Messrs. Bayly, Moss, and Shepley, and in addition, after eleven a.m., Sir Thomas Galt, and Messrs. Watson, Ritchie, and Bruce.

The minutes of Saturday, 22nd December, 1894 were confirmed.

Ordered, that the following gentlemen be called to the Bar: Messrs. J. Dickson, J. R. Logan, and H. J. Sims (Mr. Logan with honours and bronze medal).

Ordered, that the following gentlemen do receive certificates of fitness: Messrs. J. Dickson and J. H. Spence; and that Mr. John Ashworth's service under articles be allowed, notwithstanding failure to file articles at the proper time.

The Treasurer laid on the table a copy of the Report of His Honour Judge McDougall made in the matter of a certain investigation conducted

before him, under the resolution of the council of the city of Toronto of 13th November, 1894, and drew attention to that part of the Report which incriminated Mr. W. M. Hall, a barrister-at-law and solicitor, and to the stenographer's notes of the evidence of Mr. W. M. Hall before the said judge in the premises, and more particularly pages 650 to 673 and 803 and 824 of the stenographer's Report, which was also laid before Convocation. Ordered, that the Report be referred to the Discipline Committee to enquire and report to Convocation what steps should be taken under the circumstances of the case laid before Convocation by the Treasurer.

The time for the Report of the Special Committee appointed to deal with the question of closing Osgoode street was extended until Friday, February 15th.

The complaint of the County of Grey Law Association against Mr. G. W. Patterson, student-at-law, charging him with having advertised himself as a duly qualified practitioner, was referred to the Discipline Committee for enquiry and report.

The letter of Mr. N. M. Munro respecting the conduct of Mr. N. Jeffrey was referred to the Discipline Committee for enquiry and report.

The Secretary read the letter of Mr. Power, of the Department of Justice, Ottawa, which was accompanied by copies of correspondence between that Department and Mr. A. E. K. Greer, relating to the release of one Theakson from the penitentiary, with a request that the matter might be laid before the Benchers. Ordered, that the matter be referred to the Discipline Committee for enquiry and report.

The Secretary read the complaint of Mrs. Nancy Brown against Mr. S. M. Jarvis, a solicitor; also the complaint of Mr. P. Delaronde against Mr. A. S. Wink, a solicitor. Ordered, that in both the complaints the Secretary do inform the complainants that the ordinary proceedings of the courts will afford them redress if they be entitled thereto, the matters complained of not being such as the Benchers can investigate.

The following gentlemen were then called to the Bar: Messrs. J. R. Logan (with honours and bronze medal), J. Dickson, J. Ashworth, and E. W. Drew.

Mr. Shepley, on behalf of the Library Committee, presented the annual Report of the Librarian, which was received and ordered to be printed, and distributed to the profession with the next number of the current Reports.

[This Report is omitted, as it has already been distributed according to the order of Convocation.]

Mr. Watson, from the Finance Committee, then presented the annual financial statement for the year ending December 31st, 1894. [The annual statement is omitted from this résumé, as it has already been distributed to the profession, as required by the statute and the Rules of the Society.]

Moved by Mr. Ritchie, seconded by Mr. Watson, that upon a special Rule being passed repealing for this case Rule No. 207, requiring notice, etc., prior to call, the application of Sir Charles Hibbert Tupper, K.C.M.G., a member of the Bar of Nova Scotia, for call to the Bar of this Province be granted, and that upon the production to Convocation of a certificate of call to the Bar of Nova Scotia and the testimonials required by subsection 1 of chapter 146, R.S.O., Sir Charles Hibbert Tupper, K.C.M.G.,

now Minister of Justice, be called to the Bar of this Province, and that the fees payable upon such call be remitted or waived by the Society. Carried.

Moved by Mr. Ritchie, seconded by Mr. Watson, that Rule 207, subsections 1 and 3, Rules 209 and 210, and any other Rule conflicting with the above resolution, be superseded and dispensed with in the case of Sir Charles Hibbert Tupper, K.C.M.G., on his application for call to the Bar of Ontario. Carried.

The Rule was introduced, read a first and second time, and by unanimous consent Rule 21 was suspended, and the Rule was read a third time and passed.

The petitions of Messrs. Frank E. Curtis and T. R. Slaght, barristers of over ten years' standing, who applied, under 57 Vict., c. 44, for certificates of fitness, were read. Ordered, that they do receive their certificates of fitness.

Mr. A. J. Arnold's letter of January 9th, 1895, on the subject of thefts from the barristers' robing rooms, was read and referred to the Finance Committee to be dealt with.

Tuesday, February 5th, 1895.

Present, between ten and eleven a.m., the Treasurer, and Messrs. Strathy, Bayly, and Moss, and in addition, after eleven a.m., Messrs. Martin, Osler, Aylesworth, Magee, Teetzel, Watson, and Bruce. Ordered, that the following gentlemen be called to the Bar: B. H. Ardagh and G. H. Findlay.

Ordered, that the following gentlemen do receive their certificates of fitness: J. R. Logan, G. H. Findlay, and B. H. Ardagh.

After eleven a.m., Messrs. B. H. Ardagh and G. H. Findlay were called to the Bar.

The supplemental petition of Rebecca Thompson, complaining of the conduct of Mr. T. E. Williams, solicitor, was read. Ordered, that the same be referred to the Discipline Committee.

Ordered, that the editor be charged with the adjustment and equalization of the duties of the several reporters of the High Court, and empowered to act in his discretion in the premises.

Moved by Mr. Teetzel, seconded by Mr. Martin, that the propriety of issuing a new digest and the character of such digest be referred to a committee consisting of the Reporting Committee and the Chairman of each of the Standing Committees, and that Mr. Osler or Mr. Moss be the convener. Carried.

Friday, February 8th, 1895.

Present, the Treasurer and Sir Thomas Galt, and Messrs. Moss, Douglas, Riddell, Hoskin, Watson, Robinson, Bruce, MacKelcan, and Britton.

The minutes of the meeting of 5th February were confirmed.

Dr. Hoskin, from the Discipline Committee, reported in the matter of the complaint of John Porter against Mr. A. C. F. Boulton that a *prima facie* case had been shown. The Report was adopted, and it was ordered that the complaint be referred to the Discipline Committee for investigation and report.

Ordered, that the following gentlemen be called to the Bar: Messrs. J. A. Stewart and W. H. Lovering.

Ordered, that the following gentlemen do receive their certificates of fitness: Messrs. J. A. Stewart, W. H. Lovering, and W. A. Robinson.

Messrs. J. A. Stewart and W. H. Lovering were then called to the Bar.

Ordered, that Mr. Thomas Woodyatt, a solicitor of over ten years' standing, who applied for call under the Act 57 Vict., cap 44, be called to the Bar.

Sir Charles Hibbert Tupper, K.C.M.G., having produced satisfactory evidence of his having been called to the Bar of the Province of Nova Scotia, also the certificate of Sir Thomas Galt, a Bencher, that he has known him for many years, and that he knows him to be a gentleman of good character and conduct, also his commission as a Queen's Counsel from the Dominion of Canada, in all the Courts of Canada under the Great Seal, it was ordered that Sir Charles Hibbert Tupper be called to the Bar of Ontario.

Sir Charles Hibbert Tupper thereupon attended and was called to the Bar accordingly, and having retired and been presented to the Judges of the High Court of Justice, Common Pleas Division, returned to Convocation and took his seat as a Bencher.

Friday, February 15th, 1895.

Present, Dr. Hoskin, Sir Thomas Galt, and Messrs. Bayly, Moss, Britton, Shepley, Martin, Watson, Lash, and Guthrie. In the absence of the Treasurer, Dr. Hoskin was appointed Chairman. The minutes of the last meeting were read and confirmed.

Ordered, that Mr. H. J. Sims do receive his certificate of fitness.

Mr. Moss, from the Special Committee on Legislation, presented a report from that committee. Ordered, that a special call of the Bench be made for Friday, the 1st day of March prox., to consider the report and any subsequent report of the committee.

Mr. Watson, from the Finance Committee, laid on the table the estimates of revenue and expenditure for the ensuing year.

Mr. Watson, from the Discipline Committee, presented reports on the complaints against Messrs. A. E. K. Greer, Nicol Jeffrey, Geo. W. Patterson, and W. M. Hall, that in each case a *primâ facie* case had been shown. It was ordered that these complaints be referred to the committee for investigation in the usual way.

Mr. Watson, from the same committee, reported on the supplementary petition of Rebecca Thompson against Mr. Thos. E. Williams, recommending that the matter should be investigated in the usual way, and proceeded with in connection with the pending investigation of the former petition of said Rebecca Thompson against Mr. Williams.

Ordered, that the Discipline Committee be empowered to avail themselves of the services of the solicitor of the Society to conduct such matters of enquiry as the committee may think fit.

Mr. Moss, from the Legal Education Committee, laid on the table the new edition of the curriculum of the Law School.

Mr. Thomas Woodyatt was then admitted and called to the Bar.

Mr. Lash, from the Special Committee appointed to consider the question of closing Osgoode street, reported as follows:

The Special Committee to which was referred the duty of preparing and submitting to Convocation a draft of such agreement and statute as, after conference with the government and municipal authorities, they might think should be entered into and passed for the purpose of granting certain privileges to the Dominion Government over Osgoode street, in rear of Osgoode Hall, in connection with the drilling of the active militia thereon, and of protecting the interests of the Law Society, beg to report:

That your committee invited Colonel Denison, as representing the active militia, and the city engineer, as representing the municipal authorities, to be present at their meetings. Colonel Denison and Colonel Mason attended, and explained that the intention of the military authorities (if the necessary permission were granted) was to enclose the whole space between the Drill Hall and the boundary of Osgoode Hall grounds with an open picket fence, with the necessary gates therein, to permit access as usual over the street for all purposes connected with the Law Society and Osgoode Hall. Your committee were of opinion that the right should be reserved to the Law Society to require the street to be opened at any time, and this was not objected to. Believing it to be the intention of Convocation that the closing of the street should not be consented to unless equitable provisions were made for a limited use by students of the Law School of the grounds enclosed for recreation purposes, subject always to the requirements of the militia, your committee desired some proper provisions in this respect to be made, but Colonels Denison and Mason (having consulted their brother commanding officers) informed your committee that no such privileges would be agreed to. Your committee recommend that consent to the closing of the street be not given unless some equitable provisions with reference to the use of the grounds for the purpose referred to be made.

Z. A. LASH, Chairman.

The Report was received and adopted, and it was ordered that the reference to the Special Committee be continued, with power to act in case the militia authorities are willing to concede the privileges desired.

Convocation then adjourned to Friday, the first day of March next.

Friday, 1st March, 1895.

Special meeting.

Present: The Treasurer, and Sir Thomas Galt, Messrs. Idington, Guthrie, Maclennan, Barwick, Bayly, Moss, Strathy, Shepley, Watson, Robinson, Riddell, McCarthy, Aylesworth. The minutes of the last meeting were read and confirmed.

Mr. Shepley, from the Library Committee, reported, recommending the exchange of certain of the Law Society's own publications for the Nova Scotia Statutes for the period 1758 to 1853, and the Journals of the House of Assembly, Nova Scotia, from 1845 to date. The Report was adopted.

Mr. Moss, in the absence of Mr. Osler, presented the Report of the Special Committee on Legislation. The Report was taken into consideration clause by clause, and, as amended, and with resolutions supplementary thereto, was adopted by Convocation in the form of the memorandum of recommendation adopted and printed by order of Convocation this day made.

Convocation then rose.

DIARY FOR APRIL.

1. Monday .....County Court and Surrogate Sittings.
4. Thursday.....New Legislative Buildings at Toronto opened, 1893.
5. Friday.....Canada discovered, 1499.
7. Sunday.....*6th Sunday in Lent.* Great fire in Toronto, 1847.
8. Monday.....County Court non-jury Sittings in York. Hudson Bay Company founded, 1692.
12. Friday.....Good Friday.
14. Sunday.....*Easter Sunday.*
15. Monday.....Easter Monday. President Lincoln assassinated, 1865.
17. Wednesday.....Hon. Alexander Mackenzie died, 1892.
18. Thursday..... First newspaper in America, 1704.
19. Friday.....Lord Beaconsfield died, 1881.
21. Sunday.....*1st Sunday after Easter.*
22. Monday.....Call, last day for notice for Easter Term.
23. Tuesday..... ....St. George.
24. Wednesday.. ..Earl Cathcart, Gov. Gen., 1846.
25. Thursday..... St. Mark.
26. Friday .....Battle of Fish Creek, 1885.
27. Saturday.....Toronto captured (Battle of York), 1813.
28. Sunday.....*2nd Sunday after Easter.*

Reports.

EXCHEQUER COURT OF CANADA.

TORONTO ADMIRALTY DISTRICT.

IN RE SYLVESTER AND THE "GORDON GANTHIER."

Maritime Court Act, s. 14, s-s. 5—Mortgagee in possession—Subsequent purchaser.

A mortgagee who takes possession of a ship under his mortgage takes subject to any maritime liens which have arisen since the date of the mortgage and whilst the mortgagor was allowed to control the ship, and, in an action for such a claim, the plaintiff's claim is preferred to the mortgage.

TORONTO, Feb. 16—MCDOUGALL, L.J.Ad.

This was an action for seaman's wages. It is unnecessary to detail the facts of the case. The legal question discussed was whether a mortgagee who has taken possession under his mortgage can be considered as a subsequent purchaser within the meaning of s. 14, s-s. 5, of The Maritime Court Act.

MCDOUGALL, L.J. in Adm.: When a ship is mortgaged and the mortgage registered according to the requirements of The Merchants' Shipping Act, by virtue of the mortgage the property in the ship passes, *prima facie*, to the mortgagee, and he is thereby the owner of the ship, unless his rights as to ownership are restrained by any other part of The Merchants' Shipping Act. Section 70 of The Merchants' Shipping Act enacts: "A mortgagee shall not, by reason of his mortgage, be deemed to be the owner of a ship, or any shares therein, nor shall the mortgagor be deemed to have ceased to be the owner of such mortgaged ship, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt."

It is said in *Dickinson* v. *Kitchen*, 8 El. & Bl. 789, that the true meaning and intention of the earlier part of this section is to protect a mortgagee in doing acts necessary to make the ship available as a security for his debt. To so make the ship available he may take possession of her and collect the freight, and yet by the earlier part of the section he is protected from liabilities such as the debts of the ship, which might otherwise be urged against him as the legal owner in possession, receiving a beneficial interest. Coleridge, J., in the same case, says that even a defective registration of a mortgage does not prevent the ordinary incident of a mortgage, that thereby the mortgagee is become the owner of the ship. Crompton, J., in the same case, says, speaking of the position of the mortgagee of a ship: "By the ordinary incident of the conveyance to him by way of mortgage, he would be the owner. The question, therefore, is whether the conveyance by way of mortgage under s. 66 of the statute (Merchants' Shipping Act) is an ordinary mortgage. If it is, the mortgagee is thereby, by reason of such mortgage, become the owner of the ship as against a subsequent execution at the suit of a creditor. I am of the opinion that the mortgage under the statute is an ordinary mortgage with ordinary incidents. It seems to me that none of these ordinary incidents are taken away by s. 70. That section was intended to protect the mortgagee taking possession of a mortgaged ship in order to make it available as a security from certain liabilities which frequently attach upon an owner of a ship in possession." The question in this case (*Dickinson* v. *Kitchen*) was as to the rights of the mortgagee of a ship against an ordinary execution creditor of the owner of the ship, and the case determined that the mortgagee's rights as owner and right to possession of the ship prevailed against an execution creditor of the registered owner, though such owner, and not the mortgagee, was in possession of the ship at the time of the seizure under the writ of execution.

I refer also to the case of *Dean* v. *McGhie*, 4 Bing. 45. An earlier case under the statute of 6 Geo. IV., cap. 110, where it was held that a mortgagee who had taken possession of the ship under his mortgage was liable to pay seamen's wages, and very similar words in the statute of 6 Geo. IV., cap. 110, s. 45, namely, that the mortgagee by virtue of his mortgage should not be deemed to be the owner of the ship, were held to not prevent such mortgagee from being considered the legal owner of the ship. The effect of these cases would appear to be that the execution and registration of the mortgage constitutes the mortgagee the legal owner of the ship from the date of his mortgage, and that transferees of such mortgage will occupy the same position from the date of their respective transfers. Section 70 of The Merchants' Shipping Act does not limit his common law rights or vary its incidents, but simply protects him from certain claims only which he might otherwise be liable for if treated as an owner in possession. His taking possession of the ship under his mortgage does not vary or alter his title as legal owner: it only puts him in the position to make a sale for the purpose of realizing upon his security. He can in no sense be treated or considered, in my opinion, as becoming by the act of taking possession, a "subsequent purchaser" within the meaning of subsection 5, section 14, of The Maritime Court Act.

I would also refer to the cases of *Mary Ann*, L.R. 1 A. & E. 8, *The Feronia*, L.R. 2 A. & E. 65, as showing that a seaman's claim for wages will rank in priority to the claim of the mortgagee, and therefore I find that the plaintiff's claim in this case is not superseded by the claim of the Third National Bank under their mortgage, even if before the commencement of the action they had taken possession of the ship under their mortgage, and they cannot be treated as having by the act of taking possession become subsequent purchasers. The ninety-day limit, therefore, imposed by section 14, subsection 5, of The Maritime Court Act does not prevent the plaintiff bringing his action to recover against the ship the amount of his wages in this case.

I direct that judgment be entered for the plaintiff against the said ship for the sum of two hundred and thirty-five dollars ($235), and costs of suit, and that an order for the sale of the said vessel will be made unless the said amount and costs are paid within twenty days from this date.

Notes of Canadian Cases.

EXCHEQUER COURT OF CANADA.

BURBIDGE, J.] [Oct. 29, 1894.

RAY ET AL. *v* LANDRY.

Appeal from local judge in admiralty—The Admiralty Act, 1891 (54 & 55 Vict., c. 29)—Interference with finding of fact.

On appeal from a judgment of a local judge in Admiralty, under s. 14 of The Admiralty Act, 1891 (54 & 55 Vict., c. 29), the court will not interfere with a finding of fact by the local judge unless it is satisfied beyond a reasonable doubt that the evidence does not warrant such finding.

Attorney-General of Quebec, and *Belleau*, Q.C., for the appellants.

Pentland, Q.C., for the respondent.

BURBIDGE, J.] [Nov. 29, 1894.

SINCLAIR *v.* THE QUEEN.

Customs duties—R.S.C., c. 32, s. 13—50-51 Vict., c. 39, items 88 and 173—Steel rails imported for temporary use during construction of railway—Rate of duty.

(1) Steel rails, weighing twenty-five pounds per lineal yard, to be temporarily used for construction purposes on a railway and not intended to form any part of the permanent track, cannot be imported free of duty under item 173 of The Tariff Act of 1887.

(2) In virtue of clause 13 of The Customs Act (R.S.C., c. 32) the court held that such rails should pay duty at the same rate as tramway rails (under 50-51 Vict., c. 39, item 88), to which of all the enumerated articles in the tariff they bore the strongest similitude or resemblance.

A. F. May for the suppliants.

W. D. Hogg, Q.C., for the Crown.

BURBIDGE, J.] [Dec. 6, 1894.

DOMINION BAG CO. *v.* THE QUEEN.

Revenue laws—R.S.C., c. 33, items 261 and 673—57-58 Vict., c. 38, item 621—Construction—Importation of jute cloth.

In construing a clause of a Tariff Act which governs the imposition of duty upon an article which has acquired a special and technical signification in a certain trade reference must be had to the language, understanding, and usage of such trade.

By item 673 of R.S.C., c. 33, "Jute cloth as taken from the loom neither pressed, mangled, calendered, nor in any way finished, and not less than forty inches wide, when imported by manufacturers of jute bags for use in their own factories," was made free of duty.

By item 261 of such Act it was provided that manufacturers of jute cloth not elsewhere specified should be subject to a duty of 20 per cent. *ad valorem*. The claimants, who were manufacturers of jute bags, had for a number of years imported into Canada jute cloth, cropped after it was taken from the loom. It was, amongst others, a reasonable construction of item 673 that the jute cloth so cropped should be entered free of duty, and in this construction the importers and the officers of customs had concurred during such period of importation.

Held, that notwithstanding the provisions of the interpretation clause (R.S.C., c. 32, s. 2*m*), inasmuch as the cloth in question had been, in good faith, entered as free of duty and manufactured into jute bags and sold, and it would happen that if another construction than that so adopted by the importers and customs officers was now put upon the statute the whole burden of the duty would fall upon the importers, the doubt as to such construction should be resolved in their favour.

Quære, whether the words used in section 183 of The Customs Act (as amended by 51 Vict., c. 14, s. 34), "the court . . . shall decide according to the right of the matter," were intended by the legislature in any way or case to free the court from following the strict letter of the law, and to give it a discretion to depart therefrom if the enforcement, in a particular case, of the letter of the law would, in the opinion of the court, work injustice?

D. MacMaster, Q.C., and *T. S. MacLellan* for the claimants.

W. D. Hogg, Q.C., for the Crown.

HON. C. P. DAVIDSON, JUDGE *pro hac vice*.] [Dec. 20, 1894.

THE QUEEN *v.* THE MISSISSIPPI AND DOMINION STEAMSHIP COMPANY.

Navigation—Obstruction of—37 Vict., c. 29—43 Vict., c. 30—Pleading—Allegation of negligence—Demurrer.

(1) Where a ship had become a wreck, and, owing to her position, constituted an obstruction to navigation, the court held that it was not necessary, in an information against the owners for the recovery of moneys paid out by the Crown under the provisions of 37 Vict., c. 29, and 43 Vict., c. 30, for removing the obstruction, to allege negligence or wrongdoing against the owners in relation to the existence of such obstruction.

(2) Under the Acts above mentioned, it is only the owner of the ship or thing at the time of its removal by the Crown who is responsible for the payment of the expenses of such removal.

(3) The right of the Crown to charge the owner with the expenses of lighting a wrecked ship during the time it constitutes an obstruction was first given by 49 Vict., c. 36, and such expenses could not be recovered under 37 Vict., c. 29, or 43 Vict., c. 30.

W. D. Hogg, Q.C., for the Crown.

W. Cook, Q.C., for the defendants.

BURBIDGE, J.] [March 4,

COOMBS *v.* THE QUEEN.

Contract—Common carrier—Railway passenger's ticket—Condition printed on face—No stop over—Continuous journey.

The suppliant, who was a manufacturers' agent and traveller, purchased an excursion ticket for passage over the Intercolonial Railway between certain points and return within a specified time. On the going half, printed in capitals, were the words "good on date of issue only," and immediately thereunder, in full-face type, "no stop over allowed." He knew there was printing on the ticket, but put it into his pocket without reading it. He began the journey on the same day he purchased the ticket, but stopped off for the night at a station about half-way from his destination on the going journey. The next morning he attempted to continue his journey to such destination by a regular passenger train. Being asked for his ticket, he presented the one on which he had travelled the evening before, and was told by the conductor that it was good for a continuous passage only. On his refusal to pay the prescribed fare for the rest of the going journey, the conductor put him off the train at a proper place, using no unnecessary force therefor.

Held, that issuing to the suppliant a ticket with the condition plainly and distinctly printed on the face of it was in itself reasonably sufficient notice of the conditions upon which such ticket was issued; and if, under the circumstances, he saw fit to put the ticket into his pocket without reading it, he had nothing to complain of except his own carelessness or indifference.

C. N. Skinner, Q.C., and *H. A. McKeown* for the suppliant.

E. L. Newcombe, Q.C., and *J. A. Belyea* for the respondent.

BURBIDGE, J.] [March 18.

THE QUEEN *v.* ST. JOHN GAS COMPANY.

Public harbour—Ownership under royal charter—Protection of navigation and fisheries—Nuisance—B.N.A. Act, 1867, s. 108, sch. 3, also sec. 91—Deposit by gas company into harbour of materials detrimental to fish-life, under authority of Act of Local Legislature, 31 Vict., c. 60, s. 14.

(1) The harbour of the city of St. John is not one of the public harbours which, by virtue of s. 108 and the 3rd schedule of the British North America Act, 1867, became, at the union, the property of Canada. It is vested in the

corporation of the city of St. John, who are the conservators thereof, and who have certain rights of fishing therein for the benefit of the inhabitants of the city.

(2) Notwithstanding such ownership of the harbour by the corporation of the city of St. John, and their rights therein, the Attorney-General of Canada may file an information in this court to restrain any interference with or injury to the public right of navigation or fishing in such harbour.

(3) By the Act of Assembly of the Province of New Brunswick, 8 Vict., c. 89, s. 16, incorporating the defendants, they were prohibited from throwing or draining into the harbour of St. John any refuse of coal-tar or other noxious substance that might arise from their gas works, under a penalty of £20.

Held, that the remedy so provided was cumulative, and that while the repeal of the provision might relieve the defendants from the penalty prescribed by the Act, such repeal would not legalize any nuisance they might commit by throwing or permitting to drain into the harbour the refuse of coal-tar or other noxious substance that might result from the manufacture of gas at their works.

(4) *Semble*: That while an exemption granted by the Minister of Marine and Fisheries under s-s. 2 of 31 Vict., c. 60, s. 14, may be a good defence to a prosecution for the penalty therein prescribed, it would not afford a good answer to an information to restrain any one from throwing any poisonous or deleterious substance into waters frequented by fish if the act complained of constituted an injury to or interference with some right of fishing existing in such waters.

(5) By the Act of Assembly of the Province of New Brunswick, 40 Vict., c. 38, authority was given to the defendants to construct a sewer, with the sanction of the Governor-General of Canada (which was obtained), from their gas works to the harbour for the purpose of carrying off the refuse water from such works. It was further provided by the Act that the drain should be laid under the supervision of the common council of the city, and that no discharge therefrom should take place or be made except upon the ebbing of the tide, and at such times during the ebbing of the tide, as the common council should direct. After the drain was constructed it appeared that at times tar had been suffered to escape with the refuse water through the drain into the harbour, but that the discharge of refuse water, when separated from the tar, had not been injurious to the fisheries carried on in the harbour.

Under these circumstances, the court granted an order restraining the discharge of tar and other noxious substances through the drain by the defendants, and further restraining them from allowing any discharge therefrom, except at the ebbing of the tide, and at such times during the ebbing of the tide as the common council of the city of St John might direct.

Held, that whilst the Legislature of New Brunswick could not at the time of the passage of the Act of the Assembly, 40 Vict., c. 38, legalize such an interference with or injury to the right of navigation or fishery as would amount to a nuisance, they could authorize the construction of a drain to carry the refuse water from the defendants' works to the harbour, and, so long as the discharge of such refuse water through the drain did not amount to a nuisance,

there was no ground upon which to enjoin the defendant company to remove their sewer or to abandon the use of it.

J. G. Forbes, Q.C., and *L. H. Currie* for the Crown.

J. D. Hazen for the defendants.

BURBIDGE, J.] [April 1.

THE QUEEN *v.* MONTREAL WOOLLEN MILL COMPANY.

Incidental demand—Counterclaim—Substantive cause of action—Pleading.

A substantive cause of action cannot be pleaded as an incidental demand or counterclaim to an information by the Crown. (See 50 & 51 Vict., c. 16, s. 23.)

W. D. Hogg, Q.C., in support of motion to set aside incidental demand.

T. S. MacLellan, contra.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Chancery Division.

Chambers, BOYD C.] [March 12.

REGINA EX REL. ST. LOUIS *v.* REAUME.

Quo warranto—Election of deputy-reeve—Irregular addition of names to voters' lists—Quashing election.

Held, that the deputy-reeve of the municipality here in question must be unseated, because, although he had a majority of sixty-six votes, he participated in a transaction by which on the Saturday before polling day some eighty names were added to the voters' list over and above those certified by the judge to be properly there. And the fact that according to the marks on the polling books only some thirty-one of those whose names were so illegally added cast votes was not the standard by which to judge, whether the result was or was not affected within the meaning of R.S.O., 1887, c. 184, s. 175. No one could say how the addition of these names operated on the voting constituency.

W. H. R. Clement for the relator.

Aylesworth, Q.C., for the respondent.

Single Court, BOYD, C.] [March 14.

WAWANOSH SCHOOL SECTION.

Public Schools Act—Readjustment of boundaries of Union School Section—Arbitration—Finality of award.

The intention of the Public School Act, 1891, ss. 87-88, is to make an award dealing with the adjustment or readjustment of the boundaries of a Union School Section conclusive of the question for five years after the award

goes into operation, even though the decision of the arbitrators be that no change be made in the boundaries. The test as to whether a change should or should not be made is not to be applied oftener than quinquennially.

J. Cartwright, Q.C., for the Minister of Education.

No one *contra*.

Chambers, BOYD, C.] [March 16.

RE MARTIN.

Executors and administrators—Registration of caution—56 Vict., c. 20 (O.).

Held, that the provisions of 56 Vict., c. 20 (O.), as to registration of caution applied to a case in which probate has not been taken out or letters of administration obtained till more than a year after the death of the owner. By virtue of section 2 the effect of such subsequent registration would be only to withdraw to or vest in the executor or administrator so much of the land as is properly available for the purposes of administration.

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

Practice.

Chy. Div'l Court.] [March 2.

BELL *v.* VILLENEUVE.

Writ of summons—Service out of jurisdiction—Rule 271 (e)—Breach of contract within jurisdiction—Letter—Evidence—Undertaking.

Where a contract of hiring is made within the Province of Ontario, and the work thereunder is to be done there, the commission therefor will also be payable there.

Hoerler v. *Hanover, etc., Works*, 10 Times L.R. 22, and *Robey* v. *Snaefell Mining Co.*, 20 Q.B.D. 152, referred to.

If the contract is ended by letter sent from another Province, *quære* whether this indicates that the breach complained of was out of the Province.

And where, upon a motion to set aside service of a writ of summons on defendants, resident out of the jurisdiction, in an action for breach of contract of hiring, there was conflicting evidence as to whether the discharge of the plaintiff from the defendants' service was by letter or by the act of an agent of the defendants within the Province, the plaintiff was allowed to proceed to trial upon his undertaking to prove at the trial a cause of action within Rule 271 (*e*).

T. E. Williams for the plaintiff.

Dewart for the defendants.

FERGUSON, J.] [March 16.

ROBERTS *v.* DONOVAN.

Attachment for contempt—Discharge—Habeas corpus to bring up prisoner to move in person.

This was an application by one of the defendants, who is confined in the common gaol under a writ of attachment against him for not obeying a judgment of the court pronounced upon consent, for a fiat or order that he be

brought before the court for the purpose of his moving in person for his discharge, on the ground that he is unable to perform or do what is required by the judgment.

FERGUSON, J.: The defendant is in contempt for disobedience of the judgment. The position of the defendant was fully stated by me in a former judgment upon a manifold application by him for, amongst other things, the having of the original judgment vacated.

In the case of *Ford* v. *Nassau*, 9 M. & W. 793, it was decided that the court will not grant a writ of *habeas corpus* to bring up a party in custody under an attachment to enable him to move in person to set it aside. The learned judges in that case refer to authorities on the subject, and seem to have entertained no doubt in respect of the application. The same case is also reported in 1 Dowl., P.C., at page 631.

In the case of *Ford* v. *Graham*, 10 C.B. 369, it was decided that it was entirely in the discretion of the judge to grant or refuse a writ of *habeas corpus* to enable a prisoner to attend and show cause against a summons. In that case Maule, J., said: "I do not see why a prisoner should have a *habeas corpus* whenever he pleases, in order that he may come out and conduct his business, whether that business consists of a proceeding in court or at chambers, or anything else." And Jervis, C.J.: "The matter is clearly in the discretion of the judge; and I think the refusal was justified, no special ground being laid for the indulgence."

Both these cases are referred to as being the existing law in the last edition of Church on Habeas Corpus, 1893, at s. 95; and it does not appear, so far as I have been able to see, that the law on the subject has been changed since these cases were decided.

When, as here, the party imprisoned desires to move, the *habeas corpus* will not be granted. When the object is to show cause to a motion, the granting of the writ is discretionary, the discretion to be exercised in favour of the applicant upon special ground laid.

If this application had been for a *habeas corpus*, I should feel bound to refuse it, and the reason for refusing is much greater when only the fiat, or order, is asked; for when the *habeas corpus* is granted and acted upon, the party is in custody by virtue of the writ until remanded to the custody whence he came, when he is again in prison under the attachment. I do not see how the same would be the case if only a fiat or order existed. I do not see that the sheriff would be bound to render obedience to a fiat or order; nor do I see that the party, if removed from prison under such a fiat or order, would, in the meantime, be in proper and legal custody.

I am authorized to say that when, on a former occasion, such a fiat or order was granted in this case, authorities were not referred to or consulted. On the present application no special ground is laid. There is nothing beyond the bare request, and I think I am bound to refuse it.

Moss, Q.C., for plaintiff.

J. MacGregor for defendant.

ROBERTSON, J.] [March 29.

IN RE MOORE *v.* FARQUHAR.

Mandamus—Division Court—Application for new trial—Time—Judgment—Notice of judgment—R.S.O., c. 51, ss. 144, 145—57 Vict., c. 23, s. 4.

Motion by the defendant for an order in the nature of a mandamus directed to the second junior judge of the County Court of the county of York, commanding him to hear a motion by the defendant for a new trial of a plaint in a Division Court, which motion the judge refused to hear because he considered he had no jurisdiction after the lapse of fourteen days from the delivery of judgment.

After the hearing of the plaint, the judge postponed his judgment, and afterwards delivered it in writing to the clerk of the court. By reason of a mistake of the clerk, the defendant was not notified of the judgment for several days after its delivery, and, assuming that the notification which he did receive (not dated) was promptly sent, he made his motion for a new trial just before the expiry of fourteen days from the date at which he received notification, and after the expiry of fourteen days from the actual delivery of judgment.

Section 145 of the Division Courts Act, R.S.O., c. 51, provides that "the judge, upon the application of either party, within fourteen days after the trial, may grant a new trial."

Rule 283 (*f*) of the Revised Rules of the Division Courts, 1894, provides that "where, under the 144th section of the Act, judgment in writing is delivered at the clerk's office, application for a new trial may be made within fourteen days from the day of delivering such judgment."

By 57 Vict., c. 23, s. 4, an amendment was made to s. 144 of R.S.O., c. 51, which now reads: "The judge in any case heard before him shall, openly in court and as soon as may be after the hearing, pronounce his decision, but, if he is not prepared to pronounce a decision instanter, he may postpone judgment until it is convenient for him to give the same, when he shall forthwith send the same to the clerk of the court, who shall, upon the receipt thereof by him, forthwith enter the judgment and notify the parties to the suit of the same; and such judgment shall be as effectual as if rendered in court at the trial."

The motion for a mandamus was argued in Chambers on the 29th of March, 1895.

ROBERTSON, J., held that, in view of the amendment allowing judgment to be given without previously naming a day, and directing that the parties shall be notified, the fourteen days within which a party may move for a new trial do not begin to run until the day on which the party has notice of the judgment.

Ordered, that a mandamus should issue in one week, unless the judge should see fit to act upon the opinion expressed. No costs.

W. R. Smyth for the defendant.

Angus MacMurchy for the plaintiff.

MANITOBA.

COURT OF QUEEN'S BENCH.

TAYLOR, C.J.] [March 18.

RE HAMILTON'S TRUSTS.

Principal and surety—Rights of surety to securities held by creditor—Further advance by creditor.

This was an application to the court for a decision as to who was entitled to a surplus arising from the sale of three parcels of land, two of which, namely, lots 28 and 29, stood in the name of James Hamilton, and the third in the name of his brother, John Hamilton, but John Hamilton was the beneficial owner of lot 13.

The two brothers mortgaged the three lots to a loan company for $1,350, of which $390 was received by James and $960 by John. After the mortgage, John Hamilton borrowed $200 from Drewry, who took a mortgage signed by both brothers upon the three lots as security for the loan. He was aware that James Hamilton was only a surety in respect of this mortgage. After that Drewry made a further advance to John Hamilton, and took a mortgage from him upon lot 13 in security therefor. It was after all these loans had been made that the first mortgagees sold the three properties as follows: Lot No. 28 for $780; Lot No. 29 for $600; Lot No. 13 for $440. The amount of the surplus after the sale was $503 56.

James Hamilton admitted that Drewry was entitled out of this sum to receive the full amount ($189.20) due to him on the loan secured by the mortgage of the two brothers, but he claimed that he was entitled to the benefit of the security held by Drewry for the loan guaranteed by him, and now paid off out of his property, in priority to Drewry's subsequent advance, and to have the remainder of the surplus paid to him, because, as between him and his brother, he only owed $196 of the money due to the first mortgagees.

Held, that it is only in cases where there is an agreement constituting for a particular purpose the relation of principal and surety, to which agreement the creditor thereby secured is a party, that the stringent equitable rules as to the duty of the creditor and the rights of the surety apply, and that the present case was not one of them, and, therefore, that Drewry was entitled to hold the security obtained by him from John Hamilton for his further advance in priority to the rights of James Hamilton as surety against the same security pledged for the first advance.

Duncan, Fox & Co. v. *North and South Wales Bank*, 6 App. Cas. 1, followed.

Held, also, that, after deducting Drewry's $189.20 from the surplus, the remainder should be apportioned between the three parcels of land in the ratio of their values as determined by the sale, and that James Hamilton was only entitled to $130.43, being the proportion attributable to his lot No. 28.

Howell, Q.C., and *Monkman* for James Hamilton.

Perdue for Drewry.

TAYLOR, C.J.] [March 26.

MANITOBA MORTGAGE CO. *v.* DALY.

Statute of Limitations—Time when right of action accrued—Onus of proof—Evidence of default in payment—Estoppel.

This was an action upon a covenant in a mortgage, dated 2nd of January, 1883, for payment of $2,400 on the 1st of January, 1886, with interest half-yearly. The mortgage contained the usual proviso that on default of payment of interest the principal should become payable.

Defendant pleaded the Statute of Limitations, and plaintiffs joined issue.

At the trial plaintiffs put in evidence their mortgage deed.

Held, following *Reeves* v. *Butcher*, (1891) 2 Q.B. 509, and *Kemp* v. *Garland*, 4 Q.B. 519, that the statute began to run from the time when the first default in payment of interest was made, since the right of action then accrued to the plaintiffs, but that the onus lay upon defendant to prove that default was made earlier than the time fixed for payment of the principal. Plaintiffs were entitled to rely upon the production of the mortgage to prove default at 1st of January, 1886, but it did not follow from that that there had been any earlier default, and as defendant gave no evidence on this point the issue was decided against him.

He also pleaded that plaintiffs were not a body corporate, or entitled to sue in this Province or to take mortgages by the said name and style.

Held, that this defence was not open to the defendant, and that a man cannot set up the incapacity of the party with whom he contracted in bar of an action by that party for breach of the contract: Bigelow on Estoppel, p. 465, *Cowell* v. *Colorado Springs Co.*, 100 U.S. 55.

Verdict for the plaintiffs.

Howell, Q.C., for the plaintiffs.

Culver, Q.C., for the defendant.

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

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Implied warranty in manufacturer's contract of sale. *Ib.*, 182.
Property in growing trees. *Ib.*, 230.
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Obstructions near harbours. 58 *Justice of the Peace*, 761.
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Drain or sewer. 59 *ib.* 82.
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