Vol. III. MARCH, 1897. No. 3.

The BARRISTER

A. C. MACDONELL, D.C.L., Editor.

CONTENTS.

Published by The CANADIAN LEGAL PUBLISHING CO.

Office: Equity Chambers, Cor. Adelaide and Victoria Sts.,
TORONTO, CANADA.

(ASSESSMENT SYSTEM.)

THE BEST FRATERNAL SOCIETY IN THE WORLD.

Most Equitable System. Up-to-date Management.

Prompt Settlement of Claims.

Large and Constantly Increasing Reserve and Membership.

BENEFITS GIVEN BY THE I. O. F.

For Yourself During Lifetime.

A.—FURNISHED BY THE SUBORDINATE COURTS.

1.—Free Medical Attendance of the Court Physician within whose jurisdiction you are taken sick, as well as trained nurses if deemed necessary by the Court.

B.—FURNISHED BY THE SUPREME COURT.

2.—A Sick Benefit of $3.00 a week for the first two weeks and $5.00 a week for the next ten weeks, and, as provided in Section 224 (5) of the Constitution and Laws of the Order, $3.00 a week for an additional twelve weeks.

3.—A Total and Permanent Disability Benefit of $250, $500, $1,000, $1,500, $2,000 or $2,500.

For Your Beneficiaries at Your Death.

4.—A Funeral Benefit of $50.

5.—A Mortuary Benefit of $500, $1,000, $2,000, $3,000, $4,000 or $5,000.

THE COST IN THE I. O. F.

The cost of joining the I. O. F. ranges from $6.50 to $12.00, according to the amount of Benefit taken.

RATES OF ASSESSMENT PER $1,000.

ORDINARY CLASS.

Age.	Per Month.	Per Year.	Age.	Per Month.	Per Year.	Age.	Per Month.	Per Year.
18	$ .60	$7.20	31	$ .73	$ 8.76	44	$ 1.20	$14.40
19	.61	7.32	32	.74	8.88	45	1.30	15.60
20	.62	7.44	33	.75	9.00	46	1.40	16.80
21	.63	7.56	34	.76	9.12	47	1.60	19.20
22	.64	7.68	35	.78	9.36	48	1.90	22.80
23	.65	7.80	36	.80	9.60	49	2.20	26.40
24	.66	7.92	37	.82	9.84	50	2.50	30.00
25	.67	8.04	38	.84	10.08	51	2.60	31.20
26	.68	8.16	39	.86	10.32	52	2.70	32.40
27	.69	8.28	40	.90	10.80	53	2.85	34.20
28	.70	8.40	41	.95	11.40	54	3.00	36.00
29	.71	8.52	42	1.00	12.00			
30	.72	8.64	43	1.10	13.20			

INVESTMENTS OF FUNDS.

The Supreme Court surplus funds are invested in (1) Dominion Stock, $100,000; (2) Government Stock deposited in Great Britain, £20,000; (3) Debentures deposited in United States, $50,000; (4) Deposited with New Brunswick Government, $20,000; (5) Municipal and other Debentures, $33,170.61; (6) Real Estate and First Mortgages on Improved Property, $1,489,980.69; (7) large current deposit accounts with the Molsons Bank of Canada and the National Bank in London, England.

For further information apply to

ORONHYATEKHA, M.D., S.C.R., TORONTO, ONT.

JOHN A. McGILLIVRAY, Q.C., S.S., TORONTO, ONT.

Or any Officer or Member of the Order.

The Order does business throughout Canada, the United States north of Lat. 38° and Great Britain and Ireland.

The Barrister.

VOL. III. TORONTO, MARCH, 1897. No. 3

EDITORIAL.

United States Cases.

Because of the large number of cases of importance which we feel called upon to publish in this issue our editorial space has been necessarily cut down. We desire, however, to say a word or two about the number of United States cases published in this and other recent numbers of *The Barrister*. Firstly, they are published as affording what we trust is interesting and instructive reading. Then, again, cases are selected as far as possible which bear upon points of law under current review by our Courts or English Courts. In many cases we publish the decisions of our neighbours' Courts upon subjects that have never come before our Courts and on which we are without authority. Frequently, although not following an American authority, our Courts and lawyers follow and adopt the reasoning contained in the opinions of their Judges. In many States the laws upon given points are similar to ours, and even where they differ the principles and institutions which underlie both are English, and in the legal march onward that "common Anglo-Saxon citizenship," so ably proposed by Professor Dicey, will, we feel, be promoted by a knowledge of what is being done by American Courts and lawyers in the same field.

* * *

Criticism of the Bench.

We believe that a fair and moderate criticism of the behaviour of Judges where the facts warrant it, is healthful and beneficial alike to the Bench and Bar. A Judge should be upheld when right and condemned when wrong. No Judge is above the law. Counsel in the conduct of cases in Court have rights and duties to perform which no Judge can curtail. The pathway between the rights of Judge and counsel is sometimes narrow and easily crossed. Frequently the Judge is the trespasser, but except

on points of law, and even then demurely, a Judge is seldom or never opposed. In this Province we believe the Judges have aggravated to themselves much that they do not possess in justice or by right. What is done and said by a Judge during the trial of an action is usually right. Sometimes his Lordship is wrong, yet how seldom counsel crosses swords with the Judge. We do not refer to County Court Judges exclusively; some of our High Court Judges are equally human, and although usually courteous and painstaking, they are nevertheless, in some cases, terrors not alone to evil-doers.

It is not pleasant, nor is it intended, to go into the matter in detail. It is a practice for Judges to say and do just what they please in Court. Some hew more vigorously than others, but all are alike in their utter disregard as to where the chips fall. It does not take a great deal of judicial ability to humiliate or render ridiculous counsel or solicitor in the court room. The members of the profession are officers of the Court, and within their own sphere have rights which no Court can alienate from them. They have, moreover, to perform duties to their clients, although a bystander in Court might frequently not think so. We have the greatest admiration for the English law journals in their fearless and outspoken criticism of the Bench in proper cases. In England every piece of overbearing conduct on the part of a Judge is protested against and publicly condemned. Because his Lordship with us is permitted to merely permit on sufferance the legal rights of counsel, can it be said as a matter of every-day experience that he is less liable to err than his English brother? Here are a few recent samples clipped from our able "brother-in-law," the *Law Notes* for March:—

Another example to hand of "Judges' License." In a case Mr. Willis was examining one of the railway officials, and submitted to him a plan showing the position of the trolley, when Mr. Justice Hawkins interrupted him, stating that he should allow no costs of a third day in this case, remarking that the facts were quite clear. On Mr. Kemp, Q.C., rising to cross-examine the witness, his Lordship again interfered, saying, "These cases are spun out."—Mr. Kemp: By whom, my lord?—Mr. Justice Hawkins: By all parties.—Mr. Kemp: Including your Lordship?—Mr. Justice Hawkins: Don't be impertinent. —Mr. Kemp: Your Lordship has no right to say I prolong cases. I reply that it is your Lordship.—Mr. Justice Hawkins: I say that unnecessary questions are put to witnesses.—Mr. Kemp: I am the person to consider whether it is necessary to put certain questions, and you have no right to say that. —Mr. Justice Hawkins: Don't be impertinent, Mr. Kemp, and sit down.—Mr. Kemp: I am not impertinent, it is your Lordship. It is not because your Lordship is sitting there that you have a right

to address me in this language.—Mr. Justice Hawkins: I do. Now Mr. Kemp lost his temper, but small blame to him when the Judge deliberately charges him with spinning out a case to obtain another refresher. When will Judges imitate the example of their revered ancestors and hold their tongues?

Mr. Justice North last month went outside his judicial functions. His Lordship was only asked to decide a question of copyright about the song, "You never see the same bird twice." The public are not one bit interested in knowing that his Lordship thinks it is drivel. The public do not ask their Judges to act as censors for their songs. A silent tongue makes a good Judge.

We hear that in the amusing "bug" case decided last month, too late for us to comment on, Judge Bacon, at the Bloomsbury County Court, behaved most curiously. To the witness, Mrs. Phillips, he said: Take your veil off and tip your hat back.—Mrs. Phillips: I can't.—Judge Bacon: You can. Tip it farther back.—Mrs Phillips: I can't.—Judge Bacon: Oh, yes, you can. I have had other women here, and I know what can be done. Surely, even a Judge is not justified in speaking so brusquely to a woman. In addition his Honor thought fit to severely question the witness, she having taken the oath on the New Testament. Altogether, his behaviour appears to once again illustrate our article, "Judges' License."

RECENT ENGLISH CASES AND NOTES OF CASES.

Must an information allege the actual commission of a felony to justify a magistrate in granting a search warrant?

JONES v. GERMAN.

[L. T. 317; T. 173.

No, said the Court of Appeal (Esher, M.R., Lopes and Rigby, L.JJ.); it is sufficient if the information implies reasonable grounds for suspecting that the goods had been stolen.

* * *

Note on practice.

IN RE MAULE.

[L. J. 61; W. N. 8; L. T. 293.

On January 23rd, Lindley, Smith and Rigby, L.JJ., said that taxing masters must allow on taxation one copy of any necessary documents, etc., for each Lord Justice.

* * *

Can an application for consolidation of actions be made at the instance of the plaintiff under Ord. LXIX. r. 8?

MARTIN v. MARTIN.

[L. J. 72; L. T. 317; S. J. 240.

The Court of Appeal (Esher, M.R., Lopes and Chitty, L.JJ.) took time to consider, and held that the rule does not import that the application can only be made by defendants, but that the order can also be made on the application of a plaintiff if the actions are in the same division and between the same parties. (Semble, *Amos* v. *Chadwick*, L. R. 9 Ch. D. 459, overruled.)

If X. turns his business into a "one man" or "dummy" company, and receives, as part of the price for the business, debentures, and the company subsequently becomes insolvent, can the debentures be treated as "covinous bonds" within 13 Eliz. c. 5, and be set aside for the benefit of the creditors of the company?

IN RE LONDON HEALTH ELECTRICAL INSTITUTE, LIMITED.

[S. J. 275; L. J. 100.

No, said the Court of Appeal, and refused to make an order to wind up the company, as there were no assets for the creditors, in order that an inquiry might be made into the validity of the debentures.

* * *

If a first mortgagee sells the mortgaged property, and after paying himself all that is owing to him, he retains a balance in his hands instead of handing it to the second mortgagee, is the second mortgagee entitled to claim interest on the money retained?

ELEY v. READ.

[L. T. 317.

Yes, and at the rate of four per cent. per annum, said the Court of Appeal, unless the circumstances of any particular case show that it would be unjust to charge the mortgagee with interest; and the Court remarked that the fact of the second mortgagee deliberately abstaining for four years to bring an action to recover the money was not a circumstance relieving the mortgagee from the obligation to pay interest.

On what ground will the Court issue sequestration against a company?

FAIRCLOUGH v. MANCHESTER SHIP CANAL.

[S. J. 225; W. N. 7; L. T. 292; L. J. 71.

The Court of Appeal (Russell, C.J., Lindley and Smith, L.JJ., decided that this could only be done on similar principles on which a private individual is committed for contempt, *i.e.*, the order of the Court must have been contumaciously disregarded.

* * *

Are creditors or contributories supporting or opposing a petition to wind up, and appearing by the solicitors who are instructed by the petitioner or the company, entitled to a separate set of costs?

IN RE BRIGHTON MARINE PALACE AND PIER CO., LIMITED.

[T. 202; S. J. 257; L. T. 339; W. N. 12; L. J. 90.

No, said Byrne, J., remarking that he was informed that a rule had been laid down by Vaughan Williams, J., that a separate set of costs was not, in such a case, to be allowed, and he did not think he ought to refuse to adopt that rule.

* * *

When the Court has to determine whether the costs of an action brought to prove a will in solemn form shall come out of the estate of the deceased, what principle does the Court act upon?

BROWNING v. MOSTYN AND OTHERS.

[T. 184.

Barnes, J., said the question to be determined in each case is

this: Is the testator, by reason of his conduct, to be considered the cause of the reasonable litigation which has occurred after his death as to the validity of the will?

* * *

Will the Court grant an injunction restraining a trader from making representations that work or goods of a rival trader are his work or goods?

BULLIVANT v. WRIGHT.

[T. 201.

Yes, said Mr. Justice Kekewich, if the proper parties are before the Court.

* * *

If X., a cab proprietor, gives a bill of sale to A., including as part of his security several horses specifically described in the schedule, and X, after moving to other premises, sells two of the horses and substitutes two fresh ones with the consent of A., and subsequently X. sells these two horses to B., can A. claim the horses as against B.?

IN RE SPICER & CO.

[L. J. 75; W. N. 10; S. J. 242; L. T. 340.

A bill of sale to secure money cannot, as is generally known, be made to extend to subsequently acquired chattels, unless the chattels are "plant," machinery, fixtures, or growing crops, substituted for plant, etc., set out in the schedule, and this being so, could A. consider the "horses" as "plant" was the question in the case we have set out, and the Divisional Court, without holding that the word "plant" might not cover horses comprised in a bill of sale given by a cab proprietor (see *Yarmouth* v. *France*, 19 Q. B. D. 649), decided that A. could not claim the horses in question, since the substitution must be of one thing for another in connection with the same place, that is, "local substitution," and in this case the new horses were on different property.

* * *

If a solicitor institutes proceedings for an infant without authority and acting on the instructions of a third person, is he personally liable for defendant's costs?

GEILINGER v. GIBBS.

[L. J. 74; L. T. 317; S. J. 243; W. N. 12.

Yes, said Mr. Justice Kekewich, and even though the solicitor had no knowledge of the infancy.

* * *

Court of Appeal.

[LINDLEY, L.J., SMITH, L.J., RIGBY L. J.—Court of Appeal—FEB. 15, 16.

SEAWARD v. PATERSON.

Contempt—Committal—Breach of injunction—Aiding and abetting.

Appeal from a decision of North, J

At the trial of the action, North, J., granted an injunction to restrain the sole defendant from doing anything at 53 Fetter Lane, E.C., which might be a nuisance to the plaintiffs; the order following the words of a covenant in a lease. This order was served upon the defendant, and upon Sheppard and Murray, who were alleged to be connected with the defendant in carrying on the Queensbury Sports Club and holding boxing competitions at the premises in question. The plain-

tiffs now moved that Paterson, Sheppard and Murray might be committed to prison, or that writs of attachment might be issued against them, for contempt in having disobeyed and aided and assisted in disobeying the injunction.

North, J., committed Murray and Paterson to prison for a month, and Sheppard for a fortnight. Murray appealed.

Their Lordships dismissed the appeal. They said that it was true that Murray was not, and never had been, a party to the action, and there was no injunction against him. But he was bound not to interfere with orders of the Court or obstruct the course of justice. The Court had jurisdiction to commit by way of punishment as well as in matters ancillary to the security of the rights of litigants. In this case the appellant had known all about the litigation, and had aided and abetted a flagrant breach of the injunction, and the order of the Court was perfectly right.

* * *

Nuisance—Public — Liability of owner of land for—Injunction —Powers and remedies of sanitary authority—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 2, 4, 5, 13, 35, 138.

THE ATTORNEY-GENERAL v. TOD-HEATLEY.

[Feb. 18.

Appeal from a decision of Kekewich, J. (noted 31 L. J. N. C. 649).

The action was brought by the Attorney-General at the relation of the united vestry of certain parishes, and the vestry, for an injunction to restrain the owner of a piece of land within the parishes from allowing the land to be and remain a nuisance.

The land was vacant land surrounded by a boarding; and it was alleged that the boarding was out of repair, and the land had become a receptacle for refuse which caused the nuisance complained of. Kekewich, J., dismissed the action, on the ground that an injunction, if granted, would entail very serious outlay and difficulty upon the owner, and that, under s. 35 of the Public Health (London) Act, 1891, the vestry had power themselves to remedy the nuisance.

The plaintiffs appealed.

Their Lordships allowed the appeal. They said that the owner had a duty at common law to prevent his land from being a public nuisance, and it was no answer for him to say that the refuse had been put on the land by other people. The Attorney-General was, therefore, entitled to an injunction to enforce the performance of that duty. As regards the Act of 1891, if the vestry were to act under s. 35 they would be obliged constantly to put their powers into force, whereas, if they got an injunction, there would be only one order, once for all. Under s. 13 the sanitary authority might, if in their opinion summary proceedings would not give an adequate remedy, take proceedings in the High Court to abate a nuisance; and under s. 138 the powers and remedies given by the Act were in addition to, and not in derogation of any other powers, rights, and remedies conferred by law. The Act, therefore, afforded no reason for refusing the injunction; but inasmuch as the owner was willing to arrange with the vestry for the removal of the refuse at his

expense, an injunction would not now be granted, though the Attorney-General would have liberty to apply to the Judge for one if necessary.

* * *

Solicitor and client— Lien—Inspection of Documents.

IN RE BIGGS AND ROCHE.

KEKEWICH, J.—Chancery Division—[FEB. 12.

This was a motion on behalf of a lady for an order that her former solicitors might be ordered to produce to her or her solicitors all deeds or papers in their possession, but without prejudice to their lien (if any), and that copies or abstracts of the documents might be taken.

There were costs due to the former solicitors, who relied upon their lien.

E. C. Macnaghten, for the motion, referred to the case of *Lockett* v. *Cary* (1864), 10 Jur. N. S. 144; 3 N. R. 405, where Lord Romilly stated that the lien of a solicitor did not prevent his client from inspecting the documents.

T. R. Warrington, Q.C., and G. F. Hart, for the respondents.

Kekewich, J., said that it was of importance not to interfere with the lien of a solicitor, and that it would destroy the entire purpose of such a lien if the client was to be at liberty to see the documents in the possession of the solicitor and carry away the contents in his memory, or make copies of them. That would be giving him all he wants except the actual documents themselves. The motion must be refused with costs.

Innkeeper—Common inn—Traveller continuing to stay at inn and abandoning intention to proceed—Liability of innkeeper to lodge.

LAMOND v. RICHARDS AND OTHERS.

[LORD ESHER, M.R., LOPES, L.J., CHITTY, L.J.—Court of Appeal—FEB. 22.

Appeal from decision of Divisional Court (Wright, J., and Bruce, J.) affirming judgment of the Judge of Brighton County Court for defendants.

The action was for damages for illegal expulsion from the Hotel Metropole at Brighton, of which the defendants were the managers and proprietors.

The plaintiff went to the defendants' hotel in the autumn of 1895, and stayed there until the end of August, 1896, paying her bill regularly.

In August, 1896, the defendants gave to the plaintiff reasonable notice to quit the hotel, and when she failed to do so, during her absence from the hotel for a short time, packed up her goods and placed them in the hall of the hotel, and on her return refused to allow her to enter the hotel.

The County Court Judge held that the hotel was a common inn under the common law liability to afford accommodation to travellers coming to it, and that there was nothing in the condition or conduct of the plaintiff to justify the defendants in refusing to provide her with accommodation, but that the plaintiff had long ceased to be a traveller in the ordinary sense of the term, and that therefore the defendants were entitled to determine the accommodation claimed by the plaintiff by reasonable notice, and justified, on her paying no

attention to the novice, in preventing her from re-entering the hotel and in placing her goods at the entrance for her to take away. The County Court Judge, on these grounds, gave judgment for the defendants.

The Divisional Court affirmed the decision of the County Court Judge.

The plaintiff by leave appealed.

Their Lordships dismissed the appeal, holding that the County Court Judge was right in finding upon the whole of the evidence, and taking into consideration that ten months had elapsed since the arrival of the plaintiff at the hotel, that the plaintiff had ceased to be a traveller, and that the defendants were entitled in those circumstances to terminate the relation of host and guest between themselves and the plaintiff by reasonable notice.

Appeal dismissed.

THE ANIMAL KINGDOM IN COURT.

PAPER I.

"Mine enemy's dog—though he had bit me, should have stood that night against my fire."

Though human beings are the only creatures that the dignity of the Courts will stoop to recognize as parties in litigation, the subject-matter of litigation is hampered by no such exclusive restriction, and men may bring the bone of contention into Court and pick it there whether their dispute be concerning men or things or animals. It would not be easy to say which—men or things or animals—is directly responsible for the greatest amount of litigation, but if by common consent it is agreed that man himself is directly responsible for most, and indirectly, of course, for all litigation, perhaps the animal kingdom bears the palm next in order in direct responsibility.

Of animals, though perhaps not the first in resources as a provoker of litigation, certainly the most interesting animal who trots into Court is the dog. It is hard to state in so many words why we look upon the dog as our nearest in intelligence and sympathies, yet it is certain that no animal approaches so near to human intelligence, the greatest element in man. There must be some merit in dogs not apparent in a material sense, and not felt, as a result of their service to mankind, for though of no actual use and in fact being the consumers of more food than would equal in value their service when on rare occasions they are useful, yet the world over man cherishes the dog and refuses to be without his company and companionship. It follows that with the almost actual uselessness of the dog that it is not an earner or source of profit to man, and consequently the owners of dogs are generally defendants rather than the plaintiffs. But even with this as the usual and likely position of a dog-owner in Court, yet a dog's master is not often a loser through his proprietorship. As early as the year 1710 in the case of *Mason* v. *Keeling*, 1 Ld. Raym., p. 601, we find

the Court, through Lord Holt, saying that "the law takes notice that a dog is not of a fierce nature but rather the contrary." And in this dictum we see the first foundation stones in the well-defined and settled outlines that the law upon the subject has assumed. Once it is established that the nature of the species is gentle and that every dog is a law-abiding and peaceable Bruno, then it becomes necessary, before liability for the vulgar transgressions of a fierce Towzer can be fastened on the owner, that he should have previous knowledge of the unusual and not-to-be-expected feature.

This is called scienter, and until an owner has this knowledge of his dog's viciousness he is not responsible, though in the error of its ways it should behave itself in ways not becoming a gentleman of the dog species, or a lady, as the case may be. To be more accurate and exact, once a dog has departed from the narrow path of rectitude and demeaned itself in ways other than should obtain with a strictly proper and gentle animal, and the owner knows of it, then it loses status and caste, and must be put down as a vicious animal, and the owner keeps it at his peril. Lord Coleridge, it seems, was anxious to reduce the law on the subject to a nicety in the way of succinctness and brevity, and he succeeded by saying that "Every dog is entitled to one bite," and the case has special reference to spring lamb or veal. The expression is varied by making it "Every dog is entitled to one worry." We can hardly find a fairer illustration of the law than *Beck* v. *Dyson*, 4 Camp. 198, decided in 1815. The ungallant and bad-mannered cur of Mr. Dyson, seized with some apparently uncontrollable and wicked impulse, sunk his sharp teeth deep into the flesh of Beck's dearly beloved wife. She was dreadfully lacerated, and we suspect equally vexed and wrathy; and who could blame her if she dragged Dyson to the bar of justice and asked for damages, substantial damages? It was proved that the dog was of a fierce and savage disposition, that the defendant generally kept him tied up, and that the defendant also sought to placate and soothe the before-mentioned wrathiness of Mrs. Beck by an offer of pecuniary recompense. But even-handed justice in the light of judicial decision decreed that as the dog was never known to have previously fallen from grace in the way of biting human beings, the plaintiff was nonsuited. The principle of the two cases above quoted was pushed so far in a House of Lords case (*Fleming* v. *Orr*, 2 Macq. 14), where the dog had worried sheep, that an Act was passed for Scotland doing away with the necessity for scienter in cases of sheep worrying, and this law has been introduced into Ontario (R. S. O. c. 214). But the general features of the law, other than the case of sheep, remains practically intact. It has been decided that attempts to bite people will suffice, but a warning to "beware of the dog" won't establish ferocity. Though we have seen that keeping a dog tied up falls short of being evidence, yet this, coupled with general report that the dog was mad, will do. A man must be careful how he places a vicious dog on his place even as a protection. If the person injured is a wrongdoer in entering where the dog is he cannot complain; but if his mission be innocent, or even if he goes as a

beggar, he can succeed in an action if injured. Closely allied, and to some extent apt to be confounded with the subject under consideration, is the question of trespass. The cases of *Lee* v. *Riley*, 18 C. B. N. S., and *Ellis* v. *Loftus Iron Works*, L. R. 10 C. P., decide that where an animal of the defendant's causes damage on the plaintiff's property while and as a natural consequence of a trespass on the defendant's lands that there is a liability without scienter. But it seems to be considered that this would not apply to a dog. The question of proximity and remoteness of damages has to be considered, and while the fact that the defendant's stallion, as in the last case, kicked and bit the plaintiff's mare while trespassing on the plaintiff's land was not considered too remote, it is questionable whether the same rule would govern where a dog running under a fence kills chickens. Certainly in *Read* v. *Edwards*, 17 C. B. N. S., just such a case, the presence of scienter seems to have been required though the dog was a trespasser on the plaintiff's property.

Though there are many cases more or less important, each contributing its share to the moulding of the laws, it is believed there are none of very great importance between the time of the deciding of the above and the rendering of decision of the last case on the pages of the Reports, namely, *Osborne* v. *Chocqueel*, 2 Q. B., 1896, p. 109. There the plaintiff, who had had unpleasant contact with a dog, sought to make its owner liable, and essayed to establish scienter by proof that on a previous occasion the dog had shown a hostile feeling to a goat—had, in fact, handled the goat quite roughly. But Lord Russell of Killowen laid it down emphatically that the ferociousness must consist in the previous ferociousness toward mankind. But it would appear that ferociousness towards man will support an action for ferociousness practised on an animal, and even that quality previously exhibited toward animals would suffice where the damage is the result of similar acts. The killing of a dog is permissible if nothing short of that will prevent its viciousness toward man or beast. But the decisions do not favour this, and it is a rare case where it can be justified. Dogs taken red-handed or *damage feasant* may be distrained, and even when within whistle of the master. Where both the master and dog are trespassers together on the plaintiff's land scienter is not necessary, and plaintiff will succeed.

RECENT UNITED STATES CASES AND NOTES OF CASES OF INTEREST.

Medical expert testimony.

STATE v. DUESTROW.

During the trial of the recent case of *State* v. *Duestrow* (Mo.), which resulted in the conviction and execution of the defendant for murder, numerous medical experts testified—among them men of national and also some of in-

ternational reputation. Six experts on the side of the defence, in response to hypothetical questions presented by counsel for defendant, declared it as their opinion that the hypothetical defendant was insane at the time of the commission of the homicide, and that he remained insane from that time, and after the finding of the indictment, and that he was insane at the time of the trial. At the time of the homicide, they declared, he was suffering with alcoholic epileptic mania, and after his incarceration became afflicted, and then was suffering with paranoia. These experts, it was shown, were in the employ of the defendant almost from the time of the homicide until the trial, and received liberal fees; and other fees it seems were in prospect. Four of the witnesses had visited the defendant in prison daily for eighteen months. By the testimony of five experts on the part of the State, it was shown that they, at the request of the prosecuting officers, began to visit defendant in February, 1895, immediately after the first insanity hearing. That they visited him for the purpose of determining the question of his mental condition; that they were practically without compensation—scarcely enough to defray their expenses. That during their frequent visits to the jail, they conversed with the defendant, noted his actions, unobserved by him; examined him with his permission; carefully observed his conduct during the three trials in Court following the first; took into consideration the fact that when the very matters concerning his supposed delusions were being testified to in open Court in his presence, and opinions expressed both of their truth and untruth, he never flinched, nor uttered one word of disapprobation. These experts all testified that they saw nothing in his physical makeup, in his manner, conduct, or conversation, or in the facts as testified to by witnesses both for the State and the defence, or either, to indicate insanity, and upon hypothetical questions propounded both by the state and defence, based upon the evidence in this case in its various phases, unequivocally declared it as their opinion that the hypothetical defendant was not insane at the time of the commission of the homicide, but that he was sane, and that he was not insane at any time since the commission of the homicide, and up to the day of trial. One of the State experts did state in substance that in his opinion Duestrow did not have epilepsy at the time of the commission of the homicide, and that he did not think he had paranoia, but that he thought he had chronic alcoholism, which he described as being insanity.

Thus we have eleven gentlemen, eminent in their profession and distinguished as specialists on insanity, six of whom, with tongue in pawn, pronounce a man insane, and four of them, without fee, pronounce the same man sane, each coterie having made their observations and diagnosis under the same conditions and environments. And Courts will still permit such testimony to be received as evidence! In the case under consideration, at the last hour, when shamming could hold no hope of saving, the defendant threw off the ill-fitting mask he had sought to wear during his imprisonment, and thus confounded the wisdom of the experts and exposed the shallow craftiness of counsel—which passes for skill when successful.

Negligence—Where child impulsively springs in front of street car and is killed, finding of jury, that company is liable sustained—Waterman, J., dissenting.

CALUMET ELECTRIC STREET RY. CO. v. NETTIE E. VAN PELT.

[Appellate Court, Illinois.

Three little girls were running and playing in the street near appellant's tracks upon which it was operating its street cars. Upon nearing obstructions in the street narrowing the passage way along the tracks to a space some three feet wide, the decedent nine years of age, leaving her two companions who passed through the space next the track, undertook suddenly to spring or run across appellant's track so close by in front of its moving car that it was impossible to stop it, and was killed. Held, that under the facts and circumstances, the jury were justified in finding that the car should not have driven to pass the child, and that more regard should have been had as to the uncertainty of what a child might rashly do under the circumstances.

* * *

TROLLEY COMPANIES.

The introduction into crowded cities and towns of trolley cars has wonderfully increased the sum of accidents, and the litigation arising therefrom begins to fill the Courts.

Says the New Jersey Court of Errors and Appeals: "Trolley companies, by permission of the Legislature, may, in common with all persons, lawfully use that part of the highway over which their tracks are laid. Every other citizen may use all parts of the way, including the railway tracks, excepting use of the rails, for the purpose of conducting the business of transportation in competition with the trolley companies. *Citizens' Coach Co.* v. *Camden Horse R. R. Co.*, 6 Stew. Eq. 267.

"An unreasonable obstruction to the passage of the trolley car, in the conduct of its business, like the unreasonable obstructions to the passage of any other vehicle in pursuit of its legitimate occupation along the street, would constitute a nuisance and subject the offender to suit and penalty at law. The electric car in question had the right to continue on its course in the straight line to which it was confined by the railway tracks, provided that, in so doing, it did not interfere with the rights of others. It could not turn out for other vehicles, but in this case there was no impediment to prevent the decedent from turning out to let the car pass. In the exercise of their mutual rights it was incumbent upon the driver of the carriage, upon notice of the approach of the electric car, to make way for the latter. It was his duty to do so. Wilful and unnecessary obstruction to the car's progress at its usual and lawful speed could have been punished by legal process. The Legislature, however, did not clothe the railway company with power by violence to enforce the law for its benefit, or to punish the violation of a public right. It could not take the law into its own hands and by violent means force the obstructing vehicle from its way. In doing so, it would clearly become a wrong-doer. *Paterson Railway Co.* v. *Lamring*, 18 N. J. Law Journal 245; *North Hudson R. R. Co.* v. *Isley*, 20 Vr. 468."

Innkeepers—Liability—Theft by servants.

CUNNINGHAM v. BUCKY.

[Supreme Court of Appeals of West Virginia, DEC. 9, 1896.

1. An inn or hotel keeper is a guarantor for the good conduct of all members of his household, including those engaged in his service, and is liable for thefts committed by them of the property of his guests while asleep in rooms assigned them.

2. The fact that the guest is intoxicated or his door is unlocked will not destroy the landlord's liability for the acts of his servants.

* * *

Law of alimony—Husband not entitled to alimony from his wife.

GROTH v. GROTH.

[Appellate Court, First District, Illinois, MARCH, 8, 1897.

An allowance to a husband for temporary alimony and solicitor's fees, from the wife, reversed as judicial legislation, for which there is no warrant in existing law.

Appeal from order entered by Hon. John Gibbons, Circuit Court of Cook County, ordering wife to pay to husband twenty dollars per month temporary alimony, and solicitor's fees. Reversed.

Gary, J.—The appellant filed a bill to obtain a divorce from appellee. The Court ordered that she should pay him twenty dollars per month temporary alimony and twenty-five dollars' solicitor's fees, from which order is this appeal. We do not review the cause shown on which such order was made, being of the opinion that if alimony from a wife to a husband is a proper thing upon circumstances, legislation is necessary to authorize it. At common law a husband was required to provide his wife with necessaries, but there was no reciprocal duty.

The statute gives her—not him—alimony. To give it to him is not to administer existing law, but to make new law. *Summers* v. *Summers*, 39 Kan. 132; *Green* v. *Green*, 68 N. W. Rep. 947.

The order is reversed.

John C. Richberg, for appellant. Roney & Arling, for appellee.

Note.—The original opinion of Judge Gibbons may be found in the Chicago *Law Journal* (monthly) May, 1896, pp. 359-365. In characterizing the decision of Courts, which allow the wife a reasonable support pendente lite. Judge Gibbons said: "This is not statute law—simply Court-made law. If it be good law in behalf of the wife, why not in behalf of the husband? To use a trite old phrase, 'What is sauce for the goose, is sauce for the gander.'"

The Appellate Court now has turned the guns upon Judge Gibbons, and places his decision outside of the law—"simply Court-made law."

* * *

MENTAL ANGUISH IN TELEGRAPH CASES.

In an action against a telegraph company for negligence in the transmission and delivery of a message, is mental suffering alone, though resulting naturally and proximately from the neglect, if unaccompanied by any substantial pecuniary loss or physical injury, a proper element of damage, provided the message was intended for the benefit of the suitor

and the company had knowledge of the nature and importance of its contents? This important question was recently answered in the negative by the Supreme Court of Wisconsin. Being a new question in that State, and with the single exception of Dakota, the first of its kind in the northwest, we may naturally expect the added authority of so important a Court to be of considerable weight in the future, and a source of gratification to the telegraph company at least. But is the decision well founded upon logic and justice? The facts involved were substantially the following: A telegram, reading, "Mother is dying. Come immediately," was sent by one brother to another; but, through the fault of the telegraph company, was delayed in delivery some five days, during which time the mother died and was buried without the knowledge of the plaintiff. Plaintiff claimed that he would have gone to his mother's bedside had he received the telegram in time, and that by reason of the negligence of the company in delivering the message, he was prevented from doing so, and from being with his mother in her last moments, in accordance with her dying request. By reason of such negligence, he claimed to have suffered the damages in question. This state of facts is typical of this class of cases in other States.

That this is a close question, is shown by the able opposition of learned Judges, and the frequent dissenting opinions on both sides of the case. The question first came up in Texas in 1880, and has since been grappled with by only about a dozen States, with an equal division of authority, and the inferior federal Courts opposed to such damages. The United States Supreme Court has not yet passed upon it. Dakota, Kansas, Missouri, Mississippi, Georgia, Florida, and Ohio, besides Wisconsin, have sided with the federal authorities, while Texas, Indiana, Kentucky, Tennessee, Iowa, North Carolina, Alabama with possibly Illinois, together with some of the ablest text-writers, are arrayed against them. There can be no controversy as to who may sue, so long as the suitor is the beneficiary of the telegram. If he is the party injured he is a proper plaintiff, whether he had made the contract with the company or not, and whether he sues on contract or in tort.

* * *

Partnership—Illegal object.

CHATEAU v. SINGLAR.

[Cal., 33 L. R. A. 750.

Judgment for plaintiff in action to dissolve co-partnership, wind up business, and compel payment of balance due plaintiff, reversed on appeal on ground that the partnership had for its object the letting of furnished rooms for immoral purposes, and that relief will not be granted to parties to such contract.

That the Courts will not recognize a contract creating a partnership for an illegal purpose, and will not enforce the obligation to account, is well settled. See Parsons on Partnership (4th ed.), p. 8, note.

* * *

Contracts—Covenants in restraint of trade.

ALTHEN v. VREELAND.

In *Althen* v. *Vreeland*, reported in 36 Atl. Rep. 479, the Court of Chancery of New Jersey passed upon the validity of a covenant

alleged to be void as unreasonably in restraint of trade. The defendant had sold to the complainant his interest in a firm engaged in business as cracker and biscuit bakers, together with the good will, and had covenanted that he would not thereafter engage in a similar business within 1,000 miles of the city where the plant sold was located, without the written consent of the purchaser. Application was made for an injunction to restrain the violation of this latter covenant. The testimony taken established that the business sold did not extend more than 80 or 100 miles from the place where the plant sold was located. This being the extent of the business sold, the Vice-Chancellor held that the covenant in question went farther than was necessary for the protection of the business or good will sold, and declined to advise its enforcement.

This decision is undoubtedly sound. Covenants in restraint of trade are not reasonable unless restricted to the business sold; they are supported only as a protection to the good will of the trade transferred, and this good will cannot be said to extend beyond that trade. *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473, 483; *Maxim-Nordenfelt* v. *Nordenfelt*, 2 Ch. App. 307, 328; *Gamewell Fire Alarm Telegraph Co.* v. *Crane*, 35 N. E. Rep. (Mass.) 98; *Mandeville* v. *Harmon*, 15 Stew. (N. J.), 189, 192.

* * *

A PECULIAR CASE.

A peculiar case of injury to lateral support by digging a sewer trench in a street and permitting quicksand and water to run into it, and then removing them by pumps, causing the surface of the land to crack and settle and injuring the buildings thereon, is held, in *Cabot* v. *Kingman* (Mass.), 33 L. R. A. 45, to make the sewer commissioners liable if they knew the nature of the soil or ought to have known it, and did not require any unusual and extraordinary precautions to be taken by the contractor.

An excavation on one's own land without precaution to prevent the caving in of a neighbor's land is held, in *Gildersleeve* v. *Hammond* (Mich.), 33 L. R. A. 46, to create a liability for damages to a building drawn into the excavation, and which did not by its pressure cause the land to fall.

THE VOICE OF LEGAL JOURNALISM.

Extracts from Exchanges.

How Wedderburn became Lord Chancellor.

In an article dealing with encounters between Bench and Bar, suggested by the recent passage of arms between Mr. Justice Hawkins and Mr. Kemp, Q.C., the Pall Mall Gazette says: "Most dramatic scene of all, but not before an English tribunal, was that which gave a Lord Chancellor to England. In 1757 Wedderburn, under great provocation from Lockhart, another Scotch barrister, used language to him

in Court at Edinburgh which certainly cannot be justified. It was undoubtedly, as the Lord President said, when at last he did interfere, 'unbecoming an advocate and unbecoming a gentleman.' Wedderburn, beyond himself with passion, retorted, 'His Lordship had said as a Judge what he could not justify as a gentleman' (an admirable formula, by the way, when the Judge is wrong). The Bench promptly and properly resolved that he must at once apologize, under pain of deprivation. Without another word he pulled off his gown, laid it in front of him, and said, 'My Lords, I neither retract nor apologize, but I will save you the trouble of deprivation; there is my gown, and I will never wear it more: *virtute me involvo*,' and with a bow he left the Court. That very night the future Lord Loughborough set out for London.

* * *

Larceny.

The defects of the law as to larceny were well illustrated by a case before Mr. Slade at Southwark Police Court. A charge of theft was brought against the secretary and treasurer of a "shop loan club," comprising twenty-five members, mostly employees of one firm. The members paid in weekly sums to the secretary, which for 1896 amounted to about £40. On this the secretary was entitled to a shilling from each member, and the money was shared out at the end of the year. Just before Christmas the secretary absconded, and no sharing-out took place. The magistrate held, as he was bound to do, that the money was not deposited for safe custody and was not ear-marked, the secretary could not be convicted of any offence under the Larceny Act, nor, the society not being registered, of any offence under the Friendly Societies Acts; so that, assuming the secretary to be in default, the remedy is civil only, which is too encouraging for careless secretaries.—*Law Journal.*

* * *

Breaches of Confidence.

When a servant has broken a covenant not to reveal his master's business transaction and an action is brought to restrain him from committing further breaches, an interim injunction in the terms of the covenant will usually be granted. The Court of Appeal, however, have just had to consider how far such an injunction, granted in the High Court, should be allowed to stand when it might prevent justice being done to a third party. A discharged solicitor's clerk was making disclosures to a former client of his employer about some alleged misconduct of the latter, and the client was taking proceedings against the solicitor, actively assisted by the clerk. It was contended for the solicitor that, except perhaps where a master had committed a criminal act, his right to be protected was absolute. The Court, however, held that for the sake of justice the clerk must be allowed to furnish the client with a proof of the evidence which he could give, and varied the injunction accordingly. Under the peculiar circumstances of the case we think that the Court was unquestionably right, on grounds of public policy, in sanctioning a breach of the covenant.—*Law Journal.*

Misconduct of Counsel—Jury Influenced by Tears.

The conduct of counsel in argument before a jury has often been such as to work a reversal of his case. But never before has an appeal been taken to the Court of last resort because an attorney in arguing a case excited the sympathies of the jury by opening the cockles of his sympathetic heart and letting out a flood of tears. Such a case has been passed upon in Tennessee. The Court, by Judge Wilkes, in passing upon the question, said:

"It is next assigned as error that counsel for plaintiff, in his closing argument, in the midst of a very eloquent and impassioned appeal to the jury, shed tears and unduly excited the sympathies of the jury in favour of the plaintiff and greatly prejudiced them against the defendant. Bearing upon this assignment of error, we have been cited to no authority, and after diligent search we have been able to find none ourselves.

"The conduct of counsel in presenting their cases to juries is a matter which must be left largely to the ethics of the profession and the discretion of the trial Judge. Perhaps no two counsel observe the same rules in presenting their cases to the jury. Some deal wholly in logic, argument without embellishments of any kind. Others use rhetoric and occasional flights of fancy and imagination. Others employ only noise and gesticulation, relying upon their earnestness and vehemence instead of logic or rhetoric. Others appeal to the sympathies; it may be the passions and peculiarities of the jurors. Others combine all these with variations and accompaniments of different kinds.

"No cast iron rule can or should be laid down. Tears have always been considered legitimate arguments before a jury, and while the question has never arisen out of any such behaviour in this Court, we know of no rule or jurisdiction in the Court below to check them. It would appear to be one of the natural rights of counsel which no Court or constitution could take away. It is certainly, if no more, a matter of the highest personal privilege.

"Indeed, if counsel has them at command it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial Judge would not feel constrained to interfere unless they were indulged in to excess as to impede or delay the business of the Court. This must be left largely to the discretion of the trial Judge, who has all the counsel and parties before him and can see their demeanor as well as the demeanor of the jury.

"In this case the trial Judge was not asked to check the tears, and it was, we think, an eminently proper occasion for their use, and we cannot reverse for this. But for the other errors indicated the judgment must be reversed and the cause remanded for a new trial. Plaintiff will pay the costs of the appeal."

* * *

Humours of the Law.

Lawyer—"John!"

Clerk—"Yes, sir."

Lawyer—"Take this morning's paper, find the marriage list and send one of my cards to each of the persons whose name appears

there and be sure to underscore the words 'divorce business a specialty.' "—*Cleveland Leader.*

Magistrate—What is your nationality?

Witness—Well, sir, my father was Irish, my mother was an American, and I was born in a Dutch brig sailing under French colors in Spanish waters.

Magistrate — That'll do, my man; you can stand down.

A witty answer.—Judge B—— fell down a flight of stairs, recording his passage in a bump on every stair, until he reached the bottom.

A bailiff ran to his assistance, and, raising him up, said:

"I hope your honor is not hurt?"

"No," said the Judge sternly, "my honor is not hurt, but my head is."—*Albany Law Journal.*

Mrs. Brown—"Well, your husband's will is law."

Mrs. Jones—"Oh, yes, it is, but it's like an excise law; it can't be enforced."—*Puck.*

Judge—"How did you come to steal this chicken?"

Prisoner — "Heredity, your Honor.

Judge—"What do you mean, sir?"

Prisoner—"My ancestors landed on Plymouth Rock.—*Wrinkles.*

* * *

Argument to Jury—Limit of Time.

A bill has passed the Iowa Senate limiting the time which lawyers may consume in arguing cases to juries. The bill passed by a vote of 22 to 17. This is akin to that other bill attempted to be passed in another State to permit every litigant to conduct his own case and do away with lawyers altogether. These bills border on the inexcusable silliness of the old farmer who wanted to teach his son how to break the calf to the yoke. The boy had the calf yoked, and held the other side of the yoke with his hand, but the boy's father said to him: "That won't do, Johnnie; yoke in with him, yoke in with him." So the old gentleman stuck his head through the other side of the yoke, and at this juncture the calf became frightened and started down the road with his tail in the air, the old gentleman hallooing, "Head us off somebody; head us off! Confound our fool souls!" So when the laymen come to try his case he, too, would be calling for assistance, and would want the next Legislature to head off the fool law. The foolishness of a measure limiting arguments is apparent to every lawyer. It ought to be left to the Court, as it is now, to limit the time of argument as the importance of the case and the facts and circumstances surrounding it demand.

It is such measures that make it desirable that legislatures should be called only once in every 999 years.—*The American Lawyer.*

* * *

In *Seaward* v. *Paterson*, reported at page 69 of this number of *The Barrister*, the Court of Appeal, in affirming the decision of Mr. Justice North, committing a man to prison for contempt of Court by disobeying an injunction, have in appearance somewhat enlarged the law as to contempt. The injunction forbade the continuance by Peterson, his servants and agents, of certain glove fights at the Queensberry Club, which had been adjudged to be a private nuisance (cf. *The*

Pelican Club Case (1890), 7 Times L. R. 135). One Murray, not a party to the action, but having notice of the injunction, continued the nuisance, and the result of his so doing has been a decision that any person aiding and abetting disobedience to an injunction of which he has notice, whether he is or is not a party to the action in which it is granted, and whether he is or is not a servant or agent of the party enjoined, is liable to attachment or committal for contempt of Court. In other words, the common law and statutory rules applicable to misdemeanours generally also extend to contempt of Court, even though the contempt, as in the present case, is not held in a criminal cause or matter.—*The Law Journal (England).*

* * *

A One-Man Company's Debentures.

Salomon v. *Salomon* is already bearing fruit, but it was a little hard on the petitioning creditor in *The Health Electrical Institute Case,* because he had launched his petition while the view of Mr. Justice Williams and of the Court of Appeal held good that a one-man company with six dummy subscribers was a sham and a fraud—a mere alter ego for the promoter—but before the petition came on to be heard the House of Lords had rehabilitated the one-man company and thrown its celestial ægis over the debenture-holders. The facts in *The Health Institute Case* were very like those of *Salomon* v. *Salomon* —a solvent trader forming a one-man company, agreeing to sell his business to it for cash and debentures, going on trading in a corporate capacity with limited liability, incurring trade-debts, and when disaster came swooping down as debenture-holder on all the assets to the exclusion of the unsecured creditors. Finding himself baffled by *Salomon* v. *Salomon,* the petitioning creditor essayed a new line of attack on the debentures as "covinous bonds" issued by the company to defeat and delay creditors within 13 Ellz. c. 5, and argued that their being given for value was not enough if they were not also bona fide; but the Court of Appeal declined, happily, to drag *Twyne's Case* into the controversy. The fallacy of the argument, as Lord Justice Rigby pointed out, was that it did not take account of the fact that the debentures were issued by the company, not voluntarily, but in fulfilment of its agreement for purchase of the business, and the title of the petitioner, as representing unsecured creditors, to the property comprised in the debentures was derived under that agreement. The moral, as Lord Justice Lindley observed, is that persons dealing with a company of dubious reputation must be careful about giving credit. But will this truth ever go home? —*The Law Journal (England).*

* * *

The very interesting question whether jurors should, while in the custody of the Court, be allowed liquor at their meals is being discussed animatedly by press and people in Illinois. Judge Tuley, who presided over the recent O'Malley trial at Chicago, ordered the bailiffs to provide each juror with a drink of liquor at each meal. Whereupon the W. C. T. U., of Chicago, made formal and decided objections. The Judge's idea in making the order seems to have

been that it would not be proper or at least advisable to deprive persons who were habitually accustomed to take liquor with their meals of that privilege while they were in the jury-room. There will doubtless be radical differences of opinion on this point, and the great majority of people are more than likely to side with the ladies of the W. C. T. U. During the comparatively short time that the jurymen are sequestered they ought to be able to get along without artificial stimulants. If liquor were to be introduced into the jury-room, it might not be practicable to draw the line at one glass; and jurymen, as well as their verdicts, should be like the great Cæsar's wife—above suspicion.

* * *

The Prisoner's Career.

From a case at the recent Sussex Assizes at Lewes, it would appear that the Home Office has introduced a salutary practice which will restrain the ardour and oppressiveness of the police. It has been a common practice where a man is convicted to hold over other charges against him, and re-arrest him after the first sentence has been served, and proceed to a fresh trial. In the public interest it is far more desirable that where a prisoner is convicted of a serious offence, the existence of other charges or warrants should be made known to the Judge, and that, unless the prisoner himself objects or challenges the truth of the other charges, the sentence imposed should be calculated after consideration of all his known antecedents, including these pending charges; so that when it is served the prisoner can be discharged and allowed to start afresh with a comparatively clean sheet. The practice hitherto prevailing in some counties has been to play with such a prisoner like a cat with a mouse, and to give him no fair chance of ending his career of crime. The most recent instructions of the Home Office, carried out before Mr. Justice Cave at Lewes, are to give the Judge a full statement of all pending charges against the accused, which enables the Judge to decide whether he ought to have a sentence which will have the effect in fact of vacating or superseding all such pending charges or warrants, or should, without passing sentence, direct his re-trial on any charge which it would be inexpedient or improper to classify with that upon which the conviction has been obtained. At the same time, it must be confessed that the whole system of calling up the police after conviction to testify to the prisoner's record is somewhat irregular, and though well-established, especially at the Old Bailey, is at times challenged by the Judges, as it involves an informal arraignment of the accused and, to an extent, sentence without trial for offences not strictly before the Court. But, on the whole, the system is more economical and better in every way for the accused than trying and retrying him for new offences, and if, as is usual, worked with scrupulous fairness, does not expose the prisoner to any undue increase of sentence.—*The Law Journal (England).*

* * *

The Facetious Part of a Lawyer's Life.

In his address before the law students of Maryland University, Judge Brewer of the United States Supreme Court, in re-

ferring to the facetious part of the lawyer's life, said:

"It is a blessed thing to be a lawyer, providing always you are the right kind, and I take it that no one is permitted to graduate at this law school unless he is of the right. It is the rule of our profession to work hard, live well and die poor. And to such a life I most cordially invite you.

"One class of persons would as soon expect to find a baby that never cried, a woman that never talked, a Shylock loaning money without interest, a Morman advocating celibacy, a gentleman without a cent opposed to the income tax, or a candidate for the Presidency hurrying to express himself on the silver question, as an honest lawyer.

"I admit that lawyers do not support themselves by planting potatoes or plowing corn, though there is many an attorney who would bless himself and bless the bar and bless all of us if he struck his name off the Court rolls and entered it on the books of an agricultural society.

"We are not, as a profession, physically speaking, like Pharaoh's lean kine. Those pictures which Dickens, that prince of slanderers, and others like him, draw and call attorneys, are nothing but atrocious libels.

"From time immemorial, size, physical as well as mental, has been considered one of the qualifications of a Judge. Justice and corpulence seem to dwell together. There appears to be a mysterious and inexplicable connection between legal lore and large abdomens. I do not know why this is, unless it be that in order justice may not easily be moved by the foibles and passions of men, she requires as firm and as broad a foundation as possible.

"George Washington's hatchet is not popularly regarded as one of the heirlooms of the legal family. I can say that for over thirty years I have been a Judge, and of the many thousands of lawyers who have appeared before me, I have never found but a single one upon whose word I could not depend.

"While other professions and vocations are constantly putting on striped clothes, how seldom does any lawyer respond to a warden's roll call.

"The business man needs us to draw his contracts, the laborer to collect his wages, the doctor to save him from the consequence of his mistakes, the preacher to compel the payment of his salary, the wife to obtain a divorce, and the widow to settle her husband's estate.

"The people need us in the Legislature and in Congress to hold the offices and draw the salaries. Every convention and public meeting needs us to fill the chair and occupy comfortable seats on the platform. Every man accused of crime needs us to establish his innocence through the verdict of twelve of his peers.

"In short, it may be said of us, in the language of the itinerant vendor of soap, 'everybody needs us,' and like that very useful article, nothing tends to keep society so clean as the presence of a lawyer.

"Blot from American history the lawyer and all that he has done and you will rob it of more than half its glory. Remove from our society to-day the lawyer, with the work that he does, and you will leave that society as dry and shifting as the sands that sweep over Sahara."

RECENT ONTARIO DECISIONS.

Important Judgments in the Superior Courts.

Court of Appeal.

DOYLE v. NAGLE.

[BURTON, OSLER AND MACLENNAN, JJ.A., [3RD MARCH, 1897.

Will — Devise of property not owned by testator by mistake— Intention—Mistake —Devise of property owned by testator upheld—Hickey v. Hickey, 20 Ont. R. 371, followed.

Judgment on appeal by plaintiff from judgment of Falconbridge, J., in favour of defendant Jas. McGovern, in action for construction of will of Owen McGovern, heard upon motion for judgment on the pleadings. The testator died in 1894. The will was made in 1891, and after directing that his debts, etc., should be paid, devised the "residue" of his estate as follows:—"I give to my son James, his heirs and assigns, the southwesterly quarter of lot 11, concession 4, in the township of Adjala. I give to my said son James, his heirs and assigns, my farm, consisting of part of the west half of lot No. 12, in the 5th concession of the said township, on condition that he shall pay debts and legacies." The testator had no interest in the south-west quarter of lot 11 in the 4th, but was seised in fee of the south-west quarter of lot 12 in the 4th, at the time of making the will, and at the time of his decease. The Court below held (distinguishing *Hickey* v. *Stober*, 11 O. R. 106, and following *Hickey* v. *Hickey*, 20 O. R. 371) that by the will the testator devised the land he did own to the defendant James McGovern, his son. The appellant contended that the testator died intestate, as to the south-west quarter of lot 12 in the 4th. The Court agreed with the Court below in upholding the devise, and dismissed the appeal with costs. M. Scanlon, for appellant. J. Hood (Barrie), for defendant, James McGovern. D. Ross (Barrie), for other defendants.

* * *

NOVERRE v. CITY OF TORONTO.

Damages for injuries by falling —Snow and ice — Plaintiff using street or way not opened for public travel—Defendant corporation not liable.

Judgment on appeal by plaintiff from judgment of Ferguson, J. (27 O. R. 651), dismissing the action, which was brought to recover damages for injuries sustained by plaintiff by falling in Lake Street, Toronto, and injuring his thigh bone, the plaintiff alleging negligence and breach of covenant contained in his lease from defendants to keep in repair the approaches to his premises fronting on the bay, where he carries on the business of a boat-builder. The accident to the plaintiff happened on the night of the 25th January, 1895, when there were snow and ice upon the ground. At this time work was being done by the defendants upon Lake Street. Instead of taking the planked way provided for access to and from his premises, the plaintiff left it and proceeded from his premises upon a diagonal track along and across Lake Street, which, to his knowledge, was not a street or way completed, for use or opened

for public tavel, no invitation or inducement being held out by the defendants to the public to travel upon it, and on which he, owing to irregularities on its surface, fell and was injured. The appellant contended that defendants were liable for the injuries sustained by him. Appeal dismissed with costs. Laidlaw, Q.C., and J. Bicknell, for appellant. Fullerton, Q.C., and W. C. Chisholm, for defendants.

* * *

WASHINGTON v. GRAND TRUNK RAILWAY COMPANY.

Damages — Negligence — Packing frogs and wing-rails during winter months—Order of Railway Committee of Privy Council—Sec. 262 of Railway Act, 1888.

Judgment on appeal by defendants from judgment of Street, J., upon the findings of the jury, awarding the plaintiff $2,500 damages for the loss of his right arm. The plaintiff was a yardsman in the employment of defendants, and on 16th January, 1896, after coupling cars in motion, his foot caught upon the rail, and he fell, and one of the cars passed over his arm. The jury found that defendants were guilty of negligence in not blocking the frog in which the plaintiff's foot was caught. By an order of the Railway Committee of the Privy Council the defendants are absolved from packing frogs and wing-rails during the winter months. The defendants contended that the Railway Committee had the power to make such an order as to frogs as well as wing-rails, under s. 262 of the Railway Act, 1888. They also contended that the evidence showed beyond dispute that plaintiff's foot was caught in the wing-rail. Appeal allowed with costs, and action dismissed with costs. McCarthy, Q.C., for appellants. Lynch-Staunton (Hamilton), for plaintiff.

* * *

ATTORNEY-GENERAL OF ONTARIO v. HAMILTON STREET RAILWAY COMPANY.

Lord's Day Act — Running of electric cars on Sunday not within the prohibition—Nuisance — Application of the doctrine of ejusdem generis.

Judgment on appeal by the Attorney-General and John Henderson, the informant, from the judgment of Rose, J. (27 O. R. 49), dismissing the action with costs. It was brought for an injunction restraining defendants from operating their electric cars upon Sundays. It was conceded in the Court below that the defendants had the right to run their cars on Sunday unless doing so was a violation of the Lord's Day Act, R. S. O. c. 203, s. 1, which provides that "it is not lawful for any merchant, tradesman, artificer, mechanic, workman, labourer, or other person whatsoever, on the Lord's day . . . to do or exercise any worldly labour, business, or work of his ordinary calling (conveying travellers or her Majesty's mail, by land or by water, selling drugs and medicines, and other works of necessity and works of charity only excepted)." Rose, J., held, following *Sandiman* v. *Breach*, 7 B. & C. 96, *Reg.* v. *Budway*, 8 C. L. T. Occ. N. 269, and *Reg.* v. *Somers*, 24 O. R. 244, that the words "or other person whatsoever" in s. 1 of the Act were to be construed as referring to persons ejusdem generis, as the persons named, "merchant, trades-

man," etc.; and that an incorporated company or person operating street cars on Sunday was not within the prohibition of the enactment. Rose, J., was also of opinion that, if the enactment did apply to the defendants, they were within the exception as to "conveying travellers," following *Reg.* v. *Daggett*, 1 O. R. 537, in preference to *Reg.* v. *Tinning*, 11 U. C. R. 636. He found further, that by carrying persons who were not travellers defendants were not creating or continuing a nuisance. The appellants contended for a wider construction of the Statute, and that the defendants were not within the exception as to conveying travellers. All the members of the Court agreed that the defendant corporation was not included in the words of the Statute, and therefore the appellants could not succeed. Burton, J.A., disagreed with the trial Judge as to the exception in the Statute regarding *Reg.* v. *Tinning* as well decided. The appeal was dismissed with costs. Moss, Q.C., and A. E. O'Meara, for appellants. E. Martin, Q.C., for defendants.

* * *

SMALL v. THOMPSON.

Married woman—Separate estate—Purchase of land subject to mortgage—Deed taken to defendant without her knowledge or consent—Defendant not the real purchaser, not liable.

Judgment on appeal by defendant Mary C. Thompson from judgment of Armour, C.J., directing judgment to be entered against her for $4,891.96, to be paid out of her separate property. The plaintiff executed a mortgage of land, and then sold her equity to one Sinclair, who covenanted to pay the mortgage. Sinclair sold to defendant, and assigned to plaintiff the benefit of defendant's covenant made at the time of sale. Defendant contended that her separate estate was not liable because her husband was the real purchaser, and the conveyance was taken in her name without her knowledge. The Court held that the action was not maintainable. Appeal allowed with costs, and action dismissed with costs. Aylesworth, Q.C., for appellant. E. D. Armour, Q.C., for plaintiff.

* * *

TRUSTS CORPORATION OF ONTARIO v. RIDER.

Assignment of book debts by word of mouth—Words, if in writing, would have constituted a valid assignment — Assignments of chose in action held good—Sec. 7 R. S. O. c. 122.

Judgment on appeal by plaintiffs from judgment of Falconbridge, J. (27 O. R. 593), in favour of defendant upon a special case submitted to the Court. The plaintiffs were the administrators of the estate of F. J. Rosar, who died in December, 1895. The deceased was indebted to defendant, and from time to time handed him bills of account, representing certain book debts, with the purpose and intent of assigning them to the defendant as security. The words used on such occasions would, if in writing, have constituted a valid legal assignment. The defendant gave notice to the different debtors that the debts had been assigned to him. The Court below gave judgment for defendant, declaring him entitled to the book debts in question by virtue of the assignments, holding that they were good assignments of chose in action under s. 7 of the Mercantile Amendment

Act, R. S. O. c. 122. Appeal dismissed with costs, the Court agreeing with the decision below. F. A. Anglin for appellants. D. Urquhart for defendant.

* * *

CAMPBELL v. MORRISON.

Indemnity—Equitable obligation to indemnify against mortgage —Purchaser of equity of redemption — Agreement not to become liable for mortgage— Assignability of equitable obligation.

Judgment on appeal by defendant Maloney from judgment of Robertson, J., who tried action at Toronto, in favour of plaintiff, holding appellant personally liable upon an implied covenant or equitable obligation of indemnity to pay a certain mortgage debt, which obligation had been assigned to plaintiff. The appellant set up an agreement that he was not to become personally liable. The Court (Burton, J.A., dissenting), dismissed the appeal with costs. Maclennan, J.A., discussed the question of the assignability of an equitable obligation, and came to the conclusion that such an obligation as was in question here was assignable, and an action maintainable thereon by the assignee, here the mortgagee, in his name. Burton, J.A., was of the contrary opinion. Osler, J.A., did not wish to enter into a discussion of this question, but thought the principle had been recognized by this Court in *Ball* v. *Tennant*. Moss, Q.C., and Boland, for appellant. J. M. Clark, for plaintiff.

* * *

DRUMM v. O'BEIRNE.

[MEREDITH, C.J., 24TH FEBRUARY, '97.

Criminal charge—Newspaper libel —Security for costs — Withdrawing case from jury—Trivial or frivolous action.

Aylesworth, Q.C., for plaintiffs, appealed from an order of local Judge at Stratford, requiring plaintiff to give security for costs of an action of libel brought against the proprietor of the *Stratford Beacon*, a newspaper. The plaintiff contended that the words complained of involved a criminal charge, viz., that of perjury. The plaintiff was a witness at the trial of an action of *Gross* v. *Brodrecht* at Stratford, and the words complained of referred to the evidence given by him, as he contends, though they did not refer to him by name. W. H. Blake, for defendant, contended that the fact that it did not appear from the article in question there to whom the words were applied distinguished this case from the recent one of *Smyth* v. *Stephenson*, and that the fair conclusion from the article was that the plaintiff was not referred to by the words used, and therefore the words could not be taken to involve a criminal charge against the plaintiff. He also contended that the action was trivial or frivolous. The Chief Justice held that upon the statement of claim it was impossible to say that the case, if based solely upon the alleged charge of perjury, could be withdrawn from the jury, having regard to his decision in *Smyth* v. *Stephenson*, or that the question whether the plaintiff was pointed at by the article could be withdrawn from the jury; nor could it be said that the action was trivial or frivolous. Appeal allowed, and order set aside. Costs here and below to be costs in the cause.

RE CASSIE, TORONTO GENERAL TRUSTS CO. v. ALLEN.

[BOYD, C., FERGUSON, J., ROBERTSON, J., 12TH MARCH, 1897.

Action to establish will—One of the witnesses not "right wise" —Onus— Costs — Prima facie competency of witness.

W. R. Riddell, for defendant, Hannah Maria Allen, appealed from judgment of Rose, J., in establishing the will and codicil of Mrs. Pamela Cassie, in so far only as it establishes the will, the appellant contending that the will was not properly executed because one of the witnesses, a maid servant named Jennie Watkins, was insane at the time, and had since died insane. The evidence showed that she was not "right wise," or was strange or flighty, before the execution of the will, and very soon afterwards became insane. The appellant contended that the onus was upon those propounding the will to show that she was sane at the time of the actual execution of the will. H. Cassels, for the Presbyterian Church and Knox College, opposed appeal, and also moved to quash it upon the ground that appellant has no interest, because if the will is set aside and the codicil remains, the appellant takes nothing. W. C. Chisholm, for plaintiffs and the Presbyterian Church at Port Hope. The Court held that the competency of the maid servant as a witness was prima facie shown by the evidence of the other witnesses to the will, who did not know her previously, and the onus was on the appellant to show that the maid servant was non compos mentis at the time of the execution, which onus had not been satisfied. Appeal dismissed with costs. Judgment reserved as to whether, in the event of the respondents not being able to obtain payment of costs from the appellant, they should be allowed costs out of the estate.

* * *

JORDAN v. PROVINCIAL PROVIDENT INSTITUTION.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 5TH MARCH, 1897.

Action of policy of insurance— Defence of fraud and misrepresentation—Not necessary to show fraud if material misrepresentations—Untrue answers.

Judgment on appeal by plaintiff from judgment of Falconbridge, J., upon the findings of the jury at the trial in favour of defendants and upon motion to set aside certain of the findings. The action was brought to recover the amount of the policy of life insurance. The defence was that the defendants were induced by fraud and misrepresentations to issue the policy. The jury found that the deceased made untrue answers to questions put to her as to her health before the issue of the policy, and that such answers were material, but that they were not untrue to the knowledge of the deceased. It was contended by the plaintiff that defendants could not succeed in rescinding the contract of insurance in the absence of fraud on the part of the deceased, and that the jury had negatived fraud. The Court held, however, that it was unnecessary to show fraud, that there having been material misrepresentations, the contract must be rescinded, and the plaintiff could not succeed. Meredith, C.J., also held that upon the undisputed facts there was fraud in the legal sense, as the deceased undoubtedly knew of the disease with which she was afflicted. Appeal dismissed with

costs. J. Reeve, Q.C., and J. E. Day for appellant. Osler, Q.C., for defendants.

* * *

ROSE v. McLEAN PUBLISHING CO.

[BURTON AND MACLENNAN, JJ.A., FERGUSON AND ROSE, JJ., MARCH 3, '97.

Trade journals — Similarity of names of—Action to restrain use of name—No monopoly or property in a geographical name —Term "Canadian" misleading similarity.

Judgment on appeal by plaintiff from order of a Divisional Court (Boyd, C., and Robertson, J.) allowing an appeal from the judgment of MacMahon, J., at the trial, in favour of the plaintiff, and dismissing the action without costs. The plaintiff having published for a number of years a journal devoted to the interests of the booksellers in Canada, called "The Canadian Bookseller," sought to enjoin defendants from adopting as the name of a journal published and sold by them, "The Canada Bookseller and Stationer," which for many years had been published by them under another name. There was no evidence of fraudulent intention on defendants' part. The Court below held (27 O. R. 325) that as a rule a person cannot have monopoly or property in a geographical name, and that the plaintiff was not entitled to the injunction sought for. This Court held (Maclennan, J.A., dissenting) that although the word "Canadian" was a geographical term and had not acquired a secondary meaning as in some of the cases, and therefore there was in one sense no property in the word, yet the similarity of names was misleading, and the plaintiff having established the name of theirs so as to make it very closely resemble that of the plaintiff there was in effect a fraud upon the plaintiff, which the Court ought to restrain. Appeal allowed with costs here and below, and judgment of trial Judge restored. J. Bicknell for appellant. Robinson, Q.C., and Levesconte for defendants.

* * *

BLACKLEY v. TORONTO RAILWAY COMPANY.

[BURTON, OSLER, MACLENNAN, JJ.A., FERGUSON, J., 3RD MARCH, 1897.

Damages—Lord Campbell's Act—Action by father for accidental killing of son—Negligent act of deceased.

Judgment on appeal by defendants from order of a Divisional Court (Robertson, Street, JJ.) dismissing motion by defendants for a nonsuit, the jury having failed to agree at the trial. The Judges in the Court below differed in opinion, Robertson, J., being in favour of dismissing the motion for a nonsuit, and Street, J., of granting it. The action was brought by David Blackley, the father of a young man named Ralph McDonald Blackley, nearly 20 years old, who was accidentally killed on a car on the defendants' line, on the 1st October, 1892, to recover damages under Lord Campbell's Act. The car was going down Church Street on the westerly track; the deceased ran after it while it was in motion, after leaving Gerrard Street, and jumped on the footboard on the easterly side of the car. He remained on the footboard smoking, and when the car came to Gould Street, he was struck and killed by a car going northerly upon the easterly track. There was no fender to keep the deceased from getting into a seat, such as is now in use in the defendants' cars. The negligence complained of was that defendants should have had a fender

or guard on the east side of the car; that the car was running at too great speed; and that the up and down tracks were too close together. The appellants contended that there was no negligence on their part; that the deceased was guilty of contributory negligence; and that plaintiff had no pecuniary interest in the continuance of the life of the deceased. While this appeal had been pending the action has been tried a second time, and a verdict given for plaintiff for $1,000. The Court held (Osler, J.A., dissenting) that a nonsuit should have been entered at the first trial; that the negligence of the defendants was not the cause of the misfortune, but the deceased's own voluntary act in jumping upon the car, which was clearly shown by the plaintiff's own witnesses. Appeal allowed with costs, and action dismissed with costs. McCarthy, Q.C., Laidlaw, Q.C., and J. Bicknell for appellants. J. K. Kerr, Q.C., and C. D. Scott for plaintiff.

* * *

ALDRICH v. CANADA PERMANENT L. AND S. CO.

[BURTON, OSLER, MACLENNAN, JJ.A., FALCONBRIDGE, J., 3RD MARCH, '97.

Mortgagor and mortgagee—Mortgage sale of two properties "en bloc" and not in separate parcels—Loss to mortgagor—Mortgagee liable for "reckless" conduct.

Judgment on appeal by defendants from order of a Divisional Court (Ferguson, J., Robertson, J.), reversing judgment of MacMahon, J., dismissing action with costs. The plaintiff mortgaged to defendants a farm with a brick house on it, and also two stores in the village of Harrow, three-quarters of a mile distant from the farm. The mortgage becoming in arrears, the defendants sold the two properties, en bloc, under the power of sale in their mortgage. The Divisional Court held (27 O. R. 548), that the mortgagees had not acted with that prudence and discretion which they were bound to use, and were liable in damages to the mortgagor for the difference between the price obtained and that which, upon the evidence, would have been obtained had they sold the properties separately, viz., $1,300. The Court (Burton, J.A., dissenting), dismissed the appeal with costs, agreeing with the Court below, and expressed the opinion that the defendants' conduct might be aptly described as "reckless." They referred to the recent case of *Kennedy* v. *De Trafford* (1896), 1 Chy. 762. W. Cassels, Q.C., and G. A. Mackenzie for appellants. C. Macdonald for plaintiff.

* * *

Divisional Court.

STRUTHERS v. MACKENZIE.

[ARMOUR, C.J., FALCONBRIDGE, J., AND STREET, J., 9TH MARCH, 1897.

Co-operative association—R. S. O. c. 166—Purchase on credit—Action against individual members — Difference between implied representation in law to do an act and an implied representation of authority in fact to do it.

Judgment on appeal by plaintiffs from judgment of Royd, C., at the trial, dismissing the action, which was brought by the creditors of the Wyoming Co-operative Association, Limited, against the individual members of the association, to recover the price of goods sold to the association on credit. The association was incorporated under R. S. O. c. 166, by s. 13 of which it is provided that the business of such association shall be a cash business, and no credit shall be

either given or taken. The plaintiffs were precluded by that section from recovering against the association: see *Fitzgerald* v. *London Co-operative Association*, 27 U. C. R. 605. No express representation or warranty of the authority of the association to purchase on credit was ever made or given by defendants. The plaintiffs contended that there was an implied representation or warranty of such authority on the part of the defendants, or some of them. Held, that no action can be maintained upon an implied representation or warrant of authority in law to do an act, but only upon an implied representation or warranty of authority in fact to do it; and in this case the implied representation was one of the law only. *Beattie* v. *Lord Ebury*, L. R. 7, Ch. 777, Chitty on Contracts, 13th ed., p. 275, referred to. Held, also, that, as the plaintiffs were selling their goods to Wyoming Co-operative Association, Limited, they must be taken to have known that it was a co-operative Association, and that it was incorporated, and to have known the public statute R. S. O. c. 166, and the provisions of that Act, and that it forbade buying on credit. The plaintiffs and defendants having thus equal knowledge of the provisions of the law, no implication of a representation or warranty of authority could arise. Held, also, that the defendants, having obtained no personal benefit from the purchase of the goods sold by plaintiffs, were not liable to account for the value of them. Motion dismissed with costs. Gibbons, Q.C., for plaintiffs. Hanna (Sarnia), for defendants.

* * *

ELMSLEY v. HARRISON.

[12TH MARCH, 1897.

Recovery of leasehold premises—Forfeiture and cancellation of lease—Amendment of pleadings at trial—Defendant entitled to set up Statute of Frauds at the trial although not pleaded in answer to new case made by plaintiff.

Judgment on appeal by defendant from judgment of Meredith, C.J., in favour of plaintiffs in an action to recover possession of certain premises on Yonge Street, in the City of Toronto, and to declare a lease thereof, of which the appellant is the assignee, forfeited, or for other relief in respect of an alleged contract for renewal. The learned Chief Justice declined to allow the appellant at the trial to amend by setting up the Statute of Frauds as against a contract for renewal partly in writing and partly verbal, alleged by plaintiffs to have been made by the parties. Appeal allowed with costs and action dismissed with costs, Falconbridge, J., dissenting. Per Armour, C.J.:—If plaintiffs had been held to the proof of the alleged contract set out in the replication, they could not have succeeded, and, having been allowed to give evidence of an alleged contract not set out in the replication, the trial Judge was bound to allow defendant Harrison to plead to such last-mentioned contract, and to set up the Statute of Frauds—this was but common justice. Per Street, J.:—The defendant Harrison should have been allowed to set up the Statute of Frauds in answer to the new case made by plaintiff at the trial, and, being now allowed to do so, is entitled to succeed. *Oldham* v. *Brunning*, 12 Times L. R. 303, relied on by Meredith, C.J., has been reversed by the House of Lords, 13 Times L. R. 69, since the judgment of Meredith, C.J. And, further, no agreement, either parol or otherwise, has

been shown to have been arrived at between the parties. Per Falconbridge, J.:—The amendment, if allowed, would have the effect of defeating a just claim, and it ought not to be allowed, especially as the replication does not set up a written contract, and defendants might and ought to have applied at the proper time to plead the Statute, and there are no merits in the defendant. *Oldham* v. *Brunning*, supra, distinguished. *Williams* v. *Leonard*, 16 P. R. 544, 17 P. R. 73, referred to. E. D. Armour, Q.C., for defendant Harrison. E. T. English, for plaintiffs.

* * *

BELAIR v. BUCHANAN.

[FERGUSON, J., 10TH MARCH, 1897.

Security for costs—Plaintiff residing out of jurisdiction, owner of property within—Value of over incumbrance, although not readily available in money.

Judgment on appeal by plaintiff from order of Mr. Cartwright, sitting for the Master in Chambers, dismissing a motion by appellant to set aside a præcipe order for security for costs. The plaintiff resided out of the jurisdiction, but was the owner of a farm in Ontario, worth over $1,500, and incumbered to the extent of $900. Plaintiff did not negative the existence of debts in Ontario. Ferguson, J.:—It is shown that the plaintiff has in this county real property. The least value put upon this is the sum of $570 over and above all incumbrances, and above all debts, that it is shown or suggested that the plaintiff owes. The argument that this could not be readily available in money, that is, turned into money to pay costs, has in itself much force, but that is an argument that at the present time would apply to any property. After a perusal of the cases, I am of the opinion that the appeal should be allowed, and the præcipe order for security for costs set aside. Costs before Master in Chambers and of this appeal to be costs in the cause. W. Read, for plaintiff. J. Bicknell, for defendant.

* * *

REG. EX REL. MARSON v. BUTLER.

[BOYD, C., 5TH MARCH, 1897.

Quo warranto— Withdrawal of relator—No provision for introduction of new relator—Statute law insufficient — No duty of Court to eke out insufficiencies of practice.

Judgment on appeal by Albert Hudson, intervening party, from order of junior Judge of County Court of Carleton, dismissing motion by relator to void election of respondent as an alderman of the City of Ottawa, made upon the relator asking leave to withdraw his motion. Held, that there is no provision in the statute law for the introduction of a new relator, and if the statute is silent it does not devolve upon the Court to eke out the apparent insufficiencies of practice by judicial expedients. The original relator having quitted the field, and there being no suggestion of collusion, but the negation of it, the law, as it now stands, supplies no means of compelling the first relator to go on against his will, or of transferring the motion to other hands. It would be a right thing to amend the procedure so that there may be a new relator to prosecute in the public interest. Appeal dismissed without costs. R. J. Wicksteed, Q.C., for Hudson. O'Gara, Q.C., for defendant. No one appeared for relator.