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See Case 8/9

JANUARY, 1895.

The Barrister.

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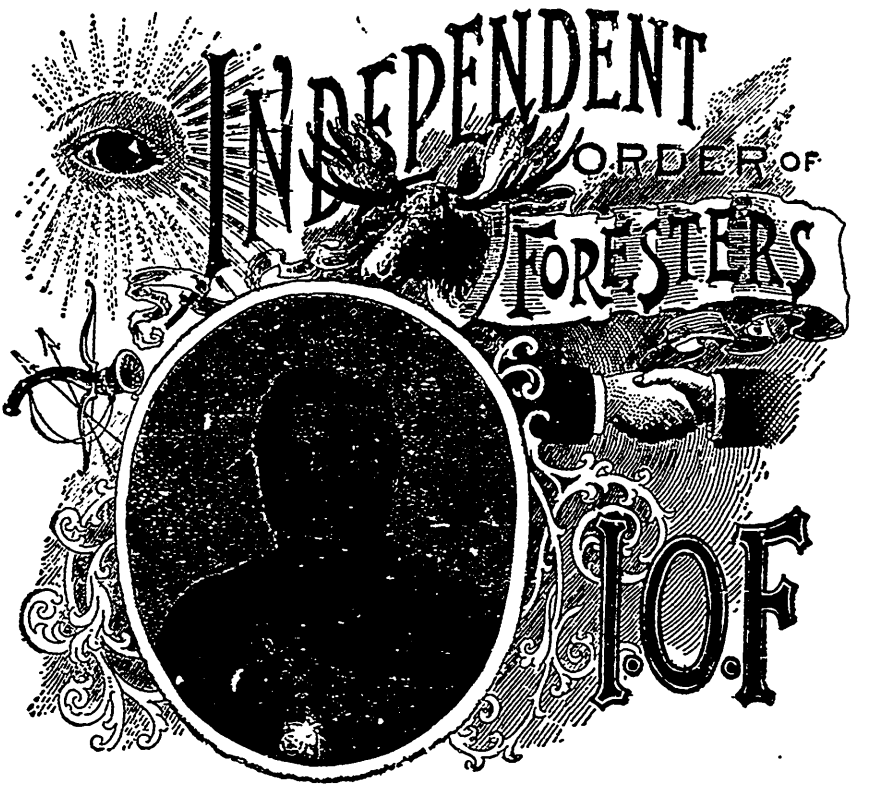

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The Unexampled Progress and Prosperity of the Independent Order of Foresters

is shown by the following figures:

	No. of Members.	Balance in Bank.		No. of Members.	Balance in Bank.		No. of Members.	Balance in Bank.
October, 1882	880	$ 1,145 07	January, 1888	7,811	$ 86,102 42	January, 1894	54,481	$858,857 89
January, 1883	1,134	2,769 58	January, 1889	11,618	117,599 88	February, "	55,149	875,860 06
January, 1884	2,216	13,070 85	January, 1890	17,026	188,130 86	March, "	56,559	876,230 03
January, 1885	2,558	20,092 30	January, 1891	24,466	253,967 20	April, "	58,339	911,520 93
January, 1886	3,648	31,082 52	January, 1892	32,303	408,793 18	May, "	59,607	928,707 04
January, 1887	5,804	60,325 02	January, 1893	43,024	583,597 85	June, "	60,266	951,571 62

Membership 1st July, 1894, about 61,000. Balance in Bank, $985,434.68.

The total number of applications considered by the Medical Board for the six months ending 30th June, 1894 was 13,381, of whom 12,296 were passed, and 1,085 rejected.

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The Barrister.

VOL. I. TORONTO, JANUARY, 1895. NO. 2.

THE RIGHT HON. SIR JOHN S. D. THOMPSON, K.C.M.G., P.C., Q.C., AS A LAWYER.

BY RICHARD ARMSTRONG.

SIR John Thompson's life has many lessons for the young lawyers of Canada. He was a self-made man; by hard work and steady application he won his way upward. In every position which he occupied he did his work faithfully. It is the object of this sketch to show why and how he succeeded. He was born in Halifax on the 10th of Nov., 1844. His parents were not wealthy, and so he did not receive a finished education. He attended the common school and free Church Academy, and at the age of 17 he entered on the study of law in the office of Henry Prior, in Halifax. The Hon. Robert Sedgewick, of the supreme court (who was a student then), remembered Thompson at that time attending the Law Students' Literary and Debating Club, and says he remembers him as a slight, delicate youth, very bashful and diffident, and but seldom taking part in the debates or programmes, and but little noticed by the other students. In July, 1865, Johnnie Thompson, as he was then known, was called to the Bar, and began the practice of law, but he failed to draw clients around him, and, having learned shorthand writing when a student, turned his attention to reporting for the Legislature. He was thus employed during the following four years.

In 1869, Mr. Joseph Coombes, then a celebrated lawyer of Halifax, took Thompson in as a junior partner. This gave Johnnie Thompson his great opening. He seized it, and from that time he worked incessantly until the time of his tragic death. While he was with Coombes he did the office work and prepared the briefs—working late and early, filling his mind with legal knowledge, until it became a vast store-house, from which he was afterwards able to draw on with such telling effect.

When he first started taking counsel work, he did so in the Equity Court, but soon practised in all the courts, taking a great deal of jury work. In 1874 we find him for the first time, in the case of Wylde et al. *vs.* The Union Marine Insurance Co., appearing in the Supreme Court of that province. He acted as junior counsel to Mr. Weatherbe, now Judge of that court. Mr. Rigby, Q.C., acted for the plaintiffs. A few months after that he acted as counsel in the case of Parker *vs.* Fairbanks, in the same court, with Mr. Rigby, Q.C.,

against him; evidently he had taken his own measure in the previous case, for we now find him acting alone, and though he lost the case, Judge Wilkins, who delivered the judgment, complimented him in the following words: "I cannot but help admiring the manner in which Mr. Thompson marshalled the evidence to have it appear that the weight of evidence did not show that the defendant interfered with the flow of the stream." Shortly after this he was retained as counsel with McDonald, Q.C., in the case of Woodworth *vs.* Troop et al. This was the most celebrated case of its time. The plaintiff was a member of the House of Assembly of N. S., and in a speech made on the floor of the House in session, charged the Provincial Secretary with having altered and falsified certain public records and grants of the Crown Lands Department, after the signature of the Lieutenant-Governor had been appended. A committee was appointed to investigate this charge, and reported that there was no foundation whatever for the same. A resolution was then passed demanding an abject apology from Woodworth, this he declined to make. Then a resolution was passed expelling him from the House—in conformity with this the Speaker ordered the Sergeant-at-Arms to eject him, which was done. Woodworth then brought action against the Speaker and the members of the committee.

The question was, had the Court power to review the action of the Legislature. Thompson and Macdonald acted for the plaintiff. The action was begun in '74, and passed through the various courts until it was finally argued in the Supreme Court of that province in 1876. Party feeling ran high over it, and the whole province took sides. In this case Thompson first displayed that wonderful knowledge of the rights, duties and prerogatives of Parliament which afterwards in the House of Commons was the admiration of his friends and the wonder of his opponents. Thompson's argument won this case and settled the power of the Provincial Legislature to punish for contempt. His argument was a surprise to his best friends, and he leaped into public favor at once. After that, he was in the majority of cases of importance in the Supreme Court, and his success was unbroken until he retired from practice to adorn the Bench before whom he had so often triumphed.

Another celebrated case that was of great importance to the province, and in which constitutional issues were involved, was the Windsor and Annapolis Railway Co. *vs.* the Western Counties Railway Co. The questions here were:

(1) Did the British Parliament have power to pass and did it pass, by the British North America Act, to Canada, a perfect and exclusive title in this railway?

(2) Had it the power to pass and did it pass full legislative power over this railway?

By this time he was one of the recognized leaders of the Nova Scotia bar; if not the leader, certainly the leader of the Conservative lawyers. When the Fisheries Commission sat at Halifax under the Washington treaty, it was but natural that the United States Government should re-

tain him as one of their counsel, as two or three of the leading Liberal counsel of Halifax had been retained by the Canadian Government. There can be no doubt that in the close study necessarily given to the whole fishery question at that time, and the inner knowledge he must have obtained of the United States position was of great value to him, and through him, to Canada on more than one occasion since: notably when representing the Government of Canada at Washington in conjunction with Sir Charles Tupper in 1888, and when representing Great Britain and Canada at Paris on the Behring Sea award in 1893.

It has been freely stated that when associated with the world's greatest jurists at Paris, he not only commanded their respect but won their admiration, and we can now understand how the work done and knowledge obtained in 1876 must have made him easily the peer of any judge on the Behring Sea award. It was stated in our newspapers at the time that Sir John was noticed taking a nap a couple of times during the long, weary arguments of counsel for the United States. We can well understand that listening to the stale old arguments which he himself had tried to work off 17 years before against Canada made him weary enough to take a nap. He must have smiled often to himself as he noticed the serious way his associates listened to the sophistical arguments of Mr. Carter. He could have slept half the time and then known more about the case than any of his associates.

He was urged upon to enter the legislature, and, much against his will, consented, and was elected for Antigonish in a by-election in December, 1877. On the Government being returned in the following October, 1878, he was appointed Attorney-General, and discharged the duties of his office with conspicuous ability and satisfaction. At the same time he carried on his practice at the head of the largest law firm in the province, and neglected no briefs. In his dual capacity as Attorney-General and working head of a large practice, he first displayed that tireless energy and wonderful capacity for work that never ceased until he literally consumed himself. He assumed the Premiership of Nova Scotia in 1882, but was defeated a few months afterwards, and retired to the Supreme Court, which was more congenial to him than politics. No judge in his province ever possessed in the same marked degree the gift of orderly, easy, and accurate expression of his views. He always endeavored to get at the truth, at the very heart of a case, and he was not willing even to deceive himself; he was always great enough to find the truth, and strong enough to pronounce judgment even against his own desires. He had no whims, no fancies. He had a clear, logical mind, and in its presence the obscure became luminous, and the most complex and intricate legal proposition became simple. He knew that even great ideas should be expressed in the simplest manner possible—hence his judgments were models, and appeals against them seldom succeeded. When in 1885 he was called to be Minister of Justice of Canada, the whole Bar of Nova Scotia regretted his removal.

When he entered the Federal Arena, the great race and religious storm swept this country, and yet he stood unmoved, patient, just, and candid amid it all, and within six months he probably won the greatest personal triumph of his life in the debate on the execution of Louis Riel. The Hon. Edward Blake, on that memorable occasion, arraigned the Government as it had never been arraigned before, and it was felt that no man on the Government side could reply to the greatest forensic orator Canada ever produced, and one who, in the opinion of the writer, may to-day be fairly ranked among the world's greatest forensic orators. Few, if any, in that House believed that the Hon. John Thompson could make an effective, let alone a crushing reply. But there was one young man who, probably had faith in him, and who was largely accountable for Thompson's entry into the Dominion House. That man was Charles Hibbert Tupper, who had studied under the great Jurist, and believed in him firmly. Mr. Thompson had singular good fortune, in that Mr. Blake finished his speech after midnight on Friday, the 19th day of March, 1886, and he had until Monday afternoon to prepare his reply. It will be remembered that Lord Erskine's first great hit when a young briefless barrister, was attributed largely to his having over night to prepare his reply to the jury. In fairness to Mr. Blake it must be also remembered that the resolution condemning the Government for the execution of Riel was not one that Mr. Blake chose. Sir John Macdonald had very craftily put up a supporter to move this one, and consequently Mr. Blake was at a disadvantage. Further, he had undoubtedly underrated Mr. Thompson and made his argument wider than he would have otherwise done, had he anticipated that it would pass under review by a great legal mind. Thus stood the situation on the afternoon of Monday, the 22nd day of March, 1886, when Mr. Thompson stood up to make his reply to the Leader of the Opposition. The scene at that moment was intensely dramatic. The supporters of the Government scanned Mr. Thompson as he stood up, but there was nothing in the air or manner of the quiet little gentleman from down by the sea, to give them hope or confidence, and a look of doubt and fear passed over their countenances. On the other side, the Opposition, as they surveyed the quiet, unassuming Minister of Justice, felt that they had nothing to dread from him. But the indefatigable work for years as lawyer, Attorney-General, and Judge, and months spent on Woodworth *vs.* Troop, when he had masticated the rights, duties, and prerogatives of the British Parliament for centuries, were now to stand him in good stead. And as he proceeded in his argument and exposed or brushed aside, one after another, the sophistries of Mr. Blake, and drew from his great store-house of accumulated knowledge, fact after fact and argument after argument, he must have felt that his years of toil and midnight oil had not been spent in vain. All Canada knows the result of that debate. His party went wild over him, and he woke up the next morning to find himself famous. It is honorable to

the Ontario Bar to know that one of the most sincere admirers Mr. Thompson had when he closed his speech, was the Hon. Edward Blake. This feeling was reciprocated by Sir John Thompson, who, in conversation with the writer a couple of years ago, said that Mr. Blake possessed the greatest legal mind he ever met, and expressed the opinion that Mr. Blake was very much misunderstood. The writer gathered the impression that there was a kindred feeling between the two men. This, probably, played no small part in the report on Charles Rykert, a session or two after, when Mr. Blake and Mr. Thompson were a sub-committee on that matter.

His next great argument was on the Constitutional questions involved in the Jesuits' Estates Act—here, again, he was not without experience, for no province, with the exception of Ontario, had so discussed the question of provincial rights as had Nova Scotia. His reply to Mr. D'Alton McCarthy on this occasion was a crushing one, and the Hon. Edward Blake crossed the floor to congratulate him, and the two greatest lawyers that ever adorned the House of Commons, clasped hands amid the applause of the entire House.

He had the faculty in an eminent degree of clothing in clear and concise language the most difficult and involved propositions of law; he could make questions so clear that they no longer appeared to have ever been difficult. This wonderful faculty was not for many years appreciated by his legal opponents. Case after case he won, and year after year he continued to be successful before the courts. Yet to his opponents he did not appear to win by his ability—they put his success down to luck in always holding a brief on the easy side of the case. There never appeared to be any room to doubt the result; his side of the question was so right and simple it won on its merits, as it appeared to opposing counsel. His manner reminds me of the old story of a father taking his son, who was studying law, to hear a celebrated lawyer plead, and when they retired from the court, the father said "Well, son, what do you think of him?" and the son replied: "Why, father, he is not much of a speaker, I think I could do as well myself." The father replied: "Yes, son, but you noticed he got the verdict;" and so it was with Thompson, he got the verdict. He was not interested in impressing his auditors with his ability—as many counsels do who lose the verdict, but who impress the court or jury with their own cleverness, and convey the idea that they are trying to pull through a desperate case by sheer force of their great ability. These men do not wear a mask to hide their intellect, and they cannot believe that anyone else could do so. Some urged that he was not profound in law. He certainly was not, if to be profound was to be obscure. He had a clear, logical mind, and so expressed everything in the simplest manner. He could influence others without effort, and consequently they never felt his personality, and never felt they were being influenced by him. He was an orator simple, sincere and lucid. There is all the difference in the world between an orator and an elocutionist.

An orator convinces people, and an elocutionist entertains and wins personal admiration. An orator places the idea above form. Undoubtedly Thompson's oratory was not calculated to win the cheap applause of a campaign crowd, who are convinced only for the moment. Before a deliberate body he had no peer.

Sir John Thompson was not of a class, he had no predecessors, and will have no successors.

I cannot close this sketch without giving a short chronological account of his wonderful career.

Born 10th November, -	1844
Entered Law - -	1861
Called to the Bar - -	1865
Elected Alderman of the City of Halifax - -	1871-72
Chairman of the Board of Education - - -	1873
Counsel for United States	1875
Elected M.P.P. - -	1877
Attorney-General - -	1878
Prime Minister - -	1882
Judge of the Supreme Court of N.S. - - -	1882
Minister of Justice of Canada - - -	1885
Honor of Knighthood conferred on him - -	1888
Member of the Ontario Bar	1890
Premier of Canada -	1892
Privy Councillor of England	1894

No record in Canadian history equals this, not even that of Sir John Macdonald.

And the memory of Sir John Thompson's tragic death at Windsor Castle on the 12th of December last, will be the strongest, tenderest tie in binding all British hearts together and holding all parts of the Empire beneath the Union Jack.

SECURITIES ON GOODS, WARES AND MERCHANDISE, IN CONNECTION WITH BANKING.

BY GEORGE KAPPELE.

A CONSIDERATION of the banking system of Canada, and of the different Acts which have dealt with it, at once impresses us with the fact that we have in that system an institution of which we may well be proud, and our pride will increase as it is compared with other systems.

By section 91 of the B.N.A. Act, the Dominion Parliament is given exclusive jurisdiction to make laws in relation to banking, incorporation of banks, and the issue of paper money.

Questions have, from time to time, arisen as to how far the Dominion Parliament could provide machinery and settle forms for carrying out the powers of banks, differing from the laws enacted by the respective provinces referring to similar dealings between private individuals.

It has been contended that the machinery by which contracts which a bank was empowered to enter into, could be put in legal form, affected property and civil rights in the provinces, and was therefore under section 92, sub-section 15, of the B.N.A. Act,

and within the exclusive jurisdiction of the provinces.

These questions, however, are set at rest by the decision of the Privy Council in Tennant *v.* The Union Bank of Canada (1894), A.C., p. 31.

It can now be taken as definitely settled that the exclusive power to confer upon banks contractural and loaning rights, and to provide the forms that all securities shall take in connection therewith, is in the Dominion Parliament, as incidental to banking, and its enactments are *intra vires* of that Parliament, even if inconsistent with the laws relating to property and civil rights in the provinces. It is well from a national and business standpoint, that it is so.

Nothing is so important to a country as uniformity in its banking institutions. If every province could regulate and control the contracting powers of banks, and the machinery by which those powers can be given effect to, banks would soon cease to be national, and become provincial, and the confidence that their national character inspires would be shaken. As it is, we have a uniform banking system over the Dominion, governed and regulated by one power, and subject to one uniform law.

Some thirty-eight banking corporations, with their numerous branches, all having the same rights and being subject to the same laws, are working out from day to day the financial problems of the people, are doing the business of the country, and are supplying the circulation necessary to meet business requirements. The depositor is safe, the note-holder is safe, and the business community have a uniform system, providing circulation sufficient for all emergencies.

Of the more important agencies used in carrying on the banking business, two are the creatures of mercantile law, viz.: bills of lading and warehouse receipts.

Commerce requires credit; credit can only be given upon good security. The best credit can be obtained by advances upon the articles of commerce, and these at the same time furnish the best security.

If banks lost confidence in bills of lading and warehouse receipts, as furnishing in the simplest manner absolute security on the articles of commerce, commerce would soon cease.

The life of commerce is the confidence of banks in it, and this confidence depends upon the banks having absolute and undoubted security for the money advanced to carry on commercial transactions. The simplest security that can be so furnished is a bill of lading or warehouse receipt. The importance of certainty as to the law respecting these two great commercial agencies, and the necessity of its being uniform and national, must be at once conceded. It is, therefore, a matter of congratulation that the Privy Council has finally determined that the Dominion Parliament has exclusive and absolute power to regulate and define them, and the rights they confer.

The Act which at the present time regulates all banking institutions in the Dominion is chapter 31, of 53 Victoria (Canada), being "An Act respecting Banks and Banking," the short title of which is "The Bank Act"

The main object of this paper is to consider briefly its provisions relating

to bills of lading and warehouse receipts.

Banks being the custodians of the people's savings, and furnishing as they do, the circulation of the country by their note issue, it has always been the policy of the law to confine them to what is considered the safest lines of business. They have never been allowed to tie up their assets by loaning on real estate or by venturing in trade or business of any kind.

The idea of the banking system has been to supply money for the purpose of bringing our goods to market. To enable this to be done, the money of the bank must be easily available, and its assets must be of the kind that are the most readily liquidated.

The whole capital and assets of a bank, including its deposits and its note issue, are constantly in circulation, and are being collected in, and again immediately loaned or circulated. If it were not for this system, and for the enterprise of our banks, it would not be possible for the lumber, wheat and other products of our Dominion to reach the markets of the world.

The difficulty with the Australian banks arose entirely from the fact that they were permitted to loan their money on real estate. All their capital and available assets became locked up, and they were, therefore, unable to meet the demands of the people, and supply them with the money necessary for the proper conduct of commercial transactions. The result was that many of the banks had to go into liquidation. This could scarcely have happened if the Australian banks had been confined to the lines of business to which our Canadian banking institutions are confined by the "Bank Act."

Under the Act, our banks are prohibited from either directly or indirectly buying or selling or bartering goods, wares, and merchandise, or from engaging in any trade or business whatsoever. They are further prohibited from, directly or indirectly loaning money or making advances upon the security, mortgage, or hypothecation of any lands, tenements, immovable property, or, except as herein pointed out, upon the security of any goods, wares and merchandise.

We will pass over any further consideration of the prohibition against banks from in any way dealing in lands, tenements, or immovable property, and will proceed to consider what powers are conferred upon banks to make advances upon the security of goods, wares and merchandise.

This brings us to a consideration of sections 73, 74, 75 of the Act.

We will first notice the definition of goods, wares and merchandise, and of a warehouse receipt and bill of lading, given in the Act.

By sub-section "c" of section 2, "goods, wares and merchandise are defined to include—in addition to the things usually understood thereby—timber, deals, boards, staves, sawlogs, and other lumber; petroleum, crude oil, and all agricultural produce and other articles of commerce."

Sub-section "d" of the same section, defines a warehouse receipt as, "any receipt given by any person for any goods, wares, or merchandise, in his actual, visible and continued possession, as bailee thereof, in good faith,

and not as of his own property, and includes receipts given by any person who is the owner or keeper of a harbor, cove, pond, wharf, yard, warehouse, shed, storehouse, or other place for the storeage of goods, wares, or merchandise; for goods, wares and merchandise delivered to him as bailee and actually in the place, or in one or more of the places owned or kept by him, whether such person is engaged in other business or not."

Sub-section "e" of the same section, defines a bill of lading as being "a receipt for goods, wares, or merchandise, accompanied by an undertaking to transport the same from the place where they were received to some other place, whether by land or water, or partly by land and partly by water, and by any mode of carriage whatever."

It will be observed that they are both defined to be receipts for goods, the one by a warehouseman, and the other by a carrier. The legal effect of them is the same. The property in the goods covered by them is transferred by the transfer of the receipt, and the receipt may be transferred either by endorsement or by delivery, the title to the property going with the receipt. Reference is made to the case of Sewell v. Burdick, 10 App., Ca. 74.

By "The Mercantile Amendment Act," R. S. O., ch. 122, contractual rights in all bills of lading pass to the transferee of the bill. This provision is applicable to banks.

Under sections 73 and 75, a bank may acquire and hold any warehouse receipt or bill of lading on goods, wares and merchandise, as already defined, as collateral security for the payment of any bill, note, or debt, *negotiated* or *contracted* at the time of the acquisition thereof by the bank; or upon a *written* promise or agreement that *such* warehouse receipt or bill of lading would be given.

A warehouse receipt or bill of lading, which a bank may acquire has already been defined. As to the warehouse receipt, it must be given by a person who is bailee in good faith, and who is in actual visible and continued possession of the goods. The possession of the bailee must not be fictitious, and the place in which the goods are warehoused, must be actually the premises of the bailee, owned or kept by him *bona fide*, for the purpose of warehousing the goods.

The provisions of the sections as to the persons to whom the receipt may issue, are ambiguous, and the section requires amendment to make its meaning plain.

It is certain that under the section a receipt may be issued:—(1) Direct to the bank making the advance; (2) Direct to the owner of the goods; (3) Direct to the agent of the owner.

The section speaks in one place of "the previous owner or holder" (referring to the warehouse receipt), and in another place, of "the previous holder or owner" (referring to the goods, wares and merchandise), and it may be contended that under the section, a warehouse receipt must either be issued direct to the bank advancing the money, or to the owner of the goods, or his agent.

The ambiguity of sub-section 2 of section 53, ch. 120, R. S. C., which is exactly the same as the section we are

considering, was referred to in the judgment of the Privy Council, in the case of Tennant *v.* The Union Bank, and it was suggested in argument there, that a warehouse receipt given to a third party, other than a bank, or the owner of the goods, could not be negotiated under this section.

Until the meaning of the section is made plain by statutory amendment, it will be well to have warehouse receipts issued only direct to the bank advancing the money, or to the owner of the goods warehoused.

A receipt when issued will pass either by endorsement or by delivery.

A receipt, or bill of lading, can be taken by a bank only to secure a debt *negotiated* or *contracted* at the time, or upon a *written* promise made at the time the debt was negotiated or contracted, that *such* receipt, or bill of lading, would be given, and a bank cannot take a warehouse receipt, or bill of lading, to secure a debt, bill, or note already negotiated or contracted. The legal meaning of "when a debt is negotiated or contracted" will be considered hereafter.

We now come to section 74, which is new, and which is most important to banking. It has taken the place of section 54 of "The Bank Act," ch. 120, R.S.C. Under this latter section, persons could in certain cases issue receipts to themselves on their own goods, in their own possession, and deliver them to banks as security for a debt negotiated or contracted at the time. It was an anomaly to allow a man to issue a warehouse receipt, certifying that he had received his own goods from himself to deliver to himself.

The new section is a change in the right direction. This section allows the transaction to be stated in its real terms, that is, it enables the persons who are within its scope to borrow money by way of mortgage from a bank upon their own goods. The form given in the Act is simple, and is:—

"In consideration of an advance of $ made by the Bank to A.B., for which the said bank holds the following bills or notes: the goods, wares, and merchandise mentioned below are hereby assigned to the said bank as security for the payment on or before the day of of the said advance, together with interest thereon, at the rate of per cent. per annum, from the day of .

"This security is given under the provisions of section 74 of 'The Bank Act,' and is subject to all the provisions of the said Act. The said goods, wares, and merchandise are now owned by and are now in possession, and are free from any mortgage, lien, or charge thereon, and are in (place) and are the following (particular description):"

It will be seen that this form is in reality a chattel mortgage upon the goods, and provides a ready means by which the persons who are within the scope of the section can, without the publicity of a provincial chattel mortgage, obtain a loan upon the security of their goods.

The policy of the law has always been against secret securities. Bills of lading and warehouse receipts, properly so called, are not secret securities.

The goods in these cases are in the

hands of bailees in good faith; the possession of the bailee is not fictitious, and there is no danger of credit being given to an owner upon the faith of goods of which he has not possession, and which, therefore, cannot induce credit. Hence these securities do not infringe upon the Chattel Mortgage Act. That Act (ch. 125, R.S.O.), and Amending Acts, only applies to a mortgage of goods, not attended with a change of possession, actual and continued.

Security of the kind, provided for by the section of the Act we are considering, could not, except for that section, be taken by a bank at all, even as a chattel mortgage. Of course, a bank being entitled to take this simple form of security, could take a chattel mortgage instead, but as the simple form is just as binding, and does not injure the credit of the person giving it, there never could be any object in a bank taking a chattel mortgage instead of the simple form of security. This form of security can only be given to secure a bill, note, or debt *negotiated* or *contracted* at the time of the acquisition thereof by the bank, or upon a *written* promise or agreement made at the time *such* bill, note, or debt was negotiated or contracted.

The persons who come within the scope of the sections are:—(*a*) Wholesale manufacturers of any goods, wares and merchandize; (b) Wholesale purchasers or shippers of products of agriculture, the forest and mine, or the seas, lakes and rivers; (*c*) Wholesale purchasers or shippers of live-stock, or dead-stock, and the products thereof.

A bank may loan money to the wholesale manufacturer upon the security of goods, wares, and merchandize manufactured by him, or procured for such manufacture, and to the wholesale purchaser or shipper upon the security of the products above mentioned, or upon such live-stock, or dead-stock, and the products thereof.

The advance must be made to the wholesale manufacturer, purchaser or shipper by the bank, upon the security of the property mentioned, which must belong to him, and must be, at the time the security is taken, in a particular place, and must be in existence, and capable of particular description.

The form in the Act should be followed, but any form to the same effect as that mentioned in the Act will suffice. As, however, there can be no occasion for a different form being used, the one in the Act should never be departed from.

The word "manufacturer" is defined in sub-section "f" of section 2 to include "malsters, distillers, brewers, refiners and producers of petroleum, tanners, curers, packers, canners of meat, pork, fish, fruit or vegetables, and any person who produces by hand, art, process or mechanical means any goods, wares or merchandise." The place where the goods are situated must be described. In a city, town or village, where the streets are named and numbered, a building or warehouse could, no doubt, be sufficiently identified by the name and number of the street, and by a description of the part of the building in which the goods are placed. In other cases, where the goods are not in a building

or premises capable of being described by reference to street and number, there must be such an actual description of the lands as would be sufficient to pass title in case the property and premises upon which the goods are, were conveyed by deed, although not such as would be required by the "Registry Act."

The cases under the Chattel Mortgage Act have settled that such a description is necessary, and there seems no doubt that the requirements as to the security under section 74 in regard to description, are as strict as those under the Chattel Mortgage Act.

A particular description of the goods covered by the security must also be given. Care should be taken to avoid a description which would cause difficulty in identifying the property: that is, in describing grain or lumber, they should not be described as so many bushels of wheat or so many feet of lumber, but as "all the grain" or as "all the lumber" in a certain defined and specified place.

The cases under the Chattel Mortgage Act as to description, which would be applicable to the form of security under section 74, show that the safest description of chattels which are not capable of specific identification, is a general description of all the goods of the kind covered by the security in a certain place.

It has already been observed that the security must be taken at the time the bill, note or debt was negotiated or contracted, or upon a written promise or agreement that such security would be given.

The question naturally arises, what must such a written promise or agreement contain? It must, of course, be a written promise or agreement by the borrower to the bank to give security on goods securing the amount of the bill, note or debt contracted when the promise or agreement is given. Must it contain particulars of the goods that are to be given, and of the place where the goods are to be located?

As a defective written promise or agreement would invalidate a warehouse receipt, it is important that care should be taken to give all necessary particulars.

The section of the Act requires that the written promise or agreement must be to give *such* warehouse receipt, bill of lading or security; that is, it must be to give the specific warehouse receipt, bill of lading or security afterwards given, and it would be wise in all cases to give the same particulars of the place where the goods are to be located and the description of the goods, as the security will afterwards contain.

The goods, no doubt, need not be in existence at the time of the giving of the promise or agreement, but their existence must be in contemplation, and therefore the particulars above referred to can be given in a written promise or agreement, and it is submitted they should be.

It has been held—and as to that point the law can be taken as definitely settled—that a simple renewal of a bill or note is not a negotiation of a bill or note, and a warehouse receipt, bill of lading or security, under section 74, taken on a simple renewal of a bill, note or debt, is therefore not a valid security in the hands of a bank.

Bank of B. N. A. *v.* Clarkson, 19, C.P., p. 187.

Dominion Bank *v.* Oliver, 17, O.R., p. 402.

The decisions as to when a bill, note or debt is negotiated or contracted, are not uniform. In the case of the Bank of Hamilton *v.* the John T. Noye Manufacturing Co., 9, O.R., p. 631, Chancellor Boyd held that giving up original notes and the security held for them, and taking new notes and new security, was a negotiation of the ne notes, and that a security so taken was valid.

His judgment also was, that a simple renewal of a prior bill, without giving up any antecedent lien, was not a negotiation which would validate a security taken upon such renewal.

The effect of Chancellor Boyd's judgment briefly is, that if what is done is simply an arrangement by which a bank obtains security for a pre-existing debt, such an arrangement would not be a negotiation; but if the transaction is the re-arrangement of a debt for which security is already held, then such re-arrangement involving the giving up of the antecedent security would be a negotiation, and the bill of lading, warehouse receipt or security so taken would be valid.

The Court of Appeal in the case of, The Bank of Hamilton *v.* Sheppard, 21 A.R. p. 156, have, however, in effect overruled the Chancellor's decision. In that case the bank originally held a note for $4,000, collaterally secured by a warehouse receipt; that note and warehouse receipt were subsequently given up, and a new note and new receipt taken therefor. Under the circumstances the Court of Appeal held that the security taken with the new note was invalid in the hands of the bank, the taking of the new note and new security not being a negotiation, within the meaning of "The Bank Act."

Mr. Justice Burton in his judgment said:—

"The statute authorizes a renewal or renewals of the bills or notes, or an extension of the debt which the bill of sale was given to secure, but it does not authorize the substitution of one bill of sale for another; on the contrary, it provides in the most explicit terms that the security must be given contemporaneously with the contracting of the debt."

Mr. Justice Osler in his judgment said:—

"The fact that for the debt when originally contracted, the bank held security which they gave up when the renewals were taken, cannot assist them. The bill or note may be renewed without affecting the security, but it is not contemplated that the latter shall be given up and fresh security taken on the renewal."

The effect of this judgment is, that a warehouse receipt regularly taken, to secure a bill, note or debt, cannot be given up on a renewal of the debt, and a new warehouse receipt taken therefor, so as to make the last receipt a valid receipt. In other words, that there can be only one original warehouse receipt for a bill, note or debt, and that receipt must remain as the only receipt that can be taken to secure such bill, note or debt, until such bill, note or debt is actually paid, not by any renewal thereof, but by

being retired in the ordinary course of business.

The matter is of the greatest importance to banks, as it is almost impossible for them to carry on business under warehouse receipts, bills of lading and securities under Section 74, if new warehouse receipts, bills of lading, and securities, cannot be taken by them in the ordinary course of business, in any case where any of the proceeds of such new transactions are applied by their customers in payment of any pre-existing debt owing to them. Unless the Dominion Parliament intervenes and defines what it means by "negotiating" or "contracting" a bill, note or debt, the above decision of the Court of Appeal will, no doubt, be questioned.

It is a pity that the grounds stated by Chancellor Boyd, in coming to the conclusion he did in the case already referred to, were not discussed by the Court of Appeal in their judgments. Simply renewing a bill or note is, of course, not negotiating it; but arranging a new bill or note with new security, for the purpose of taking up another bill or note properly secured, may well be argued to be more than simply continuing the debt. The giving of a bill or note with new security for the purpose of releasing another security is surely a negotiation. The releasing of the old security is a good consideration for the giving of a new security, and could not be accomplished except by negotiation.

It must, of course, be observed, that the judgments of the Court of Appeal are based upon the fact that there was a renewal in the sense that the bill, with the security, became due, and that by arrangement between the bank and its customer, another bill for the precise sum, with another security, was taken therefor. The Court of Appeal seems to have looked more to the bill or note side of the transaction, than to the security side, and because one bill or note was taken up by another bill or note, it was treated as a renewal, viz.: a simple continuance of the old debt, notwithstanding the fact, that at the same time one security was given up for another. Would the judgment of the Court of Appeal have been the same if the bill or note and security had been given, not in relation to any bill or note due, or maturing due, or for the purpose of renewing any bill or note maturing due, but in the ordinary course of business between the customer and the bank, and if it had been shewn that the whole or a part of the proceeds of such bill or note lastly taken, went to pay an existing indebtedness to the bank, that this occurred simply as a result of the customer having his account with the bank, and as a result of the usual course of dealings between them?

All banks have daily transactions with their customers involving large amounts secured in many cases by warehouse receipts, bills of lading or securities under section 74. Their customers are constantly buying and selling, borrowing and depositing, and discounting bills and notes, the proceeds of which go to their own accounts. From this common fund the business is managed, and prior bills and prior securities are paid and released. This is essential to enable the

business to be carried on. Goods covered by one warehouse receipt are required for the market; other goods must be substituted to enable the customer to continue his business. Would then, this dealing by a bank with its customer, in the ordinary course of business, make invalid all warehouse receipts, bills of lading and securities taken to secure advances, the whole or part of which were required to redeem other securities held by the bank?

It is submitted with considerable confidence that such a dealing would be a negotiation, within the meaning of "The Bank Act," and that the warehouse receipts, bills of lading, and securities so taken, would be valid. The effect of the renewal or substitution of goods held under any of the securities just discussed, and of the mixing of goods so held, with others, is reserved for another paper.

None of the securities discussed can be taken by a bank to secure either past or future advances. A bank can in no case take security of any kind to secure future advances: on the other hand, a bank can take the same securities as individuals, as collateral to past advances. The advances need not be due, but must have been made without any understanding that security should be given for them.

Individuals like Banks can only take warehouse receipts to secure present advances, and cannot take them to secure either past or future advances.

FLETCHER V. RYLANDS.

BY A. C. MACDONELL, D.C.L.

This leading case, reported in L. R. 1 Ex. 265, and L. R. 3 H. L. 330, is frequently cited in our courts, and its principle is of wide and increasing application. The gist of this principle is found in Mr. Justice Blackburn's judgment in the Court of Exchequer, where he says, "the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." On appeal, this dictum was adopted by the House of Lords.

Thus (1) the person whose grass is eaten by the escaping cattle of his neighbor, (2) whose mine is flooded by water from his neighbor's reservoir, (3) whose cellar is invaded by filth from his neighbor's privy, (4) or whose habitation is made unhealthy by vapors from his factory has, in each case, legitimate ground of complaint. In all these cases, however, it will be found that something, be it beasts, water, filth or smells, has somehow escaped from the defendant's land.

B-asts.—The owners of savage and ferocious animals are required to exercise such a degree of care over them as will absolutely prevent the occurrence of any injury to others through such vicious acts of the animals as

they are naturally inclined to commit, in any way whatsoever. To such an extent is this carried, that Bramwell B., in Nichols *v.* Marsland (L. R. 10 Ex. 255), is reported:—"I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable." In Shaw *v.* McCreary (19 O. R. 39), a bear belonging to one of the defendants, escaped from premises, the separate property of his wife, the other defendant, where it had been confined by him without objection by her, and attacked and injured the plaintiff on a public street in the city of Toronto. Held, that the wife having under R. S. O. 1887, ch. 132, sects. 3 and 14, all the rights of a femme sole in respect of her separate property, might have had the bear removed therefrom, and not having done so, was liable to the plaintiff for the injuries complained of. The principle of Fletcher *v.* Rylands applied.

In Firth *v.* The Bowling Iron Company (3 C. P. D. 254), the predecessors of the defendants had fenced their land with wire rope which the defendants had allowed to remain. From long exposure, the strands of the wire composing the rope became decayed, and pieces of it fell on the plaintiff's adjoining pasture. One of his cows swallowed a piece and died in consequence. The defendants were held liable to compensate the plaintiff.

In Crowhurst *v.* Amersham Burial Board (4 Ex. D. 5), the defendants had planted on their own land a yew tree, which projected over the plaintiff's land. The plaintiff's horse ate of it and died. The defendants were held liable.

In Porting *v.* Noakes (1894, 2 Q. B. 281), the plaintiff and defendant owned adjoining fields. On the defendant's land near the fence grew a yew tree, the branches of which projected over the ditch which belonged to the defendant, but not beyond. A colt of the plaintiff's having eaten of the yew tree, died in consequence. Held that the defendant was not liable, for there was no duty on him to prevent the colt having access to the tree, and the principle of Fletcher *v.* Rylands did not apply. The poisonous tree was admitted to be wholly on the defendant's land, but inasmuch as it was so near the boundary that the animal could easily reach the branches, it was contended that the principle of Fletcher *v.* Rylands was applicable. Mr. Justice Charles, however, said, "Fletcher *v.* Rylands is inapplicable to this case, for that decision refers only to the escape from the defendant's land of something which he has brought there, and which is liable to do mischief if it escapes."

Where the defendant's land had been artificially raised by earth placed thereon, and in consequence rain water falling on the defendant's land made its way through the defendant's wall into the adjoining house of the plaintiff, and caused substantial damage:—held, a good cause for action. (Hurdman *v.* North Eastern Railway Company, 3 C. P. D. 168).

Filth.—In Tenant *v.* Golding (1 Sack. 21), the plaintiff was possessed of a cellar contiguous to the defendant's privy, and parted by a wall, part of the defendant's house, and for

want of repair the filth of the defendant's privy ran into the plaintiff's cellar. The defendant was held liable to the plaintiff.

Smells.—Tipping *v.* The St. Helen's Smelting Company (4 B. and S. 609), was an action for nuisance, caused by noxious vapors proceeding from smelting works upon land of the defendants. The defendants were held liable because, in the absence of prescriptive right, every man is bound to use his own property in such a manner as not to injure the property of his neighbor. As to smells, however, everything must be looked at from a reasonable point of view—locality, country, etc., etc.

In Fuller *v.* Chandler Electric Co. (21 S. C. R. 337), the pipe from a condenser attached to a steam engine, used in the manufacture of electricity, passed through the floor of the premises and discharged the steam in a dock below, some twenty feet from an adjoining warehouse, into which the steam entered and damaged the contents. Notice was given to the Electric Company, but the injury continued, and an action was brought by the owners of the warehouse for damages. Held, that the act causing the injury violated the rule of law which does not permit one, even on his own land, to do anything, lawful in itself, which necessarily injures another, and that the plaintiffs were entitled to succeed, more especially as the injury complained of, continued after notice to the company. Fletcher *v.* Rylands applied and followed.

Drainage.—In Rowe *v.* Township of Rochester (29 W. C. 590), the defendants, in order to drain a highway, conveyed the surface water along the side of it for some distance, by digging drains there, and stopped the work opposite the plaintiff's land, which was thus overflowed. Held, that the defendants were liable without any allegation of negligence. And again, in Coghlan *v.* Ottawa (1 A. R. 54) where the city corporation, adopting an existing sewer as part of the drainage system, connected it with two others of greater capacity, which brought more water than the first could carry away, in consequence of which water escaped, and injured the property of the plaintiff. The city was held liable.

Ice and Snow.—"For an injury resulting from the sliding of a mass of ice and snow from a roof upon a person travelling with due care upon the highway, the owner of the building is liable, if he suffered the ice and snow to remain there for an unusual time after he had notice of its accumulation, and ought to have removed it." This seems reasonable enough, when the owner knows that ice or snow is accumulated on a sloping roof, liable, of course, at any change of atmosphere or otherwise, to fall into the public street. He may properly be held responsible if in reasonable time he do not take steps to prevent injuries to passers by. Dictum of Hagarty, C. J., in Skilton *v.* Thompson (3 Ont., R. 14.)

Overhanging Buildings.—In Roberts *v.* Mitchell (21 A. R. 433), it was held that the owner of a building from which a cornice overhanging the sidewalk falls, because the nails fastening it to the building have become loosened by ordinary decay, and injures a passer by, is liable in damages, without proof of knowledge on his part of

the dangerous condition of the defect, being one which he could have ascertained by reasonable inspection. Fletcher *v.* Rylands quoted.

Electricity.—In National Telephone Co. *v.* Baker (1893) 2 Chy 186, it was held that a man who creates on his land an electric current for his own purposes, and discharges it into the earth beyond his control is, on the principle of Fletcher *v.* Rylands, as responsible for damage caused by that current as he would have been if, instead, he had discharged a stream of water.

Fire.—In Dean *v.* McCarthy (2 W. C. 448), it was held that a person kindling a fire on his own land for the purpose of clearing it, is not liable at all risks for injurious consequences that may ensue to the property of his neighbors. Negligence must be proved. This case was decided before Fletcher *v.* Rylands, after which the question came up again in our courts in Gillson *v.* North Grey Railway Co. (35 W. C. 475), where the principle of Dean *v.* McCarthy, was affirmed. Blake, V. C., however, dissented, being of the opinion that upon the rule of law laid down in Fletcher *v.* Rylands, the defendants here were liable, whether the fire was set out negligently or not. In Furlong *v.* Carroll (7 A. R. 145), a distinction is drawn between kindling fire, as in the case of Dean *v.* McCarthy, for husbandry purposes, and lighting fires which serve no such useful or necessary purpose.

Beven on Negligence, 1889 Ed., at p. 1,127, lays down the following exceptions to Fletcher *v.* Rylands :—

(1) Where the damage to the plaintiff has occurred in the natural user of the land, a user, that is, for which it might in the ordinary course of the enjoyment of the land be used.

(2) Where the damage to the plaintiff was caused by his own default.

(3) Where the damage to the plaintiff was the consequence of *vis major* or the act of God.

(4) Where the damage was the consequence of accumulation for public purposes under the express authority of a statute.

THE PARDONING POWER CASE.

In the number of the Supreme Court reports just delivered (23 S.C.R. 458), the decision of the court in this case is printed.

In 1888, the Provincial Legislature passed (51 Vic. c. 5, Ont.) a declaratory Act, that the Lieutenant-Governor had, in matters within the legislative jurisdiction of the Province, all powers which before the passing of the *British North America Act* were invested in the Governors, including a power to commute or remit sentences for offences against the laws of the Province, or offences over which the legislative authority of the Province extended. The Dominion Government objected to this declaration, that the Act purported to confer powers upon the Lieutenant-Governor beyond those conferred upon him by the British North America Act, and in particular,

as section 9 of the B.N.A. Act provides that all prerogative powers, not specifically bestowed upon the Governor-General or Lieutenant-Governors, are vested in the Queen. Therefore, the pardoning power could only be conferred upon the Lieutenant-Governor by delegation from the Queen, through the usual channel of commissions and instructions. An action was brought under the Judicature Act (R.S. O., c. 44, sec. 52 (2)) in the name of the Attorney-General for Canada against the Attorney-General for Ontario, for a declaration as to the validity of the Provincial Act. The judgment of the Chancery Division (reported 20 O.R. 222) declared that it was within the power of the Legislature to pass this Act. Upon appeal, the Court of Appeal confirmed the judgment of the lower court (19 A.R. 31), and the Supreme Court of Canada (Gwynne dissenting) support the finding of the Court of Appeal.

The judgment of the Chief Justice does not deal with all the questions raised upon the argument. Starting from the 15th sub-section of section 92 of the B.N.A. Act, and the decision of the Privy Council in Hodge *v.* The Queen (9 App. Cas. 117), the Chief Justice holds that there is no room to doubt the power of Provincial Legislatures to impose punishment by fine and imprisonment, as sanctions for laws which these legislatures have power to enact. The next step in support of Provincial jurisdiction is the case of the Receiver-General of New Brunswick *v.* Liquidators of the Maritime Bank ([1892] A.C. 437), which establishes the doctrine that the Provincial Lieutenant-Governor, although appointed by the Governor-General, under the Great Seal of Canada, represents not the Governor-General, but the Queen. The prerogative of pardoning, which was exercised by Lieutenant-Governors before the B. N. A. Act confederated the Provinces, was not derived from Statute. The Chief Justice seems to be of the opinion that the prerogative of pardoning is not incidental to the office of a colonial governor, but requires express delegation by commission, under the Great Seal, or by the Crown instructions. For, as he points out, by the Common Law of England, the royal prerogative of mercy is not limited territorially to the United Kingdom, but is vested in the Queen as to the whole of her dominions. Any delegation does not exclude the direct exercise of the prerogative.

The next question is, assuming delegation to be necessary, in what legislature does the power of conferring this prerogative upon the Crown representative reside? In the Imperial Parliament? Or in the Parliament of Canada? Or in the Legislature of the Province? For although the Crown can delegate the prerogative, it is a recognized canon of constitutional law, that the Crown must act through some adviser. The Chief Justice does not decide the question raised, but it is evident in which direction he is leaning. As the Provincial Act in question is on its face made subject to a condition that the Legislature has power to enact it, it seemed to the Chief Justice an impossibility to hold it to be *ultra vires*, therefore the appeal was dismissed. This is an unsatisfactory disposition

of the questions raised, and it will require a decision of the Privy Council to set at rest the whole discussion as to the prerogative power of the Provincial Lieutenant-Governor.

In so many words, Taschereau, J., says:—"Constitutional questions cannot be finally determined in this court. They never have been, and can never be under the present system."

THE LAWYER'S LULLABY.

Be still, my child! remain in statu quo,
While I propel thy cradle to and fro.
Let no involved res inter alios
Prevail while we're consulting inter nos.

Was that a little pain in medias res?
Too bad! too bad! we'll have no more of these.
I'll send a capias for some wise expert
Who knows to eject the pain and stay the hurt.

No trespasser shall come to trouble thee,
For thou dost own this house in simple fee—
And thy administrators, heirs, assigns,
to have, to hold, convey at thy designs.

Correct thy pleadings, my own baby boy!
Let there be an abatement of thy joy;
Quash every tendency to keep awake,
And verdicts, costs and judgments thou shalt take.

A NASAL DEMONSTRATION.

A SUIT was brought a few years ago by the people of a certain quarter of Montreal against a manufacturing company. The vile odors of the chemicals used in the works, they alleged, had made the neighborhood untenantable, and seriously lessened the value of their property.

Judge and jury were inclined to turn a deaf ear to the complaint. The company was rich and powerful, and "an alleged smell," as their counsel declared "was too intangible a grievance to grasp."

One of the opposing counsel was seen to go out, and not long after returned with two glass retorts.

"Here," he said, in the course of his plea for his clients, "are the offending subjects of our contention." He passed them to the judge, and then to the jury, who smelled them, and, smilingly declared them pure and odorless.

"But," said the counsel, "the company mixes them!" He suddenly poured the contents of one of the retorts into the other, and the nauseous fumes of hydrosulphuric acid or sulphuretted hydrogen filled the air. Judge, jury and spectators choked for breath. It was necessary to adjourn court until the next day, when heavy damages were at once awarded to the plaintiffs.

HUSBANDS-IN-LAW.

NOT very long ago, troubles in a well-known Washington family were the cause of divorce proceedings. The wife got a judgment, though the husband had filed a strong cross bill. In a few months the ex-wife was again married, this time also to a Washington man. One evening, recently, at a large reception, the two met unexpectedly, and an acquaintance, not well up in the family history, was proceeding to introduce them. "Oh, we've met before," said the last husband, "we're husbands-in-law."

The Barrister.

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TORONTO, JANUARY, 1895.

THE BARRISTER was one of the numerous minor sufferers in the late big fire in Toronto. The whole edition of this number went up in smoke. We also mourn the loss of several contributed articles of which no duplicates remain. This, our second edition for the month, is a week late and doubtless is imperfect. Our readers, knowing the cause, will make all just allowances.

*

A committee of the Benchers waited upon the Attorney-General the other day to inform him of some items of change desired in the constitution of the courts, and some reforms in the rules of practice. It is not known precisely what it is that the committee urged, but it is understood that one of the means suggested to render litigation less burdensome, was to abolish the intermediate appeal to the Divisional Court in non-jury actions. In the English system, the only appeals from trial judges heard by Divisional Courts are in jury cases, all other *nisi prius* appeals are taken to the Court of Appeals. To meet the obvious objection that resort to the Court of Appeal, under the present practice, is very onerous as regards the appellant, it is proposed to abolish the rule requiring security for costs and to reduce the cost of appeal books. One advantage would accrue to the science of the law by the single appeal to the Court of Appeal. Decided cases would be consistent; all the judgments proceeding from the one tribunal, there would be uniformity in the application of principles. At present, many appeals are not carried further than the Divisional Courts, and we have occasionally conflicting decisions on the same point by the different Divisions. If the security for costs were abolished, and other outlay at present necessary largely reduced, undoubtedly it would be some relief to litigants to confine appeals within the province to one tribunal. If, as has been feared, the Court of Appeal would become choked with the number of cases, the remedy is apparent. Let the Court of Appeal sit as two Divisions to hear appeals, summoning *ad hoc* High Court judges to fill up the bench.

*

It would have been useful to the cause of law reform if the profession at large had been informed of the changes to be urged upon the Government. As it is, discussion can take place only when the concrete measure is brought down to the Legislature, and therefore at a stage when the measure has passed practically beyond the region of debate. If we had in existence a Provincial Bar Association, with appropriate machinery for collecting the experience of all the practitioners, the representations of the profession to the Government would have had a force that cannot

be conceded to the opinions of even a Committee of Benchers. Everywhere in the province, members of the profession are earnest in their desire to assist law reform, and valuable help could be had for genuine reform if the profession was taken into the confidence of the Benchers. It is usual in other countries to call out suggestions and opinions by printing a draft of the proposed measure and circulating it among those who are to be affected thereby. If this were done even now, although the meeting of the Legislature is close at hand, many questions would receive more satisfactory solution than at present seems probable. For Benchers and Government together can not be fully informed of the needs of every locality, so that any measure of reform, prepared in private, will fall short of what is reasonably expected. In any event, suspicion is easily excited that the Toronto Bar is seeking legislation in the local interest, and the cry of centralization will again be heard.

*

There is another reason, found in human nature itself, why the lamp of reform should be passed constantly from hand to hand, and not be left to the sole care of him who has first kindled the flame. To one who has contended strenuously for a reform, and whose exertions are at last crowned with success, the work seems perfect. He no longer initiates reform but in turn, is disinclined to admit that further change is desirable. Anything further seems to him subversive of principle. There is a curious note in the diary of one of England's great law reformers illustrative of this phase of our nature. Lord Campbell had done much, but was troubled in mind that others were willing to go further than their leader in simplifying the practice. Under the date of July 14, 1857, in his diary, he, as it were, protests to himself against the unreasonableness of those who were agitating further reform.

"I have hitherto successfully struggled for the true principles on which legal reform should be conducted. There is now a class of pessimists who maintain that 'whatever is, is wrong,' they think that all disputes may be settled by calling the parties before the Judge, and summarily deciding after the fashion of a Turkish Kadi. I shall continue to stand up for *special pleading—i.e.*, a written statement of the claim and the defence, evolving the questions of fact or of law, to be decided by the jury and the Judge. No doubt this art has been dreadfully perverted and much labor will be required to simplify and improve it."

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How does it come that to have judgment in a Division Court by default on a claim of $100, costs in disbursements more than double what a similar judgment by default costs in the High Court on a claim of $10,000? This state of affairs seems to need a remedy. Division Courts were established as small debt courts, to enable suitors concerned with little things to have justice administered at a trifling cost. The theory was good, but the performance is unsatisfactory. We commend to the Legislature the following suggestions which we have received from correspondents. The suitor in the Division Court ought to

be allowed to serve the summons himself, if he desire to avoid the costs and mileage incidental to service by the Court Bailiff. If it is proper to allow the litigant in High Court to avoid Sheriff's fees of service, the rule ought certainly to be good in a small debt court. It may be urged that unless the Bailiff is allowed this opportunity to take toll of every suitor, the Court business will not be remunerative enough to support him. The answer is obvious—the function of the Division Court is not to provide maintenance for Bailiffs. The Bailiff can easily combine, as many of them now do, other employment with his Division Court office. Again, the clerk's fees seem much too large in comparison both with the amount in dispute and with the responsibilities of the office. It would be a sensible relief to a large portion of the community, and particularly to the class who can least afford to have claims swollen by large costs, if the scale is considerably reduced, and permission given to serve the defendant in the most economical way. Besides these matters, it would be well for the Legislature to consider whether the judgment summons proceeding should not be wholly abolished. It is imprisonment for debt very thinly veiled, and is degrading to Court, solicitor and debtor. In practice, it has been found nearly valueless as a means to the end desired, viz., collection of the debt. If this proceeding is defensible, why should exception be made in favor of the married woman? It seems to us that the very exception is an admission that the procedure is a relic of barbarism. In effect, the Court says to the debtor—you are ordered to pay B five dollars—you have not paid B five dollars—you disobeyed the order of the Court—you are therefore in contempt; for the contempt, mind you, and not for your inability or neglect to pay B five dollars—you are sentenced to ten days in goal. This farce is in itself calculated every time it is enacted, to inspire the debtor, and every one who hears it, to believe that justice has been mocked.

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ELSEWHERE in the present issue, we print the latest instalments of New Rules of Practice. As first published, the two instalments purported to have been adopted at the same time—on the 29th September, 1894. This had the curious effect of enacting and repealing a rule (1,380) on the same day. It is now announced that the second batch properly bears date the 29th December, 1894. It is matter of complaint that there is no regular time of year for revision of the rules and additions to the practice, but the changes appear to follow one another at irregular intervals, as if the judges occasionally said amongst themselves, Let there be new rules, whereupon new rules came into being. We may take the present opportunity of pointing out that the practice in setting forth amendments to the rules is faulty in several particulars. The obvious way of saying that a rule, 761 for example, which had been repealed, and a new rule substituted therefor, had in turn been repealed or amended, would be, "Rule 761, as substituted by Rule 1,352, is amended, etc." This method is certainly preferable to saying that "rule 761 is amended, etc.," and trusting to a bracket clause (see rule 1352)

to give us the necessary information that it is not the original rule 761, but the new rule 761 enacted by rule 1,352, which is amended. One example will make the desirability of the change apparent. The Consolidated Rules contain a rule 666; rule 1,277 establishes a subsidiary clause as 666 (*a*); rule 1,278 establishes a further clause as 666 (*b*), and now rule 1,391 establishes a further clause as 666 (*c*). Instead of referring us to rule 666 and the successive additions, by setting forth that "Rule 666, as amended by rules 1,277 and 1,278, is further amended by adding as clause (*c*), etc.," the alteration is thus set forth: "Rule 1,278 is hereby amended by adding thereto the following words 666 (*c*), etc.," and the practitioner is left to his own devices to ascertain what happened to rule 666 between the time of its enactment and the adoption of rule 1,278. The demands upon the professional time of a practitioner are heavy enough without having it forced upon him to compare the rules with all intermediate amendments. There are two rules 1,277, one of the 29th December, 1893, the other of the 4th January, 1894; the latter only is subsectioned. It is probable, therefore, that of these legal twins, it is the latter that is amended by the new rule 1,390, which purports to amend subsection (*d*) of 1,277. Again, in amending this sub-section (*d*) of 1,277, the draftsman strikes out the word "day" only, instead of the words "same day." A similar lack of precision is seen in the new rule 1,388. Rule 596 said correctly enough "an examination." We are now to read Rule 596 as saying "*an* commission."

A CORRESPONDENT favors us with the following note on what he terms a missing section in our Real Property Statutes:—

"For many years our Ontario Legislature has followed at a respectful distance the Imperial Parliament in the path of legislation, and wherever the Englishmen have erected a milestone to mark their progress in law-making, we have broken from it a substantial chunk wherewith to build to our own edifice of statutes. Generally the immigrant enactments have been welcome settlers amongst us, but occasionally they bring with them a certain Anglicism that seems out of place. On the other hand, it sometime happens that the long expected immigrants fail to arrive.

"An instance of a section that never came is the 18th section of the Imperial Conveyancing Act, 1881. This section gives to mortgagors in possession (as against incumbrancers) and to mortgagees in possession, extensive powers of leasing for periods, in case of agricultural or occupation leases, of not more than twenty-one years. The advantage of the *de facto* owner, *i.e.*, the man in possession, whether mortgagor, or mortgagee, being able to make safe leases, and insure quiet possession to users of the land, is an advantage that cannot be over-estimated. Especially is this the case in a country like Ontario, where two-thirds of the farms seem to be pledged, and where the prosperity of the people depends on their ability to get the utmost profit out of the land.

"The law at present in Ontario pertaining to leases by the mortgagor subsequently to the mortgage, has the

merit of simplicity. The mortgagee may treat the mortgagor's tenant as a trespasser; the tenant, while liable to eviction, is not subject to distress or action for rent of the mortgagee (see Woodfall, 13th ed., ch. 1, sec. 28; Canada Permanent *v.* Byers, 19 U.C., C. P. 473, (1869.) This state of the law is a simple evil, for it destroys the power of two-thirds of our people to make sound leases. Moreover, Canada Permanent *v.* Rowell (19 U.C.R. 124) shows how the position of a tenant may be prejudiced by a mortgage given subsequently to the commencement of his tenancy. Instead of attempting a statutory repudiation of the personal covenant in mortgages, our M.P.P.'s might well see that the holders of equities of redemption have a free hand to deal with their own."

MISCELLANEOUS.

NEW RULES OF PRACTICE.

THE following rules were passed by the Supreme Court of Judicature for Ontario, on the 29th September last:

1,380—Rule 1,289, passed 23rd June, 1894, rescinding consolidated rule 41, and substituting a new rule in lieu thereof, is amended by striking out the words "proceedings in the nature of a *quo warranto* under the Municipal Act, or to" in the 9th and 10th lines.

1,382—Rule 211 is amended by adding thereto the following words: (*a*) "All documents sent from outside offices to Toronto for use in the weekly courts are, in all cases, to be sent to the Clerk of Records and Writs, and the necessary postage or express charges for return of same is to be transmitted therewith."

1,383—Rule 274 is rescinded.

1,384—Rule 1,177 is rescinded, and the following substituted therefor: "1,177, (1) The costs of every interlocutory *viva voce* examination and cross-examination shall be borne by the party who examines, unless it is otherwise ordered, as to the whole or part of the examination, by a judge of the High Court in actions in such court, and in actions in the County Court by a judge of that court. (2) No costs of obtaining the allowance of such costs against the opposite party shall be taxed unless so ordered."

The following new rules were made by the Supreme Court of Judicature for Ontario, on Saturday, 29th December, 1894:

1,385—Rule 23 (17) is amended by striking out the word "demurrers."

1,386—Rules 41, 1,289, 1,380 are rescinded, and the following substituted for rule 41:—

"41. The judge of every County Court, other than the County Court of York, shall, in all actions brought in his county, and in interpleader proceedings where the goods, in respect of which interpleader is sought, are situate in his county, have concurrent jurisdiction with, and the same power and authority as, the Master-in-Chambers in all proceedings now determined in Chambers at Toronto, except that the authority of such judge

shall not (except as provided by an act to facilitate the local administration of justice in certain cases—57 Vic., Ch. 200, or rule 1,164) extend to the payment of money into court in any action or matter, or to appeals from the taxing officers in Toronto, pending taxation, or to making an order for the sale of infants' estates.

1,387—Rule 509 is amended by striking out "rule 329," and by substituting "rules 328 and 332 (c)."

1,388—Rule 696 is amended by striking out the word "examination" in the first line, and by substituting "commission."

1,389—Rule 761 is amended by striking out "delivered," and by substituting "in cases tried." (See rule 1,352.)

1,390—Sub-section (*d*) of rule 1,277 is hereby amended by striking thereout the word "day" in the last line thereof, and inserting in lieu thereof the words "expiration of ten days."

1,391—Rule 1,278 is hereby amended by adding thereto the following words:

"666 (c). In counties where there is a deputy clerk of the Crown and a deputy registrar of the High Court of Justice, the records for trial at the jury sittings shall be entered with the deputy clerk of the Crown, and he shall act as registrar at such jury sittings; and the records for trial at the non-jury sittings shall be entered with the deputy registrar, and he shall act as registrar at such non-jury sittings.

A HARD DOLLAR.

LORD COLERIDGE was at Mount Vernon with Mr. Evarts, and talking about Washington, said, "I have heard that he was a very strong man physically, and that, standing on the lawn here, he could throw a dollar right across the river to the other bank."

Mr. Evarts paused a moment, to measure the breadth of the river with his eye. It seemed rather a "tall" story, but it was not for him to belittle the Father of his country in the eyes of a foreigner.

"Don't you believe it?" asked Lord Coleridge. "Yes," Mr. Evarts replied. "I think it's very likely to be true. You know a dollar would go farther in those days than it does now."

THE THIRTEEN MAXIMS OF EQUITY.*

EQUITY follows the law, regards what should be done.
To reach the substance every form looks through,
On strictly equal plane puts every one;
Who seeks her aid, himself must justice do.

*The maxims of equity, as indexed by the American and English Encyclopedia of Law, are as follows:—

1. Equity follows the law.
2. Equity regards that as done which ought to have been done.
3. Equity looks to the intent rather than to the form.
4. Equality is equity.
5. He who seeks equity must do equity.
6. He who comes into equity must come with clean hands.
7. Between equal equities the first in time shall prevail.
8. Between equal equities the law must prevail.
9. Equity aids the vigilant, not the sleeping.
10. Equity imputes an intention to fulfil an obligation.
11. Equity will not suffer a right to be without a remedy.
12. Equity acts in personam.
13. Equity acts specifically.

With hands unstained her suitors all must be ;
With equal right the first in time prevails ;
With equal right the law controls degree ;
The wakeful, not the sleeping, turns her scales.

To each she will impute a purpose fair,
Each legal right her ample power protects.
She acts alone on persons everywhere,
The very thing that should be, she directs.

ROBERTSON PALMER,
In the Green Bag.

NOTES OF RECENT ENGLISH CASES.

Copyright publication by newspaper of plot before play performed. Gilbert *v.* The Star Newspaper Co., (Chan. D. Chitty J. Oct. 26, 1894) 11 Times L.R. 4. The ground upon which an interim injunction was asked was that there had been a publication of the author's work before it had been published by him or his authority. The principle is enunciated in Prince Albert *v.* Strange, 1 Mac. and G. 25. The injunction granted was confined to the article complained of, and did not prevent the *Star* from giving an account of the opera, when and after it was performed.

Local authority, liability of, to action for breach of Statutory duty. Saunders *v.* the Board of Works for the Holborn District (Q. B. D., Mathew and Charles JJ., Oct. 26, 1894) 11 Times L.R. 5. When a penalty is imposed by statute, on a local authority, for breach of a duty thereby created, they are not also liable to an action, unless the statute so indicates. This was the principle laid down in Atkinson *v.* Newcastle Water Company, 2 Ex. D., 44. The older cases, which supposed such a right of action, if not formally overruled, had been so spoken of in the Court of Appeal, and the House of Lords, that they could no longer be considered as authorities. The case in the Privy Council, the Municipality of Picton *v.* Geldert, [1893] A. C., 524, reviews the authorities and overrules the older cases.

Joint Guarantors', action against one, after unsatisfied judgment on dishonored check of the other. Wegg-Prosser *v.* Evans, (Court of Appeal, Lord Esher, M. R., Lopes and Rigby, LJJ., Nov. 1, 1894) 11 Times L.R., 12. The plaintiff had not sued on the guarantee, but took a cheque from one. Taking that cheque was only conditional payment. The cheque was dishonored and judgment obtained, which judgment was unsatisfied. The rule of law laid down in King *v.* Hoare, 13 M. & W. 494; and Kendall *v.* Hamilton, 4 App. Cas. 504, applies only when the action claimed as a bar was for the same particular cause of action. That action was no bar to an action against the other guarantor upon the guarantee. Cambefort *v.* Chapman, 19 Q. B. D., 229, was wrongly decided. The leading case is Drake *v.* Mitchell, 3 East 251 (1803).

Marine Insurance—"Sue and labour" clause. J. Lysaght (Limited *v.* Coleman (Court of Appeal, Esher, M. R., Lopes and Rigby LJJ., Oct. 31, 1894), 11 Times L.R., 10. The assured in a marine policy of insurance cannot under the sue and labour clause, recover expenses incurred in examining goods which, on examination, proved to be undamaged. At the most, there was only a suspicion of

damage, and against that the underwriter did not insure, but against actual damage. As to the sue and labour clause, it could not be said that what was done by the insured, was done to save or diminish a loss to the underwriters.

Strike—Trade Union—Inducing servants to strike. Inducing persons to break contracts. Interim injunction. Wright *v.* Hennesy, (Q.B. Div., Wright and Collins, JJ., Nov. 1, 1894), 11 Times L.R. 14. Injunction will be granted to restrain defendant from inducing persons to break their contracts with plaintiff. Bowen *v.* Hall, 6 Q.B. D. 333. Temperton *v* Russell [1893], 1 Q.B, 715, are authorities. Strikes, within certain limits, are legal means of furthering the objects of trade unions, and to grant an interim injunction and not be granted, restraining defendants from inducing persons employed, to go on strike. It would likewise be going too far to grant an interim injunction restraining defendants from inducing others not to enter into contracts with the plaintiff.

Maritime law—jurisdiction of Admiralty Court. Necessaries furnished to foreign vessel in foreign Court. The Mecca, (Prob. and Adm. Div., Bruce J., Nov. 8, 1894), 11 Times L.R. 19. So long ago as "The India," (1863, 1 Mar Law Cases, 390) it was held that the Court of Admiralty had no jurisdiction over a claim in respect of necessaries supplied to a foreign ship in a foreign port. The Admiralty Court Act, 1851, applied only to British ships.

Charitable bequest, lapse of, when not administered cy-pres. In *re* Horatio Rymer (Ct. of App., Herschell L.C., Lindley and A. L. Smith, L.JJ., Nov. 6, 1894), 11 Times L.R., 20. Where a testator's object in giving a legacy, was to benefit an institution which had ceased to exist at the death of the testator, the case falls within the rule of Clark *v.* Taylor, 1 Drew. 642, and lapses in the same way that a legacy to a person who dies before the testator, usually lapses.

New trial—misdirection. Ford *v.* Bray (Ct. of App., Esher M.R. Lopes and Rigby, L. JJ., Nov. 10, 1894), 11 Times L. R. 32. This case again lays down the rule that a new trial, on the ground of misdirection, will not be granted, unless some substantial wrong or miscarriage of justice has been occasioned thereby.

Partnership—Firm of Solicitors—Fraud of one—Rule that misfeasance must have been within the scope of authority as solicitor to render other partners liable. Rhodes *v.* Moules (Ct. of App. Haschell L. C. Lindley, and A. L. Smith, L. J. J., Nov. 12, 1894), 11 Times L. R. 33. Cleather *v.* Twisden, 28 ch. D. 340, decided that where securities are deposited for safe custody with one of the partners, that the others are not liable for his fraud, because, beyond the ordinary scope of the business of solicitors. This case is to be distinguished from the case of securities being intrusted as part of a transaction which was being conducted by the firm or one of its members in the ordinary course of business. The English statute applicable is the Partnership Act, 1890, s. 11.

Contempt of Court by newspaper commenting on case pending. Rus-

sell *v.* Russell (Prob. Div., Bruce J., Nov. 12, 1894), 11 Times L. R. 38. In this case, although the *Figaro* in its affidavit, setting out the facts, made apology, the Judge thought the contempt should not go unpunished, and imposed a fine of £50 and costs of motion to commit. Former cases, Tichborne *v.* Tichborne, L. J. 187*v*, N. S. 398. Motion to commit printer of *Champion et al.* Atkyns, vol. 2, case 291, p. 469.

SPURIOUS WAREHOUSE RECEIPTS.

The litigation of the Bank of New York National Banking Association against the American Dock and Trust Co. (38 N. E. 713), for damages arising out of the insurance of a spurious Warehouse receipt, has finally ended in the defeat of the plaintiff and the loss of the collateral. The judgment of affirmance by the New York Court of Appeals upholds the rulings of the lower courts. (24 N. Y. Supp. 406.)

The president of the company (Stone) made an individual loan with the bank, and pledged as collateral a warehouse receipt for 162 bales of cotton, evidenced by the following receipt: "New York, Nov. 4, 1890. Received on storage at the American Docks for account of M. W. Stone, 162 bales of cotton, marked G. B., subject to the order of himself on the payment of the charges accrued thereon, and surrender of this receipt. M. W. Stone, President."

A by-law of the company permitted the president or treasurer to sign warehouse receipts, but in construing the by-law the court held that it did not give authority to the president to sign a warehouse receipt in his own case.

Had the receipt recited that the cotton was stored by a third person, the company would have been liable although the person had not in fact, deposited any cotton.

The argument of the court on the subject of the proper construction of the by-law rests on the law of agency and adjudications like, Claflin *v.* Bank, 25 N. Y. 293; Pratt *v.* Ins. Co., 130 N. Y. 206; Neuendorff *v.* Ins. Co., 69 N. Y. 389; Manh. Life Ins. Co., *v.* 42nd, etc. Co., 139 N. Y. 146. The court distinguished Titus *v.* Turnpike Co. 61 N. Y. 237, and Goshen Nat. Bank *v.* State, 141 N. Y. 379.

In the case under consideration, the warehouse receipt would likely have been good if signed by the Treasurer of the company, although it recited that the cotton was stored by the President.—*Nat. Co.p. Reporter.*

LAW SCHOOL DEPARTMENT.

STATUTES, MERCHANT AND STAPLE.

W. MARTIN GRIFFIN.

IN the text-books prescribed for the law school course, and in many of the older cases, frequent mention is made of debts by Statutes Merchant and Staple, without any explanation being given of these terms, and having had occasion to look this question up, the following account of these enactments may not be without interest to many students.

The statute of Acton-Burnell II, Edw. I. (so-called from the place where it was passed), was enacted to render easier the process of law for the recovery of trade debts. A creditor wishing to secure payment of a debt, brought his debtor before the Mayor of London, York, or Bristol, there to enter into a recognizance and a "writing obligatory," to which the king's seal and that of the debtor were affixed, for the amount of the debt. These were enrolled with a clerk appointed by the king. Upon default, the creditor applied to the Mayor, who caused the goods and devisable lands of the debtor to be sold to the amount of the debt. If the debtor had no goods within his jurisdiction, the Mayor sent the recognizance to the Chancellor, who issued a writ to the Sheriff of the County where the goods were, and he acted for the Mayor. If no purchaser could be found for the goods, they were delivered to the creditor at an appraisement. Should it happen that the appraisers, out of favor to the debtor, set too high a value on the goods, the creditor could force them to buy the goods at the appraised value. If the debtor had no goods, and failed to get securities (mainpernors) he was imprisoned until he or his friends made satisfaction.

This statute was re-enacted by the Statute of Merchants, 13 Edw. I., 3, and extended to all the large towns. After this Act, the recognizance and writing obligatory were to be made in two parts; the one to be kept by the Mayor, and the other by the clerk. The initial proceedings against the debtor's goods were also omitted, and his body could be taken and imprisoned in the first instance. Within a quarter of a year of his imprisonment, the debtor's goods and all his lands (devisable or not), were to be delivered to him, that he might sell them, and make payments. If he failed to do this within half a year, or if the body of the debtor could not be found, they were delivered to the creditor at a reasonable extent (appraisement), to hold as "tenant by statute merchant," until his debt was realized; the debtor meanwhile to continue in prison. Land of the debtor aliened subsequently to the acknowledgment could be taken from the feoffee under this process. The recognizance under these acts took the name of "statute-merchant."

The object of the Statute of the Staple, 27 Edw. III., st. 2, was to encourage trade with foreign nations and to make the commerce in certain articles centre in England. This Act provided certain places in England, in Ireland, and on the Continent, where alone the staple products of England: viz., wool, leather and lead, were to be bought and sold, and prohibited their exportation by British merchants. Though opposed to the modern idea of unfettered competition, these staples were not without their use in facilitating the collection of the customs' duties. They also enabled the State by its officers to oversee to some extent the quality of the goods offered for sale, and to prohibit their export if inferior.

For the convenience of merchants, especially foreigners, traders within the staple towns were not to be subject to the Common Law, but were

placed solely under the jurisdiction of an elective mayor and constables of the staple who were to administer the law merchant. Where one party was a merchant, suits could be brought either in the staple or at Common Law; and suits relating to land were withdrawn from the jurisdiction of the staple entirely. If both parties were aliens, the jury was to be composed of foreigners; if they were both English, the jury was to be English; and if one party was a denizen and the other an alien, the jury was to be composed half of denizens and half of strangers. The Statute 36 Edw. III., st. 1, c. 7, restricted the jurisdiction of the staple to actions of debt, contract and covenant between merchants. All pleas of felony and all other actions were to be at Common Law, except in the case of alien merchants, who could implead or be impleaded of any offence either in the staple or at Common Law. In order that contracts within the staple might be better observed, recognizances called "statutes-staple," similar to statutes-merchant, were entered into before the mayor and sealed with the seal of the staple. Upon default, the proceedings were similar to those above detailed, but when execution was to be issued out of Chancery, instead of sending the recognizance to the Chancellor, the mayor of the staple sent merely a certificate under his hand of the amount due. Moreover, the debtor was not allowed the benefit of the quarter of a year given him for payment by a statute-merchant. By 23, Henry VIII., c. 6, the benefit of these mercantile transactions was extended to the public generally.

These Acts are interesting as being part of the old system of state direction of commerce, which was not entirely abandoned even when, in the middle of this century, the free trade policy was established in England. The state still controls railways by means of a Commission, and regulates the Canadian cattle trade by Orders-in-Council; and we still have in Canada a survival of this old establishment of staples in our "Ports of Entry," under the Customs Act (R.S.C., c. 32, s.s. 21-24), no goods being allowed to be entered except at certain places fixed by Orders-in-Council. References can be made to Reeve's History of English Law, Vol. 2; Stephen's Commentaries, Vol. 1, and Gibbin's Commercial History of England.

WITH this number we begin our first year. We hope the student body will give this column their encouragement. The news in this number is somewhat old, but owing to the great fire of January 10th, this number was destroyed. The law students should appoint some one to edit this column in their interests; possibly the Literary Society would appoint some one editor. We will devote this column to the students and welfare of students at law, and advocate everything that is to their interest.

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LEGAL AND LITERARY SOCIETY.

SINCE our last issue we have here to note the meetings of December 1st, 7th, and 15th, and the meeting of January 12th. We will take them in regular order.

THE meeting of Saturday, December 1st, was very large; our President was in the chair, and the debate was of unusual interest. After a well-rendered piano solo by Mr. W. E. Buckingham, the debate on the question of Women's Suffrage was taken up. Mr. John H. Tennant and Mr. Gundy supported the affirmative. The former is a good debater, and made a clear and forcible argument. Mr. Gundy also spoke well, his speech showing careful preparation. Seldom have we heard a more eloquent address in a literary society than that delivered by Mr. A. E. Lafferty, who led the negative. Explicitness of statement marked his speech; the language was beautiful, and was the subject of favorable comment by our president. Mr. Kerns' speech was humorous and well given. Mr. Kerns will make a good debater if he will practise. His speech was practical, forcible, and entertaining. After an able summing up of the various arguments advanced, the President decided that it would not be advisable to extend the franchise to women. The arrangements for the public debate were made at this meeting. Mr. Vining proposed an amendment to the constitution regarding the duties of the Treasurer. Just as this motion was being introduced, the President ruled a motion to adjourn—Carried. The meeting was very enthusiastic.

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OVER 700 invitations had been issued for the public debate of Friday, December 17th, and long before the time appointed for opening the proceedings, old Convocation Hall was crowded with a large gathering of the members and their friends.

The hall was decorated with plants, flowers, and bunting, and presented a very pleasing sight. The committee in charge of the arrangements had done some hard work, as was evident from the successful way everything went off. The singing and music was all of a high class order, especially the singing of Mrs. Frank McKelcan, of Hamilton. Mr. Frank McKelcan delivered a spirited address. The debate was on a subject not likely to present much amusement or interest for the fair sex. The question was, "That a one chamber legislature was inadvisable in any country." Messrs. A. B. Pottenger, and John C. T. Thompson, supported the affirmative.

The former delivered a capital speech in a truly dramatic way, that greatly pleased the ladies. The speaker is somewhat dramatic in demeanor, and held the attention of his auditors while he delivered an able argument. The latter included a number of very clear statements, showing that he had studied the question. His speech showed good judgment, a good flow of language, and was unique and well rendered. The speaker possesses a very mellow voice, that in itself is pleasing to listen to.

Messrs. W. E. Bull and S. J. McLean, well-known 'Varsity-men, supported the negative. The former is a spirited debater, and his speech was frequently applauded. The latter argued well, and his speech showed preparation, an interesting thing to notice in a debate. Hon. Mr. Justice Rose, who always was an ideal and pleasing chairman, set himself to work to thresh out

the arguments brought forward by the various speakers. He gave an able resumé of the speeches, and gave his decision in favor of the affirmative. This concluded the programme and the hall was cleared, and dancing commenced. It is to be regretted that more room could not have been had for dancing; as the dances were somewhat crowded. A good orchestra was provided, and the merry dancers enjoyed a most delightful, impromptu dance. The clock was well advanced in its morning flight when the last dance on the programme was reached. Refreshments were served during the evening. Owing to lack of space, the names of those present are withheld.

1ST Vice-President, Buckingham, occupied the chair at the last meeting for the year, held on Saturday, December 15th. The meeting was chiefly notable for the large amount of business transacted. The debate on Mr. Vining's motion *re* the duties of the Treasurer, was continued. Messrs. Vining, Kerr, Stuart, Church, and others supported the motion, and Messrs. White, Griffin, Moore, and Ford opposed it. Mr. S. J. McLean proposed an amendment, which got defeated. The motion was declared lost. Twenty-six voted for the motion, and nineteen against; the motion failed to get the necessary two-thirds vote.

A RESOLUTION of condolence with Lady Thompson was drafted by Mr. Peter White, and adopted, and ordered to be sent to Ottawa to Lady Thompson. Mr. Sinclair succeeded in having a resolution adopted, calling on the executive to report weekly to the Society on all business matters, said report to be subject to amendment by the Society. Mr. Church moved, seconded by Mr. C. A. Stuart, that an "At Home" be held under the auspices of the Society, at a date to be fixed by the Executive Committee. Said "At Home" to be subject to and governed in accordance with a resolution adopted by the Society, on Nov. 10th, and that the Society proceed to elect an "At Home" Committee. The motion was carried, and the nomination of the "At Home" Committee was left in the hands of Messrs. Lamport, Kerr, Ford, Sinclair, Hunter, and the President. The Reeve Memorial Committee was voted $50. Mr. White gave notice of a motion to grant the football club $50. The Executive were asked to forthwith communicate with the necessary authorities in reference to obtaining the use of the hall as usual, for the annual "At Home." The singing of Mr. R. K. Barker at this meeting, was much admired, he received one or two encores.

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PRESIDENT McCarthy occupied the chair at the first meeting for the year held on Saturday, Jan. 12th. The nominating committee appointed to draft the names of those who are to compose this year's At-Home committee, reported that they were unable to decide on a committee. After much discussion the society resolved itself into committee of the whole with Mr. Anderson in the chair. When the committee rose, Mr. Anderson reported that the president and executive had been appointed to select the At-Home committee. In the society, Mr. Church made an unsuccessful attempt to have the president alone make the

appointment; this was defeated, and the report of the committee of the whole adopted, without amendment. $50.00 was voted to the football club. The programme was postponed until January 19th. The attendance was large, and a successful "At-Home" may be expected, as the president has good executive ability. The At-Home will probably come off on Friday, Feb. 7th.

NOTES.

THE Society ought to arrange another public debate, for the end of February, and a smoking concert for March.

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THE President ought to arrange a "Past Presidents' Night," and make it an annual affair. We want our Past Presidents to take an interest in the Society. Each of the Past Presidents might be asked to deliver an address.

*

THE attendance at all the meetings has been very large, and much enthusiasm has been exhibited at them all.

THE Society should undertake the running of this department. It could be made the official organ of the Society, and full reports could be published. The journal will be furnished to students at one dollar per year, and this department would save the Society running a journal of their own; it would fill a long felt want in the Society.

SOCIAL AND PERSONAL.

MR. F.G. ANDERSON has been elected secretary of the Hockey Club. "Fred," as he is popularly called, is a good sport. He is a good player and a hard-working committee man. He is the right man in the right place. He ought to make the affairs of the Hockey club flourish

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GREAT sympathy is felt around Osgoode Hall for Mr. John Thompson, who was in attendance at lectures on the day his father died. Mr. Thompson is one of the most popular students that ever attended the law school. He possesses a very high character, and is greatly respected for his pleasant and unassuming manner.

*

MR. HOYLES is making himself very popular with the students. He is most courteous and obliging to one and all, and is always most ready to aid and assist them in our studies.

*

MR. J. F. PATTERSON, captain of the Hockey Club, is doing some hard work at present—getting his team into shape. A prominent member of a city team says he regards Mr. Patterson as "one of the best players in Canada." He says "he showed more science than any man on the ice" the night of the Queen's-Osgoode final match last winter.

*

MISS MARTIN was defeated by 300 votes for school trustee in Ward 2 of the city of Toronto. We congratulate her on the large vote she polled. There were five candidates; two were to be elected; Miss Martin was third. All the women who ran for school trustees in Toronto got defeated. The *Evening News* considered it a piece of presumption for a student-at-law, male or female, to run for a public office.

The balance of the examination papers will appear in the next issue.

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A long list of items belonging to this column got lost in the great fire at the Osgoode Hall building, when the forms and proof-sheets of the BARRISTER went up in smoke. This accounts for this column being cut short.

SPORTS.

HOCKEY is now being vigorously pushed at the Hall. Mr. J. F. Patterson is captain of the first seven, and Mr. W. M. Griffin of the second. Mr. F. G. Anderson is Secretary. The practices are held in the Granite Rink. Season tickets are $3. Those who turn out to the practices, and qualify as playing members, will have $2 refunded. The practices are in the evening. Several good practices have been held, and Osgoode ought to do well in hockey this year.

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A MEETING of the Football and Hockey Clubs was held at Clancy's on Thursday last, to consider the advisability of joining the Toronto Athletic Club.

*

QUITE a number of our sports have turned out to the hockey practices, and some fifteen or twenty were at practice last Monday. All were to be seen in eager pursuit of the Hon. Mr. Puck. First-class material can be had for a winning second teams. Both our teams ought to win.

*

AN Athletic Association ought to be formed at Osgoode Hall. Osgoode Hall has not been properly backed in sports. The student body don't support their teams properly. The *esprit de corps* is greatly lacking.

*

LOOK at the success an Athletic Association has had at 'Varsity and Trinity. At 'Varsity, such an association collected funds enough in a short time to erect one of the finest gymnasiums in Canada. At Trinity—look at the way the students support their teams. Owing to the good work done there by the Athletic Association, every man in college is a sport. At this college, the Athletic Association has charge of sports in general, including hockey, cricket, tennis, football and baseball. It also conducts a sport day in November, and greatly strengthens the various collegiate teams as regards playing strength, enthusiasm, and financially. At this college, such an association has also worked up a good gymnasium. Look again at the successful Athletic Associations of Yale and Princeton. The formation of such an association would tend to strengthen Osgoode greatly; and instead of only 5 or 10 per cent. of our students belonging to our various clubs, we would have nearly every student in the school directly interested in sport, and lending his aid to the success of the black and white on field and ice.

At present, we have a football club, tennis club, and hockey club: the annual subscription is one dollar to each club. The net receipts from fees of the three clubs do not total $100. If the Athletic Association were formed, nearly every student would join the association, to encourage sports, and the Literary Society would, no

doubt, give the association financial aid. The association might take up football, tennis, hockey, and lacrosse or cricket, and might conduct a sports day in the fall. Let us have this matter discussed.

EXAMINATION PAPERS.

SECOND YEAR—CONTRACT.

Examiner: M. H. LUDWIG.

1. A. assigned a debt to C., and verbally guaranteed payment of the debt. Can C. enforce A.'s guarantee? Why?

2. Point out clearly when a principal is bound by the contract of his agent under the 1st, the 4th and the 17th sections of the Statute of Frauds.

3. Is an infant liable—

(*a*) On a promissory note given in payment for necessaries?

(*b*) For money lent to be expended in the purchase of necessaries?

4. Is a man liable for goods supplied to a woman living with him, though not married, if the goods supplied are suitable to the position which he permits her to assume? Answer fully.

5. When is a husband liable, and when is he not liable for goods supplied to his wife? Answer fully.

6. When is insanity or drunkenness a good defence to an action on a contract?

7. A corporation, without the corporate seal, made a lease of a certain premises for two years. The tenant paid two quarterly instalments of rent, after which the corporation repudiated the lease, alleging that it was not bound by a lease not under seal.

In an action of ejectment, who should succeed? Why?

8. A. saved B. from drowning. C., the father of B., out of gratitude gave A. a cheque for $100, but subsequently he notified the bank not to pay the cheque. A. sued on the cheque, and C. pleaded want of consideration. Who should succeed? Reasons.

9. Is a promiser bound by his agreement, if at the time the agreement is made

(*a*) both parties were aware that the agreement could not be carried out.

(*b*) The promiser only, (*c*) the promisee only, knew that performance was impossible.

10. Point out clearly the distinctions between Champerty and Maintenance, and illustrate your answer by an example of each.

11. Does an action lie against a person for illegally maintaing a suit? Reasons.

12. A. owed B. $1,000. B. insured the life of A. in two different insurance companies, each policy being for $1,000. Subsequently A. paid B. the $1,000. B. continued to pay the insurance premiums on both policies for two years longer, when A. died.

Are the companies liable to pay the amount of the policies to B.? Reasons.

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SECOND YEAR—EQUITY.

Examiner: J. H. MOSS.

1 To what extent is the contract of suretyship *uberrimae fidei?*

2. What is meant by the maxim "Equity never wants a trustee"?

3. What is meant by the *cy-pres* doctrine as applied to charitable trusts?

4. Will a Court of Equity entertain an action for specific performance of an agreement relating to foreign lands when the defendant is within the jurisdiction? Explain.

5. Can an agreement by which a creditor agrees to enter into a composition on condition of his receiving a payment over and above the amount of his dividend be sustained? Explain.

6. Define the extent of the jurisdiction of Equity to rectify Wills.

7. Explain the principle upon which Equity grants relief against penalties and forfeitures, and define the limits of its application. Illustrate by an example.

8. What test is applied to determine whether mortgagees who are in receipt of the rents and profits of the mortgaged estate are chargeable as mortgagees in possession?

9. What is the essential element necessary to constitute a partnership?

10. Will the Court decree specific performance of a contract for the sale of the good-will of a business unconnected with the premises? Explain.

FIRST YEAR—CONTRACT.

Examiner: M. H. LUDWIG.

1. Is an unnamed principle liable on a contract required to be in writing by the Statute of Frauds, if the contract is signed by the agent in his (the agent's) name? Reasons.

2. What is the effect of a contract within the 4th or the 17th section of the Statute of Frauds, if the provisions of the sections have been complied with?

3. What is meant by "Insurable Interest," "Valued Policy," "Owner's Risk," "Salvage," "Demurrage," "A contract of fire insurance is a contract of indemnity, life insurance is not"?

4. "An offer although accepted may not be binding on the party making it." State five classes of cases where an acceptance of an offer will not bind the party making it?

5. "Mere nondisclosure, unless it occurs in particular kinds of contracts, does not affect the validity of consent." State the exceptions referred to in above quotation?

6. A master of a ship by mistake gave a bill of lading to a shipper for 500 barrels of flour. The number of barrels actually shipped was 300. The bill was endorsed to a bank for full value. The bank had no knowledge that there was a shortage in the shipment. Is the shipowner liable to the bank for the 500 barrels? Reasons.

7. A., B. and C. became sureties for a debt of $600. Default having been made, the sureties were called on to pay. A., without the consent or knowledge of B. or C., compromised the claim for $200. Are B. and C. liable to contribute, and if so, how much?

8. *(a)* What debts and *choses in action* may be assigned?

(b) Is an assignment of a *chose in action* complete without notice to the debtor? Answer fully.

9 *(a)* A. and B. are jointly liable to C. in the sum of $690 for money loaned. If the debt has become barred by the Statute of Limitations, in what different ways may it be revived other than by an acknowledgment in writing?

(b) If B. gave an acknowledgment in writing to C., is the debt revived as against A.?

10. State how far, if at all, negotiable instruments given to secure the payment of money due upon an illegal transaction are valid?

FIRST YEAR—EQUITY.

Examiner: JOHN H. MOSS.

1. Explain and illustrate the application of the maxim "qui prior est tempore potior est jure."

2. What are the provisions of the Statute of Frauds relating to trusts?

3. A. buys land, paying the purchase money himself, and to enable his son

B. to qualify as a candidate for a parliamentary election, has the conveyance made to B. B. having been defeated in the election, A. brings an action to have it declared that B holds the land as trustee for him (A.) Can he succeed?

4. Under what circumstances may a trustee safely purchase from his *cestui que trust*?

5. What are (*a*) general, (*b*) specific, (*c*) demonstrative legacies? In what respects is the distinction important?

6. Explain and illustrate the equitable doctrine of conversion.

7. Distinguish between a mortgage and a mortgage of personal property.

8. What is the nature and extent of the lien of a solicitor upon the deeds, books, papers, etc., of his client for costs?

9. What is meant by "mutual accounts," and why were they formerly assigned to the equity jurisdiction?

10. What criterion does equity apply in deciding whether a contract is proper to be the subject of an action for Specific Performance?

CERTIFICATE OF FITNESS: SEPT. 4TH, 1894.

MERCANTILE LAW—STATUTES—PRACTICE.

Examiner: M. H. LUDWIG.

1. A. by false and fraudulent representations induced B. to sell him goods on credit.

(*a*) Is the contract void or voidable?

(*b*) In what different ways may B. treat the above transaction?

2. On a contract for the sale of goods what tests would you apply to determine whether the property in the goods has passed, and why does this question sometimes become material?

3. What warranty is implied on a sale of goods by a person who is (*a*) the manufacturer, (*b*) not the manufacturer.

4. State briefly the provision of the Act of 1891 (54 Vic., Ont., cap. 20), amending the Assignment and Preference Act, and how the amendment has been construed.

5. (*a*) What is meant by a "fixture," and what different classes of fixtures are there?

(*b*) Compare the rights of a landlord to fixtures placed on the premises by the tenant, with the right of a mortgagee to fixtures placed by a mortgagor on the lands covered by the mortgage.

6. Can a chattel mortgagee who discovers that his mortgage does not comply with the provisions of the Chattel Mortgage Act, cure the defect by taking possession of the goods included in the mortgage? Reasons.

7. A. an insolvent, gave B. a mortgage and the next day made an assignment for the benefit of his creditors to C. B. sold the goods covered by the mortgage and received the cash proceeds.

Can he be compelled to account to C. for the proceeds, so that they may be ratably distributed amongst the creditors of A.? Reasons.

8. Name the different classes of debts or demands for which a writ of summons may be specially endorsed.

9. When will the court grant relief against a forfeiture for breach of a covenant in a lease to insure against loss by fire?

10. If a defendant intends to rely on a plea of "Not Guilty by Statute," how must he plead so as to be allowed to give evidence under such plea?

CERTIFICATE OF FITNESS: SEPT. 4TH, 1894.

EQUITY.

Examiner: J. H. MOSS.

1. Under what circumstances may a trustee safely purchase from his *cestui que trust*?

2. Distinguish between a mortgage and a pledge of personal property.

3. What was the obligation, under the old law, of a purchaser from a trustee in regard to seeing to the application of the purchase money? What is his obligation under the present law?

4. A mortgagee who has obtained a final order of foreclosure sells the mortgaged property for a sum less than the amount of mortgage debt and then sues the mortgagor on his covenant for the balance. What are the rights of the parties?

5. Why is it desirable for the assignee of a debt to give notice of the assignment to the debtor?

6. What are the rules governing the appropriation of payments as laid down in *Clayton's* case?

7. Explain the maxim "Equity follows the law."

8. What conditions must concur to constitute a valid *Donatio mortis causa?*

9. What is the nature and extent of a banker's lien.

10. Mention some of the principal cases in which and grounds upon which Courts of Equity will decree dissolution of a partnership at suit of one of the partners.

TOLD OF THE CHIEF JUSTICE.

AMONG a number of amusing scenes and incidents that have occurred at various times during the Supreme Court sitting, it is related that, not many years ago, an Ottawa barrister, who was, as he supposed, on rather familiar terms with the present Chief-Justice, was arguing a *habeas corpus* case. The judges were not inclined to hear him, when the lawyer remarked that the Statute imposed certain duties upon Supreme Court Judges which they could not endeavor to shirk. "I am not going to sit here and listen to language of that sort," remarked Mr. Justice Strong, in a rather angry tone. "What is that, Mr. Strong?" queried the lawyer, who had not apparently heard his lordship's remark. "Mr. Strong!" roared the judge, now thoroughly enraged. "Is that the way to address a Judge of the Supreme Court? I leave the bench." And with these words he left for the library. The lawyer tried to go on, but as there had only been five judges sitting, there was no quorum. At last *Mr.* Strong was sent for, and when he took his seat the lawyer apologized for his *faux pas.—Canadian Green Bay.*