THE

Canada Law Journal.

VOL. XXIX. DECEMBER 30, 1893. No. 20.

IN accordance with our usual custom, we publish with this, the last number for the year 1893, the Index and Table of Cases, etc. The Sheet Almanac for 1894 will be sent with the first number of the coming year.

ALL men, to say nothing of all judges, have their peculiarities. It has been said of one of the judges who, not many years ago, graced our Chancery Bench that he had a great aptitude for smelling out fraud in cases brought before him. Others have a mania for keeping up the dignity of the Bench by discovering contempts of court in remarks or writings which to every one else seem perfectly innocent and proper. We have had examples of this in various of Her Majesty's colonial possessions, as well as in England. The attention of these well-meaning and highly respectable, though somewhat antiquated, expounders of the law might be directed to the ordinary observations of Hindu prisoners who enliven the tedium of their trial by loudly exclaiming, "Shame! Shame! Injustice! Injustice!" It would, we fear, be a terrible shock to some of these to be transplanted to Hindustan. For a time, at least, they would be kept busy training the criminal classes to a due regard to the awesomeness of their position.

A WRITER in the *Indian Jurist* writes a short homily on the Bench in Canada, taking as his text the conduct of Judge Elliot in connection with a case of political interest in London, Ont., wherein one party said he was right and the other said he was wrong, and the practices of Judge Palmer, at the other end of the Dominion, which latter were certainly deserving of severe censure.

We fail to see, however, that the conduct of these two functionaries warrants the remark that "these judicial scandals are getting too common in Canada, and are bringing the Bench into disrepute." The fact that Judge Palmer has been taken severely to task by the Canadian press, and that these two cases are the only pegs which our Indian friend can discover whereon to hang his argument, help to prove the contrary; and simply show that the editor was in want of an item for his paper, and was entirely wanting in any knowledge of what he wrote. There is no country under the sun where judicial scandals are less common, and where the Bench is held in higher repute, than in Canada.

SOLICITORS ACTING UNDER ADVICE OF COUNSEL.

THE case of *Midgley* v. *Midgley*, 69 L.T.N.S. 241, has created some little stir among solicitors in England. It was a case in which a solicitor, acting on the advice of a barrister, procured one of two executors to pay a debt due to his client, after an adjudication had been made that the debt had been barred by the Statute of Limitations. The court not only ordered the money to be refunded at the instance of the co-executor who objected to the payment, but ordered the solicitor to pay the costs of the action. And it is this order as to costs which is by some regarded as a serious blow at the immunity of solicitors from personal liability when acting *bona fide* in the interests of their clients.

There seems to be no room to doubt that the solicitor in question was acting in perfect good faith, and with a zealous regard, as he supposed, for his client's interest; and there is also no doubt that in the course he pursued he was justified by the opinion of counsel. At the same time, in the judgment of the court, what he did was to induce the executor from whom he obtained payment of the debt in question to commit a breach of trust; and, after all, it is by no means an unheard-of thing that a solicitor who participates in, or induces the commission of, a breach of trust should be ordered personally to pay the costs of a suit rendered necessary in consequence thereof. And this, we take it, is the ground of the order against the solicitor in this case.

The fact that a solicitor has acted *bona fide* on the advice of counsel may be, and ordinarily is, a good answer to any action

against the solicitor by his client, charging negligence in respect of proceedings so taken on the client's behalf; but it is altogether a different matter when the solicitor is sued by a third person who has been injured by the solicitor's proceedings. In the case in question, the wrongful payment was not brought about as the result of legal proceedings, in which the parties were at arm's length, in which case, no doubt, the solicitor would have escaped liability; but, on the contrary, was due to the persuasions of the solicitor that such payment might be validly made, notwithstanding the prior adjudication that the debt had been barred by the statute.

CURRENT ENGLISH CASES.

EXECUTOR—ASSENT TO LEGACY OF LEASEHOLDS—MORTGAGE BY EXECUTOR TO BUILDING SOCIETY, HOW FAR BINDING ON TESTATOR'S ESTATE.

In *Thorne* v. *Thorne*, (1893) 3 Ch. 196, two points are discussed. The first was as to whether payments made by an executor to or for the benefit of a legatee of leaseholds and other property, not specially out of or on account of rents, could be deemed evidence of the executor's assent to the legacy. On this point Romer, J., was of opinion that in the absence of any representations on the subject by the executor, such payments would not be sufficient evidence of assent to the legacy by the executor. The other point was as to the extent to which the beneficiaries would be bound by a mortgage of his testator's assets made by an executor to a building society. On this point Romer, J., held that although the executor could not make the estate liable for him as a shareholder of the society, yet that such a mortgage, though made to secure not only the money actually advanced and interest thereon, but all moneys becoming due from the executor as a shareholder, is not wholly void, but good as security for the money advanced and reasonable interest, if the advance was made in good faith to the executor in that capacity.

INFANT—MARRIAGE SETTLEMENT—CONTRACT OF INFANT—AGREEMENT TO SETTLE AFTER-ACQUIRED PROPERTY—REPUDIATION OF SETTLEMENT BY INFANT FIVE YEARS AFTER ATTAINING MAJORITY—REASONABLE TIME.

Edwards v. *Carter*, (1893) A.C. 360, is a case known in the courts below as *Carter* v. *Silber*, (1891) 3 Ch. 553, and (1892) 2 Ch. 278, which has been noted *ante* vol. 28, pp. 106, 493. The

House of Lords (Lords Herschell, L.C., Watson, Halsbury, Macnaghten, Morris, and Shand) have now affirmed the decision of the Court of Appeal. It will be remembered that the question in issue was whether a marriage settlement made by an infant, wherein he bound himself to settle after-acquired property, could be repudiated by the settlor after the lapse of more than five years after his attaining his majority. The settlement was made in October, 1883. The infant settlor came of age in November, 1883. In July, 1888, the infant repudiated the settlement. Their lordships agreed with the Court of Appeal that the settlement was not void, but voidable, and that the repudiation of it, to be effective, must take place within a reasonable time after the infant attained majority, and that the repudiation in this case was not, in the circumstances, made within a reasonable time. In the case of a woman who repudiated a settlement made by her in infancy, it was held by North, J., that the repudiation was in time, though it did not take place till thirty-three years after the settlement. See *ante* p. 625.

MORTGAGE BY CESTUI QUE TRUST—INQUIRY OF TRUSTEES—PRIORITY—NOTICE TO TRUSTEES.

Ward v. *Duncombe*, (1893) A.C. 369, known in its previous stages as *In re Wyatt*, (1892) 1 Ch. 188, noted *ante* vol. 28, p. 199, was a contest for priority between a mortgagee and the trustees of a settlement, under the following circumstances: By a marriage settlement the wife's share in a fund held by the trustees of a will was settled. Sharp, one of the trustees of the will, had notice of the settlement: but Ellis, the other trustee, had not. Subsequently the husband and wife proposed to mortgage the wife's share, without disclosing the settlement. The mortgagee, prior to making the advance, made inquiry of Sharp and Ellis as to whether they had notice of any prior charge on the fund. Sharp returned an evasive answer, and Ellis stated that he had no notice of any prior charge. Without making further inquiry of Sharp, the money was advanced by the mortgagee. The House of Lords (Lords Herschell, L.C., Macnaghten, and Hannen) affirmed the decision of the Court of Appeal, that the trustees of the settlement were entitled to priority over the mortgagee, and that the fact that Sharp had died could not have the effect of depriving them of the priority which they had ac-

quired during his lifetime. Whether it would have made any difference if the mortgage had been made after the death of Sharp seems somewhat doubtful. Lord Herschell, L.C., expressed himself as in accord with the view of Wigram, V.C., in regard to the case of *Timson* v. *Ramsbottom*, 2 Keen. 35, 52, being good law. In that case one of several executors was himself assignee, but his co-executors had no notice of the assignment. After the death of the executor-assignee there was an assignment to a third person, who gave the surviving executors notice, and he was held entitled to priority over the prior assignment to the deceased executor. Lord Macnaghten, on the other hand, does not regard that case as of much weight, because it was appealed, and compromised before the appeal was argued; and, further, because the notice of the first assignment in that case was considered by Lord Langdale insufficient, because each one of the other holders of the fund, being executors, "had separate authority to receive and pay on account of the estate," and he (Lord Langdale) thought that if they had no notice of the assignment they might have made payment without incurring any liability on that account.

COMPANY—CERTIFICATE OF OWNERSHIP OF SHARES—ESTOPPEL—DAMAGES.

The Balkis Company v. *Tomkinson*, (1893) Q.C. 396, is an appeal from the decision of the Court of Appeal, (1891) 2 Q.B. 614 (noted *ante* vol. 28, p. 38, as *Tomkinson* v. *Balkis*). The facts were simple. A person who, in fact, did not own any shares in the defendant company executed a transfer purporting to transfer certain shares in the company. The transferee, acting in good faith, presented the transfer, which was accepted by the company, and they issued a certificate to the transferee certifying that he was the owner of the shares in question. On the faith of this certificate he sold the shares, but on his transferee presenting his transfer to the company they refused to accept on the ground that the transferor was not the owner of the shares, and that the certificate had been issued by mistake, and the question was whether or not they were estopped by their certificate. The House of Lords (Lords Herschell, L.C., Macnaghten and Field) agreed with the Court of Appeal that they were, and the transferor having, in consequence of the refusal of the company to register his transfer, purchased other shares in the market in

order to carry out his contract with the purchaser, it was held that the amount so paid for the shares was the measure of damages for which the company was liable.

INTEREST—MONEY PAYABLE ON A FUTURE CONTINGENT EVENT—DAMAGES FOR DETENTION OF DEBT—3 & 4 W. 4, C. 42, S. 28—(R.S.O., C. 44, S. 86).

In *The London, Chatham and Dover Railway Company* v. *The South-Eastern Railway*, (1893) A.C. 429, the House of Lords have affirmed the decision of the Court of Appeal, (1892) 1 Ch. 120 (noted *ante* vol. 28, p. 198), holding that where under an award accounts were to be exchanged between the plaintiffs and defendants in the month of May, and that a payment of not less than seventy-five per cent. was to be made on account of the balance appearing due on the face of the accounts so exchanged as soon after the 1st of June as possible, and not later than the 15th of June, this was not a debt or sum certain payable by virtue of a written instrument at a certain time within the meaning of 3 & 4 W. 4, c. 42, s. 28 (R.S.O., c. 44, s. 86), nor had any demand of payment been made entitling the creditor to interest on the balance, and that interest could not be given by way of damages for detention of the debt even from the commencement of the action. This case may, therefore, be deemed to have settled the point that the bringing of an action is not a sufficient "demand in writing" to entitle the plaintiff to interest on a debt not otherwise bearing interest under R.S.O., c. 44, s. 86, s-s. 2. It is said, however, in *Spartalli* v. *Constantinidi*, 20 W.R. 825, that courts of equity are not bound by that section.

STATUTE—CONSTRUCTION—EXPROPRIATION—"PRICE," MEANING OF.

Stockton v. *Kirkleatham*, (1893) A.C. 444, turns upon the construction of a statute whereby a municipal body was authorized to buy the mains, pipes, and fittings of a waterworks company, "at a price to be fixed in default of agreement by an arbitrator." The question at issue was the meaning of the word "price" in the statute; did it authorize the arbitrator to allow not merely the value of the pipes, mains, etc., as plant *in situ* capable of earning a profit, but also a compensation to the owners for the loss of the right to supply water? The House of Lords affirmed the decision of the Court of Appeal, that the word "price" did not authorize the allowance of any compensation for the loss of

the right of supplying water. The question involved in this case seems to have some resemblance to that in *Toronto Street Railway* v. *Toronto, infra.*

AGREEMENT TO LET LAND FOR A SPECIFIC PURPOSE—APPLICATION OF PREMISES TO ANOTHER PURPOSE—INJUNCTION.

Kehoe v. *Lansdowne*, (1893) A.C. 451, a decision of the House of Lords affirming a judgment of the Court of Appeal of Ireland, shows that where a person makes an agreement to allow another to use a parcel of land for a particular purpose the diversion of the land by the licensee to any other purpose may be restrained by injunction. In this case the respondent had agreed to permit the use of a parcel of land for a priest's residence, and the priest had erected on the property a number of huts to shelter evicted tenants; and it was held that such a use of the premises was unauthorized, and could properly be prevented by injunction.

SHARES HELD "IN TRUST"—TRANSFER OF SHARES—CONSTRUCTIVE NOTICE—SIGNATURE OF BANK MANAGER AS "MANAGER IN TRUST."

The London and Canadian Loan and Agency Company v. *Duggan*, (1893) A.C. 506, which in the previous stages of its career was known as *Duggan* v. *London and Canadian Loan and Agency Company*, is a case to which we have already referred, *ante* vol. 27, p. 289. It is one of those cases which are calculated to induce a sense of thankfulness that there is a Privy Council; for though it is true that the inconvenient decisions of our Supreme Court may be corrected by legislation, yet it is always a difficult matter to get the legislation, and where it is got it is liable to be emasculated of its meaning in the process of judicial construction. It is, therefore, on the whole, a great deal more satisfactory when such decisions are reversed by a superior tribunal. The public dealing with a bank manager holding shares "in trust" may hereafter do so with the assurance that the words import no more than that the manager is trustee of the shares for his bank, for so the Judicial Committee of the Privy Council has decided.

AGREEMENT—CONSTRUCTION—RIGHT OF PURCHASE OF STREET RAILWAY.

The Toronto Street Railway v. *Toronto*, (1893) A.C. 511, is another decision of the Privy Council upon an appeal from the Court of Appeal in which their lordships have affirmed the judgment of the court below. By an agreement entered into between

the city of Toronto and the Toronto Street Railway, the latter were granted the exclusive privilege of operating a street railway in the city of Toronto for the period of thirty years, subject to a provision that at the expiration of that period the city might, on certain terms therein specified, assume the ownership of the railway, and all property used in connection with the working thereof, at a price to be fixed by arbitration. The railway was at first constructed along three streets only, but during the thirty years it was from time to time extended over other streets with the consent of the corporation, and it was contended by the railway company that this franchise or privilege of operating the railway was granted to them in perpetuity, or, at all events, they were entitled to it for, at least, thirty years from the time it was granted, and that in addition to the value of the property taken over by the city they were entitled also to be paid for the franchise or privilege of operating the street railway. The Privy Council agreed with the Court of Appeal that this contention was untenable.

ROAD—MUNICIPALITY, WHEN LIABLE FOR NEGLECT TO REPAIR ROAD—NONFEASANCE.

Pictou v. *Geldert*, (1893) A.C. 524, appears to us to be likely to upset a good deal of Canadian law on the subject of the liability of corporations in whom is vested the care of public roads for damages occasioned by neglect to repair. In this case, which was an appeal from the Supreme Court of Nova Scotia, their lordships reversed the judgment of the court below, and have held that a municipal body is not liable in damages for injuries sustained by reason of nonfeasance on their part in not repairing a road under their control, unless in the Act vesting the control of the road in the municipality there is an indication of an intention to impose such a liability. *Bathurst* v. *Macpherson*, 4 App. Cas. 256, is distinguished as being a case of misfeasance.

ONTARIO MUNICIPAL ACT OF 1887 (R.S.O., c. 184), ss. 583, 586, 587, 589, 591—DAMAGES FOR NONFEASANCE—NOTICE BEFORE ACTION—MANDAMUS—ARBITRATION.

Raleigh v. *Williams*, (1893) A.C. 540, is an appeal from the Supreme Court of Canada, 21 S.C.R. 103. The action was brought by Williams against the township of Raleigh to recover

damages for the non-repair of a government drain, whereby the water therefrom overflowed and injured the plaintiffs' crops, and also for a mandamus to compel the township to restore, clean out, and repair a drain constructed by it under the authority of a by-law, and for damages occasioned by its defective construction. By s. 583 the service of a notice in writing is a necessary preliminary to the granting of a mandamus, but it is held by the Judicial Committee that such notice is not required before an action for non-repair is brought. It is also held that no action will lie for the improper or negligent construction of a drain by the township under its statutory power, but that the remedy of a person aggrieved thereby is by arbitration, as provided by s. 591, and, so far as the plaintiffs claimed relief on that ground, their action failed; but that, so far as the injury complained of was due to the non-repair of municipal drainage works, or from their not being kept in such a state of repair as to carry off, in relief of the plaintiffs' land, all the water they were, as originally constructed, capable of carrying off, the action was maintainable without previous notice. The judgment of the court below was therefore varied accordingly.

EVIDENCE—ONUS PROBANDI, AS BETWEEN APPLICANT TO REGISTER LAND UNDER LAND TITLES ACT AND CAVEATORS IN POSSESSION.

Solling v. *Broughton*, (1893) A.C. 556, is an appeal from New South Wales on a question of evidence. The respondent applied to bring lands under the Land Titles Act of N.S.W., which is similar in principle to the Land Titles Act of Ontario. His title was passed by the examiners of titles; the appellants, who were in adverse possession, lodged caveats against the application; an issue was thereupon directed, in which the appellants were made plaintiffs and the respondent defendant. One of the grounds of appeal was that the respondent ought to have been plaintiff; but as no appeal had been had in the courts below, the Privy Council held that this objection could not be entertained. On the main question they affirmed the judgment of the colonial court. The defendant having proved entries on the land when vacant, within twenty years before action, it was held that the onus of proving that such entries were ineffective, and had either not been made *animo possidendi*, or had been made after the defendant's title had been extinguished, was on the plaintiff

in this issue. The plaintiffs had relied on the clause of the statute which declares that no person shall be deemed to be in possession of any land within the meaning of the Act "merely by reason of having made any entry thereon" (see R.S.O., c. 111, s. 8). But as to this their lordships say, at p. 559: "That evidently applies," as Lord Campbell observes in *Randall* v. *Stevens*, 2 El. & Bl. 652, "to a mere entry, as for the purpose of avoiding a fine, which may be made by stepping on any corner of the land in the night time and pronouncing a few words, without any attempt or intention or wish to take possession."

CONTRACT—NEGOTIATION BY TELEGRAM—ACCEPTANCE OF OFFER NOT PROVED.

In *Harvey* v. *Facey*, (1893) A.C. 552, the action was brought to enforce an alleged contract. In proof of the contract sued on, the following telegrams which passed between the plaintiff and defendants were relied on. The plaintiff telegraphed: "Will you sell us B.H.P? Telegraph lowest cash price." The defendants answered: "Lowest price for B.H.P. £900." The plaintiffs replied: "We agree to buy B.H.P. for £900 asked by you. Please send us your title deed that we may get early possession." To this the defendants made no response; and the Judicial Committee affirmed the jndgment of the Supreme Court of Jamaica, holding that there was no contract. The final telegram was not an acceptance of an offer to sell, for none had been made; but was itself an offer, the acceptance of which must be proved, and could not be implied.

Notes and Selections.

PUBLIC SCHOOL EDUCATION. — "Boys, said the teacher, "can any of you quote a verse from scripture to prove that it is wrong for a man to have two wives?" The reply was ready, "No man can serve two masters." This must have been the same boy who wrote, "Titus was a Roman Emperor, supposed to have written the Epistle to the Hebrews. His other name was Oates."

The science in that school was not much better. "The food passes through your wind-pipe to the pores, and thus passes off your body by evaporation through a lot of little holes in the skin called capillaries." "A circle is a round straight line with a hole in the middle." "Things which are equal to each other are equal to anything else." "In Austria the principal occupation is gathering Austrich feathers." "The two most famous volcanoes of Europe are Sodom and Gomorrah." "Climate lasts all the time and weather only a few days." "Columbus knew the earth was round because he balanced an egg on the table." "The blood is putrefied in the lungs by inspired air."

A poor boy was asked, "What is a gentleman?" "A fellow that has a watch and chain," he replied, and, when he saw that his answer was not perfectly satisfactory, he added, "and loves Jesus."

"Mediæval is a wicked man who has been tempted" was another answer. "A demagogue is a vessel containing beer and other liquids" was, perhaps, more true than polite. "Tom, use a sentence with responsibility in it." Tom said: "When one suspender button is gone there is a great deal of responsibility on the other one."—*Canadian Magazine.*

DIARY FOR DECEMBER.

1. Friday .....Convocation meets. Princess of Wales born, 1844.
3. Sunday......*1st Sunday in Advent.*
5. Tuesday.....Gen. Sess. and Co. Ct. sittings for trial in York.
6. Wednesday..Rebellion broke out, 1837.
7. Thursday....Chy. Div. H.C.J. sits. Rebels defeated at Toronto, 1837.
8. Friday ......Convocation meets. Sir Wm. Campbell, 6th C.J. of Q.B., 1825.
9. Saturday....Michaelmas Term ends.
10. Sunday......*2nd Sunday in Advent.* Niagara destroyed by the U.S. troops, 1813.
12. Tuesday.....County Court sittings for trial, except in York.
13. Wednesday..S. H. Strong appt. C.J. of Supreme Court, 1892.
15. Friday ......J. B. Macaulay, 1st C.J. of C.P., 1849. Prince Albert died, 1861.
17. Sunday......*3rd Sunday in Advent.* First Lower Canada Parliament, 1792.
18. Monday.....Slavery abolished in the United States, 1862.
19. Tuesday.....Fort Niagara captured, 1813.
24. Sunday......*4th Sunday in Advent.* Christmas vacation begins.
25. Monday.....Christmas Day.
26. Tuesday.....Convocation meets. Upper Canada made a province, 1791.
27. Wednesday..J. G. Spragge, 3rd Chancellor, 1869.
29. Friday......Sir Adam Wilson, C.J. of Q.B., died, 1891.
31. Sunday......*1st Sunday after Christmas.* Montgomery repulsed at Quebec, 1775.

Reports.

EXCHEQUER COURT.

TORONTO ADMIRALTY DISTRICT.

(Reported for THE CANADA LAW JOURNAL.)

THE SHIP W. J. AIKENS.

Jurisdiction of Exchequer Court of Canada in Admiralty cases—R.S.C., c. 75, s. 34—Costs.

A seaman (engineer on a tug) took proceedings in the Exchequer Court, Admiralty side, on a claim for $136 wages, and arrested the ship. On the trial at Collingwood it was contended that the court had no jurisdiction to try a claim for less than $200 in the Admiralty Court, the owner not being insolvent, the ship not being under arrest, and the case not referred to the court by a judge, magistrate, or justice pursuant to R.S.C., c. 75, s. 34, The Inland Waters Seaman's Act.

Held, that the Admiralty Act, 1891, conferred upon the Exchequer Court all the jurisdiction possessed by the High Court Admiralty Division in England as it stood on the 25th July, 1890, the date of the passing of the Colonial Courts of Admiralty Act, 1890; and that the Admiralty Court in Canada could now try any claim for seaman's wages, including claims below $200; and that s. 34 of R.S.C., c. 75, was repealed by implication (not having been expressly preserved) to the extent, at any rate, that it curtailed the jurisdiction of the Admiralty Court to entertain claims for seaman's wages below $200 in amount.

Held, as to the costs of any such action, that they were in the discretion of the judge trying the cause: *Rule* 132 *Canadian Admiralty Rules.* This was the practice and rule in England on July 25th, 1890, and since: *Tenant* v. *Ellis*, L.R. 6 Q.B.D. 46; *Rockett* v. *Clippingdale*, 2 Q.B. (1891) 293; *The Saltburn*, (1892) Pro. 333.

[TORONTO, Nov. 30th, 1893. MCDOUGALL, Local J.

This was an action brought to recover an amount claimed for wages by the plaintiff as gineer of the tug, *W. J. Atkens.* The total original claim was $149.33, reduc by an admitted cash payment of $12.50, leaving the net balance sued for $136.83.

The evidence was taken by the local judge at Collingwood on the 20th October, 1893, and after hearing all parties he adjusted the account as follows: Total original claim should be:

Three months' wages as engineer at $40 per month	$120
Some extra labour pumping in the tug in spring	10
Total	$130

He also found that various payments prior to action had been made, amounting, in all, to $100; leaving a balance due plaintiff of $30.

Moberly for the plaintiff.

G. W. Bruce for the ship.

McDOUGALL, Local Judge: The principal question raised upon the whole case was that of jurisdiction. It was contended that the present action could not be brought in the Exchequer Court, as the amount claimed and found to be due was below the sum of $200, and ss. 34 and 35 of the Inland Waters Seaman's Act, R.S.C., c. 75, were relied upon.

These sections are as follows:

Sec. 34. "No suit or proceedings for the recovery of wages under the sum of $200 shall be instituted by or on behalf of any seaman or apprentice belonging to any ship subject to the provisions of this Act in any Court of Vice-Admiralty or in the Maritime Court of Ontario, or in any Superior Court, unless the owner of the ship is insolvent within the meaning of any Act respecting insolvency for the time being in force in Canada, or unless the ship is under arrest or is sold by the authority of any such court as aforesaid, or unless any judge, magistrate, or justices acting under the authority of this Act refer the case to be adjudged by such court, or unless neither the owner nor the master is or resides within twenty miles of the place where the seaman is discharged or put ashore."

Sec. 35. "If any suit of the recovery of a seaman's wages is instituted against any ship or the master or owner thereof in any Court of Vice-Admiralty, or in the Maritime Court of Ontario, or in any Superior Court of Canada, and it appears to the court, in the course of such suit, that the plaintiff might have had as effectual a remedy for the recovery of his wages by complaint to a judge, magistrate, or two Justices of the Peace under this Act, then the judge shall certify to that effect, and thereupon no costs shall be awarded to the plaintiff."

No doubt that prior to the passage of the Admiralty Act of 1891 these sections of the Inland Waters Seaman's Act governed, and no action for the recovery of an amount less than $200 for seamen's wages could have been properly brought in the Maritime Court of Ontario unless the case came within some one of the exceptions named in section 34. Has the passage of the Admiralty Act of 1891 altered the law? Section 3 of the Admiralty Act declares that "In pursuance of the powers given by the Colonial Courts of Admiralty Act,

1890, aforesaid, or otherwise in any manner vested in the Parliament of Canada, it is enacted and declared that the Exchequer Court of Canada is and shall be, within Canada, a Colonial Court of Admiralty, and as a Court of Admiralty shall, within Canada, have and exercise *all the jurisdiction, powers, and authority conferred by the said Act or by this Act.*

Section 4 declares that "*Such* jurisdiction shall be exercised by the Exchequer Court throughout Canada and the waters thereof, whether tidal or non-tidal," etc., etc.

Now, let us see what is the jurisdiction conferred by the Colonial Courts of Admiralty Act, 1890. Section 2, sub-section 2, states, "The jurisdiction of a Colonial Court of Admiralty is to be (subject to the provisions of this Act) over the like places, persons, matters, and things *as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise*, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England," etc., etc. Section 3 enacts that "The legislature of a British possession may by any colonial law (*a*) declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Court of Admiralty, and provide for the exercise by such court of its jurisdiction under this Act, and *limit territorially or otherwise the extent of such jurisdiction.*

Now, our statute, the Admiralty Act of 1891, in its preamble recites the powers conferred by the English Act of 1890, and that the Exchequer Court of Canada is a court of law in Canada, with unlimited civil jurisdiction, and then proceeds by virtue of the powers conferred by the English Act to declare the Exchequer Court to be a Court of Admiralty. It defines the extent of the jurisdiction by section 3, as we have seen, to be all the powers conferred by the English Colonial Courts of Admiralty Act, 1890, as well as by the Admiralty Act itself.

It limits the jurisdiction territorially by s. 13 by making the action to be in the local territorial court :

(*a*) Where the ship, the subject of the suit, is within the local district.

(*b*) When the owner or owners of the largest part of the shares reside in the district.

(*c*) The port or registry of the ship is in the district ; or

(*d*) Where the parties agree in writing that it shall be tried in the district.

Section 9 enacts that every local judge shall have and exercise all the jurisdiction, and the powers and authority relating thereto, within his district, that the judge of the Exchequer Court could have or exercise in respect of the admiralty jurisdiction of his court.

Section 20 gives the judge of the Maritime Court of Ontario all the powers of a local judge in the Toronto Admiralty district.

Section 23 abolishes the Maritime Court, saving all the pending actions, and preserving the existing rules and practice till new rules are made.

The 189th section of the Merchants' Shipping Act, 1854, was in terms precisely the same as s. 34 of our Inland Waters Seaman's Act, and doubtless the section in the latter Act was taken from it.

Section 10 of the Admiralty Court Act of 1861 read as follows : "The High

Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, etc., etc. Provided always that if in any such cause the plaintiff do not recover £50 he shall not be entitled to any costs, charges, or expenses incurred by him therein unless the judge shall certify that the cause was a fit one to be tried in the said court."

The 9th section of the Admiralty Court Jurisdiction Act, 1868, conferred upon the Court of Admiralty power to order proceedings which might without agreement have been taken in a County Court having admiralty jurisdiction to be taken in a Court of Admiralty, and this power is transferred and vested in the Admiralty Division of the High Court of Justice. It has been held that the effect off this section was to restore to the Court of Admiralty its inherent juris diction over the actions therein mentioned, whenever such jurisdiction had been taken away by previous legislation; and consequently in England, at the date when the Colonial Courts of Admiralty Act of 1890 was passed and became law, the Admiralty Division had admiralty jurisdiction in all actions of wages, irrespective of the smallness of the plaintiff's claim: *The Empress*, L.R. 3 A. & E. 502.

Upon the question as to the right of the plaintiff to recover costs where he brought his action in the Court of Admiralty for an amount which he could have recovered in a County Court having admiralty jurisdiction, it has been expressly held that the provisions of Order 55 of the English Judicature Act has impliedly repealed all the restrictions imposed by section 9 of the County Courts Admiralty Jurisdiction Act, 1868, in reference to costs, and that therefore no judge's certificate is required, but that the costs in each case rests in the judge's discretion. This was expressly decided, first, by the Queen's Bench Division in 1880, in the case of *Tennant & Co.* v. *Ellis*, L.R. 6 Q.B.D. 46, approved by the Court of Appeal in *Rockett* v. *Clippingdale*, 2 Q.B. (1891) 293, and also affirmed in *The Saltburn*, (1892) Pro. 333.

Upon turning to the Rules of Practice adopted under the Admiralty Act and approved by an order of Her Majesty in Council, we find by Rule 132 that costs are left in the discretion of the judge.

Rule 224 directs that, where the sum in dispute does not exceed $200, one-half only of the fees (other than disbursements) set forth in the table annexed to the rules shall be charged or allowed.

Rule 228 directs "That in all cases not provided for by these rules the practice for the time being in force in respect to admiralty proceedings in the High Court of Justice in England shall be followed."

From the foregoing I conclude that it is quite clear that in England, at the date of the passage of the Colonial Courts of Admiralty Act, 1890, the Court of Admiralty had jurisdiction in all cases of wages, salvage, or otherwise, regardless of the amount involved; that with reference to clauses in previous statutes purporting to limit that jurisdiction, such clauses had been repealed by implication by the later statutes enlarging the jurisdiction of the Court of Admiralty; and that clauses in statutes which purported to have for their aim the compelling of suitors claiming small amounts to proceed in inferior courts having admiralty jurisdiction, and depriving them of costs if they brought their action in the Court of Admiralty, were also to be treated as repealed, and costs

in such cases, though brought in the Court of Admiralty, were, nevertheless, in the discretion of the judge.

I also conclude that this jurisdiction, with all the foregoing consequences, was conferred upon the Exchequer Court by our Admiralty Act, 1891, and a wider jurisdiction was conferred by this latter Act upon the Exchequer Court than that existing in the Vice-Admiralty Courts of the Dominion or the Maritime Court of Ontario prior to the passage of the Admiralty Act. That sections 34 & 35 of the Inland Waters Seaman's Act (R.S.C., 75) and the limitations therein contained not having been expressly preserved have been impliedly repealed, so far at any rate as they affect the jurisdiction of the Exchequer Court to entertain an action for wages under $200.

In my opinion, therefore, the Exchequer Court of Canada, in the exercise of its admiralty jurisdiction, can entertain a claim for seaman's wages without any limit as to amount, and that in every such case the determination of the question of costs rests in the discretion of the judge trying the case.

In the present case I find a verdict for the plaintiff for $30, being for the balance of the wages due him, and under Rule 133 I fix the costs of the plaintiff at the lump sum of $30 in lieu of taxed costs.

Notes of Canadian Cases.

MANITOBA.

IN CHAMBERS—BAIN, J.] [Nov. 10.

WINNIPEG JEWELLERY CO. *v.* PERRETT.

Costs—Taxation of—County Court or Queen's Bench scale—Effect of want of Judge's certificate.

Action on common counts on open account.

Pleas: Never indebted and payment except as to sum of $42.15, as to which defendant pleaded tender before action and payment into court. Plaintiffs replied accepting the sum paid in, in full discharge of their claim, but took issue with the allegation of tender before action. Thereupon the defendant entered the record for trial, and the parties went to trial on this issue.

TAYLOR, C.J., entered a verdict for the plaintiffs. On taxation of costs the master allowed and taxed to the defendant costs of the action, including costs of the trial of the issue, on the Queen's Bench scale, amounting to $175.

Plaintiffs obtained a summons for the review of the taxation, claiming that the defendant was not entitled to tax costs of the trial.

Held, "If, as is admitted, this action is one that might have been brought in the County Court, I think s. 62 of the Administration of Justice Act left the master no alternative than to tax to the defendant her costs of the trial on the Queen's Bench scale. This section applies to every action brought in this court that is of a proper competence of a County Court; and the trial that took place, though it was merely to decide the issue of tender that the pleadings

eventually raised, was, nevertheless, the trial of such an action. The plaintiffs failed to obtain from the judge who tried the issue a certificate either to entitle them to full costs or to prevent the defendant setting off full costs, and the case therefore is governed by s-s. (*c*) of s. 62. The costs of the trial were part of the costs of the action, and the sub-section expressly directs how the costs of such an action are to be taxed when there is no certificate, and neither the master nor the court is left any discretion in the matter."

Summons dismissed with costs.

Hough for the plaintiff.

Elliott for the defendant.

KILLAM, J.] [Sept. 7.

IN RE THE COMMERCIAL BANK.

Winding-up Act—Costs of appointing liquidators.

Winding-up Act. Question of the costs of the contest respecting the ap pointment of liquidators.

Held, that these contests should be discouraged, and the rule laid down in *Re London and Northern Insurance Company*, 19 L.T.N.S. 144, should be followed.

"There will be one set of costs allowed to the shareholders, and one to the creditors appearing on the hearing of the petition, save and except so far as these costs have been increased by the contest respecting the appointment of liquidators, and costs must be allowed to the bank and the petitioner. In the latter's costs may be included reasonable disbursements for procuring a place for the meeting of creditors, and for secretaries and scrutineers and otherwise properly incurred in the opinion of the Master in and about the meetings of creditors and shareholders."

W. J. Tupper for the petitioners.

Howell, Q.C., *Culver*, Q.C., *Gilmour*, *Munson*, *Perdue*, and *Joseph Martin* for creditors and shareholders.

TAYLOR, C.J.] [Sept. 16.

WRIGHT *v.* JEWELL.

Will—Deed—Setting aside—Undue influence—Mental incapacity—Demurrer —Multifariousness—Want of jurisdiction—Another suit pending.

This was a bill to set aside a deed and will executed by the late John Thomas Wright, an old man nearly seventy-four years of age, about four months before his death, on the grounds of undue influence and mental incapacity.

The will was in favour of his wife, and the deed to the husband of her daughter by a former marriage. These documents were executed at the same time.

The original bill sought to set aside the deed only, but the defendants in their answers set up the will as a bar to the plaintiff's claim, and then the bill was amended by attacking the will also. The evidence was conflicting, but

the learned judge found that the old man at the time he executed these documents had not mental capacity sufficient for the transaction of any business.

At the hearing defendants demurred for multifariousness because the bill sought to set aside the deed to one defendant, and also a will made by the same person in favour of another defendant.

Demurrer overruled.

They also demurred for want of jurisdiction, contending that the court on its equity side has no jurisdiction to try the validity of a will or to pronounce it void for fraud or undue influence.

Demurrer overruled following *Wood* v. *Wood*, 1 M.R. 317.

They also demurred on the ground of another suit pending.

Demurrer overruled.

Held, (1) That the onus of supporting the deed and will rested upon the defendants, as they procured them to be prepared and executed : *Baker* v. *Batt* 2 Moo. P.C. 321 ; *Barry* v. *Butlin*, 2 Moo. P.C. 482 ; *Mitchell* v. *Thomas*, 6 Moo. P.C. 150 ; *Fulton* v. *Andrew*, L.R. 7 H.L. 448 ; *Donaldson* v. *Donaldson*, 12 Gr. 431.

(2) That it seems in such case there is thrown on the parties seeking to support the instrument proof that the transaction was a righteous one : *Fulton* v. *Andrew*, *supra ; Hogg* v. *Maguire*, 11 A.R. 507.

(3) That on the evidence the old man had not sufficient mental capacity for the transaction of business when he executed the deed and will : *Harwood* v. *Baker*, 3 Moo. P.C. 282 ; *Banks* v. *Goodfellow*, L.R. 5 Q.B. 549.

Decree declaring both deed and will void, and setting them aside with costs.

Ewart, Q.C., for the plaintiff.

Monkman for the defendant.

DUBUC, J.] [Oct. 16.

SHIELDS *v.* MCLAREN
AND
T. S. KENNEDY, PETITIONER.

Charging order—Solicitor's lien—Assignment of costs as security—Statute of Limitations—Collusion—General assets.

Petition for charging order in favour of a solicitor on a certain fund in court paid in in the suit of *Shields* v. *McLaren.*

The lien was claimed for the solicitor's services in defending four suits brought against the Northwest Milling Company, arising out of a contract for cutting and getting out certain saw logs from timber limits held by the company.

These suits were brought against Leacock & Shields, but by a judgment of the Supreme Court and a decree which was made a decree of this court Haggert and McLaren were declared partners of the said companies, and responsible with Leacock & Shields for its liabilities.

The saw logs were sold, and the proceeds paid into court, and this money was afterwards paid out by an arrangement between the parties without notice

to the petitioner, and, the petition alleged, with the intention of defrauding him. The moneys in court on which this lien was claimed were the proceeds of the sale of timber limits belonging to the company.

Certain objections were taken to the petition.

Held, (1) That although the petitioner has assigned his interests in the costs as security for money advanced, he still had such an interest as would entitle him to the lien: *Parker* v. *The Great Western Railway Company*, 9 C.B. 756.

(2) The fact that the services were rendered in 1883 did not bar the claim by the Statute of Limitations because: (*a*) As to Leacock & Shields they took out an order in August, 1889, for the taxation of these very costs, admitting thereby that they were liable. (*b*) As to Haggert & McLaren they had never been resident in this province, and the statute did not run in their favour.

(3) That although both suits were nominally against Leacock & Shields they were in reality against the interests of the Northwest Milling Company, of which Haggert & McLaren were declared partners, and that the action of the solicitor in defending these suits were beneficial to the company, and largely contributed to preserve the general assets of the company: *Grier* v. *Young*, 24 Ch.D. 545; *Bailey* v. *Birchall*, 2 H. & M. 371; *Catlow* v. *Catlow*, 2 C.P.D. 362; and *Jones* v. *Frost*, L.R. 7 Ch. App. 773.

(4) That there being an apparent collusion between the parties to defeat the petitioner's lien, and the moneys now in court being the proceeds of the general assets of the Northwest Milling Company, which general assets the petitioner's services were contributed to preserve petition was entitled to a lien on the moneys in court: *Brunsdon* v. *Allara*, 2 E. & E. 19; *Bellamy* v. *Connelly*, 15 P.R. 87.

Objections overruled, with leave to the respondents to bring evidence as to facts within three weeks.

Mulock, Q.C., for Shields.

Perdue for Logan, assignee of Leacock.

Wilson for Haggert & McLaren.

Howden for the petitioner.

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