The Canada Law Journal.

Vol. XXVIII. FEBRUARY 16, 1892. No. 3.

By the death of Mr. George Theodore Berthon a distinguished artist has been removed from our midst; and, as many specimens of his skill adc... the library and corridors of Osgoode Hall, it is not out of place that some reference to his demise should appear in these columns.

Mr. Berthon was the son of a noted artist, who was Painter in Ordinary to the great Napoleon; he was born in Vienna in 1806, and came to Canada in 1841. His father intended him to embrace the medical profession, but the artistic instincts of the son were too strong to be overcome, and he devoted himself to the profession of a portrait painter. His ability as an artist was soon recognized in his adopted country; and although the patrons of art were not numerous, yet Mr. Berthon had the field, such as it was, pretty much to himself.

The long line of portraits of distinguished lawyers which have come from his easel during the past fifty years will prove an enduring and highly-prized memorial of his skill. Perhaps one of the happiest efforts of his brush is that of the late Chief Justice Sir Matthew Cameron, who was, we believe, a warm personal friend of the artist.

The skill which, by many years of faithful and patient endeavor, Mr. Berthon acquired in his profession he retained to the last, and his latest works will be found to bear favorable comparison with any of his earlier productions.

Those who had the privilege of knowing Mr. Berthon personally will regret the loss of a warm-hearted, modest, unassuming friend. The brush of some other artist must now be called into requisition at Osgoode Hall, but we doubt whether any successor will be found again to fill the post so acceptably for so long a period as that over which Mr. Berthon's portrait gallery extends.

DRUNKENNESS AND CRIME.

In a late issue of *The Times* appears a correspondence on the above subject, between Sir Henry James, Q.C., and Sir Lyon Playfair. The latter, referring to the statement that "apparently contradictory judgments are given by eminent judges in regard to crimes committed under the influence of drunkenness," asks the eminent Q.C. "whether there is any general principle which is accepted by judges to regulate their decisions in cases where drunkenness seems to be the incentive to crime."

Sir Henry, in his reply, says: "The question is full of difficulty and interest. The extent to which drunkenness can excuse crime, or ought to increase or mitigate punishment, is constantly the subject of judicial consideration," and he

adds, "yet, so varied are the aspects of the problem you submit to me, that I am unable to quote any general or definite rules affording a solution of it." The writer thinks that "of course it is repugnant to all right reason that drunkenness should confer immunity upon, or produce benefit to, anyone; and that the effect would be most disastrous if drunkards are ever encouraged to believe that they will, when drunk, be treated with greater consideration than if they were sober."

We presume he means to say they will be treated with greater consideration for offences committed when they were drunk than those committed when they were sober. He then goes on to say, "Therefore I think it is necessary, in the interests of the public, that when magistrates are from day to day determining cases of assault, accompanied often with brutal violence, they should give no heed—certainly none in the direction of mitigation—to the constant plea of drunkenness." He then touches upon a point which we have more than once heard brought forward by judges on the Bench, when he says: "In such cases, I doubt if the reasoning faculty is ever totally absent, and the man who chooses to drink to excess, and, when drunk, from time to time commits acts of brutal violence, must be taught that he is answerable both for being under the influence of alcohol and for the acts such influence produces."

It certainly does seem strange at times to hear the confession of the commission of *another* offence pleaded by a prisoner in extenuation of, or as an excuse for, the offence for which he is then being tried, though we admit that, in some special case, a judge might well take into consideration, in his own mind, such a plea when passing sentence. We say, *in his own mind*, for we doubt the expediency of giving any open expression of opinion in such a case, inasmuch as it might seem like offering a premium for drinking to excess if it were known that a mitigation of punishment resulted from it.

We have, indeed, known a judge, while passing a lighter sentence in such a case than he otherwise would, not only refrain from letting the prisoner know this, but tell him that he ought to be punished also for the minor offence. Here the offender gets the benefit of a *moral* consideration of his guilt, without receiving in the slightest degree any encouragement to promote a "want of moral accountability" prior to the commission of his next offence. On the other hand, there are cases where the fact of the offender being under the influence of liquor at the time might almost be said to call for a heavier punishment. Where, for instance, a man does not dare to attack another unless he first "screw his courage to the sticking place" by ample potations—by, in other words, acquiring "Dutch courage." Here it is deemed necessary to break one law in order that the commission of another offence may be undertaken: and the absence of the moral restraint of a cool head and intellect may fairly be claimed as a potent factor in the commission of a more serious offence, it may be, than was at first contemplated, and calling, therefore, for a more severe punishment.

Sir Henry summarizes his ideas thus: "In determining the legal character of the offence committed, drunkenness may be taken into account:

"1. Where it has established a condition of positive and well-defined insanity.

"2. If it produces a sudden outbreak of passion, occasioning the commission

of crime under circumstances which, in the case of sober persons, would reduce the offence of murder to manslaughter.

"3. In the case of minor assaults and acts of violence, it never can form any legal answer to the charge preferred, but it may further aggravate or mitigate the character of the act committed—probably the former.

"4. As to the effect that should be given to drunkenness when determining the amount of punishment to be inflicted, no general rule can be laid down. Its existence may be considered, and may tend either in the direction of increasing or diminishing the punishment imposed."

And so, Sir Henry leaves his enquirer just where he found him. He omits, however, to notice the introductory part of Sir Lyon Playfair's letter, where he speaks of "apparently contradictory judgments given by eminent judges in regard to crimes committed under the influence of drunkenness." In the nature of the case this must be so. There will be, and there have been, instances where two different judges will pass almost similar *sentence* in the case of offences fairly similar in their nature, but one judge will animadvert very strongly in his *judgment* upon the iniquity of the prisoner in having committed *two* offences instead of one, while the other judge will intimate that, but for the excuse of drunkenness, as implying a partial absence of accountability, a heavier sentence would have been imposed; both of them thus appearing to give expression to contradictory *judgments* while their sentences are tolerably similar.

But what shall be said if the two offences are not similar—that is to say, where their surroundings, and the moving cause in each, are different, though the acts themselves are similar? The public cannot always be as familiar with these as the court and jury who try the offences, and even when the whole evidence is given verbatim, they do not examine it critically before expressing the opinions referred to by Sir Lyon, nor have they had the opportunity of *hearing* the evidence given.

It is a very common thing to see, in some of our newspapers, a comparison drawn between the light sentence passed for a serious offence (it is charged) and the much heavier sentence for a lighter offence. But in the one case, the offence may be the first, and its commission show no special moral perversity on the part of the offender; while in the other, the offence charged may, though apparently trivial, be the act of an oft-sentenced offender, whom lighter punishments have failed to reform.

It would be possible to suggest contrasted cases, where, on the surface, there might be some ground—though not a valid one—for the charge of "contradictory judgments," but *cui bono?* Is it not better to leave the apportionment of the punishment to the judge who has had all the circumstances and surroundings of the offence given before him on oath, and who can have no motive for being either unnecessarily severe or improperly lenient, than to make a cast-iron rule by which a fixed punishment is attached to a certain offence, without regard being had to the obvious justice of some distinction being drawn.

Even if the circumstances under which two offences of the same character were committed are identical, it cannot be expected, in the nature of things, that

two judges will take exactly the same view as to the immorality of the offence—one's standard of rectitude and morality being, either from nature or education, higher than that of the other, or whose "bowels of compassion" are less easily moved. As long, however, as our judges impose sentence swayed by strictly conscientious motives, no great harm will be done, even if transgressors "equal in intention" do not always meet exactly the same punishment.

COMMENTS ON CURRENT ENGLISH DECISIONS.

(Law Reports for December.—*Continued.*)

WASTE—TENANT FOR LIFE.

Dashwood v. *Magniac* (1891), 3 Ch. 306, was an action by remaindermen to recover from the estate of a deceased tenant for life upwards of $250,000, for alleged waste in cutting timber. The case occupies upwards of 80 pp. of the reports, and the doctrine formulated by the late Sir Geo. Jessel, M.R., as to the right of a tenant for life to cut timber for his own benefit, where the estate is "a timber estate," *i.e.*, an estate on which the timber is periodically cut so as to allow a succession of timber to grow, is elaborately discussed, and, while Sir Geo. Jessel's view is adopted by the majority of the Court of Appeal (Lindley and Bowen, L.JJ.), it is strenuously denied by Kay, L.J., that "timber estates" form any exception to the general rule of law that a tenant for life cannot cut timber on the estate. There was also a question raised as to whether a tenant for life was bound to keep an artificial lake clear, which Chitty, J., decided in the negative, and on which point there was no appeal. On the main point it may be observed that in this country it has been established by authority that a tenant for life may, without being liable for waste, cut timber for the purpose of clearing, in the usual course of good husbandry: see *Saunders* v. *Breakie*, 5 O.R. 603.

WILL—CONSTRUCTION—"EFFECTS," REAL ESTATE, WHEN INCLUDED.

In *Hall* v. *Hall* (1891), 3 Ch. 389, the main question was whether real estate would pass under the term "effects." The testator "gave, devised, and bequeathed" to his wife "all my furniture, chattels, goods, and effects that I may be possessed of at my decease, whatsoever the same may be, or wheresoever the same may be situate"; and after her death he "gave, devised, and bequeathed," to be equally divided between three of his children until they should attain twenty-one, "the furniture and moneys, or any property which my said wife may have become entitled to through this my will or through any other source," and after the three attained twenty-one, he directed "the furniture, goods, chattels, and effects, whatsoever the same may be, or wheresoever it may be situated," should be equally divided between his six children. The testator's property substantially consisted of an undivided moiety in real estate, and the action was brought by the widow to establish her title as tenant for life of the real estate. Fry, L.J., decided that the will was sufficient to pass the real estate, and that, though the word "devise" and the expression "whatsoever the same may be" were not of them-

selves enough to make the word "effects" include realty, yet the combination of these words and the subsequent use of the word "property" in the will as an equivalent of the word "effects" was enough to show the intention of the testator to dispose of real estate, and he therefore held the plaintiff entitled.

SETTLEMENT—PORTIONS—"ELDEST SON"—ANTICIPATION OF INTEREST—DOUBLE PORTION.

In re Fitzgerald, Saunders v. *Boyd* (1891), 3 Ch. 394, is one of those cases which, in the present social conditions of this Province, is not of very great interest here. The case arose out of a settlement of property whereby estates were limited to a father for life, with remainder to trustees for a term of years to secure £20,000 for portions for younger children "other than an eldest or only son for the time being entitled under the settlement"; with remainder to the father's first and other sons in tail male. There were five children in all. On the eldest son, George, attaining twenty-one, he joined with his father in barring the entail and resettling the estates to such uses as the father and son should jointly appoint, and subject thereto to the uses declared by the previous settlement. Under this power the father and his son created mortgages to the amount of £8,000, of which George received for his own use £3,000. George predeceased his father, the tenant for life, without issue, and his brother Charles succeeded to the estate. The present action was brought by the representatives of George, claiming to be entitled to a further share in the portions fund of £20,000. Chitty, J., held that George must be taken to have anticipated the whole of what would otherwise have come to him under the settlement, and that his legal personal representatives were not entitled to any further share of the £20,000, and as there was only one person to be excluded as "the eldest son," Charles, notwithstanding he had succeeded to the bulk of the estates, nevertheless took a share in the £20,000.

VENDOR AND PURCHASER—RIGHT OF WAY—DEFECT IN TITLE—RESCISSION—CONDITIONS OF SALE.

Ashburner v. *Sewell* (1891), 3 Ch. 405, was an action by a vendor claiming a declaration that the contract of sale had been rescinded. The agreement for sale was subject to special conditions: (*a*) That if any error should be found in the description of the lands, it should not annul the sale, but compensation should be allowed; and (*b*) that if the purchaser should insist on any objection or requisition which the vendor should be unable or unwilling to remove or comply with, the vendor should be at liberty to rescind. It turned out that a right of way existed over the property which neither vendor nor purchaser had been aware of at the time of the sale. The purchaser claimed compensation. The vendor refused to allow compensation, and elected to rescind the contract. The question, therefore, was whether this right of way was a "defect of title." The defendant claimed that the omission of the right of way in the description was an error, which was the subject of compensation under the condition of sale referred to above. Chitty, J., however, agreed with the plaintiff that it was a latent defect of title which entitled him to rescind the contract, although it also fell within the clause providing for compensation.

PRACTICE—RECEIVER—RIGHT OF WAY, OBSTRUCTION—LEAVE TO ABATE NUISANCE, NOTWITHSTANDING RECEIVER.

Lane v. *Capsey* (1891), 3 Ch. 411, was an action for foreclosure in which a receiver had been appointed, and an application was now made to the court by third parties for leave to proceed to abate an obstruction to a right of way over the mortgaged premises notwithstanding the appointment of the receiver. The applicants, in a former action against the defendants in the present action, had established their right of way, but had failed to obtain a mandatory injunction to remove the obstruction. They now claimed the right to proceed under their common law rights to abate the obstruction. Chitty, J., without deciding whether or not the applicants had not lost their right to abatement, or whether or not they might, after notice and request to remove the obstructing house, pull it down although it was inhabited, nevertheless held that the applicants ought to have leave to pursue any remedies, or do any act they might lawfully take or do to abate the obstruction notwithstanding the receiver, leaving it to be hereafter decided, if necessary, how far such measures as they might see fit to pursue were legally open to them under the circumstances.

PRACTICE—COPYRIGHT IN DESIGN—DEFENDANTS' PARTICULARS OF OBJECTIONS, AMENDMENT OF—COSTS.

In *Morris* v. *Coventry Machinists Co.* (1891), 3 Ch. 418, North, J., decided that the rule of practice in patent actions established by *Edison Telephone Co.* v. *India Rubber Co.*, 17 Ch. D. 137, to the effect that where a defendant asks to amend his particulars of objections, he can only be allowed to do so on the terms of the plaintiff having the right to elect to discontinue his action, the defendant paying the costs subsequent to the delivery of his first particulars, applies also to actions to restrain the infringement of copyright designs.

WILL—LEGACY TO DEBTOR OF TESTATOR—APPOINTMENT OF DEBTOR AS EXECUTOR—RELEASE OF DEBT—ESTOPPEL.

In re Applebee, Leveson v. *Beales* (1891), 3 Ch. 422, a testatrix by her will, made in 1886, had bequeathed to the plaintiff two legacies of £100 each, and she gave her residuary estate to the defendant, and appointed the plaintiff and defendant executors. By a codicil dated in 1887, to the making of which the defendant was a party, she gave additional legacies, including one of £700 to the plaintiff, and in other respects confirmed her will. She afterwards in her lifetime made payments to the plaintiff on account of the legacies to him, though at the time he was indebted to her in a greater amount. She died in 1888, and the defendant alone proved the will. The defendant refused to pay the plaintiff's legacies on the ground that he was indebted to the testatrix's estate to an amount exceeding the legacies, and the present action was brought to recover payment thereof. Stirling, J., held that the appointment of the plaintiff as executor was in law a release of his debt, notwithstanding he had not proved the will, and on the evidence any claim in equity was rebutted by the presumption of an intention on the part of the testatrix to forgive the debt, and that evidence of such intention was admissible; and, even if it were not, the defendant, by being party

to the making of the codicil, was as residuary legatee estopped, as against the plaintiff, from setting up the debts due by him to the testatrix.

INCORPORATED COMPANY—IMPLIED POWER TO BORROW MONEY.

General Auction Co. v. *Smith* (1891), 3 Ch. 432, is a decision of Stirling, J., the action being one brought by a liquidator of a company being wound up, to set aside a security held by the defendant for a loan, on the ground that it was *ultra vires* of the company to borrow money. The company was incorporated for the purpose of purchasing and selling estates and property, and of making advances on property intended for sale, and loans on deposit of securities, and for the discounting of bills, but it had no express power under its articles of association to borrow money. The loan for which the security had been given was made by the defendant for the purpose of enabling the company to carry on its business. Stirling, J., held that, the company being incorporated for the purpose of trading, there was an implied power to borrow money for the purposes of its business, and therefore that the security sought to be impeached was valid.

PRACTICE—SERVICE OUT OF JURISDICTION.

In re La Compagnie Generale D'Eaux Minerales, etc. (1891), 3 Ch. 451, shows that where a party is pursuing a statutory remedy (in this case it was an application to strike out a registered trade mark) he cannot, unless he be authorized so to do by statute, serve a party out of the jurisdiction with notice of the motion, and, on application of the party thus served, the service was set aside as an abuse of the process of the court. Stirling, J., was of opinion that in such a case it was proper to proceed on notice to the comptroller, the absent party being notified that proceedings are pending in court which may affect his interests, leaving it for him to appear and submit to the jurisdiction of the court if so advised.

COMPANY—SURRENDER OF SHARES—ISSUE OF NEW SHARES IN EXCHANGE—PREFERENCE SHARES.

In *Eichbaum* v. *City of Chicago Grain Elevators* (1891), 3 Ch. 459, the right of a company to pass special resolutions authorizing the increase of its capital by the issue of new shares, with preferential rights as to payment of interest and repayment of capital, and empowering the allotment of such new shares as fully paid up to any holder of ordinary shares, in consideration of the surrender of an equivalent amount of ordinary paid up shares, was contested. It was contended that the resolution amounted either to an authority to issue gratis shares which ought to be paid for in cash or property, or else as an authority to the company to buy its own ordinary shares and to give preference shares in exchange as the price of the purchase, contrary to the decision of the House of Lords in *Trevor* v. *Whitworth*, 11 App. Cas. 409; and, further, that it was *ultra vires* of the company to alter the rights of the ordinary shareholders so that some shall be preferred. Stirling, J., however, upheld the resolution, provided that the surrenders of the ordinary shares were made *bond fide* and not for the purpose of enabling the shareholders to escape liability, following *Teasdale's Case*, L.R. 9, Ch. 54, which he holds not to have been overruled by *Trevor* v. *Whitworth*.

WILL—ACCUMULATION OF INCOME—REBUILDING AND REPAIRS—THELLUSSON ACT (39 & 40 GEO. 3, c. 98)—(52 VICT., c. 10, s. 1 (O.)).

In re Mason, Mason v. *Mason* (1891), 3 Ch. 467, is a case which turns upon the effect of the Thellusson Act (39 & 40 Geo. 3, c. 98), which by 52 Vict., c. 10, s. 1 (O.), is declared to have been and to be in force in this Province. The question arose under the will of a testator who died in 1870 entitled to numerous freehold and leasehold properties. By his will, after giving legacies and annuities, to be paid out of the rents of his real and leasehold estates and out of the income of his general trust fund, he bequeathed his pure personal estate upon trust for sale and payment of his debts and legacies, and directed the clear surplus to be invested to form the nucleus of a general trust fund. He then gave his real and leasehold estates upon certain trusts during the lifetime of the annuitants and the survivors of them, and directed the net rents and income of his real and leasehold estate and general trust fund to be applied (*inter alia*) in paying the ground rents of the leasehold, and keeping the freehold and leasehold properties insured against fire and in tenantable repair, and in paying the annuities, and the clear surplus to be invested for the augmentation of the general trust fund, declaring that any deficiency in the insurance moneys received upon the loss by fire of any building should be made good out of the general trust fund. After the death of the survivors of the annuitants, the real and leasehold estates were directed to be sold and the proceeds, together with the general trust fund, were given on trust for certain persons as tenants in common. Twenty-one years after the testator's death some of the annuitants were still living, several of the terms for which the leaseholds were held were still running, and the covenants in some of the leases had not been completely performed. The heirs-at-law and next-of-kin now claimed that the surplus rents of the real and leasehold estates should now be paid to them respectively, instead of being any longer accumulated, as directed by the will, on the ground that the direction to accumulate beyond twenty-one years from the testator's death could not, under the Thellusson Act, be lawfully made. It was admitted that the trusts for insuring, rebuilding, and maintaining the property in repair were valid and subject to the trusts for those purposes. But it was declared by Stirling, J., that the trust for the accumulation of the surplus income for other purposes was invalid from the expiration of twenty-one years from the testator's death.

GENERAL POWER OF APPOINTMENT—GENERAL DEVISE—WILLS ACT (1 VICT., C. 26) S. 27 (R.S.O., C. 109, S. 29).

In re Byron, Williams v. *Mitchell* (1891), 3 Ch. 474, the question was whether a power of appointment was to be deemed to have been exercised by a general devise by virtue of the Wills Act (1 Vict., c. 26), s. 27 (R.S.O., c. 109, s. 29). The power of appointment in question was vested in a married woman under a settlement in favor of "such person or persons (not being her husband or any friend or relative of his), and for such estate or estates as she might by deed or will appoint": and in default of appointment there was a gift over. In 1885 the donee of the power (her husband being then dead) made a will containing a general devise of all her real and personal estate in favor of a sister and her children,

and it was claimed by the devisees that the will operated as an execution of the power in their favor. But Kekewich, J., held that the power was not one within the statute because the testatrix had not the power "to appoint in any manner she might think proper." Another point in the case turned on the effect of a mortgage of the settled estate in which the settlor and the donee of the power had joined after the settlement, and whereby the right of redemption and reconveyance was reserved to the donee of the power, "her heirs, and assigns, as she shall direct," and it was claimed that this had the effect of altering the limitations of the settlement so as to confer on the donee of the power the fee simple; but Kekewich, J., was of opinion that it had no such operation, there being nothing to indicate any intention to alter the trusts of the settlement. It may be added that if the exception in the objects of the power had been confined to the husband of the donee alone the Act might have applied, he being dead at the time of the making of the will, because the power would then have become a general power to appoint in favor of any one except a non-existent person; but the addition of the words "or any friend or relative of his" to the exception prevented that result.

TENANT FOR LIFE—REMAINDERMAN—INCOME OF SECURITIES.

In re Thomas, Wood v. *Thomas* (1891), 3 Ch. 482, was a contest between a tenant for life and remainderman as to the right of the latter to enjoy in specie the actual income of certain securities. The securities in question belonged to a testator's estate which was directed to be converted and invested in certain specified securities, and though they were not securities in which the trustees were authorized by the will to invest, the trustees had nevertheless an unlimited discretion to retain them if they thought fit. The securities in question yielded 6 per cent. per annum, and the dispute was whether the tenant for life was entitled to the actual income or merely 4 per cent., which would be all the securities authorized by the will would produce. Kekewich, J., held that it was a question of intention to be gathered from the will, and that the testator having in the present case disposed of the income of the securities retained "as constituting or representing the residuary personal estate," the tenant for life was entitled to the net actual income of such securities, so long as they should be retained by the trustees.

Notes on Exchanges and Legal Scrap Book.

ANCIENT MORTGAGES.—It is stated by the *Deutsche Revue*, of Breslau, that a tablet has been unearthed on the site of Babylon which records that Belshazzar, son of Nabunid, on making a sale of wool, took a lien on the purchaser's house as security for the amount of the purchase money, 20 silver mins. It is probable, too, that his "proceedings under power of sale" were more effective and expeditious than those at present in vogue, and that his mortgage would be a very "short form" indeed.

DETECTION OF ALTERED DOCUMENTS.—A Belgian expert asserts that any alteration in a cheque or other document can be detected by exposing the paper to the vapors of iodine.

PHOTOGRAPHY AND CRIME.—The coming importance of photography in the detection of forgery and crime generally is well illustrated by the experiments of Dr. P. Jeserich, of Germany, who illustrated, at the recent exhibition of the Photographic Society of Great Britain, the possibility of detecting certain kinds of forgery. By means of enlarged photographs taken on sensitized plates, an alteration of a letter or figure is shown on the plate by a difference in the colors of the inks in the writing. The experiments also show that it is impossible entirely to remove pencil marks from paper by erasure, so that where a signature has been written in pencil and then traced over with ink, some of the plumbago will in all cases be revealed in the magnified photograph. Many other uses and abuses of photography we have referred to during the past year or two.

A NEW FORM OF SWINDLE.—A dispatch received at St. Louis, U.S., from El Paso, Texas, says: "The banking firm of McManus & Sons, of Chihuahua, Mexico, was robbed of $13,500 Saturday. H. Chariton, the telegraph operator in the town, and a man named Silverberg, were concerned in the job. The firm, early Saturday morning, received a telegram ordering them to pay to H. Silverberg $13,500. It was signed by the Merchants' National Bank of St. Louis. McManus & Sons refused to pay Silverberg the money until they had telegraphed the St. Louis bank about it. In the course of a few hours an answer was returned that it was all right. Chariton had destroyed the bank's telegram and awaited a reasonable time, when he answered the message himself. Silverberg secured the money, and divided with Chariton. Both then left town. Silverberg was arrested a short time afterward, but Chariton has thus far eluded the police. An inquiry was made at the Merchants' National Bank concerning the alleged telegram. A careful search of the records and files for the past three days was made, but no messages in any way connected with the case could be found, so that it is probable that the telegram of inquiry sent out never passed the operator in Chihuahua. The bank officers had heard no mention of the case whatever until questioned concerning it this morning." *Query:* Will the telegraph company be liable to the paying bank for the fraud of its operator? Was his act done in the course of his principal's business? Questions of responsibility of principals for the acts and misconduct of their employees are of frequent occurrence, and the border line between liability and non-liability is not yet tightly drawn.—*Banking Law Journal.*

THE WICKED LAWYERS.—A correspondent sends us the following: The old adage, "Give a dog a bad name, and hang him," was strikingly brought to my mind the other day. I am a country solicitor, and most of my clients are to be found among the stalwart farmers of western Ontario. There is a deep-rooted

conviction in the minds of these simple sons of the soil that all lawyers are sharpers and require close watching. But notwithstanding this, they find it necessary to employ the rogues occasionally. An elderly agriculturist, owning a fine farm not far from here, being in need of a legal adviser, called at my office, and requested me to draw his will. After receiving his instructions, I prepared the document and read it over to him. I had apparently hit off exactly what he wanted, as, after hearing it read over twice, and seeming to understand it perfectly, he signed it and left it with me for safe keeping. Two or three days afterwards I was astonished by a visit from a brother of my client, who appeared to be somewhat excited, and accused me of attempting to secure his brother's property by drawing his will to suit myself. Of course I indignantly denied any such intention, and asked for an explanation. It appeared that after leaving my office my client had begun to think over the terms of the will, and it had suddenly struck him that, to the best of his recollection, he had signed a document leaving his farm to his son, "his heirs, executors, and *advisers.*" The more he thought of it, the surer he became that the wicked lawyer had sharked him, and would inherit all his property after his death, as his *adviser*. So he hastened off to his brother and laid the case before him, and he immediately came to me with the accusation I have mentioned. I soon cleared the matter up by producing the will and showing my excited friend that the word really used was "*administrators*." Peace and confidence were restored, and my reputation was saved for a time.

BANK—ERROR IN ACCOUNT DISCOVERED AFTER TWENTY YEARS.—In *Goodell v. Brandon National Bank*, a recent case in the Supreme Court of Vermont, it appeared that the plaintiff, in 1868, drew a check payable to himself on the defendant bank, in which he was a depositor, in writing, for $900, but in the corner, by mistake, set forth $1,900 in figures. Such check was charged against him at $1 900, and, in bringing the present suit in April, 1889, he claimed that he did not discover the overcharge of $1,000 until that time. Two defences were raised: estoppel *in pais* and the Statute of Limitations. The trial court directed a verdict for defendant upon the undisputed facts. The Supreme Court, on appeal, passed on both of such defences, and said:

1. It appears that the plaintiff kept a deposit book, which he frequently had written up by the defendant, on which occasions it returned the checks which he had drawn since the account was last written up on his deposit book. In about four weeks after the claimed overcharge, the plaintiff had the defendant write up his account in his deposit book. On this occasion he was charged on this check the sum of $1,900, and the check was returned to him. To establish an estoppel *in pais*, it must appear from uncontroverted facts that the defendant has been put to material disadvantage by the neglect and delay of the plaintiff in making the discovery; or that in reliance upon the fact that the charge truly represented the sum paid, it has taken, or neglected to take, some action, or lost some right which would be to its benefit. Nothing of the kind appears from the facts certified in the record. The long delay has doubtless deprived

both parties of the personal recollection of those engaged in the transaction. But this is a disadvantage which attaches to both parties. If the defendant, being a moneyed institution, kept its books with care and accuracy, the books ought to have disclosed it at once whether its cash on hand was $1,000 in excess of what its books required. On the basis that there was an overcharge of this amount, the defendant must have been guilty of negligence in not discovering it on the very day it occurred. The record does not disclose that the defendant is put to any disadvantage by the delay of the plaintiff in making discovery of the claimed overcharge. Its books, so far as appears, are in existence, and show its version of the transaction. If the plaintiff's contention is true, the defendant for many years has had this $1,000 to use probably without any charge for interest. We find no ground to justify the action of the trial court on the basis of an estoppel *in pais*.

2. The defendant also contends that the action of the County Court should be upheld, because the claim of the plaintiff, if otherwise established, on the undisputed facts, was barred by the Statute of Limitations. It appears that the plaintiff in April, 1878, drew out the balance standing to his credit upon the books of the defendant, and that he did not keep any deposit or account with the defendant for about two years thereafter. He then opened a new or further account. The defendant claims that the draft for the balance, in 1878, was a demand for what then was due, and that the statute would begin to run from that date. It is well settled that a deposit of this kind is not payable except upon demand, and that the course of business requires the demand to be made by a written voucher or check. But checks are only demands for the amounts named in them. Hence the check drawn for the balance shown by the defendant's books, in 1878, was not a demand for the $1,000 now claimed by the plaintiff. The defendant further contends that passing back the plaintiff's deposit book, on this occasion and all other occasions, after the now claimed $1,000 was charged thereon, was legally a denial by the defendant that it had that $1,000 subject to the check of the plaintiff, and a refusal to pay it if demanded; and thereupon the plaintiff had a right of action for its recovery, without demand. Ordinarily, a denial of the debt, subject to payment only on demand, is a waiver of the right of demand, and the creditor may sue at once without making demand. To have this effect, the denial must relate to the identical sum sued for. Where the debtor holds such sum under an honest mistake, his neglect or refusal of payment, to amount to a waiver of a formal demand, must occur after his attention has been called to the circumstances of the claimed mistake, and after he has had reasonable time and opportunity to investigate the circumstances. On none of the occasions in which the plaintiff's deposit book was written up by the the defendant, and returned to the plaintiff, subsequently to the claimed overcharge, was attention of either party called to the fact of the overcharge. Hence no waiver of demand on the part of the defendant arose. On the facts disclosed the plaintiff had never drawn a check for the claimed $1,000, nor demanded it until 1889, and no right of action arose in favor of the plaintiff for its recovery until then. On these views, neither of the contentions of defendant sustains the action of the County Court in ordering the verdict. Judgment reversed and cause remanded.—*N. Y. Law Journal.*

BAILOR RECOVERING GOODS BAILED.—The contract of bailment, by which the owner of goods lends or deposits the goods to or with a third party, gives rise to many complications, and is often, ultimately, mixed up with fraud, which requires justices of the peace to take part in the solution. Hence, it is useful to bear in mind the leading doctrines governing a relation between parties so common, and, occasionally, so extremely useful. There are many delicate considerations surrounding the common cases of bailment, and it is creditable that the remedies available to the parties are so seldom put in requisition. Yet, when litigation is resorted to, the decisions of the court bring out a wealth of learning and good sense, which comes in most usefully to assist justices of the peace when administering some part of the remedy. Moreover, these bailments seem to be susceptible of an infinite variety of circumstances, which try the sagacity of all who adjudicate upon them.

One of the perplexities often presented to a court, in dealing with bailments, is that the bailee often sets up some right in a different party than the owner, and makes that an excuse for not delivering up the goods to the original bailor. In *Betteley* v. *Reed*, 4 Q.B. 511, the circumstances were very complicated. The bailee was a wharfinger holding goods of the owner, who was said to have made a colorable sale to the plaintiff, and the latter sued for the value of the goods. The importance of the decision of the court was that the baileee had attempted to set up a right in some third party, who had repudiated any such right. The court observed that no instance among the many cases of wharfingers, warehousemen, and such like, could be adduced in which it was held the *jus tertii* could be set up when the third person, being aware of the circumstances, had abandoned his claim. To allow a depository of goods or money who has acknowledged the title of one person to set up the title of another, who makes no claim or has abandoned all claim, would enable the depository to keep for himself that to which he does not pretend to have any title in himself whatsoever.

Common carriers are often perplexed, in course of their business, with questions of this kind. And in a case of *Sheridan* v. *New Quay Company*, 4 C.B.N.S. 618, a complicated case occurred as to a bill of lading, the particulars of which it is unnecessary to state. But the court there observed that common carriers, being bound to receive goods for carriage, can make no enquiry as to the ownership. And it is not uncommon for the real owner to demand delivery before the carriers have parted with the goods. The law protects carriers against the real owner if the carriers have delivered the goods in pursuance of their employment without notice of his claim. And it ought equally to protect them against the pseudo-owner, from whom they could not refuse to receive the goods, in the event of the real owner claiming them, and their being given up to him.

In another case of *Thorne* v. *Tilbury*, 3 H. & N. 535, the plaintiff had delivered some goods, consisting of trunks, boxes, wearing apparel, and household furniture, to the defendant, to be warehoused, kept, and taken care of. Before the delivery, the goods had been the property of one Thorne, deceased, and there was not at the time of the delivery any legal representative of the estate of Thorne. This fact was not known to the defendant. But the defendant had

afterwards ascertained that one Huxham had been duly appointed the administrator of the deceased owner, and as such administrator claimed the goods. The defendant, having accordingly refused to deliver up the goods to the person depositing them, was sued for the goods or their value; and the question was whether this was a good defence. The court held that it was, and the reason stated was this: At the time of depositing the goods, the plaintiff had a good enough title as against the rest of the world. But he had not completed his title by taking out letters of administration; consequently, when Huxham, another person, made out his title, and obtained administration, the ownership of the goods vested in Huxham, and the defendant was entitled to refuse delivery to the first depositor.

Another case relating to the business of an auctioneer was of some interest and novelty. In *Biddle* v. *Bond*, 6 B. & S. 225, the plaintiff had seized the goods of one Robbins under a distress for rent of a house demised by the plaintiff to Robbins, and had delivered the goods to the defendant, an auctioneer, to sell by auction. When the sale was about to begin, Robbins served a notice on the defendant that the distress was void, as the relation of landlord and tenant did not exist between the plaintiff and himself, and there was no rent in arrear. By this notice, Robbins requested the defendant not to sell the goods, or, if he had sold them, then to retain the proceeds for Robbins. The defendant sold the goods, not having time to inquire into the title, but refused to pay the proceeds over to the plaintiff, and relied on the right of Robbins. The relation of the plaintiff and Robbins was that of vendor and vendee; and, consequently, the distress was altogether void and tortious. The question afterwards raised was whether, under such circumstances, the defendant could set up the title of Robbins. The court took time to consider the judgment and Blackburn, J., in delivering the judgment, said that the position of an ordinary bailee, where there had been no special contract or misrepresentation on his part, was very analogous to that of a tenant who, having accepted the possession of land from another, is estopped from denying his landlord's title: but this estoppel ceases when he is evicted by a title paramount. It is not enough that the bailee has become aware of the title of a third person: nor is it enough that an adverse claim is made upon him so that he may be entitled to relief under an interpleader. The bailee can only set up the title of another if he depends upon the right and title, and by the authority of the third person.

Another difficulty is often created when the goods had been obtained by the bailor by fraud. Thus in the case of *Attenborough* v. *London Dock Company*, 3 C.P.D. 450, certain dock warrants for wine had been pledged with the plaintiffs to secure advances, and the dock company afterwards refused to give up the wine when the plaintiff demanded it. In that case the effect of the Interpleader Acts on the remedy required to be considered, and the Court of Appeal then explained the mode in which the parties stood since the Interpleader Act of 1830, as modified by the Common Law Procedure Act of 1860, had passed. The mischief intended to be remedied by these acts was this: A person in possession of goods might be sued by some one setting up title to them. If the claim was contested, he might

be defeated and be liable to pay the value of the goods. And afterwards he might be sued by some other claimant to the goods, and it would be no defence to say that the value of the goods had been already paid to a prior claimant. The new claimant, if he was the real owner, would be entitled to recover in respect of them, and to say that he was not bound by the proceedings in the former action. Therefore a person who had committed no legal wrong, but was simply in possession of goods claimed by other persons, might be compelled to pay their value twice over. The remedy for this hardship was the procedure of interpleader. And great facilities are thus given for having all rights ascertained and disposed of in that way, and all the interests duly protected.

Another difficulty to perplex a bailee is where the bailor has since the bailment mortgaged the goods to a third person. In *European Company* v. *Royal Mail Company*, 30 L.J. C.P. 247, a case of this kind arose as to a ship. The plaintiffs delivered a ship to the defendants under a contract which provided, amongst other things, that the defendants should, during the continuance of the contract, and while the ship remained in the possession and use of the defendants, pay and discharge certain claims which would arise against the owners of the ship for its expenses, and upon the determination thereof re-deliver the ship to the plaintiffs. The plaintiffs afterwards mortgaged the ship, and certain expenses were incurred within the above provision, and after that the mortgagees demanded possession under their mortgage. Then the plaintiffs demanded possession, and the question was whether the defendants were bound to deliver up the ship to the mortgagees. The court said that the plaintiffs had hindered the performance by the defendant of the contract by mortgaging the ship, and hence the defendants were excused from delivering the ship to the plaintiffs because the mortgagees had now the better title.

These cases seem still to have left some doubt as to the circumstances under which a bailee might safely set up as a defence the title of a third person, or the *jus tertii*. The recent case of *Rodgers* v. *Lambert*, *ante* p. 452, brings out this point more clearly than any of the preceding cases. The plaintiffs had purchased two hundred tons of copper from the defendants, who were copper smelters at Swansea, and paid the price. But the defendants retained it in their possession as warehousemen, subject to warehousing charges, and they gave the plaintiffs delivery orders directed to themselves and their order, and entered the plaintiffs as owners in their warehouse books. Afterwards the plaintiffs sold the copper to a firm of Morrison & Company, who paid them the price of it, and took the delivery orders indorsed to themselves. Those delivery orders had never been presented by Morrison & Company, and the plaintiffs gave notice to the defendants that the indorsement of the delivery orders had been cancelled, and that they now wished the delivery of the copper to themselves. This delivery being refused by the defendants, who did not set up any other person as owner, the present action was brought, claiming damages for non-delivery. At the trial of the action the judge held that, under the circumstances, the plaintiffs had ceased to have any interest in the copper, and judgment was given for the defendants. An appeal was then brought.

The main contention of the defendants was that, as the plaintiffs had sold the copper and been paid for it, the copper was no longer theirs.

The Court of Appeal held that the plaintiffs were entitled to succeed because the defendants were not setting up the title of any third party, but relying on their own title, and they had none. They merely held the copper for the right owner. The defendants had not found out who were in possession of the delivery orders with the right to use them. If they had done so, and had the authority of such third parties as owners to refuse delivery to the plaintiffs, then that might have been a good defence. Even if the plaintiffs had given a delivery order to a third person, still, as between plaintiffs and defendants, the plaintiff could withdraw that order at any moment, and they did so here, by demanding the goods. Hence the defendants, upon the contract of bailment, were without any defence as for a breach of contract. Lindley, L.J., observed that the defendants had only themselves to thank for the trouble they had got into. As soon as there were several rival claimants to the copper, the defendants should have resorted to an interpleader issue, in which case the true owner of the copper could have been ascertained, and the copper or its money value would have been adjudicated to him. The mistake of the defendants was that they were not defending at the instance of any real owner, but on their own title, which was only a title of bailee, and nothing more. Hence, they had no defence whatever, and judgment must be given against them.

The above cases show a variety of circumstances under which bailees are put upon their defence: and though they are entitled in some circumstances to set up the title of a third party as their defence, yet the very least they must do is to prove that there is a third party who is the real owner, and that it is at his instance that the defence is made. If this is not done, the bailee incurs serious responsibility.—*Justice of the Peace.*

Proceedings of Law Societies.

COUNTY OF CARLETON LAW ASSOCIATION.

ANNUAL REPORT OF THE BOARD OF TRUSTEES FOR 1891.

To the Members of the County of Carleton Law Association :

GENTLEMEN: The Trustees in presenting this their Fourth Annual Report to the Association, take great pleasure in again reporting that the affairs of the Association are in a prosperous condition, and that the objects for which the Association was formed are being attained.

Annual fees to the amount of $232.50 have been paid, and, in addition to the grant of $256.50 from the Law Society, the Association has received a Provincial grant of $62.50.

After expending $567.95 in the purchase of books for the library, and after paying the other necessary expenses of the Association, there remains a balance on hand of $178. In view of the amount of this balance, and considering the

large proportions the library has now attained, your Trustees have not deemed it advisable to contract the loan from the Law Society which you at the last annual meeting authorized them to do.

The library now contains 1003 volumes, of which 126 volumes were added during the year, as appears by the schedule annexed hereto. The books purchased for and now in the library, apart from those presented to the Association, represent a value of about $3000, for which amount your Trustees have placed an insurance thereon. None of the books have disappeared during the past year, owing principally to the carefulness of the librarian, Miss Kealy, whom your Trustees engaged in compliance with your direction to appoint a librarian. In addition to taking care of the books in the library, the librarian has noted up in the Revised and Consolidated Statutes the amendments of subsequent years.

The Trustees have to report as a matter of regret that the membership is less than last year, two of the members, Messrs. C. H. Pinhey and T. G. Rothwell, having withdrawn from the Association, while no new members joined during the year. It is suggested that your Association should consider the matter, with the view of devising means of inducing at least some of the large number of the profession of Ottawa who are not now members to join the Association.

Your Trustees desire to congratulate the Association on the election of one of your members, Mr. A. J. Christie, Q.C., as a Bencher of the Law Society at the election of Benchers last March. While, perhaps, the City of Ottawa is entitled to more than one representative, yet, before your Association was formed it appears to have been impossible to appoint even one representative from Ottawa.

Another advantage derived from the formation of your Association was apparent in the long list of important cases set down for hearing at the recent Winter Assize, which extra sitting of the court at Ottawa was arranged for in the first instance by your Association.

During the year Mr. Winchester inspected the library and books of your Association, when he expressed himself as much pleased with everything in connection therewith.

Your Trustees refer to you, for your consideration, correspondence received relative to the more complete fusion of the different divisions of the courts, and also in reference to the feasibility of requesting the Law Society to supply to the profession the Supreme Court Reports in the manner in which they supply the Ontario Reports. The particulars required by the by-laws accompany this Report, being:

(1) The names of the members admitted during the year.

(2) A list of the books contained in the library.

(3) A list of the books added to the library during the year.

(4) A detailed statement of the assets and liabilities of the Association at the date of the Report, and of the receipts and disbursements during the year.

The Treasurer's accounts have been duly audited, and the Report of the Auditors will be submitted to you for your approval.

(Sgd.) F. H. CHRYSLER, *President.*

Ottawa, Dec. 31st, 1891. " J. M. BALDERSON, *Secretary.*

LAW SOCIETY OF UPPER CANADA.

TRINITY TERM, 1891.

(Continued from page 56.)

Tuesday, September 15th.

Present—between 10 and 11 a.m.: The Treasurer, and Messrs. Irving, S. H. Blake, Shepley, Moss, Strathy, and Guthrie. In addition, after 11, Messrs. Idington, Lash, Robinson, Barwick, and Riddell.

The minutes of last meeting of Convocation were read, approved, and signed by the Treasurer.

The Secretary reported, as to cases reserved, that the following gentlemen have completed their papers and are entitled to their certificates of fitness, namely: Messrs. E. F. Blake, A. G. McLean, E. Mortimer, G. S. Kerr, and T. A. Beament.

Ordered, that they receive their certificates of fitness.

The Report of the Examiners on the First Intermediate Examination was read.

Ordered for immediate consideration and adopted.

The Report of the Secretary on the standing of the candidates who had passed the examination was read.

Ordered, that the examination of the following candidates be allowed them as students and articled clerks, namely: Messrs. W. D. Moss, J. G. Hay, A. McFarlane, J. L. Crawford, W. F. W. Lent, A. B. Carscallen, R. J. Bonner, J. A. Stevenson, C. R. McKeown, F. H. Colter, D. H. McLean, A. Mearns, R. J. Slattery, G. H. Pettit, and H. Robertson.

The Report of the Examiners in the Second Intermediate Examination was read.

Ordered for immediate consideration, and adopted.

The Report of the Secretary on the standing of the candidates who had passed the examination was read.

Ordered, that the examinations of the following candidates be allowed them as students and articled clerks, namely: W. McFarlane, E. Harley, W. F. Scott, W. Farnham, St. Clair Leitch, C. T. Sutherland, G. A. Sayer, J. McKay, C. E. Fulford, H. M. Graydon, and J. H. Senkler.

The petition of D. E. K. Stuart was read and received.

Ordered to be referred to a special committee, composed of Messrs. Moss, Lash, Strathy, and Idington, to make the necessary enquiries and conduct the prescribed examination, and to report to Convocation.

The petition of H. McMillan was read and received.

Ordered to be referred to a special committee, composed of Messrs. Moss, Lash, Strathy, and Idington, to make the necessary enquiries and report to Convocation.

The petitions of Messrs. Saunders, Lyall, McCullough, and Hunter, praying for admission as solicitors under 54 Vict. cap. 25, were read and received.

Ordered to be referred to the Legal Education Committee, to enquire and report to Convocation.

The petitions of Messrs. Choppin, Morwood, Kennings, Stewart, Ross, and Defries were received and read.

Ordered, that the prayers of these petitions be granted, and that their notices stand good.

The petition of A. J. McKinnon was received and read.

Ordered, that the prayer be granted, and that his notice stand good.

The Report of the special committee on the case of Mr. D. E. K. Stuart was received and read.

Ordered for immediate consideration, and adopted.

Ordered, that Mr. Stuart be called to the Bar.

The Report of the special committee on the case of Mr. H. McMillan was received and read.

Ordered for immediate consideration, and adopted.

Ordered, that Mr. H. McMillan be called to the Bar.

The letters of Mr. Apjohn, and Messrs. Robinson, Thibeaudeau & Langford, were received and read.

Mr. Shepley moved as follows: "That the matter of the communications from Mr. Apjohn, and Messrs. Robinson, Thibeaudeau & Langford, be referred to the Discipline Committee, pursuant to the rule laid down in the Heaslip case, Easter, 1890, with instructions to communicate with these gentlemen and to ascertain and report whether it is a case in which the court may be moved under the Statute."—Carried.

Mr. Lash, pursuant to notice moves for leave to introduce a Rule amending Rule 201, as to scholarships.

Ordered, and the Rule was introduced and read a first time.

Mr. Lash moves that the Rule be read a second time, as follows: "(201) Of the candidates passed with honors at each Intermediate Examination, or Law School Examination allowed in lieu thereof, the first sha'' be entitled to a scholarship of $100, the second to a scholarship of $60, and the next five to a scholarship of $40 each; and each scholar shall receive a diploma certifying to the fact."—Carried.

The Rule as to stages was dispensed with unanimously, and the Rule was read a third time and passed.

The paragraphs 4 and 5 of the Report of the Finance Committee, deferred until to-day, were brought up for consideration.

The fourth paragraph was considered.

Ordered, that Mr. Grasett's services be dispensed with, and that on his retirement he do receive a gratuity of $500 in addition to his salary for the current month.

The fifth paragraph was considered.

The Report of the Library Committee on the same subject, presented yesterday, was read.

Mr. Shepley moved: "That the fifth paragraph be adopted, and that the whole matter of staff reorganization be referred to a joint committee composed of the Finance and Library Committees, with instructions to frame a scheme of reorganization, and report the same, with the details thereof, to Convocation during this term."—Carried.

The Report of the Library Committee, ordered to be taken up to-day, was considered paragraph by paragraph.

1st, 2nd, and 3rd paragraphs adopted. The committee to report its plan for placing the binding contract on a better footing.

4th, 5th, and 6th paragraphs adopted.

Messrs. D. E. K. Stuart and H. McMillan were called to the Bar.

The Report of the Special Committee on the application of Miss Clara Brett Martin, ordered to be considered to-day, was considered and adopted, and the Secretary was directed to notify Miss Brett Martin accordingly.

Mr. Shepley gave notice that he would at the next meeting of Convocation introduce a Rule to strike out Rule 134, to re-number Rule 135 as 134, and to enact the following Rule as Rule 135: "(135) The notices required by the preceding Rules may be given within three months prior to the taking of his degree by a graduate, or to the passing of his examination by a candidate, seeking admission under Rule 134."

Convocation adjourned.

Saturday, September 19th.

Convocation met.

Present—The Treasurer, and Messrs. Strathy, MacKelcan, Irving, Osler, Moss, Robinson, and Aylesworth.

The minutes of last meeting were read and approved.

Mr. Osler, from the Reporting Committee, presented the Editor's Report of 18th September, as follows:

TORONTO, 18th September, 1891.

DEAR SIR: The work of reporting is in a forward state. In the Court of Appeal there are eleven unreported cases, all of 30th June last. In the Queen's Bench Division there are six, five of which are of June, and one of August. In the Common Pleas there are nine, all of June. In the Chancery Division Mr. Lefroy has one of August; those judgments delivered this month having yet to be considered. Mr. Boomer has nine, two of June, one of July, two of August, and four of September. There are two Practice Cases unreported, one of July and one of August. A Number of the Election Cases is in type, revised, and will shortly issue. The Digest Number, Vol. 20 Ontario Reports, is in type, revised, and will be issued in a few days. I enclose a report from Mr. F. J. Joseph regarding the Consolidated Digest in course of preparation by him.

Mr. Joseph's letter referred to above:

TORONTO, 14th September, 1891.

MY DEAR MR. SMITH: Mr. Osler has asked me to inform him through you of the progress made in compiling the Digest. I expect that fully one half the work will be in type this month, and if the printers continue working as at present the entire work will be in type (except the Table of Cases) by the end of the year. I have spared neither labor nor expense to get the work finished as soon as possible.

Ordered to be considered at the next meeting of Convocation.

Mr. Moss, from the Committee on Legal Education, reports:

(1) On the case of R. M. Noble: That the Secretary reports his papers complete, and his attendance at the Law School having been allowed by Convocation, the Committee recommend that he do receive his certificate of fitness.

Ordered for immediate consideration. Adopted.

Ordered, that he do receive his certificate of fitness.

(2) On the case of Nelson D. Mills: That the Secretary reports his papers complete, and his attendance at the Law School having been allowed by Convocation, the Committee recommend that he do receive his certificate of fitness.

Ordered for immediate consideration. Adopted.

Ordered, that he do receive his certificate of fitness.

(3) On the case of W. J. McDonald: That the Secretary reports his papers complete, save as to the date of filing his articles—that the filing be allowed *nunc pro tunc*—and Convocation having allowed his attendance at the Law School, that he do receive his certificate of fitness.

The Report was ordered for immediate consideration, adopted, and it was ordered accordingly.

(4) In the cases of Messrs. Sanders, Lyall, and McCullough: That they have been called to the Bar, passed the examination, and complied with the regulations applicable to their cases, and are entitled to receive certificates under the regulations for presentation to the court.

The Report was ordered for immediate consideration, adopted, and it was ordered accordingly.

Mr. Irving presented the Report of the Special Committee appointed at last meeting of Convocation, as follows:

To the Benchers of the Law Society in Convocation assembled:

The Special Committee appointed by Convocation at their meeting on 15th inst., composed of the members of the Finance and Library Committees, to frame a scheme of reorganization of the executive staff of the Society, and report the details thereof to Convocation, beg leave to report that they have considered the matters referred to, and have resolved to recommend as follows:

(1) That Mr. Esten, the present Secretary, sub-Treasurer, and Librarian, be relieved of his duties as Librarian, and discharge the duties of Secretary and sub-Treasurer, and that such duties be discharged by him without any further special assistance.

(2) That Convocation appoint a Librarian, to hold office like other officers, during pleasure, and that Mr. John J. Daley, hitherto an assistant of the Secretary, sub-Treasurer, and Librarian, be continued in the service of the Society with the title of Assistant Librarian.

(3) That the above-named three officers of the Society be severally required at all times to discharge or assist in the discharge of the duty of any officer of the Society as may be required by Convocation, or by the Treasurer, or by the Chairman of any Committee having supervision over the functions or duty to be discharged or required to be done.

(4) That Messrs. Irving, Watson, and Barwick be appointed a sub-Committee to confer with Messrs. Clarkson & Cross, accountants, with the object of having advice and assistance in relation to opening a new set of books and registers as may be suggested, and to report their own recommendations to this Committee.

(5) That the officers receive the following salaries:

The salary of Mr. Esten and emoluments to remain as at present.

The salary of the Librarian to be at the rate of one thousand dollars per annum, to be increased to eleven hundred dollars for the second year, and to twelve hundred dollars for the third and subsequent years.

The salary of Mr. Daley to remain as at present, eight hundred dollars per annum.

(6) The Committee respectfully suggest to Convocation that the selection of a Librarian be made as soon as practicable, and in view of Rule 40 of the Society's Rules (page 16), that it be ordered that a meeting of Convocation be held by adjournment from Friday next to Saturday, the 3rd of October, and that the notices, in the Rule specified, of intention to appoint a Librarian be given, and that in pursuance of the practice of Convocation, in accordance with a report adopted 3rd December, 1875, in relation to the appointment of lecturers, and subsequently extended to reporters, public notice of the intention to appoint be given by advertisement in two of the Toronto daily papers, instructing persons desiring the said office to forward their applications to the Secretary of the Law Society by such certain date as Convocation may fix.

(Signed) ÆMILIUS IRVING,

19th September, 1891. *On behalf of the Special Committee.*

The Report was ordered for immediate consideration, adopted, and the Committee was ordered to be continued for the purposes mentioned in the Report.

Mr. Irving moves for leave to introduce a Rule based on the Report of the Committee.—Ordered.

The Rule was read a first time and ordered to be read a second time as follows:

Rule 38 is amended as follows by repealing sub-sections 1 and 7 and substituting therefor the following:

38 (1) A Secretary who shall be ex-officio sub-Treasurer.

38 (7) A Librarian and an Assistant Librarian, and by adding the following as sub-section 8:

38 (8) The Secretary, Librarian, and Assistant Librarian, shall be severally required at all times to discharge any of the duties of any officer of the Society when required by Convocation, or by the Treasurer, or by the Chairman of any Committee having supervison over the functions or duties to be discharged.

Rule 48 is repealed and the following substituted therefor:

48. The salary of the Secretary shall be two thousand dollars per annum, payable monthly, for all his duties in every capacity, in addition to which he shall be furnished with rooms, fuel, water, and light.

Rule 49 is repealed and the following substituted:

49. The salary of the Librarian shall be at the rate of one thousand dollars per annum for his first year, eleven hundred dollars for his second year, and twelve hundred dollars for his third and subsequent years of service.

The salary of the Assistant Librarian shall be at the rate of eight hundred dollars per annum.

Rule 68 is repealed and the following substituted:

68. The Librarian shall have the immediate and general charge of the Library under the superintendence of the Library Committee.

Ordered unanimously, that the Rule as to stages be dispensed with.

The Rule was read a third time and passed.

The Secretary was directed to publish the usual advertisement under the instructions of the Chairman of the Finance Committe. Applications to be put in not later than Tuesday, 29th September, and to be reported to Convocation by the Library Committee, and the Secretary to issue the required notice that a meeting of the Bench would be held on Saturday, 3rd October, to make the appointment.

The Secretary reports that Mr. A. A. Smith has completed his papers and is entitled to his certificate of fitness.

Ordered, that he do receive his certificate.

The statement of the Ontario Government as to the allocation of the Government grant to libraries was read.

Ordered to be referred to the County Libraries Committee.

Mr. Moss, from the Legal Education Committee, reports as follows:

The Legal Education Committee beg to report as follows: During the vacation the Committee considered the suggestions contained in the Principal's report, with reference to changes in the text-books in the Law School curriculum, and decided to make the following changes:

(1) Transfer Deane's Principles of Conveyancing from the second year to the first year.

(2) Substitute Clarke and Humphries' Sales of Lands for Dart on Vendors, in the third year.

(3) Substitute Underhill on Trusts, Kelleher on Specific Performance, and De Colyar on Guaranty and Suretyship, for Lewin on Trusts, in the third year.

All of which is respectfully submitted.

(Signed) CHARLES MOSS,
Chairman.

September 19th, 1891.

The Report was read.

The letter of Arthur Armstrong, as to his complaint against Mr. Fisher asking for a copy of the report, and of the finding of Convocation, was received and read.

Ordered to be referred to the Discipline Committee, to search for precedents, enquire and report to Convocation as to a general rule, and the action to be taken in the present case.

The letter of Mr. Walter Read, the solicitor of the Society, as to the case of Mr. J. G. Currie, was received and read.

Ordered, that it be referred to the Discipline Committee, with instructions to report on Mr. Currie's matter at the next meeting of Convocation.

Mr. Shepley, pursuant to notice, moves for leave to introduce a Rule as to notice.

Ordered, and the Rule was read a first time.

The Rule was ordered to be read a second time as follows:

(1) Rule 134a is renumbered 132a.

(2) Rule 134 is hereby repealed.

(3) Rule 135 is renumbered as 134.

(4) The following is hereby enacted as Rule 135:

135. The notice required by the preceding Rules may be given within three months prior to the taking of his degree by a graduate, or to the passing of his examination by a candidate seeking admission under Rule 134.

Ordered to be read a third time at the next meeting of Convocation.

Convocation adjourned.

DIARY FOR FEBRUARY.

1. Mon. ...Hilary Term begins. Q.B. and C.P. Divisions of H.C.J. sittings and County Court non-jury sittings in York begin. Sir Edward Coke born, 1552.
6. Sat.......W. H. Draper, 2nd C.J. of C.P., 1856.
7. Sun......*5th Sunday after Epiphany.*
9. Tues....Union of Upper and Lower Canada, 1841.
10. Wed.....Canada ceded to Great Britain, 1763.
11. Thur....T. Robertson appointed to Chancery Division, 1887.
13. Sat.......Hilary Term and High Court of Justice sittings end.
14. Sun......*Septuagesima Sunday.* Toronto University burned, 1890.
16. Tues....Supreme Court of Canada sits.
18. Thur....Chancery Division H.C.J. sits.
21. Sun......*Sexagesima Sunday.*
24. Wed.....St. Matthias.
27. Sat.......Sir John Colborne, Administrator, 1838.
28. Sun......*Quinquagesima Sunday.* Indian Mutiny began, 1857.

Reports.

ONTARIO.

(Reported for THE CANADA LAW JOURNAL.)

FOURTH DIVISION COURT, COUNTY OF ONTARIO.

TEMPERANCE INS. CO. *v.* COOMBE.

Exemptions — Absolute right to — Fraudulent preferences.

Exemptions are at the absolute disposal of the execution debtor, and it is not a fraudulent preference to hand them over to one creditor in payment of a debt in preference to another creditor.

[Whitby, January, 1892.

The subject matter of this interpleader were certain chattels, which were admittedly exempt, but which the plaintiffs contended became liable to seizure, because the defendant had transferred them to the claimant in satisfaction of a debt due to him.

DARTNELL, JJ.: The contention is founded upon a fallacy. The debtor has an absolute *jus disponendi* over the exemptions. He is not compelled to keep them in his possession in order that they should retain the character of exemptions. If sold, he is entitled to the proceeds in money, which he can deal with as he likes; and after his death his widow has the same right as he himself had.

At common law a debtor has a right to prefer his creditor. A preference is fraudulent only by virtue of the statute, and the plaintiff cannot be placed in any better position than if the chattels had remained in the defendant's hands. There can be no fraudulent transfer of chattels which in no case could be reached by execution.

There will be judgment for the claimant with costs.

T. W. Chapple for the claimant.

A. J. Reid for the execution creditors.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Ontario.] [Nov. 16.

QUIRT *v.* THE QUEEN.

Constitutional law— Validity of Dominion acts —31 Vict., c. 17 (D.)—33 Vict., c. 50 (D.)— Banking and incorporation of banks— Bankruptcy and insolvency—Taxation—Exemption—Crown lands — Beneficial interest of Crown.

The Bank of Upper Canada was insolvent when the British North America Act was passed, and all its property and assets had been transferred to trustees. By 31 Vict., c. 17, the Dominion Parliament ratified the assignment and constituted the trustees a body corporate with power to carry on the business of the bank as far as was necessary for winding up the same. By 33 Vict., c. 50, the same Parliament transferred all the property and assets of the bank to the Dominion Government. Subsequently a piece of land included in said assets was sold by the Government and a mortgage taken for the purchase money. This land was assessed by the municipality in which it was situated and sold for unpaid taxes. In a suit to set aside this tax sale,

Held, affirming the judgment (*sub-nomine Regina* v. *The County of Wellington)* of the Court of Appeal (17 O.R. 615), that said Acts of the Dominion Parliament were *intra vires.*

Per RITCHIE, C.J.: Parliament, having legislative jurisdiction over "Banking and the Incorporation of Banks" and over "Bankruptcy and Insolvency," could pass the Acts in question.

Per STRONG, TASCHEREAU, and PATTERSON, JJ.: The right of the Dominion Parliament to pass the said Acts cannot be referred to its right to legislate with respect to "Banking and the Incorporation of Banks," but is derived from its jurisdiction over "Bankruptcy and Insolvency."

Held, also, that the Crown having a beneficial interest in the lands on which it held a mortgage, such lands were exempt from taxation, and the tax sale was invalid.

Appeal dismissed with costs.

Bain, Q.C., for appellants.

Gamble for respondents.

Quebec.] [Nov. 6.

DAWSON *v.* DUMONT.

Appeal—Jurisdiction—Action in disavowal—Prescription—Appearance by attorney—Service of summons—C.S.L.C., c. 83, s. 44.

In an action brought in 1866 for the sum of $800 and interest at 12½ per cent. against two brothers, J.S.D. and W.McD.D., being the amount of a promissory note signed by them, one copy of the summons was served at the domicile of J.S.D. at Three Rivers, the other defendant, W.McD.D., then residing in the State of New York. On the return of the writ the respondent filed an appearance as attorney for both defendants, and proceedings were suspended until 1874, when judgment was taken, and in December, 1880, upon the issue of an alias writ of execution, W.McD.D., having failed in an opposition to judgment, filed a petition in disavowal of the respondent. The disavowal attorney pleaded *inter alia* that he had been authorized to appear by a letter signed by J.S.D., saying, "Be so good as to file an appearance in the case to which the enclosed has reference," etc.

The petition in disavowal was dismissed. On appeal to the Supreme Court of Canada, the respondent moved to quash the appeal on the ground that the matter in controversy did not amount to the sum of $2000.

Held, 1st, that as the judgment obtained against W.McD.D. in March, 1874, on the appearance filed by the respndent, exceeded $2000, the judgment on the petition for disavowal was appealable.

2nd. That there was no evidence of authority given to the respondent, or of ratification by W.McD.D. of respondent's act, and therefore the petition in disavowal should be maintained.

3rd. Following *McDonald* v. *Dawson*, Cassels' Digest, p. 322, and 11 Q.L.R. 181, that the only prescription available against a petition in disavowal is that of thirty years.

4th. That where a petition in disavowal has been served on all parties to the suit, and is only contested by the attorney whose authority to act is denied, the latter cannot on an appeal complain that all parties interested in the result are not parties to the appeal.

Appeal allowed with costs.

Irvine, Q.C., and *Robertson* for appellant.

McLean for respondent.

[Nov. 10.

HURTUBISE *v.* DESMARTEAU.

Supreme and Exchequer Courts Amending Act, 1891, s. 3—Appeal from Court of Review.

By s. 3 of the Supreme and Exchequer Courts Amending Act of 1891, an appeal may lie to the Supreme Court of Canada from the Superior Court in Review, Province of Quebec, in cases which, by the law of the Province of Quebec, are appealable direct to the Judicial Committee of the Privy Council.

In a suit between H. and D., a judgment was delivered by the Superior Court of Review at Montreal in favor of D. the respondent, on the same day on which the Amending Act came into force. On appeal to the Supreme Court of Canada, taken by H.,

Held, that H. *et al.* (the appellants) not having shown that the judgment was delivered subsequent to the passing of the Amending Act, the court had no jurisdiction.

Quære: Whether an appeal will lie from a judgment pronounced after the passing of the Amending Act in an action pending before the change of the law?

Appeal quashed with costs.

Geoffrion, Q.C., for motion.

Charbonneau and *Brosseau contra.*

[Nov. 16.

BROSSARD ET AL. *v.* DUPRAS ET AL.

Composition—Loan to effect payment—Secret agreement—Failure to pay—Articles 1039 and 1040 C.C.

On the 20th December, 1883, the creditors of one L. resolved to accept a composition payable by his promissory notes at four, five, and twelve months. At the time L. was indebted to the Exchange Bank (in liquidation), who did not sign the composition deed, in a sum of $4000. B. *et al.*, the appellants, were at that time accommodation endorsers for $7415 of that

amount, and held as security a mortgage dated 5th September, 1881, on L.'s real estate. The bank having agreed to accept $8000 cash for its claim, B. *et al.* on the 11th of January, 1884, advanced $3000 to L. and took his promissory notes and a new mortgage for the amounts, having discharged and releasèd on the same day the previous mortgage of the 5th September, 1881. This new transaction was not made known to D. *et al.*, who, on 14th January, 1884, advanced a further sum of $3000 to L. to enable him to pay off the Exchange Bank, and for which they accepted L.'s promissory notes. L., the debtor, having failed to pay the second instalment of his notes, D.*et al.*, who were not originally parties to the deed, brought an action to have the transaction between L. and the appellants set aside and the mortgage declared void on the ground of having been granted in fraud of the rights of the debtor's creditors.

Held, reversing the judgments of the courts below, that the agreement by the debtor L. with the appellants was valid, the debtor having at the time the right to pledge a part of his assets to secure the payment of a loan made to assist in the payment of his composition. The CHIEF JUSTICE and TASCHEREAU, J., dissenting.

Per FOURNIER, J., that as the mortgage sought to be set aside had not been registered on the 13th of January, the respondent's right of action was prescribed by one year from that date. Art. 1040 C.C.

Appeal allowed with costs.

Geoffrion, Q.C., and *Beausoliel* for appellants.

Ouimet, Q.C., for respondents.

HUS *v.* COMMISSAIRES D'ECOLES DE STE. VICTOIRE.

Mandamus—Establishment of new school district—School visitors—Superintendent of Education—Jurisdiction of—Upon appeal—Approval of three visitors—49 Vict., c. 22, s. 11 (Que.), R.S.P.Q., Art. 2055.

Upon an application by H., appellant for a writ of mandamus to compel the respondents to establish a new school district in the parish of Ste. Victoire in accordance with the terms of a sentence rendered on appeal by the Superintendent of Education under 40 Vict., c. 22, s. 11 (Que.), the respondents pleaded *inter alia* that the superintendent had no jurisdiction to make the order, the petition in appeal to the superintendent not having been approved of by three qualified visitors. The decree of the superintendent alleged that the petition was also approved of by one L., inspector of schools.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the petition in appeal must have the approval of three visitors qualified for the municipality where the appeal to the superintendent originated, and as Rev. A. Desoray, one of the three visitors who had signed the petition in appeal, was parish priest of an adjoining parish, and not a qualified school visitor for the municipality of Ste. Victoire, the sentence rendered by the superintendent was null and void.

TASCHEREAU, J., dissenting on the ground that as the decree of the superintendent stated that L., the inspector of schools, was a visitor, it was *prima facie* evidence that the formalities required to give the superintendent jurisdiction had been complied with. C.S.L.C., c. 15, s. 25.

Appeal dismissed with costs.

Lacoste, Q.C., and *Germain* for appellant.

Geoffrion, Q.C., for respondents.

QUEBEC, ETC., RY. CO. *v.* MATHIEU.

Expropriation—Q.R.S. 5164, ss. 12, 16, 17, 18, 24—Award—Arbitrators—Jurisdiction of—Lands injuriously affected—43 & 44 Vict., c. 43 (Que.)—Appeal—Amount in controversy—Costs.

In a railway expropriation case, the respondent in naming his arbitrator declared that he "only appointed him to watch over the arbitrator of the company," but the company recognized him officially, and subsequently an award of $1974.25 and costs for land expropriated and damages was made under Art. 5164, R.S.C. The demand for expropriation as formulated in their notice to arbitrate by the appellants was for the width of their track, but the award granted damages for three feet outside of the fences on each side as being valueless. In an action to set aside the award,

Held, affirming the judgment of the courts below, that the appointment of the respondent's arbitrator was valid under the statute, and bound both parties, and that in awarding damages for three feet of land injuriously affected on each side of the track the arbitrators had not excéeded their jurisdiction.

STRONG and TASCHEREAU, JJ., doubting whether the case was appealable, the amount in controversy, deducting the taxed costs, being $2000.

Appeal dismissed with costs.

Irvine, Q.C., and *Bedard* for appellants.

Casgrain, Q.C., for respondent.

BENNING ET AL. *v.* THE ATLANTIC & NORTH-WEST RY. CO.

Expropriation under Railway Act—R.S.C., c. 109—Discretion of arbitrators—Award.

In a case of an award in expropriation proceedings, it was held by two courts that the arbitrators had acted in good faith and fairness in considering the value of the property before the railway passed through it, and its value after the railway had been constructed, and that the sum awarded was not so grossly and scandalously inadequate as to shock one's sense of justice.

On appeal to the Supreme Court of Canada,

Held, that the judgments should not be interfered with.

Appeal dismissed with costs.

Laflamme, Q.C., and *Trenholme* for appellants.

Geoffrion, Q.C., and *H. Abbott*, Q.C., for respondents.

HOLLAND *v.* ROSS.

Crown lands—Location tickets—Transfer of purchaser's rights—Registration of—Waiver by crown—Cancellation of license—23 Vict., c. 2, ss. 18 and 20—32 Vict., c. 11, s. 18 (Q)—36 Vict., c. 8 (Q).

A location ticket of certain lots was granted to G.C.H. in 1863. In 1872 G.C.H. put on record with the Crown Land Department, that by arrangement with the Crown Land agent, he had performed settlement duties on another lot known as the Homestead lot. In 1874 G.C.H. transferred his rights to appellant, paid all monies due with interest on the lots, registered the transfer under 32 Vict., c. 11, s. 18, and the Crown accepted the fees for registering the transfer and for the issuing of the patent. In 1878 the commissioner cancelled the location ticket for default to perform settlement duties.

Held, that the registration by the commissioner in 1874, of the transfer to respondent was a waiver of the right of the Crown to cancel the location ticket for default to perform settlement duties, and the cancellation was illegally effected.

Appeal allowed with costs.

Lacoste, Q.C., and *Nicholls* for appellant.

Laflamme, Q.C., and *Robertson*, Q.C., for respondent.

[Nov. 17.

PETERS *v.* QUEBEC HARBOR COMMISSIONERS.

Contract—Engineer's certificate—Finality of—Bulk sum contract—Deduction—Engineer's powers—Interest.

In a bulk sum contract for various works and materials, executed, performed, and furnished on the Quebec Harbor Works, the contractors were allowed by the final certificate of the engineers a balance of $52,011. The contract contained the ordinary powers given in such contracts to the engineers to determine all points in dispute by their final certificate. The work was completed and accepted by the commissioners on the 11th October, 1882, but the certificate was only granted on the 4th February 1886. In action brought by the contractors (appellants) for $181,241 for alleged balance of contract price and extra work,

Held, 1st, that although the certificate of the engineers was binding on the parties and could not be set aside as regards any matter coming within the jurisdiction of the engineers, yet, that such certificate can be corrected or reformed by the court where it is shown that the engineers have improperly deducted from the bulk sum contract price the sum of $33,100 for an alleged error in the calculation of the quantities of dredging to be done, stated in the specification, and the quantities actually done.

2nd. That interest could not be computed from an earlier date than from the date of the final certificate, fixing the amount due to the contractors under the contract, viz., 4th February, 1886.

STRONG and GWYNNE, JJ., were of opinion that the certificate could have been reformed as regards an item for removal of sand erroneously paid for to other contractors by the commissioners and charged to the plaintiffs.

Appeal and cross-appeal allowed with costs.

Osler, Q.C., and *W. Cook*, Q.C., for appellants.

Irvine, Q.C., and *Stuart*, Q.C., for respondents.

PETRY ET AL. *v.* CAISSE D'ECONOMIE.

Bank stock—Substituted property—Registration —Arts. 931, 938, 939 C.C.—Shares in trust —Condictio indebiti—Arts. 1047, 1048 C.C.

The curator, to the substitution of W. Petry, paid to the respondents the sum of $8,632 to redeem thirty-four shares of the capital stock of the Bank of Montreal, entered in the books of the bank in the name of W.P.G. in trust, and which the said W.P.G., one of the *grevés* and manager of the estate, had pledged to respondent for advances made to him personally. H.P. et al., appellants, representing the substitution, by their action seek to be refunded the money which they allege Rev. J. P., one of them, had paid by error as curator to redeem shares belonging to the substitution. The shares in question were not mentioned in the will of William Petry, and there was no inventory to show they formed part of the estate, and no *acte d'emploi or remploi* to show that they were acquired with the assets of the estate.

Held, affirming the judgments of the court below, per RITCHIE, C.J., and FOURNIER and TASCHEREAU, JJ., 1st, that the debt having been paid with full knowledge of the facts, the plaintiffs could not recover.

2nd, per STRONG and FOURNIER, JJ., that bank stock cannot be held, as regards third parties, in good faith to form part of substituted property on the ground that they have been purchased with monies belonging to the substitution without an act of investment in the name of the substitution and a due registratian thereof. Arts. 931, 938, 939 C.C. (PATTERSON, J., dissenting).

Appeal dismissed with costs.

Irvine, Q.C., and *Stuart*, Q.C., for appellants.

Hamel, Q.C., and *Fitzpatrick*, for respondents.

New Brunswick.] [June 22.

MCKEAN *v.* JONES.

Practice—Proceedings in equity—Parties.

C., who had a suit pending on certain policies of insurance, assigned to defendant all his interest in said suit and said policies, and being ndebted to B. & Co., he gave them an order on defendant, directing the latter to pay B. & Co. the balance coming from the insurance claim after paying what was due to defendant himself. B. & Co. indorsed the order and delivered it to plaintiff, who presented it to defendant, and defendant accepted it by writing his name across the face. B. & Co. afterwards gave plaintiff a written document, stating that having been informed that the order was not negotiable by indorsement, in order to perfect plaintiff's title they assigned and transferred to him the order and made him their attorney, in their name, but for his own benefit, to collect the same.

The insurance monies having come into the hands of defendant, he refused to give plaintiff an account or pay what was due to him, but stated that prior claims had exhausted the money. In an action for an account and payment the defendant demurred, claiming that both C. and B. & Co. should be made parties. The demurrer was overruled and the same objection was raised in the answer. On appeal, the question of want of parties was the only one argued.

Held, affirming the judgment of the court below, STRONG, J., dissenting, that the question was *res judicata* by the judgment on the demurrer; if not, the judgment was right, as neither C. nor B. & Co. were necessary parties.

Appeal dismissed with costs.

A. G. Blair, and *Hazen*, for appellants.

Weldon, Q.C., for respondent.

Manitoba.] [Nov. 16.

BERNARDIN *v.* MUNICIPALITY OF NORTH DUFFERIN.

Contract—Corporation—Capacity to contract except under seal.

G., in answer to advertisement tendered for a contract to build a bridge for the municipality of North Dufferin, and his tender was accepted by resolution of the municipal council. No by-law was passed authorizing G. to do the work, but the bridge was built and partly paid for, but a balance remained unpaid for which B., to whom G. had assigned the contract, notice of the assignment having been given to the Council in writing, brought an action. This balance had been garnished by a creditor of G., but the only defence urged to the action was that there was no contract under seal in the absence of which the corporation could not be held liable. On the trial there was produced a document signed by G. purporting to be the

contract for the building of the bridge. It had no seal and was not signed by any officer of the municipality.

Held, reversing the judgment of the Court of Queen's Bench, Manitoba (6 Man. L.R. 88), RITCHIE, C.J., and STRONG, J., dissenting, that the work having been executed and the corporation having accepted it and enjoyed the benefit of it, they could not now be permitted to raise the defence that there was no liability on them because there was no contract under seal.

Appeal allowed with costs.

Tupper, Q.C., for apellant.

Osler, Q.C., and *Martin*, Attorney-General of Manitoba, for respondent.

MUNICIPALITY OF MORRIS *v.* THE LONDON & CANADIAN LOAN CO.

Appeal—Final judgment—Practice—Specially indorsed writ—Summary judgment on.

In an action against a municipality to recover the amount of certain debentures, the writ of summons was specially indorsed, and, defendants having appeared, a summons was taken out according to the practice in the Court of Queen's Bench in such cases, calling upon said defendants to show cause, at a day named, why judgment should not be signed against them summarily. On the return of the summons the judge before whom it was returnable, after hearing the parties, ordered that plaintiffs should be at liberty to enter judgment in the action for the amount indorsed on the writ. This order was affirmed on appeal to the full court, and a further appeal was sought by the defendants to the Supreme Court of Canada.

Held, that the judgment sought to be appealed from was not a final judgment within the meaning of the Supreme Court Act, and no appeal therefrom would lie.

Appeal quashed with costs.

Chrysler, Q.C., for motion.

Hogg, Q.C., and *Crawford*, *contra*

RURAL MUNICIPALITY OF CORNWALLIS *v.* CANADIAN PACIFIC RY. CO.

Taxation—Exemption from—Lands sold or occupied—Crown Lands—Locus.

By the charter of the Canadian Pacific Railway Co. the lands of the company in the North-West territories, until sold or occupied, are exempt from Dominion, Provincial, or Municipal taxation for twenty years after the grant thereof from the Crown.

Held, affirming the judgment of the Court of Queen's Bench, Manitoba.

1. That an agreement to sell any of said lands which has not yet been completed and of which no conveyance has been executed, does not take away the exemption, to effect which the land must be actually sold.

2. The exemption attaches to land alloted to the company before, as well as after, the patent is issued by the Crown.

3. Lands situated in the North-West-Territories do not lose the exemption by being afterwards incorporated within the boundaries of the Province of Manitoba on an extension thereof.

Appeal dismissed with costs.

Robinson, Q.C., and *Crawford*, for the appellants.

S. H. Blake, Q.C., for the respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

[Jan. 8.

MCGUGAN *v.* MCGUGAN.

Costs—Order for taxation—Party liable to pay—Application by ratepayer for taxation of bill paid by School Board.

An individual ratepayer of a school section is not, merely by reason of his having to contribute as a ratepayer, entitled to obtain an order for taxation of a bill of costs delivered to and paid by the Board of Public School Trustees either under R.S.O. 1887, c. 147, ss. 32 & 42, or under Con. Rule 1229.

Glen and *Crowthers* for appellants.

J. A. Robinson for respondent.

WESTERN ASSURANCE CO. *v.* ONTARIO COAL CO.

General average—Salvage—Cargo left in peril for benefit of vessel—Expense of subsequent efforts to save both vessel and cargo.

A vessel, loaded with coal, stranded. The owners of the cargo desired to take the coal out, which could have been done at small expense, but the underwriters of the ship refused to permit this, as it would much in-

crease the risk to the vessel. Extraordinary expense was gone to for the purpose of saving both vessel and cargo, and most of the cargo was saved, but the vessel was a total loss.

Held, that the owners of the cargo were only liable to pay a reasonable amount for the cost of saving the coal, and that there was no claim for general average against the coal saved.

Wallace Nesbitt for appellants.

Delamere, Q.C., for respondents.

HIGH COURT OF JUSTICE.

Chancery Division.

Div'l Court.] [Dec. 23.

HESSON *v.* LLOYD.

Revising officer — Prohibition to — Electoral Franchise Act — Jurisdiction of the High Court of Justice.

There is no jurisdiction in the High Court of Justice to issue a writ of prohibition to a revising officer to compel him to abstain from performing any duty under the Electoral Franchise Act.

The legislation in regard to such matters does not trench upon, nor is the question one of "property and civil rights in the province."

Re *Simmons* and *Dalton*, 12 O.R., 505, not followed.

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

Lash, Q.C., *contra.*

Div'l Court.] [Jan. 22.

RE WATSON TRUSTS.

Lease—Power to renew for further term—Extent of English Settled Estates Act of 1856, 19 & 20 Vict., c. 120—53 Vict., c. 114 (O.) —Construction of words "usual custom."

In applying the English Settled Estates Act of 1856, 19 & 20 Vict., c. 120, to Canadian affairs, the words "usual custom" in s. 2 must be satisfied with something less than the immemorial custom of England. It is satisfied by proof of a well recognized method or usuage of framing building leases in a given locality.

Held, under that statute and 53 Vict., c. 114 (O.), that power to lease with extended right of renewal might be granted up to 999 years.

D. E. Thomson, Q.C., for the petitioner.

J. Hoskin, Q.C., for the infants and unborn issue.

Div'l Court.] [Jan. 27.

GAULT ET AL. *v.* MURRAY ET AL.

Injunction—Dismissal of action at trial—Damages—Award of reference as to.

The jurisdiction to award an enquiry as to damages, or to assess without a reference, when an injunction has been granted and an undertaking as to damages taken, is a discretionary one to be exercised judiciously and not capriciously. And as the trial judge was, on the evidence, of opinion that no damage was proved, occasioned by the injunction, as distinct from the detriment arising from the litigation, whereby the defendants' title to the property was impeached, and as no additional evidence was before the Divisional Court, it was

Held (affirming ROSE, J.), that under the circumstances of this case, no reference as to damages should be ordered, or damages awarded.

Geo. Kerr, Jr., for the plaintiffs.

E. D. Armour, Q.C., for defendant McIntosh.

BOYD, C.] Jan. 25.

TILLIE *v.* SPRINGER.

Trustees and Executors—Right of retainer—Devolution of Estates Act—Assignment for creditors—R.S.O., c. 124.

Under their father's will, C. and W. were to receive a share of the proceeds of certain land to be sold on the death of the widow, who was still alive. They also owed the estate a certain debt which, by an extension in the will, was to be payable in five yearly instalments from the death of the testator—February 1888.

In December, 1890, C. and W. made an assignment for the benefit of their creditors.

Held, (1) that the effect of the assignment was by virtue of R.S.O., c. 124, s. 20, s-s. 4, to accelerate payment of the debt due from C. and W. to the estate; and

(2) That the executors, being also trustees of the land of which C. and W. were to receive shares when sold under the will, held security for their claim against C. and W., having (since the Devolution of Estates Act applied here) the right to retain C. and W.'s share under the will as against their debt to the estate. This security the executors and trustees should value pursuant to the Act respecting assignments for the benefit of creditors.

Bain, Q.C., for the plaintiff.

Du Vernet for the defendants.

Practice.

MEREDITH, J.] [Jan. 21.

IN RE CHOSEN FRIENDS, RODDY AND LEAH.

Jurisdiction of Master-in-Chambers—Rule 1149—Insurance moneys—"His wife"—Fiancée claiming.

This was originally an application by the Grand Council of the Canadian Order of Chosen Friends for an order directing the trial of an issue between Margaret Roddy and Joseph Leah, two claimants for the proceeds of an insurance certificate of $1000 on the life of Samuel Leah, deceased. The certificate was on its face made payable to "his wife." The uncontradicted affidavit evidence showed that deceased was, when insuring, and up to time of his death, engaged to marry Miss Roddy; that when insuring he had stated that he was to marry her in a short time and was insuring for her benefit, that he gave her the policy, which she held continuously until his death; that he had often declared it was a provision for her should anything happen to him before or after their marriage. Joseph Leah claimed as administrator of the estate of the deceased.

The Master-in-Chambers *held* that the issue was purely one of law, and that Miss Roddy had no legal claim to the insurance moneys, and made an order bearing her claim.

On appeal, MEREDITH, J., *held*, that it was not contemplated by Rule 1149 that a case involving such an amount and such nice questions of fact and law should be summarily disposed of by the Master-in-Chambers, and ordered that unless the adverse claimants could agree to state facts for a special case to be submitted to a Divisional Court, an issue should be tried which he would settle if the parties could not agree as to its form.

D. Armour for Order of Chosen Friends.

F. A. Anglin for claimant Roddy (appellant).

C. W. Kerr for claimant Leah (respondent).

WINCHESTER, Official Referee, for Master-in-Chambers. [Jan. 26.

COOK *v.* COOK.

Alimony action—Examination on affidavit—Questions in issue—Examination on merits of case.

An application for interim alimony. Defendant, after putting in affidavit in answer, asked enlargement to examine plaintiff on her affidavit filed in support of motion. The plaintiff, in her affidavit, swore to the marriage, and that she had left defendant's house, and that her husband was possessed of means while she was utterly destitute, and in a general clause she verified the facts in the statement of claim. The affidavits filed on behalf of defendant did not contradict plaintiff, except as to amount of defendant's means and the allegations of cruelty in statement of claim. The statement of defence, while not denying, did not admit the marriage or departure of plaintiff. Plaintiff's counsel opposed enlargement on the grounds that of the only material matters on an application for interim alimony, two, viz., marriage and departure of wife, were not in issue on the affidavits filed; and another, the husband's means, was within his own knowledge, and he denied the defendant's right to examine on the merits of the case.

Held, that the defendant might examine the plaintiff, but such examination must be confined to questions as to her own means of support. Subsequently, on examination of plaintiff, questions as to husband's means were also put without objection.

F. A. Anglin for plaintiff.

Reesor for defendant.

SECOND DIVISION COURT, COUNTY OF ONTARIO.

DARTNELL, JJ.] [Nov. 3.

MCNICHOLL *v.* ELLIS.

Chattel mortgage—Statement of renewal—Omission of one of the statements.

The statement of renewal was in the statutory form, except that the words "that the said mortgagee is still the mortgagee of the said property, and has not assigned the said mortgage," were omitted.

Held, that this omission was fatal.

T. Heaslop for the execution creditor.

J. B. Dow for the claimant.

Notes of United States Cases.

NEW YORK COURT OF COMMON PLEAS.

FULLER *v.* KEMP.

Accord and satisfaction—Action for professional services—Cheque given for smaller amount—Letter accompanying saying "in full satisfaction."

An accord and satisfaction is the substitution of a new agreement between the same parties for the old one.

Plaintiff, a physician, rendered a bill to defendant for professional services, which the latter objected to as excessive. After correspondence, and the rendering of a second itemized statement of the account aggregating the same amount, the defendant mailed his cheque to plaintiff for a smaller amount, enclosed in a letter, stating that the same was "in full satisfaction of your claim for professional services against me to date." Plaintiff retained and collected the cheque, immediately rendering defendant another bill in the original amount, but giving credit for the sum so received.

Held, that the element of assent was wanting to establish an accord and satisfaction.

SPRING ASSIZES, 1892.

HOME CIRCUIT.

Falconbridge, J.

Orangeville	Tuesday	1st	March.
St. Catharines	Monday	7th	March.
Milton	Monday	14th	March.
Brampton	Thursday	17th	March.
Toronto—Criminal	Monday	21st	March.
Toronto—Civil	Monday	28th	March.

NORTH-WESTERN CIRCUIT.

Armour, C.J.

Woodstock	Wednesday	2nd	March.
Stratford	Monday	7th	March.
Goderich	Monday	14th	March.
Walkerton	Monday	21st	March.
Guelph	Monday	28th	March.
Berlin	Tuesday	5th	April.
Brantford	Monday	11th	April.
Owen Sound	Tuesday	19th	April.

MIDLAND CIRCUIT.

Rose, J.

Barrie	Tuesday	1st	March.
Hamilton	Wednesday	9th	March.
Belleville	Monday	21st	March.
Picton	Monday	4th	April.
Whitby	Tuesday	12th	April.
Lindsay	Monday	18th	April.
Peterboro	Monday	25th	April.
Cobourg	Monday	2nd	May.

EASTERN CIRCUIT.

MacMahon, J.

Cornwall	Tuesday	8th	March.
Brockville	Monday	14th	March.
Napanee	Monday	21st	March.
Kingston	Thursday	24th	March.
Perth	Monday	4th	April.
Pembroke	Thursday	7th	April.
L'Orignal	Wednesday	13th	April.
Ottawa	Monday	18th	April.

SOUTH-WESTERN CIRCUIT.

Street, J.

Welland	Monday	21st	March.
St. Thomas	Monday	28th	March.
Simcoe	Monday	4th	April.
Cayuga	Thursday	7th	April.
Sandwich	Monday	11th	April.
Sarnia	Monday	18th	April.
Chatham	Monday	25th	April.
London	Wednesday	4th	May.

CHANCERY SPRING CIRCUITS, 1892.

Boyd, C.

Toronto	Wednesday	20th	April.
Woodstock	Friday	1st	April.
Barrie	Tuesday	5th	April.
Stratford	Monday	11th	April.
Whitby	Friday	20th	May.
Lindsay	Wednesday	25th	May.
Peterboro	Tuesday	31st	May.

Ferguson, J.

London	Monday	4th	April.
Goderich	Monday	18th	April.
Walkerton	Monday	25th	April.
St. Thomas	Monday	2nd	May.
Sandwich	Monday	9th	May.
Sarnia	Thursday	12th	May.
Chatham	Monday	23rd	May.

Robertson, J.

Ottawa	Thursday	17th	March.
Cobourg	Thursday	31st	March.
Cornwall	Monday	18th	April.
Brockville	Monday	25th	April.
Kingston	Monday	2nd	May.
Belleville	Monday	9th	May.

Meredith, J.

Brantford	Tuesday	8th	March.
Owen Sound	Tuesday	15th	March.
Hamilton	Thursday	7th	April.
Guelph	Thursday	28th	April.
Simcoe	Monday	16th	May.
St. Catharines	Thursday	26th	May.