Canada Law Journal.

VOL. XLVIII. TORONTO, OCTOBER 1. No. 18.

PAYMENT BY A STRANGER.

In May, 1911, an important case relating to the above matter came up for decision before the Court of Appeal. *Hirachand Punamchand* v. *Temple*.[1]

This was an action brought upon a promissory note by moneylenders against Lieutenant Temple who had borrowed money from them. The plaintiffs began to press the defendant for payment, and, not getting their money, they communicated with his father, Sir Richard Temple, in the hope that they might obtain payment from him. Several letters passed between the plaintiffs and Sir Richard Temple's solicitors. At length, the father, through his solicitors, sent the plaintiffs a draft for an amount less than that of the debt and offered it in full settlement of the debt. The plaintiffs took this draft, cashed it, and kept the money; but, in spite of that, they brought this action for the balance of the amount of the note. Vaughan-Williams, L.J., was not inclined to agree that these facts shewed an accord and satisfaction, but thought there were two ways of viewing the facts of this case. First, he was bound to conclude that the plaintiffs agreed to accept the draft on the terms upon which it was sent, and that, in consequence, the plaintiffs had ceased really to be holders of the negotiable instrument on which they sued; for in their hands the document had ceased to be a negotiable instrument quite as much as if there had been an erasure of the writing of the signature to the note. Hence, if there was no accord and satisfaction, the defendant could have pleaded that the document in the circumstances had ceased to be a promissory note. Secondly, assuming that the instrument did not cease to be a negotiable instrument, then, from the moment when the draft was cashed by the plaintiffs, a trust

(1) 1911, 2 K.B. 330.

was created as between Sir Richard Temple and the plaintiffs in favour of the former, so that any money which the latter might receive upon the promissory note would be held by them in trust for him. The defendant could have pleaded that any money recoverable on the note by the plaintiffs were recoverable by them merely as trustees for Sir Richard Temple, and that, under the circumstances disclosed by the correspondence, the relations between the father and son were such that it was impossible to suppose that the father wished to insist on payment of the note by the son. Fletcher Moulton and Farwell, L.J.J., were both of opinion that by the transaction between the plaintiffs and Sir Richard Temple the debt on the promissory note became extinct.

With this case we should compare *Graham* v. *Wickham*, 1863,[1a] where a father voluntarily paid a debt due to a bank from his son, and afterwards died insolvent. Sir John Romilly, M.R., held that there was no debt from the son to the father's estate, and observed: "It is no more a debt due from the son to the father than if one stranger thought fit to pay the debt of another stranger, in which case he would not obtain a right of action against the person whose debt he pays off." But it would seem that the learned Master of the Rolls was inclined to treat the payment as an advancement.

These two cases raise several points of great interest, namely:—

1. If A offers money to B and at the same time states the terms upon which he offers it, and B accepts the money without saying anything about the terms upon which he accepts it, has B accepted the terms stated by A?

2. If A owes B money, and C, who is not bound to pay, is not A's agent and acts neither at the request of A nor with his knowledge—

(*a*) pays B, in cash, the whole amount due to him by A, and B accepts C's money in settlement of the amount so due, can B

(1*a*) 31 Beav. 478; 1 DeG. J. & S. 474.

still sue A for the amount? Or, is the debt extinct? Or again, can B recover against A and hold the money so recovered upon trust for C?

(*b*) pays B, in cash, part only of the amount due to him by A, and B accepts C's money in settlement of the whole amount so due, is the result the same as in case (*a*)?, or, can B sue A for the balance of the debt?

(*c*) offers B a negotiable instrument or a horse or a piece of freehold land, which B accepts in settlement of the amount due, is the result the same as in case (*a*)?

3. If, in any of the cases in 2, A can successfully resist B's claim, is it necessary that A should ratify C's act? Or, does B fail on the ground of his attempted fraud on C? Or again, does A win because he must be presumed to have accepted a gift?

4. In any of the cases in 2, has C any and what rights against A?

Let us deal with these points in order.

1. There is ample authority for stating that the answer to this question must be in the affirmative. Two cases only need receive particular attention.

In *Croft* v. *Lumley*,[2] (1857), Bramwell, B. (at page 706 of the report) observed: "If the party to whom money is offered does not agree to apply it according to the express will of the party offering it, he must refuse it, and stand upon the rights which the law gives him." This approves the judgment of Lord Campbell, C.J., in the same case.[3]

Again, in *Day* v. *McLea* (1889),[4] the defendants had committed a breach of contract. On a claim being made by the plaintiff, the defendants sent them a cheque for a less amount than that claimed, stating that it was "in full of all demands."

(2) 6 H.L.C. 672.

(3) 5 E. & B. at page 680. Compare *Torrance* v. *Bank of British North America*, 1873, L.R. 5 P.C. 246; *Devonport* v. *Reg.* 1877, 3 A.C. 115; *James* v. *Young*, 1884, 27 C.D., at page 663. See the observations of Cave and Wills, JJ., in *Ackroyd* v. *Smithies*, 1885, 54 L.T. (N.S.) 130. Compare *Keith Prowse & Co.* v. *National Telephone Co.*, 1894, 2 Ch. at page 155.

(4) 22 Q.B.D. 610.

The plaintiffs wrote in reply that they took the cheque on account but asked for a cheque for the balance of the claim. The defendants refused to pay this balance and pleaded accord and satisfaction. Charles, J., held that there was no accord and satisfaction, and gave judgment for the plaintiffs. The Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.), held that keeping the cheque was, as a matter of law, conclusive that there was an accord and satisfaction of the claim, but that it was a question of fact on what terms the cheque was kept. As Charles, J., had found that fact in favour of the plaintiffs, the defendants' appeal was dismissed.[5]

2. These questions give rise to many difficulties, and several cases must be considered in some detail before we can clearly understand the manner in which these difficulties have been faced by the Judges, and so discover the theory of the law, if theory there be, for some of us may be inclined to say, in the words of a learned American Judge, that "the law did not begin with a theory. It has never worked one out."[6]

In the reign of Henry VI.[7] the Judges gave an opionion on the questions we are discussing, and in Fitzherbert's Abridgment[8] their opinion is reported thus: "If a stranger does trespass to me, and one of his relations or any other, gives anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for if I be satisfied, it is no reason that I be again satisfied. Quod tota curia concessit."

In the reign of Queen Elizabeth, *Grymes* v. *Blofield*,[9] was decided, but whether in favour of the plaintiff or in that of the defendant is uncertain. It was an action of debt upon an obligation of £20, and the defendant pleaded a surrender of a copy-

(5) The Court of Appeal relied on *Miller* v. *Davies*, unreported, but decided by the Court of Appeal on Nov. 10th, 1879. See 22 Q.B.D. at page 612.

(6) Mr. Justice Holmes in "The Common Law." Lecture III. p. 77.

(7) 1422-1461.

(8) 36 H. 6. Title Barre, pp. 1, 166.

(9) Cro. Eliz. 541. 1 Rolle's Abridgment, 471. Condition (F) 5 Vin. Abr. 296; Condition (F.d.) p. 1. See 9 C.B. pp. 195, 196 and 197.

hold tenement to the use of the plaintiff by a stranger in satisfaction of that £20 and acceptance thereof by the plaintiff. Croke, J., in his report, tells us that the judgment was given in favour of the plaintiff, but, in Rolle's Abridgment, the judgment is stated exactly the other way, to have been for the defendant, and that the plea was good. The case, therefore, is not of much authority, but in Comyn's Digest[10] it is quoted in support of the statement that satisfaction from a stranger will not suffice for a plea of accord and satisfaction. The opinion given in Fitzherbert receives strong support from Coke upon Littleton[11] where we read as follows:—

"But if any stranger *in the name of the mortgagor* or his heir (without his consent or privity) tender the money, and the mortgagee accepteth it, this is a good satisfaction, and *the mortgagor or his heir agreeing thereunto* may re-enter into the land; omnis ratihabitio retro trahitur et mandato acquiparatur. But the mortgagor or his heir may disagree thereunto if he will." Further support is given by Lord Parker, C.J., who, in the course of his judgment in *Hawkshaw* v. *Rawlings* (1717),[12] observed: "Although payment by a stranger be not a legal discharge yet acceptance in satisfaction is."

In *Edgcombe* v. *Rodd*, (1804),[13] both Ellenborough, C.J., and Lawrence, J., treated *Grymes* v. *Blofield* as deciding that satisfaction from a stranger is no satisfaction in law, but it is clear that judgment was given for the plaintiff in that case mainly on the ground that the agreement pleaded by the defendants was illegal, as stifling a prosecution for a public misdemeanour, and thereby impeding the course of justice, and that the defendants had given no consideration.

An important decision was given in *Welby* v. *Drake*, (1825).[14] This was an action of assumpsit against the defendant as the drawer of a bill for £18.3.11 which had been returned

(10) 5th edition, vol. 1, p. 203. Accord (A. 2).
(11) 206*b*.
(12) 1 Stra. 23.
(13) 5 East. 294.
(14) 1 C. & P. 557.

unaccepted. It appeared that the plaintiff had agreed that if the defendant's father would pay him £9 he would accept it in satisfaction of the whole debt; and that this sum had accordingly been paid by the father. Abbott, Ch.J., remarked:—

"If the father did pay the smaller sum in satisfaction of this debt, it is a bar to the plaintiff's now recovering against the son; because by suing the son *he commits a fraud on the father*, whom he induced to advance his money on the faith of such advance being a discharge of his son from further liability." A verdict was given for the defendant.

A case decided in 1840, *Thurman* v. *Wild*,[15] is often quoted in this connection, but it is of no assistance to us, for Lord Denman, C.J., who gave the judgment of the Court, said that the stranger in that case must be taken upon the pleadings to have been a co-trespasser with the defendants, and held, on the authority of *Hillman* v. *Uncles* (1693),[16] that an accord and satisfaction between the plaintiff in trespass and one of two trespassers not sued, might be pleaded in bar by the other. In other words, the plaintiff had failed to make out that the agreement pleaded by the defendants was made by him with a stranger.

In *Alexander* v *Strong* (1842),[17] the plaintiff acceptor of a bill of exchange, on the day it fell due, sent a person to the defendant, who held it, to pay the amount of the bill and bring it back. The defendant received the money and gave a receipt for it. On being pressed for the bill, the defendant sent to the plaintiff a paper signed by one G., acknowledging the receipt from the defendant of the amount of the bill, and undertaking to bear the plaintiff harmless for the amount of the bill. The plaintiff kept this guarantee, but sued the defendant for money had and received. It was held that the plaintiff's right of action vested on the defendant's refusal to repay the money or give up the bill; and, therefore, that the receipt by the plaintiff of

(15) 11 Ad. & E. 453.
(16) Skinner, 391.
(17) 9 M. & W. 733.

G.'s guarantee was in the nature of accord and satisfaction, and was no defence to the action, unless specially pleaded.

Here we must notice the case of *Goodwin* v. *Cremer* (1852).[18] The indorsee of a bill of exchange sued the acceptor, who pleaded that, puis darrein continuance (that is, matter arising since the last pleading), an earlier indorser had paid to the plaintiff, then being holder, and the plaintiff accepted, the full amount of the bill, and all interest thereon, in full satisfaction and discharge of the bill and all moneys due in respect thereof (not mentioning damages or costs). This was held to be a bad plea, because it did not allege that what the plaintiff had received was in satisfaction of damages or costs.[18a]

In *Jones* v. *Broadhurst* (1850),[19] the plaintiffs, as indorsees, sued the defendant as the acceptor of a bill of exchange for £49 drawn by W. & C. Cook. The defendant, by his fourth plea, alleged that, after the indorsement of the bill to the plaintiffs and before the commencement of the action, the drawers of the bill had delivered to the plaintiffs, who had accepted, divers goods of the value of £50 in full satisfaction and discharge of the bill, and all damages and causes of action in respect thereof. A verdict was found for the defendant upon the trial of the issue joined on that plea, and for the plaintiffs on all the other issues. The plaintiffs obtained a rule calling upon the defendant to shew cause why judgment should not be entered for them non obstante veredicto. Cresswell, J., delivered the judgment of the Court (which is said to have been written by Lord Truro) and observed: "The plea does not allege whether such satisfaction was given and accepted before or after the bill became due; nor is it averred to have been *at the request, or for, or on behalf of, the defendant,* or *in satisfaction of his liability upon the bill,* or of the cause of action of the plaintiffs against him; nor does it, in any way, connect the defendant with the transaction, or

(18) 18 Q.B. 757.

(18a) This case was approved by Parke, B., in *Kemp* v. *Balls*, 1855, 10 Ex. Rep. 607. Compare *Tetley* v. *Wanless*, 1867, L.R. 2 Ex. 275.

(19) 9 C.B. 173. Compare Odgers' Pleading and Practice, 6th edition, p. 216.

shew any privity between him and the parties to the satisfaction given, except so far as such parties were the drawers of the bill, and the defendant was the acceptor. The plea does not aver that the value of the goods delivered in satisfaction was equal to the amount of the bill; and it is consistent with the language of the plea, that the drawers may have made satisfaction of the bill, so far as regarded their liability, by any small composition, leaving the plaintiffs with all their remedies in point of law against the acceptor and other parties to the bill;[19a] and yet the drawers may afterwards have dissented from the plaintiffs' retaining the bill, or suing the acceptor upon it." . . . *Supposing the effect of the plea to be, that the plaintiffs are suing as trustees for the drawers, but against their consent, such matters would furnish no legal bar to the plaintiffs, as the law can take no notice of the trust.*" The learned Judge then stated that the plea, as proved and sustained by the verdict, did not shew sufficient matter to bar the plaintiffs, and, after an exhaustive review of authorities, proceeded thus (p. 193):

"There is very early authority to the effect that satisfaction made by a stranger to a party having a cause of action, *and adopted by the party liable to the action*, may be used as a good bar to an action for such cause.' . . . "The Court does not feel called upon to express any opinion upon the point although it must be obvious that the decision in the 36 H. 6 reported in Fitzherbert is consistent with reason and justice."

In *Belshaw* v. *Bush* (1852),[20] to debt on simple contract the defendant pleaded: "as to £33.10.0 parcel of the debt and the causes of action in respect thereof," that the plaintiff drew a bill on W.B., the father of the defendant, for £33.10.0 payable to the plaintiff's order; that W. B. accepted the bill and delivered it to the plaintiff, and the plaintiff received it, for and on account of the said sum of £33.10.0; and that the plaintiff indorsed and delivered the bill to one D., who was entitled

(19a) Compare the judgment of Bramwell, B., in *Agra & Masterman's Bank* v. *Leighton*, 1866, L.R. 2 Ex. at page 63.

(20) 11 C.B. 191.

to sue W.B., thereon. Maule, J., in the course of the judgment which he delivered for the Court, said:—

"If a bill given by the defendant himself on account of the debt operate as a conditional payment, and so be of the same force as an absolute payment by the defendant, if the condition by which it is to be defeated has not arisen, there seems no reason why a bill given by a stranger for and on account of the debt should operate as a conditional payment by the stranger; and, if it have that operation, the plea in the present case will have the same effect as if it had alleged that the money was paid by W.B., for and on account of the debt. But, if a stranger give money in payment, absolute or conditional, of the debt of another, and the causes of action in respect of it, it must be a payment on behalf of that other against whom alone the causes of action exist, and, *if adopted by him,* will operate as payment by himself." In the result, it was held that the bill had been adopted by the defendant. This reasoning was adopted by Parke, B., in two cases. In *Kemp* v. *Balls* (1855),[21] he held that a payment to the creditor by a stranger must be for and on account of the debt, and that such payment must be subsequently ratified by the debtor; and, again, in *Simpson* v. *Eggington*, (1855),[22] the same learned Judge remarked: "It (that is, the payment) is not sufficient to discharge a debtor unless it is made by the third person, as agent, for and on account of the debtor and with his prior authority or subsequent ratification."[22a]

A good illustration of this doctrine is afforded by *James* v. *Isaacs* (1852), [23] In assumpsit for work and labour, the defendants pleaded that the money accrued due to the plaintiff under an agreement for the building of a church; that the plaintiff having suspended the work, another agreement was entered into between him and A, under which the plaintiff, in consideration

(21) 10 Ex. Rep. 607.

(22) 10 Ex. Rep. 845.

(22a) Compare the judgment of Kelly, C.B., in *Walter* v. *James*, 1871, L.R. 6 Ex. 124, and that of Buller, J., in *Williams* v. *Bartholomew*, 1798, 1 Bos. & P. 326.

(23) 12 C.B. 791.

of certain stipulated payments, undertook to complete the work, and to rely for the residue of the contract price upon certain subscriptions which were to be raised; and that A duly made, and the plaintiff received, the payments in satisfaction and discharge of the original agreement between the plaintiff and the defendants. This plea was held bad, and Maule, J., observed: "But it is not alleged here that A made that agreement on behalf of the defendant (sic) so as to entitle him to ratify and adopt it. It is hardly possible to say that the plaintiff could have sued the defendants on that agreement."[23a]

Cook v. *Lister* (1863),[24] is an instructive case. This was an action by the holders against the defendant as the acceptor of certain bills of exchange, and the defendant paid the money into Court. It appeared that the plaintiffs had received in respect of the bills full satisfaction in point of amount, namely, 20s. in the pound and interest. Erle, C.J., said: "Under some circumstances unquestionably, it has been held that, although he (the holder) may have received the whole principal and interest, if the whole or a part of it has been received from other parties to the instrument, he may go on against the acceptor, not for his own benefit, *but as trustees.*"[24a] . . "The substance of the judgment (in *Jones* v. *Broadhurst*) is, that there is no allegation that the goods were delivered in satisfaction of the claim of the holders against the acceptor." Willes, J., gave a vigorous judgment. As to the doctrine that if a stranger pays A's debt, A not knowing of it, and therefore not assenting to it, until he assents to it it is no payment of the debt at all, but the creditor, having received the whole amount, may recover it again against the debtor, he said: "I desire to say that I do not, as at present advised, assent to that proposition. It appears to me to be contrary to a well-known principle of law. It is contrary to the rule of the civil

(23a) Compare *Keighley* v. *Durant*, 1901, A.C. 240.

(24) 13 C.B. (N.S.) 543; and see *Pellas* v. *Boosey*, 1862, 31 L.J.C.P. 281.

(24a) Compare the judgment of Channell, B., in *Agra & Masterman's Bank* v. *Leighton*, 1866, L.R. 2 Ex. at page 65, and *Thornton* v. *Maynard*, 1875, L.R. 10 C.P. 695.

law.[25] I apprehend it is also contrary to the well-known rule of mercantile law as to payment; because, if the debtor pays a portion of the debt, it does not enure as a discharge of the whole, though so agreed, but if a stranger pays a part of the debt in discharge of the whole, the debt is gone, because *it would be a fraud on the stranger to proceed.*" . . And, with respect to the necessity for shewing the assent of the debtor, I apprehend that it is contrary to the well-known principle of law, by which a benefit conferred upon a man is presumed to be accepted by him, until the contrary is proved. If assent were necessary, . . . then I say, that, according to familiar authorities, one of which is the case of *Atkin* v. *Barwick,* [26] so often referred to, the assent of the debtor ought to be presumed."

It is submitted that Willes, J., is supported by the authorities. In support of his first "principle of law" we may quote *Welby* v. *Drake*, which has already been referred to, and Archibald, J., in *Edwards* v. *Hancher* (1875), where he said: "If a bill or note is given by a debtor to his creditor for a smaller sum than is due, the bill or note so given cannot of itself operate as a satisfaction of such larger claim, though it may, if given by a third person."[27] In *Bidder* v. *Bridges* (1887),[28] Lopes, L.J., said: "Now it is also law that the giving of a negotiable instrument for a smaller sum by a third party would support accord and satisfaction."[29]

As for the second "principle of law" we may consider the statements of Mellish, L.J., in *Ex parte Lambton* (1875),[30] that in the absence of evidence to the contrary we might presume

(25) Digest XLVI 3, 23, Institutes III. 29 pr.: "Tollitur autem omnis obligatio solutione ejus quod debetur, vel si quis consentiente creditore aliud pro alio solverit. Nec tamen interest, quis solvat, utrum ipse qui debet an alius pro eo: liberatur enim et alio solvente, sive sciente debitore sive ignorante vel invito solutio fiat."

(26) 1719, I Stra. 165.

(27) 1 C.P.D. III. All this is not now strictly correct.

(28) 37 C.D. 406.

(29) Compare Bacon's Abridgment, 7th edition, vol. 1, p. 46. Accord and Satisfaction (A).

(30) L.R. 10 Ch. at page 416.

that a person accepted an offer which was for his benefit, and of Lindley, L.J., in the *London and County Bank* v. *The London and River Plate Bank* (1888),[31] that it was settled as long ago as the time of Lord Coke that the acceptance of a gift by a donee is to be presumed until his dissent is signified, even though the donnee is not aware of the gift.

We are now in a position to assert that the answers to cases a, b and c in 2 must all be to the effect that B cannot successfully sue A, so long as A does not repudiate C's act; but we must proceed to discuss the reason for this.[32]

3. Three main reasons have been given, namely:—

(*a*) That "If I be satisfied, it is not reason that I be again satisfied."

(*b*) That A has ratisfied C's act and that such ratification is necessary, but Willes, J., has succeeded in shewing that this cannot be the true reason.

(*c*) That there would otherwise be a fraud upon C. "Quid non mortalia pectora cogis, auri sacra fames?" It is submitted that this is the true ground for allowing A to claim the benefit of C's act; but that it must be shewn that the money or property handed over by C was on account of A's liability. This point is well brought out by *Re Rowe* (1904).[33] At the date of his bankruptcy B owed Derenburg & Co. £16,500 for moneys advanced to him by them on the deposit of a transfer of shares which turned out to be a forgery. Bewing, Moreing & Co. repudiated any liability, either legal or moral, for the acts of B, and made a voluntary payment of £6,500 which was accompanied by the following letter:—

"Messrs. Derenburg & Co.

"Dear Sirs.—We have now given careful consideration to the matter of your losses in connection with B, and, although

(31) 21 Q.B.D. 535. Compare Butler's and Baker's Case, 1591, 3 Rep. 25; *Siggers* v. *Evans*, 1885, 5 El. and Bl. 367, and "A Digest of English Civil Law," edited by Mr. Edward Jenks, Book II. part I., sec. 219.

(32) See Pollock on Contracts, 8th edition, p. 498, and Leake on Contracts, 6th edition, p. 666.

(33) 1904, 2 K.B. 483.

you have admitted that we are not liable in any way in the matter to you, we have pleasure in sending you a cheque for £6,500. This we understand will pay all the losses you have sustained, except those for which you hold an insurance policy.

"Yours faithfully,

"BEWING, MOREING & Co."

Derenburg & Co., by a letter, accepted the money on this footing; but claimed to prove for the full amount due to them by B without deducting the £6,500. Buckley, J., held that they were right in their contention, and said:

"This is not a case in which a stranger comes and offers to the creditor a portion of the debt due, and the creditor accepts it towards satisfaction of the amount due, there being no communiciation with the debtor in the matter. It was not tendered or accepted in reference to any part of the debt at all, but it was offered and accepted as a voluntary payment made in consideration of the fact that the creditor had incurred losses through the act of a person for whom Bewing, Moreing & Co. held themselves to be on some moral ground, at any rate not upon any legal ground, responsible." The Court of Appeal affirmed this decision.

4. There is a well-known rule which is stated by Mr. Ashbur[illegible]r[34] thus: "A stranger who pays off a mortgage or charge on property is in equity treated as a transferee of the benefit of the mortgage or charge." This rule in favour of the benevolent stranger was followed in *Butler* v. *Rice* (1910).[35] Mrs. Rice was the owner of a leasehold house in Manor Road, Bristol, and of property in Cardiff, which were together subject to a charge in favour of a bank to secure £450 and interest, and the title deeds of both properties were deposited with the bank. Mr. Rice called on the plaintiff, and stated that he wanted the plaintiff to advance him £450 to pay off his indebtedness to the bank, and that the bank held as security the title deeds of his property

(34) On Mortgages, second edition, p. 436.

(35) 1910, 2 Ch. 277. Compare *Patten* v. *Bond*, 1889, 60 L.T. 583 and *Chetwynd* v. *Allen*, 1899, 1 Ch. 353.

in Manor Road. The plaintiff thought the mortgaged property belonged to Mr. Rice and did not know of the Cardiff property. He agreed to advance the money upon having a legal mortgage for £300 on the Manor Road property, and a guarantee of £150 by Mr. and Mrs. Rice's solicitor, who was to hold the deeds for him in the meantime. The money was paid, and the deeds of the Manor Road property were placed in the custody of the solicitor as stakeholder, but Mrs. Rice refused to execute a mortgage in favour of the plaintiff, who brought this action for a declaration that he was entitled to a charge on the Manor Road property for £450 and interest. There was no evidence that Mr. Rice was acting at the request or with the knowledge of his wife. It was held that it must be presumed that the plaintiff intended to keep the charge alive in his own favour, and that the fact that Mrs. Rice had not requested him to make the payment and did not know of the transaction was immaterial, so that the plaintiff was entitled to the charge he claimed. Warrington, J., remarked: "Her (that is, Mrs. Rice's) position is not altered. The only alteration in her position is that instead of owing the money to A, she will in future owe it to B."[36]

But another question still remains and that is, What rights, if any, has C against A *personally*?

In *Exall* v. *Partridge* (1799),[37] Lord Kenyon, Ch.J., laid down the law thus: "It has been said, that where one person is benefited by the payment of money by another, the law raises an assumpsit against the former; but that I deny: if that were so, and I owed a sum of money to a friend, and an enemy chose to pay that debt, the latter might convert himself into my creditor,[37a] nolens volens." The same learned Judge was no less emphatic in *Child* v. *Morley* (1800),[38] where he said: "I admit that

(36) Compare *McIntyre* v. *Miller*, 1845, 13 M. & W. 725 and *Lucas* v. *Wilkinson*, 1856, 1 H. & N. 420. As to the question whether payment by a stranger will prevent the Statutes of Limitation from running, see *Harlock* v. *Ashberry*, 1882, 19 C.D. 539; *Bradshaw* v. *Widdington*, 1902, 2 Ch. 430; and Ashburner on Mortgages, second edition, pages 609 and 619.

(37) 8 T.R. 308.

(37a) The word in the report is "debtor." This is obviously a mistake.

(38) 8 T.R. 610.

no man can by a voluntary payment of the debt of another make himself that man's creditor and recover from him the amount of the debt so paid."

These statements are supported by *Stokes* v. *Lewis* (1785),[38a] *Pownal* v. *Ferrand* (1827),[39] *Sleigh* v. *Sleigh* (1850),[40] *Johnson* v. *Royal Mail Steam Packet Co.* (1867),[41] *Ex parte Bishop* (1880),[42] *Re Leslie* (1883),[43] and *Leigh* v. *Dickeson* (1884)[44] In the last mentioned case, Brett, M.R., made the following instructive remarks: "But it has been always clear that a purely voluntary payment cannot be recovered back. Voluntary payments may be divided into two classes. Sometimes money has been expended for the benefit of another person under such circumstances that an option is allowed to him to adopt or decline the benefit. In this case, if he exercises his option to adopt the benefit, he will be liable to repay the money expended; but if he declines the benefit he will not be liable. But sometimes the money is expended for the benefit of another person under such circumstances that he cannot help accepting the benefit, in fact that he is bound to accept it; in this case he has no opportunity of exercising any option, and he will be under no liability."

The result is, therefore, that C cannot sue A personally,[44a] but there seems to be one exception to this general rule. In *Jenkins* v. *Tucker* (1788),[45] the defendant married the plaintiff's

(38a) 1 T.R. 20. The headnote to *Roberts* v. *Champion*, 1826, 5 L.J. (O.S.), K.B. 44 is not supported by the decision. The facts are not very clearly reported, no cases are quoted, and no reasons are given for the judgments. This case, therefore, is very unsatisfactory.

(39) 6 B. & C. 439. See the judgment of Bayley, J.

(40) 5 Ex. 514.

(41) L.R. 3 C.P. 38.

(42) 15 C.D. 400. See the judgment of Thesiger, L.J.

(43) 23 C.D. 552.

(44) 15 Q.B.D. 60; and see *Tappin* v. *Broster*, 1823, 1 Car. & P. 112.

(44a) Compare Sir William Anson on Contracts, 12th edition, pp. 116, 396 and 397; *Alexander* v. *Vane*, 1836, 1 M. & W. 511, is no exception, for it was held that authority to pay had been given to the stranger. Compare also *Eden* v. *Smyth*, 1800, 5 Ves. 341.

(45) 1 H. Black, 91.

daughter, and went to Jamaica, leaving her and an infant child in England. During his absence she died. This was an action for the recovery of money which the plaintiff had expended after his daughter's death in defraying the expenses of her funeral. The action was successful. Lord Loughborough observed: "I think there was a sufficient consideration to support this action for the funeral expenses, though there was neither request nor assent on the part of the defendant for the plaintiff acted in discharge of a duty which the defendant was under a strict legal necessity of himself performing, and which common decency required at his hands; the money, therefore, which the plaintiff paid on this account was paid to the use of the defendant. . . . There are many cases of this sort, where a person having paid money which another was under a legal obligation to pay, though without his knowledge or request, may maintain an action to recover back the money so paid. . . ." This exception was also recognized in *Ambrose* v. *Kerrison* (1851),[46] and *Bradshaw* v. *Beard* (1862).[47] In the latter case the defendant's wife voluntarily left his house, and went to reside at her brother's, where she continued to reside until her death. Her brother, without any communication with her husband, buried her and then sued her husband for the expenses of the funeral. It was held that he was entitled to succeed in the action, although one of the Judges, namely, Willes, J., admitted that "Generally speaking, parties are not allowed to claim in respect of moneys expended for others without request."[48]

The general rule is in accordance with the broad principle set forth in Addison on Contracts, namely, "But the law raises no implied promise in respect of services rendered against the will of the recipient, or in respect of mere gratuitous services, such as voluntary assistance in saving property from fire, or securing property found afloat, or beasts found astray, or volun-

(46) 10 C.B. 776.

(47) 12 C.B.N.S. 344.

(48) This exception should be compared with the liability of an executor in such circumstances, see *Rogers* v. *Price*, 1829, 3 Y. & J. 28, and Halsbury's Laws of England, vol III. pp. 404-407.

tary and unsolicited supplies of food and lodging, or voluntary services in the management of the affairs of another, for that which is offered and accepted as a gratuity cannot afterwards be converted into a debt."[49] This principle underlies the well-known remarks of Bowen, L.J., in *Falcke* v. *Scottish Imperial Insurance Co.* (1886),[50] "Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will. There is an exception to this proposition in the maritime law, *e.g.*, salvage. With regard to salvage, general average, and contribution, the maritime law differs from the common law."

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(49) 11th edition, pp. 452 and 453. Compare *Nicholson* v. *Chapman*, 1793, 2 ... d. 254; *Re Rhodes*, 1890, 44 C.D. 94 (a lunatic); *Re Beavan*, 1912, 1 Ch. 196 (a lunatic) and the "negotiorum gestor" in Roman Law.

(50) 34 C.D. 234.

LIVING EPISTLES FOR LAWYERS

There is abroad in these days an unwholesome spirit of commercialism which pervades not only the classes devoted to the pursuits of trade and commerce, but which has crept into the learned professions, and notably that of the law, where one might have hoped the soil would not have been found congenial.

It is moreover a sorrowful fact, much to be deplored, that this spirit is growing, and all of us who have an interest in our honourable profession should fight against it. Much has been written and said on the subject; but, as example is more powerful than precept, it may be well to devote a little space to a short record of the life of a member of our profession, recently deceased, who in all his relations with the public and with his brethren at the Bar was a notable example of what a high-minded and conscientious lawyer and gentleman should be. We refer to the late Mr. Nicol Kingsmill, M.A., K.C. Others who have passed away before him might also be named in this connection, as for example Mr. Christopher Robinson, and these, with others that might be named, stand out as models for imitation.

Mr. Kingsmill was the son of the late Col. Kingsmill, formerly of Her Majesty's 66th Regiment, and afterwards Sheriff of the Niagara District, and was born in the town of Port Hope in 1834. He was educated at Upper Canada College and entered Toronto University as winner of the classical prize of that year. His career at the University was a brilliant one; and, in 1855, he graduated as a silver medallist and won the prize for Latin verse.

In the same year he was articled to Mr. Lauder of Niagara (afterwards Judge Lauder) and subsequently continued the study of the law in the office of Ferguson & Kingsmill, at Guelph, of which firm his brother the late John Juchereau Kingsmill, afterwards County Court Judge of the county of Bruce, was a partner. In 1858 he took his M.A. degree from the University of Toronto, and in August of the same year passed as barrister-at-law, and became a member of the firm of Crooks, Kingsmill & Cattanach, continuing to practise with this firm and its successors from that time until the date of his death on July 22nd ult.

In 1891 he was elected a Bencher of the Law Society of Upper Canada, and in 1892 was made President of the York Law Association.

Mr. Kingsmill was a keen Imperialist, and, up to the time of his death, interested himself in Militia matters, serving on the frontier in 1866 on Col. Lowrie's staff at the time of the Fenian Raid. Later in life he held a commission in the 10th Royals, retiring with the rank of captain.

In 1866, with the late W. A. Thompson, then member for the county of Welland, he obtained a charter for the Erie and Niagara Extension Railway (afterwards the Canada Southern) now operated by the Michigan Central Railroad, and was the secretary of the Canada Southern from its creation to the time of his death, a period of over thirty-five years. He was also the legal adviser of the New York Central lines in Canada, conducting the many important matters which this connection brought to him with the skilfulness and resource which characterised him.

Mr. Kingsmill lead a very active and useful life, being interested in a number of enterprises which claimed his attention outside of his regular business. For example, Upper Canada College owes him a lasting debt of gratitude for his wise counsel and energetic action which was a large factor in the success which has since attended it. But space forbids enlarging on these incidents, and others which might be referred to. They all go to shew how much a man can do for the benefit of the public if public spirited, as every lawyer ought to be.

Court practice and public notoriety had no attractions for Mr. Kingsmill; but those he served and those he helped gratuitously safely trusted in one whose clear head, wise advice and untiring devotion was to them a tower of strength. A skilful negotiator, with an earnest desire to avoid litigation, he steered many a client and friend through dangerous reefs to harbours of safety. Not merely however by his wise judgment and broad views of the situation did he succeed, but he gained the confidence of opponents as well as clients by his absolute fairness and honesty and the belief he established that he would be no party to any trick or quibble for the purpose of gaining an advantage. The extensive operations of his many large clients brought him continuously before the Committees of the Dominion Parliament, and such was his reputation for honesty, veracity and fairness that any statement he might make was always accepted without question. This enviable reputation was similar to that which was gained by his old friend Christopher Robinson, whose word was taken by all the judges before whom he practised as absolutely correct to the extent of his assertion either as to the facts or the law of a case.

Rather than seek business, Mr. Kingsmill would refuse it if he could not approve of the manner in which it was proposed to be done; and being more regardful of the rights of others than of his own he would refuse business if he thought that by taking it he would be encroaching on the domain of fellow-practitioners.

One of the great railway men of the United States, with whom he had close intercourse for many years in many import-

ant affairs, thus wrote of him: "A man of great industry, learned in the law and of never-failing courtesy and gentleness of manner, I consider him one of the finest types of a gentleman I have ever met." Though engrossed with business he always found time to help anyone in difficulty or trouble. That indeed seemed to be to him recreation rather than work. It was a good thing to have him for a friend.

Such men as Mr. Kingsmill and those of his class, of unblemished reputation and with high ideals of right and wrong, bring honour to our profession, and stand out as models for imitation by all who come after them; and, when they pass away, it may well be said of them that they have not lived in vain.

DOMICILE.

MOOREHOUSE V. LORD.

It is satisfactory to learn from the last edition (9th) of Westlake's Private International Law, just published, that that eminent authority takes the same view as was submitted in the article on the above case to be found at p.— ante, of this journal.

He says: "Finally the doctrine of *Moorhouse* v. *Lord* must be considered to have been dismissed by the judgment of Lord Macnaghten in *Winans* v. *Attorney-General* (1904), A.C. 287. The animus required for acquiring a domicile of choice must be an intention, either formed by the de cujus or which it may be believed that he would have formed if his thoughts had been crystallised by a question put to him, to reside in the fullest and most permanent way, and in that sense to acquire a new domicile, but it need not be an intention to subject himself to another system of law, or to identify himself with the social ideas and habits of another country. If, therefore, it be described as an intention quatenus in illo exuere patriam, that can only be in the most external sense, from which all the moral considerations that go to make up a patria are excluded. If such moral considerations are referred to at all, as Lord Macnaghten remarked that of the two dreams of Mr. Winans's life 'one was anti-English and the other wholly American,' that is

only because they may furnish arguments on the probability of an intention to change the domicile in the purely external sense" (pp. 362, 364.)

N. W. HOYLES.

RESPONSIBILITY OF DIRECTORS FOR AMOUNT OF JUDGMENT AGAINST CORPORATION IN LIBEL SUIT.

The case of *Hill, et al.* v. *Murphy, et al.*, 98 N.E. 781, decided by Supreme Judicial Court of Massachusetts, is along the line of removing the corporate screen as a defense against personal responsibility, or rather, we might say, along the line of preventing abuse of corporate authority without incurring personal liability in a civil action. This character of decision correllates with the growing reaction in sentiment that criminality should be fastened on individuals, as morality requires, rather than on the owners of the machinery the criminals employ.

The case referred to was decided upon a demurrer and therefore facts averred in pleadings are taken as true.

Certain stockholders of a corporation on their own behalf and on behalf of other stockholders sued its directors. It was alleged that the latter published as directors and in the name of the corporation a false and malicious libel of another in connection with his acts as treasurer and director of the company, and that he had brought an action therefor against the corporation and recovered judgment for a substantial amount, which, with expenses incurred in defending the action, was paid out of the corporate treasury. It was further alleged that this publication was wholly outside the legitimate business of the corporation and was maliciously circulated by the directors to gratify their personal ends, and that demand had been made upon them to reimburse the corporation.

The Court thought a cause of action in favor of the corporation was clearly set out, because there was averment of intentional action ultra vires the corporation, citing therefor *Richardson* v. *Clinton*, 181 Mass. 580, 64 N.E. 400; *Greenfield Savings Bank* v. *Abercrombie*, 211 Mass. 252, 97 N.E. 897; *Leeds*

Estate Bldg. & L. Assn. v. *Shepherd*, 36 Ch.D. 787; *Williams* v. *McDonald*, 42 N.J. Eq. 392, 7 Atl. 866.

The Court also says: "And regardless of whether the publishing of the libel was within the powers of the corporation, the tortious act, alleged to be wilfully done by the directors to gratify their own personal ends, was a breach of the duty they owed as quasi-trustees and it has resulted in loss to the corporation: *Fogg* v. *Boston & Lowell Railroad*, 148 Mass. 513, 20 N.E. 109, 12 Am. St. Rep. 583."

There are other reasons advanced for holding the directors to personal liability for personal acts of this character, which amount to an extension in liability beyond their fraudulent misconduct or where they derive financial profit which in equity belongs to the corporation.

The trend is to bring a director to the status not only of a trustee for the corporation, but also of the stockholders as its real owners. While many exceptions may prove that this goal may not always be attained, it is refreshing to note that Courts are disposed to make these exceptions fewer in number and less sweeping in their influence.

The Massachusetts Court confines itself very strictly to decide the question at bar, without elaboration as to the justice or reach of the principle involved. It opens up, however, a wide field of speculation regarding the remedies of minority stockholders, where a corporation, whose directors are guilty of criminal acts, is in the control of those who favor its course.—*Central Law Journal.*

MONEY PAID UNDER COMPULSION OF LEGAL PROCESS.

Money paid in performance of some contract under the compulsion of legal process, but subsequently discovered not to have been due, is nevertheless irrecoverable. That was the decision in the leading case of *Marriott* v. *Hampton*, 7 T.R. 269; 2 Sm. L. Cas., 9th edit., p. 441, its object being to prevent multiplicity of proceedings. It was an extension of the principle of res judicata to a case where money had been paid in the course of

proceedings. The defendant to an action being unable to find a receipt for money claimed from him by the plaintiff, and having no other proof of payment, was obliged to submit and pay the money again. Afterwards, however, he found the receipt, and thereupon sought to recover the money back in an action for money had and received. But the Court, giving effect to the well-settled maxim, Interest republicæ ut sit finis litium, held that the action was not maintainable. For, as was said by Lord Kenyon, C.J., "after a recovery by process of law, there must be an end of litigation; otherwise there would be no security for any person." In the same way that a judgment obtained inter partes estops either of the parties from again canvassing any question which has been decided between them—estoppel by matter of record, in short—payment under compulsion of legal process prevents recovery of the money so paid. Mr. Justice Patteson, in the later case of *Duke of Cadaval* v. *Collins*, 4 A. & E. 866, made the principle even more clear. And it has been acted upon in case after case up till quite recent times, of which fact *Moore* v. *Vestry of the Parish of Fulham*, 71 L.T. Rep. 862; (1895), 1 Q.B. 399, may be cited as a capital instance. The principle depends on this, said Lord Halsbury in that case: "The person who has paid the money had an opportunity of defending the action if he pleased, but thought proper to pay, and therefore the law will not allow him in a second action to set up a defence which might have been set up as a defence to the original action." But on the question whether the principle is equally applicable to legal proceedings instituted in a foreign court, and compulsion of foreign law has the like consequences as compulsion of English law, authority there was none until the decision of Mr. Justice Bray in the recent case of *Clydesdale Bank Limited* v. *Schröder and Co.*, 106 L.T. Rep. 955. It seemed, however, to his Lordship that there was no difference in principle between proceedings in a foreign Court and in this country. The principle as a principle was the same, said the learned Judge. And, regarded in that light, there appears to be little reason to doubt that he was right in the view which he

took. It will be observed from our report that the defendants, acting under an order of the Chilian Court, arrested a ship of which the plaintiffs were mortgagees in possession and which was lying off Valparaiso. The defendants offered to release the ship on receiving from the plaintiffs an unconditional guarantee covering the amount of the debt due to the defendants by the shipowners. The plaintiffs paid the amount in question under protest, informing the defendants that they reserved the right to open up the whole question in London. The ship was then released. The plaintiffs' contention that an Englishman's refusal to incur expense abroad in fighting an action on unknown facts should not prejudice him in an English Court appears so cogent that one almost hesitates to accept as right any contrary conclusion. But, as Mr. Justice Bray pointed out, proceedings of some kind had been taken in the Court at Chile; and the plaintiffs paid the money that they did in order to get rid of those legal proceedings. The money was therefore paid "under compulsion of legal process," although not a process in this country. If the plaintiffs had good grounds for considering that the money was not actually payable, their proper course was to have resisted the proceedings. They chose, however, to pay the defendants' claim, and could not, as his Lordship remarked, reserve their right to test the matter later. This, as appears from our quotation from what Lord Halsbury said in *Moore's* case (ubi sup.) is the very foundation of the principle.—*Law Times.*

A word about Osgoode Hall, the home of the Law Society of Upper Canada. During the vacation we see that the interior of the centre part of the building has been carefully renovated. The stone work, which had got somewhat discoloured with dust, has been cleaned and the skylights have not only been cleaned, but repaired, so that they no longer present a dirty and neglected look and actually admit light. It is to be hoped that the vandals who have been accustomed to amuse their leisure moments by defacing the balustrade round the gallery of the

quadrangle, will be kind enough to reserve their labours for the backwoods where they may more appropriately be exercised, and that as far as Osgoode Hall is concerned, they may be induced to join themselves to those who not only refrain from inflicting injury on the building, but are ready to do what they can to induce others to refrain from doing so. The Chancery Court room has also undergone a thorough overhauling and repair, and rejoices in a new carpet. Here, also, it is to be hoped that the budding lawyers will in future kindly withhold their knives from cutting unnecessary gashes in the covering of the desks or seats. The infliction of such wanton injuries to public property ill become members of a learned and supposedly civilized society.

The International Law Association held its last conference in Paris. A number of distinguished jurists were present. After opening addresses of welcome, the conference took up and discussed the following subjects upon which learned papers had been written by various jurists, followed by discussion:— Aviation law, Maritime law, dealing especially with general averages, deck loads, etc., Territorial waters, International arbitration, referring to the progress made in this direction since the conference at London (not much by the way). Extradition was the subject of two excellent papers. A comparison was made between the English and French rules of evidence and modes of criminal investigation, in which one English writer spoke strongly of the advantage of French methods. Another paper discussed the liability of judges, foreign judgments, etc. The subject of bills and exchange and copyright were also referred to. The adoption of uniform rules of private international law connected with nationality and domicile was urged, and solutions offered for several difficulties. Road and sea traffic and incidentally safety at sea also claimed attention.

REVIEW OF CURRENT ENGLISH CASES.

PROBATE—ADMINISTRATION—GRANT DE BONIS NON—NON-PRODUCTION OF OUTSTANDING GRANT—SMALL ESTATE—ADMINISTRATOR OUT OF JURISDICTION—REVOCATION OF GRANT.

Re Thomas (1912) P. 177. In this case an administrator of a small estate had gone to New Zealand, taking the letters of administration with him and was permanently residing there. He was one of nine children of the deceased. A married daughter applied to revoke the grant, and for a grant to herself de bonis non. Most of the other next of kin consented. Evans, P.P.D., in these circumstances dispensed with notice to the administrator and the production of the grant to him, and made a fresh grant de bonis non in favour of the applicant.

ADMIRALTY—COLLISION—VALUE OF SUNKEN SHIP—DISCOVERY.

The Pacuare (1912) P. 179 was an admiralty action for collision. The vessel sunk in the collision was a lightship and the defendants, while admitting their liability, claimed the right to inspect the plaintiffs' books in order to ascertain the figures upon which the plaintiffs based the value they set upon the vessel, and the Court of Appeal (Moulton and Buckley, L.JJ.) reversing the District Registrar and Deane, J., held that the defendants were entitled to an order for the production of the books forthwith as the only material question was the value of the sunken vessel at the date of the collision, and it would assist the defendants before going into the reference to have the figures shewing the original cost of the vessel, and its subsequent depreciation in value.

WILL — CONSTRUCTION — RESIDUARY GIFT — TENANT FOR LIFE—"RENTS, ISSUES AND PROFITS"—LEASEHOLDS—ENJOYMENT IN SPECIE—CONVERSION.

In re Wareham, Wareham v. *Brewin* (1912) 2 Ch. 312. In this case the construction of a will was in question, whereby the testator gave the residue of his real and personal estate to trustees on trust to permit his widow during her lifetime to receive "the rents, issues and profits" thereof, and after her death he gave the residue, "whatsoever it may consist of and wherever

it may be," to two persons in equal shares. The residuary estate comprised both freehold and leasehold property, and the question was whether the widow was entitled to receive the whole of the rents, and Neville, J., held that she was not, but that according to the rule laid down, *Howe* v. *Dartmouth* (1802), 7 Ves. 137*a*, she was only entitled thereout annually to a sum equal to the dividends which would be produced if the leaseholds had been sold a year after the testator's death and the proceeds invested in consols. The Court of Appeal (Cozens-Hardy, M.R., and Farwell, and Kennedy, L.JJ.), affirmed this decision, and in so doing approved of *Harris* v. *Poyner* (1852), 1 Drew. 174; *Craig* v. *Wheeler* (1860), 29 L.J. Ch. 374, and *In re Game* (1897), 1 Ch. 881, and overruled *Crowe* v. *Crisford* (1853), 17 Beav. 507; *Wearing* v. *Wearing* (1856), 23 Beav. 99; *Vachell* v. *Roberts* (1863), 32 Beav. 140; and *In re Elmore* (1860), 9 W.R. 66. Farwell, L.J., points out that the words "whatsoever it may consist of and wherever it may be," precluded the idea that the testator intended that there should be no conversion; and the Master of the Rolls says the word "rents" is satisfied by applying it to the freeholds.

PAYMENT UNDER MISTAKE OF FACT—RECOVERY OF MONEY PAID BY MISTAKE—MONEY HAD AND RECEIVED—LIABILITY OF PAYEE FOR MONEY PAID BY MISTAKE.

Baylis v. *Bishop of London* (1912) 2 Ch. 318 is a case deserving of attention. A clergyman of the Church of England having been adjudicated bankrupt, on the application of the trustee in bankruptcy the Bishop of London made a sequestration whereby he appointed his secretary sequestrator of the bankrupt's benefice and directed him to collect and receive the emoluments thereof. Pursuant to this order the sequestrator demanded and received from the plaintiffs sums of money as tithe rent charge in respect of property of which they had been, but had ceased to be lessees. In forgetfulness of the fact that they had ceased to be lessees and were consequently no longer liable for the rent charge they paid it to the sequestrator, who duly accounted for it to the bishop, who, after paying thereout the stipend of the curate and other outgoings, handed over the balance to the trustee in bankruptcy. On behalf of the bishop it was contended that the mistake amounted to a mistake in law and, therefore, the action would not lie; and that even if the mistake were one of fact, the bishop being in effect in a similar position to a

sheriff and having, in good faith and without notice, paid the money over to third parties was not liable; but Neville, J., held that the payment was made under a mistake of fact, and that the bishop was liable to refund it, and that he was in the position of a principal and not a mere agent.

COMPANY—DEBENTURE HOLDERS—TRUST DEED TO SECURE DEBENTURES—RESOLUTION OF MAJORITY OF DEBENTURE HOLDERS—SCHEME MAKING SPECIAL PROVISION FOR SPECIAL INTERESTS.

Goodfellow v. *Nelson Line* (1912) 2 Ch. 324. In this case the point in controversy was whether a resolution of a majority of debenture holders, affirming a scheme for varying the rights of all debenture holders under a trust deed, was binding on a dissentient majority. The facts were, that the defendant company had issued £200,000 of debentures bearing 4½ per cent. interest, £150,000 of which were guaranteed by the Loan Guarantee Society, and £50,000 by the B. S. Investment Trust, £47,000 of the debentures being taken by the Trust itself. The Society and the Trust were co-trustees of a trust deed securing the debentures. The Society having gone into liquidation, the liquidator offered to retire from the trust, in consideration of being released from the guarantee. The defendant company desired to accept this offer, and as an inducement to the Trust and other debenture holders, to accede to it submitted a scheme to issue in place of the debentures guaranteed by the Society new unguaranteed debentures bearing 5 per cent. interest, and at the same time providing that the debentures guaranteed by the Trust should be unaffected except that the Trust should give credit for the additional 10s. interest on the debentures formerly guaranteed by them and would also receive an increased premium for their guarantee; without which provisions the Trust would not, as debenture holders, have acceded to the arrangement. The plaintiff, one of the dissentient minority, brought the present action to restrain the company from carrying out the resolution, on the ground that the provisions in favour of the Trust were in the nature of a bribe to induce them to vote for the resolution which, without their vote, would not have received the assent of the necessary majority. Parker, J., came to the conclusion, that the scheme having been fairly laid before the debenture holders, and there being nothing unfair or unreasonable in it, the resolution affirming it was binding on the minority, and that there was no equity precluding a debenture holder

from voting for a scheme merely because he was interested thereunder; although he admits that a secret bargain by one debenture holder for special treatment might be considered as corrupt, and in the nature of bribery, which would vitiate the transaction.

WILL—CONSTRUCTION—"OR" READ AS "AND"—GIFT OVER IN CASE OF PRIOR TAKER DYING "INTESTATE OR CHILDLESS, OR UNDER TWENTY-ONE."

In re Crutchley, Kidson v. *Marsden* (1912) 2 Ch. 335. In this case the will of a testator was in question, whereby he gave to his niece F. A. Smith two freehold houses, for her own use and disposal, "subject only to the following conditions, namely, in the event of the said F. A. Smith dying intestate or childless, or under twenty-one (but not otherwise), the said two houses shall become the property of" Richard Marsden. F. A. Smith attained 21 and died a spinster, and intestate; and the point in controversy was whether or not the gift over took effect. Parker, J., decided that it did not; because, in his opinion, the gift over in the event of the first absolute taker dying intestate or childless or under 21, must be read as if either the first or second "or" was "and," and so reading the devise the event had not happened, and, therefore, the gift over did not take effect. This rule of construction the learned judge remarks is based on a presumed intention on the part of the testator to benefit the children, if any, of the first taker, which would be defeated if he died under twenty-one, leaving children, and the word "or" were construed disjunctively.

SETTLEMENT OF PERSONAL ESTATE—POWER TO INVEST IN REAL ESTATE—PURCHASE BY TRUSTEES OF TIMBER ESTATE—RENTS AND PROFITS—PERIODICAL CUTTINGS—TENANT FOR LIFE AND REMAINDERMAN.

In re Trevor-Batye, Bull v. *Trevor-Batye* (1912) 2 Ch. 339. By a settlement of personal estate the trustees were empowered to invest the trust fund in freehold lands, the rents and profits of which were to be paid to the person entitled to the income of the trust fund if the investment had not been made. The trustees in pursuance of the power purchased a timber estate having a large number of beech trees on it. In the proper management of the estate the trustees cut and sold a number of beech trees, and it was held by Parker, J., that the proceeds of sales arising

from periodical cuttings, after deducting the expense of replanting and fencing incurred in a proper course of management, were "net profits" of the estate within the meaning of the settlement, and as such payable to the tenant for life.

PRACTICE—INTERPLEADER—RIGHT TO ISSUE INTERPLEADER SUMMONS AFTER FINAL JUDGMENT IN THE ACTION—RULE 850 (ONT. RULE, 1103).

Stevenson v. *Brownell* (1912) 2 Ch. 344. This was an action to recover royalties for the manufacture of a patented article. After the writ was issued the defendants consented to a judgment for a specified sum. After the judgment the defendants applied for an interpleader between the plaintiff and certain claimants of the royalties. This summons was dismissed by the district registrar on the ground that the defendants were indemnified by the claimants, and of collusion between the defendants and the claimants. Eve, J., on appeal, reversed the order of the district registrar and granted the interpleader and directed the amount of the judgment to be paid into court by the defendants to abide the further order of the court. On appeal to the Court of Appeal (Cozens-Hardy, M.R., and Farwell, and Kennedy, L.JJ), the order of Eve, J., was set aside and the order of the district registrar restored, on the ground that after judgment it was not open to the defendants to obtain an interpleader—and that Rule 850 (Ont. Rule 1103) does not warrant an application in such circumstances.

EXECUTOR—FIDUCIARY RELATION—JUDGMENT AGAINST EXECUTOR DE BONIS PROPRIIS—DETERMINATION OF FIDUCIARY RELATIONSHIP.

Sutton v. *Thomas* (1912) 2 Ch. 348. The plaintiff, a creditor of a deceased person, had obtained in an administration action a personal order against the executor for payment of his debt, he being the sole creditor of the estate, and it was held by the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.), that this proceeding had the effect of putting an end to the fiduciary relationship between the plaintiff and the executor, so that the plaintiff could not resort to the punitive jurisdiction reserved to the court under the Debtor's Act against defaulting trustees. The court, holding that the effect of the plaintiff's taking the personal order for payment was to put the parties on the footing of ordinary debtor and creditor.

CRIMINAL LAW—EVIDENCE—CHARGE OF ILLEGAL OPERATION ON A WOMAN—STATEMENTS OF DECEASED WOMAN AS TO OPERATION.

Rex v. *Thomson* (1912) 3 K.B. 19. This was a criminal prosecution for having used an instrument on a woman to procure a miscarriage. The defendant set up that he had done nothing, and that the woman herself had performed the operation; and in support of his defence he tendered evidence of statements made by the woman, who was dead, that she intended herself to perform the operation, and also that she had in fact performed it. The judge at the trial rejected the evidence as being merely hearsay and, therefore, inadmissible, and the Divisional Court (Lord Alverstone, C.J., and Darling and Avory, JJ.) held that he was right, there being no ground for admitting the statements either as part of the res gestae or as a dying declaration, or as an admission against interest.

COMPANY—NAME OF PROPOSED COMPANY—SIMILARITY TO NAME OF COMPANY ALREADY REGISTERED—MANDAMUS—DISCRETION.

The King v. *The Registrar of Companies* (1912) 3 K.B. 23. This was an application for a mandamus to the registrar of companies to compel him to register the applicants with the name "The Water Softening Materials Company (Sofnal), Limited." The registrar had refused their application on the ground that the name resembled a company styled "Water Softeners, Limited," already registered, so as to be calculated to deceive within the meaning of s. 8(1) of the Companies Act. The Divisional Court (Lord Alverstone, C.J., and Pickford and Avory, JJ.) upheld the registrar and refused the motion.

PASSING OFF ACTION—SOLE AGENT FOR SALE OF GOODS—ALLEGED IMITATION OF GOODS—RIGHT OF AGENT TO INJUNCTION.

Dental Manufacturing Co. v. *De Trey* (1912) 3 K.B. 76. In this case the defendants set up a counterclaim for damages and for an injunction in the following circumstances. By an arrangement with one Clark, who lived in Chicago, the defendants were to purchase a certain number of a certain spitoon for dentists' use, manufactured by Clark. By their arrangement with Clark he was to do his best to prevent the spitoons from coming to the English market by any other channel. These goods the defendants resold without any alteration or "get up," for their

own profit, and they claimed that certain spitoons manufactured and sold by the plaintiffs were got up so as to be passed off as Clark's manufacture. Pickford, J., who tried the counterclaim, decided that the defendants had no right of action and the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) agreed with him. Their Lordships holding that the right to maintain such an action was in Clark and not in the defendants, though it might be if the de..ants had in any way "got up" the goods, that so far as that "get up" was imitated by the plaintiffs, the defendants could have maintained an action against them for so doing. The counterclaim, therefore, failed.

United States Decisions.

STREET RAILWAY—CONTRACT FOR SPECIAL RATE—SUBURBAN PROPERTY—DEFINITENESS.]—A promise by a street railway company to maintain a special rate, the amount and duration of which is not specified, to suburban property which it sells to one proposing to develop it for homes, is held in the Maryland case of *Arundel Realty Co.* v. *Maryland Electric R. Co.*, 116 Md. 257, 81 Atl. 787, annotated in 38 L.R.A. (N.S.) 157, to be too indefinite for enforcement, and, therefore, the purchaser has no right of action in case, after he has partially disposed of the property, the rate first established is more than doubled, so that demand for the property ceases and its value is greatly depreciated.

TELEPHONE — CHARTER DUTY — REASONABLE HOURS.] — The power of the government or its agencies to regulate days and hours of service of telephone companies seems to have been considered for the first time in *Twin Valley Teleph. Co.* v. *Mitchell*, 27 Okla. 388, 113 Pac. 914, 38 L.R.A. (N.S.) 235, holding that a telephone company is required to operate its exchange during reasonable hours on every day in the week, including Sunday, in order to comply with its charter and franchise obligations.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Divisional Court, K.B.] [August 9.

RE CLARKSON AND WISHART.

Execution—Interest of certificated holder of mining claim before issue of patent—Tenant at will—Mining Act.

Appeal from judgment of a mining commissioner.

Held, 1. The interest of the holder of a mining claim for which a certificate of record has been issued, but which has not been patented was not exigible before 2 Geo. V. c. 8, s. 7, either as lands or goods.

2. A tenancy at will is not exigible at common law.

Bain, K.C., and *W. L. Gordon*, for appellant. *J. M. Godfrey*, contra.

Divisional Court, C. P.] [August 20.

RENAUD *v.* THIBERT.

Division Courts—Jurisdiction—Increase of under 10 *Edw. VII. c.* 32.

Appeal from County Court of Essex. The action was on a mortgage for the recovery of $260. The mortgage had been assigned by the plaintiff by an assignment absolute in form, but which was intended to be only collateral security for a loan.

Held, that any necessity to give evidence as to the assignment being only as collateral security would not oust the jurisdiction. It is sufficient if the liability of the defendant and the amount of such liability be established without "other and extrinsic evidence."

J. H. Rodd, for appellant. *F. D. Davis*, contra.

Divisional Court, K.B.] PEARSON *v.* ADAMS. [August 27.

Building restrictions—"Detached dwelling-house"—Apartment house—Construction of deed.

Appeal from Middleton, J., who considered that he was

bound by *Robertson* v. *Defoe*, 25 O.L.R. 286 to hold that the building in question in that case and which was used as an apartment house was a "detached dwelling house." The restriction in this case was as to a lot "to be used only as a site for a detached brick or stone dwelling house to cost at least $2,000, to be of fair architectural appearance and to be built at the same distance from the street line as the houses on the adjoining lots."

Held, that the erection of a six suite apartment house would be a breach of the above restriction.

J. H. Cooke, for plaintiff. *J. M. Godfrey*, for defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] McCURDY v. NORRIE. [September 12.

Nuisance—Entry upon land of another to abate—Assault committed by owner of land—Liability for in damages.

Plaintiff entered upon defendant's land for the purpose of abating a nuisance and while lawfully so engaged was assaulted by defendant.

Held, affirming the judgment of the trial Judge and dismissing defendant's appeal with costs that plaintiff was entitled to recover damages for the assault so committed.

S. D. McLellan, K.C., for appellant. *J. P. Bill*, for respondent.

Province of Manitoba.

KING'S BENCH.

Mathers, C.J.K.B.] [June 4.

HAFFNER v. GRUNDY.

Brokers—Real estate agent—Commission—Liability of owner of land—Proposed purchase on unauthorised terms.

This was an action by an agent against his principals for a commission for procuring a purchaser of real estate.

Held, that the defendant, the owner of property that he had

placed for sale in the hands of the plaintiff, a real estate agent, is not liable to the latter for commissions where the agent found a purchaser for the property on terms he had no authority to offer, and which the defendant refused to accept, notwithstanding that the proposed purchaser testified at the trial that he had been and was ready, and willing to buy upon the defendant's terms, which fact he had not until then communicated to either the plaintiff or the defendant.

A. J. Andrews, K.C., and *F. M. Burbidge*, for plaintiff. *D. A. Stackpoole* and *E. J. Elliott*, for defendant.

Book Reviews.

The Practice of the Privy Council in judicial matters in appeals from Courts of Civil, Criminal and Admiralty Jurisdiction and in appeals from Ecclesiastical and Prize Courts, with statutes, rules and forms. By NORMAN BENTWICH, Barrister-at-law. London: Sweet & Maxwell, Limited, 3 Chancery Lane, W.C. 1912.

In 1901 the comprehensive work of Safford & Wheeler was published. Since that time the practice of the Privy Council has been very much simplified, so that that elephantinus liber may be said to be now out of date, and the number of pages reduced by more than half.

Part I sets forth the constitution and jurisdiction of the Privy Council, an interesting historical sketch. Then follow the rules of appeal for the colonial dependencies of England differentiating, so far as Canada is concerned, between the various provinces. The other dependencies are treated in the same way. A glance at these gives some idea of the enormous extent and importance of imperial Britain.

Part II gives the conditions and rules of appeal in the Privy Council—appeal by right of grant—appeal by special leave—special references—general practice as to petitions—practice on appeals in England—dismissal for non-prosecution, etc.—abatement and revivor of an appeal—costs—concerning the delivery of judgment—notices and other matters of practice connected with judgments by the Committee.

Part III. discusses the practice as to appeals in Admiralty, Prize Court and Ecclesiastical matters.

An appendix gives the various imperial statutes, dealing

with the jurisdiction and practice of the Judicial Committee. Another appendix gives the Judicial Committee rules of 1908, and various forms, also a time-table of steps to be taken on an appeal. The whole gives to practitioners a full insight into the subject, with much practical information which will be most helpful to all those concerned in appeals to the foot of the throne. The index appears to be copious and comprehensive.

Quite apart from the value of the work to practitioners there is much in it of interest to the lay readers.

On the Interpretation of Statutes. By the late SIR PETER BENSON MAXWELL, Chief Justice of the Straits Settlements. 5th edition by the late F. Stroud, Recorder of Tewkesbury. London: Sweet & Maxwell, Limited, 3 Chancery Lane, Law Publishers. Toronto: The Carswell Company. 1912.

This book is so well known that it is unnecessary to refer to it at length. It is simply the previous edition brought up to date. The object of the work, as stated in the preface of the first edition, is "to present in some order the leading principles which govern our courts in the interpretation of statutes with illustrations of their application, etc." The popularity of this work is sufficiently evidenced by the number of editions it has passed through: first edition, 1875; second, 1882; third, 1896; fourth, 1905.

Flotsam and Jetsam.

A detective was talking about jail breaking.

"Down in Colombo," he said, "they've got a very good dodge against the jail-breaker. It's simple, too. Just bricks."

"You see, the Mutival jail at Colombo is surrounded by a very high brick wall. Well, the last dozen courses of these bricks are laid loose, without mortar. So, when you try to escape, you climb stealthily, hardly daring to breathe, up the wall, and with a sigh of relief you reach the loose course at the top, and—clatter, crash, bang, clatter, clatter—a thousand bricks in the profound silence fall with a noise fit to wake the dead, and a dozen warders rush out, and you climb down sadly into their waiting arms."—*Case and Comment.*