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We understand that it is the intention of Mr. Holmested and Mr. Langton, Q.C., to issue a new edition of the Ontario Judicature Act and Rules, as soon as possible after the completion of the revision of the Rules now in progress, and that they have also in contemplation the issue of a book of Forms. We are authorized to say that they have not, at present, made any arrangements for the publication of either of these works. Any persons desirous of receiving early copies are therefore recommended to send their orders direct either to Mr. Holmested or Mr. Langton, as no other persons are authorized by them to receive orders.

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Whatever view we may take of the question as to whether women should or should not be allowed to enter the ranks of the legal profession, it would now be ungenerous to withhold our congratulations to (shall we say our "brother" or our "sister"?) Miss Clara Brett Martin on the success of her persevering efforts to attain the object of her ambition in being called to the Bar of Ontario. We would therefore express the hope that she may be successful in the profession she has chosen. At the same time it will not be disloyal to her as now one of the brethren of the gown also to express the hope that she may be the one brilliant exception to the time-honored rule which has hitherto closed our ranks to those who are not of the male persuasion.

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A fourth Canadian has been added to the list of those on whom the honor of membership in the Imperial Privy Council has been bestowed. On the 22nd ult. the Lord Chamberlain cabled that the Queen had been pleased to approve of the

admission to Her Majesty's Privy Council of the Chief Justice of Canada, who is now entitled to be addressed as the Right Honorable Sir Henry Strong, P.C. It is understood that this is prefatory to his appointment as a member of the Judicial Committee. Before, however, the Chief Justice can take his seat in the Court of last resort of the Colonies of the Empire, he must be sworn in as a Privy Councillor. For this purpose we understand that the Chief contemplates a visit to England this summer.

It is natural here to recall the three Sir Johns, the previous Canadian recipients of this honor: first, Sir John Rose, next Sir John Macdonald, and lastly Sir John Thompson, whose untimely death followed almost immediately upon his installation as adviser of the Queen. It being a matter in which we have now more interest than formerly, we may better appreciate the prayer to "endue the Lords of the Council with grace, wisdom and understanding."

## *NOTICE OF ACTION.*

*Sinden* v. *Brown*, 17 A.R. 173, was once more invoked before the Court of Appeal recently, and it is stated in the head note to the report of *McGinness* v. *Dafoe*, 23 A.R. 704, that it was approved and followed. On a previous occasion we believe the Court declined to follow it at all, (see ante vol. 31, p. 624), and it is curious to note how Burton, J.A., seems to think the case is to be applied.

In the case before the Court, which was an action against a magistrate for false imprisonment, the magistrate had without any sworn information issued the warrant for the plaintiff's arrest on a charge of arson, and Burton, J.A., says although *Sinden* v. *Brown* is a binding decision, it did not apply because the magistrate was aware of the necessity of a sworn information to justify the issue of a warrant, and therefore he was not entitled to notice of action. In *Sinden* v. *Brown* it was held that if a magistrate acted in the honest belief that he was acting in the execution of his duty as such, even though he was acting in fact without jurisdiction, he was

nevertheless entitled to notice of action. The other members of the Court, whose opinion was delivered by Osler, J.A., say: "The principle on which we decided *Sinden* v. *Brown* fully supports the defendant's right to notice of action." There is therefore, a very wide divergence of opinion between Burton, J.A., and the other members of the Court as to what *Sinden* v. *Brown* really means. There is the further difficulty in applying the principle of that case arising from the fact that the Court of Appeal did not see its way to decide whether the question of the defendant's bona fides is for the judge or the jury. As is well known, there are conflicting decisions and dicta on this point. But whichever way it is decided there will all always be uncertainty as to what view may be taken of the conduct of a defendant. Juries are proverbially uncertain, and the case of *McGinness* v. *Dafoe* shows that even judges take different views of the same state of facts.

## *WORKMENS' COMPENSATION FOR INJURIES.*

Two cases bearing on the Workmens' compensation for injuries Act, (55 Vict., c. 30) deserve attention. The first is *Cavanagh* v. *Park*, 23 A.R. 715, (ante vol. 32, p. 768), and *Montreal Rolling Mills* v. *Corcoran*, (ante p. 110).

*Cavanagh* v. *Park* is a decision of the Court of Appeal for Ontario on a question of practice, affirming the ruling of the learned Chancellor of Ontario at the trial, to the effect that where want of notice of action is relied on as a defence, it is not sufficient in actions in the High Court to plead the want of notice in the statement of defence, but it is necessary also further, under s. 14, to deliver a notice in writing to the plaintiff not less than seven days before the trial, informing him that the defendant intends to rely on that defence.

Mr. Holmested, in his annotations on this statute, seems on p. 104 of his book to have taken the view that where a defendant formally pleads a defence, that that is a sufficient notice under the Act that he intends to rely on it. This now appears to be erroneous. One can well understand

that the statute was intended to prevent a plaintiff from relying on any such defence under any general denial of the plaintiff's right to recover, but it seems to require a little stretch of imagination to suppose that the statute was intended to require a defendant both formally to plead the want of notice and at the same time, or at any other time, to deliver a formal notice that he intended to rely on the defence which he had in due form of law set up.

The other case is *Montreal Rolling Mills Co.* v. *Corcoran*, noted ante p. 110, in which the Supreme Court seems to have shattered the authority of *Kervin* v. *Canada Cotton Co.*, 28 O.R. 73. An accident occurs in a factory where machinery is unfenced, and without proof that the accident was occasioned or aggravated by the absence of the fence, the Ontario Court, in the interest of workmen, held that this constitutes prima facie evidence of negligence; but the Supreme Court, with more regard to the rights of employers, has said that that is not good law.

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## *CAUTIONS UNDER THE DEVOLUTION OF ESTATES ACT.*

A question of some interest recently arose under the Devolution of Estates Act, and under 54 Vict., c. 18, as to the necessity of filing a caution within a year after the death of a testator during the pendency of a life estate. The parties concerned agreed to abide by such opinion as might be expressed on the question in dispute by His Honor Judge McDougall. The facts submitted were as follows:

One M., of the City of Toronto, died on the 31st of July, 1893, having previously made his will whereby he gave and bequeathed all his property to his wife for her natural life, with power to use and dispose of the corpus of his estate as she should desire in any way that she might think fit, and upon the death of his wife, he disposed of such of his property as should then remain undisposed of by her as follows: Charitable bequests to the extent of $18,000; a bequest to a nephew of $1,000, and other small bequests of personalty, and

directed the residue of his estate to be divided equally per capita, and not per stirpes, among the then surviving children of S., J. and I., children of the deceased brother of M. He directed his executor to allow his estate to remain invested upon the same securities as it was invested at his death until the death of his wife, with liberty, however, to his executor at any time in his discretion to vary the investments thereof, and appointed an executor, to whom probate was granted on the 25th of October, 1893. At the time of the making of the will all of the testator's property was in personalty, but after making his will and prior to his death, he purchased a house in Toronto which was occupied by his widow until the time of her death in June, 1896.

The personalty was not sufficient to pay the legacies, and the executor entered into a contract for the sale of the dwelling house in order to realize money wherewith to pay these legacies. The solicitor for the purchaser objected to the title and the executor's right to convey, on the ground that a caution should have been filed pursuant to 54 Vict., c. 18, within one year after the death of the testator. This not having been done, the executor contended that it was unnecessary to file a caution for the reason that the property in question having been devised to the widow for her life, and after her death the residue of his estate was directed to be divided equally between the then surviving children of the three persons named in the will, the estate could not vest until after the death of the widow, which had taken place within the last year. For the purchaser it was claimed that the cautior should now be registered under the provisions of 56 Vict., c. 20, s. 1, sub-sec. 5. It was, however, said that this was unnecessary and that the executor had power to sell under the provisions of R.S.O. c. 110, s. 23, there being an implied direction in the will, it being necessary to make sale of the property for the purpose of paying the bequests and dividing the estate. The point in question was whether a caution should have been filed within the year after the death of the testator, and if so, whether an order should now be made allowing it to be filed under the provisions of 56 Vict., c. 20.

The learned Judge expressed his opinion as follows:

"As to the question of the necessity of filing a caution in order to enable the executors to make a good title to the real estate included in the will of the testator, I am inclined to the opinion that the obtaining and registration of such caution is necessary.

"R.S.O. c. 110, s. 23, it is true, gives power to an executor to sell, if such power can be implied from the will. In other words it gives an authority, where no person is expressly named, to the executor. 54 Vict., c. 18, is a subsequent Act and directs that real estate not disposed of or conveyed by the executors within twelve months after death shall vest in the devisees or heirs beneficially entitled; in this case, therefore, the real estate vested in the widow at the expiration of twelve months; and she might thereafter have disposed of the same without the concurrence of the executors. It not having been disposed of by her, and she now being dead, I take it that the real estate vests by force of the statute in the residuary devisees, subject to a liability to pay thereout the pecuniary legacies, if the personal estate should prove insufficient to pay such legacies. Real estate appears to vest in the executors only provisionally for twelve months; if not disposed of by them within the twelve months their power to sell seems to terminate unless a caution is filed. The Devolution of Estates Act, R.S.O. c. 108, s. 4, vests all real estate notwithstanding specific devises in the executors to pay debts. 54 Vict., c. 18, s. 2, sub-sec. 1, expressly gives power of sale to executors of lands vested in them by force of the Devolution of Estates Act, for the purpose either of paying debts or of dividing the estate amongst the beneficiaries.

"I think the executors' power to sell in this case is better attributed to 54 Vict., c. 18, s. 2, sub-sec. 1, than to R.S.O., c. 110, s. 23. The latter provision would more appropriately lie where the real estate was devised to the executors by the will, and questions arose under the wording of the devise as to whether express power to sell was given, or where a general devise was made to the executors without an express power to sell, and the will

directed the payment of a number of pecuniary legacies, which could only be paid by disposing of the real estate; in such latter case a power to sell real estate would necessarily be implied, and the statute confers such authority to remove any doubt. There is no devise in this will of the estate to the executors, but there is a direct devise of the estate to the wife for life, and a further specific devise of legacies to charities and individuals, followed by a direction to divide the residue amongst named residuary legatees. There is no expression that the executor shall distribute: *Bentham* v. *Wiltshire*, 4 Madd. 44. In the present case the interest which the executor took in the real estate was by virtue of the Devolution of Estates Act rather than under the express terms of the will; and the duration of such interest is determined by 54 Vict., and therefore the executors in order to obtain a title to sell the real estate either to pay debts or legacies, after the expiration of twelve months from the decease of the testator, must secure the registration of a caution; this latter under the provisions of 56 Vict., c. 20, s. 1, sub-sec. 5, may be procured notwithstanding the expiration of the period of twelve months."

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## *CAUSERIE.*

"We'll push back chairs, and talk."
BROWNING: *Bishop Blougram's Apology.*

JUDGE-MADE LAW.—Bentham and Austin, doubtless, deceived no one but themselves in their attempts to stigmatize judge-made law as a presumptuous usurpation of the function of the legislature, and subversive of the coherency and exactness of the written law. It is true that under the English system of jurisprudence, judiciary law has a stronger raison d' etre than under those systems that are based upon codes; yet, notwithstanding the express prohibitions contained in such codes against prior decisions being treated as precedents in cases subsequently arising for determination, it will be found that the judges constantly refer to earlier decisions as

guides and aids in reaching right conclusions in the matters in controversy before them. For instance, by the Prussian Code (Allgemeines Land-Recht. [Introd.] s. 6) it is declared that "the opinions of law professors and the views taken by prior judges shall not be in any way considered in future decisions." Yet so persistently have the judges referred to the opinions of commentators upon this code and to previous decisions thereunder that a sort of usus fori, or customary law of the courts, has grown up under the name of "Juristenrecht." Again, Art. 5 of the French Civil Code, prohibits the judges from pretending to lay down general rules when giving their decisions. Yet there is hardly a French decision that one takes up where he does not find the judge repeatedly referring to "la doctrine et la jurisprudence," and also discussing the case from what he designates "le point de vue juridique." It is idle to say that these opinions and "points of view" do not exercise an important influence in the determination of new cases as they arise: and it is difficult to see how, in the result, this custom materially differs from the English mode of deferring to precedents, no matter how strenuously that principle may be disavowed in theory. But this by the way.

After all said and done, English judiciary law is but a mos artificii, a usage of the trade, so to speak. For as in every other department of human activity, there have, perforce, grown up certain recognized canons which govern its operations, whether it be that of the carpenter with his rules as to scarfing and mortising, or that of the mathematician with his axioms and logarithms, so under our indeterminate system of jurisprudence the judges find it necessary to declare certain dogmas of procedure and principle to facilitate the determination of particular cases as they arise from time to time; and in order to avoid dissonance and confusion the rationes decidendi of such cases are crystallized into precedents. Until the legislature makes its enactments precise enough to meet every possible case arising thereunder both in respect of doctrine and procedure (and we think that day is somewhat distant), this usage of the Courts must, of course,

continue. Although we have in our statute-law no such splendid spur to judicial activity as that contained in the French Civil Code, Art. 4, to the effect that a judge who refuses to decide a case under the pretext of the silence, obscurity or insufficiency of the law, may be prosecuted for a denial of justice; yet our courts are expected to find the law covering a particular case, by hook or by crook, somewhere.

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ITS LIMITATIONS.—The reasonableness of judiciary law being thus conceded, the question arises, how far are the judges justified in exercising their undoubted authority to prescribe the law where the legislature has not spoken?

In the older repositories of the common law there are to be found many judicial tours de main, superimposed upon the process of making precedents by, to use Sir Matthew Hale's phrase, "illations on anterior law," and the resultant harvest of indisputably new principles is therein garnered. But courts now honestly endeavor to remember that their office is jus discere only, instead of grandiloquently talking about it as a wise limitation of their powers, and, at the same time, using it as a cover to screen their excursions into the forbidden and seductive field of law-making, as their forensic forbears were wont to do.

In *Webb* v. *Rorke*, 2 Sch. & L. 666, a case decided so late as 1806, Lord Redesdale said: "If a case arises of fraud, or presumption of fraud, to which no principle already established can be applied, a new principle must be established to meet the fraud; for the possibility will always exist that human ingenuity in contriving fraud will go beyond any cases which have before occurred."

If he meant by this, as it seems from the report he did, that a new principle can be enunciated without reference to any analogy it bears to one already existing, then he was altogether wrong.

An opinion more akin to the present attitude of the Courts upon this question was stated by Lord Brougham in the case of *Leith* v. *Irvine*, 1 My. & K. 294, where he says:

"It is no part of the duty of this Court to alter the law, so as to accommodate it to the varying circumstances of society; and that is law to me which I find established by those who have gone before me, whether by the legislature, or by my predecessors, in whose time the principles of the Court have been reduced to a system. Neither the makers of the law will carefully perform their duty, nor will its expounders with adequate caution discharge theirs, if the former are made to believe that their deficiencies can always be supplied by judicial misconstruction. My resolution is to abide by what I find to be the law, whether it has been promulgated on the record of the statute, or of the Court, and to leave the legislature to alter it, if alteration be required."

Furthermore, we may observe that of late years the Courts have persistently refused to supply a casus omissus in an Act of Parliament, no matter how manifest the omission may be; and they have generally declined to extend the operation of an Act beyond the plain meaning of the words used (see *Mcharg v. Lumbers*, 23 O.A. at pp. 59, 60, and authorities cited).

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A MODERN INSTANCE.—Mention of this rule as applied to statutes reminds us of some observations pertinent to the question in a case decided by the judge of the Exchequer Court a short time ago, *Auer Incandescent Light Co.* v. *O'Brien* (post p. 154). This was an action arising upon the infringement of a patent; and the defendant attacked the validity of a reissue of the patent, because, inter alia, its owner had been guilty of laches in making his application for such reissue. The learned judge said:

"The doctrine that the right of a patentee to a reissue is lost in certain cases by lapse of some time after the date of the expiry of the original patent, and before the application for the re-issue, has been established in the Courts of the United States, and recognized in Canada. The doctrine itself has no statutory support. The legislature has not either in the United States or in Canada required that an applicant for a reissue should come to the Commissioner within any definite or specified time. It is a doctrine that rests wholly upon the authority of decided cases. The object aimed at by the rule is good; but the rule is, I think, open to some objections when enforced by a Court. If it were applied by the Commissioner there would not be the same objection; for if he refused to issue the new patent because the application

had been made too late, the patentee would not have surrendered his original patent, and would still have the benefit of it, whatever that might be. But if the rule is enforced by a Court very grave injustice may be done. Take, for illustration, a case in which there was a perfectly good and valid patent, but which was deemed defective or inoperative for some reason. The question whether it was defective or not might be a very abstruse and difficult question. The Commissioner deems it to be defective, and though a long time has elapsed he accepts the surrender of the original patent, one which was in fact good and valuable ; and causes a new patent to be issued. Later the reissue comes in question in the Court (and the more valuable the patent is the more likely it is to be infringed and to be brought into question), and the Court says to the patentee : 'You were too late in making your application to the Commissioner for the reissue, and for that reason, and that reason only, we refuse to sustain the new patent, notwithstanding that the legislature has not imposed any such terms or conditions upon you or the Commissioner ; and notwithstanding that we are not able to restore to you the use and benefits of your surrendered patent.' That is a rule that I should not care to adopt or follow unless compelled to do so by the clearest authority."

CHARLES MORSE.

# ENGLISH CASES.

## *EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.*



PROBATE—ADMINISTRATION WITH WILL ANNEXED—ADMINISTRATION BOND—LIMITED COMPANY ACCEPTED AS SOLE SURETY.

*In the Goods of Hunt*, (1896), P. 288, a trust company was appointed by a testator executors of his will. The company, which was a limited joint stock company, appointed their manager under their seal to obtain administration with the will annexed, and tendered the company as sole surety to the administration bond. Barnes, J., to whom the matter was referred by the Registrar, held that administration with the will annexed might properly be granted to the manager as the company's nominee, and that the company should be accepted as sole surety to the bond. One would almost have thought that the bond under the circumstances might as well have been altogether dispensed with.

LOST WILL—PROOF OF LOST WILL—PROBATE—PRACTICE—NEXT OF KIN.

*In the Goods of Pearson*, (1896) P. 289, Barnes, J., held that the contents of a lost will cannot be proved ex parte on affidavit for the purpose of obtaining probate thereof, where the next of kin are minors, and therefore unable to consent; but that the will in such a case must be propounded and proved in solemn form.

TRUSTEE—BREACH OF TRUST—NEGLECT TO REALIZE MORTGAGE SECURITY—RETAINING INVESTMENTS OF TESTATOR—DEPRECIATION OF SECURITIES.

*In re Chapman, Cocks* v. *Chapman*, (1896) 2 Ch. 763, was described by Lindley, L.J., as one of the most important cases which had been before the Court for years. The main point in controversy was whether the trustees of a will were personally liable for the loss which had resulted to their testator's estate by reason of their not having called in certain moneys outstanding upon the security of certain mortgages belonging to the testator's estate at the time of his death. The will in question authorized investments on mortgages of real estate, and at the time of the testator's death in 1880 the depreciation in the value of agricultural land in England had set in, and the trustees, in the exercise of their judgment, deemed it would be unwise to attempt to realize the outstanding mortgages, believing that it was better to wait till the value of land improved, but instead of improving it steadily got worse. Most of the mortgages were for two-thirds the price paid for the lands. The moneys outstanding were not required for the payment of debts or legacies. The case came originally before Kekewich, J., (1896) 1 Ch. 323, when it seems to have been conceded that the trustees were liable, and the only question argued was whether the Trustee amendment Act, 1893, s. 4, was retrospective, and it was therefore not then noted: but when the case was brought before the Court of Appeal (Lindley, Lopes and Rigby, L.JJ.) the question of liability, altogether apart from that statute, was raised by the trustees, and the Court unanimously determined that they were not liable, and that there is no rule of law which requires trustees to call in, in a falling market, investments made by their testator, or rendering

them personally liable for loss if they do not, assuming that they act honestly and with ordinary prudence. Lopes, L.J., thus succinctly formulates the law on this point, "A trustee who is honest and reasonably competent is not to be held responsible for a mere error in judgment when the question which he has to consider is whether a security of a class authorized, but depreciated in value, should be retained or realized, provided he acts with reasonable care, prudence and circumspection." The case is noteworthy, also, from the fact that the trustee had omitted to appeal from the Chief Clerk's certificate, and the Court of Appeal permitted him to do so in order to raise the substantial question of merits, which had practically been conceded when the case was before Kekewich, J.

PRACTICE—ADMINISTRATION—RES JUDICATA—PERSON NOT A PARTY, WHEN BOUND BY JUDGMENT—NOTICE—ESTOPPEL BY CONDUCT—ABSENT PARTIES—CLASS, REPRESENTATION OF—ORD. XVI., RR. 11. 32—(ONT. RULES, 324, 316).

*In re Lart, Wilkinson* v. *Blades*, (1896) 2 Ch. 788, turns on a question of practice. In 1881 an action was commenced for the construction of a will as to the share of the testator's estate given to a Mrs. Stanton. To this action Mrs. Wilkinson, one of the parties interested in the fund, was not a party; but an order was made appointing one of the parties to the action to represent the testator's next of kin, of whom Mrs. Wilkinson was one; but she had an interest distinct from that of the other next of kin. The will was, however, construed in the action so constituted, and Mrs. Wilkinson and her husband had full knowledge of the proceedings, and received and accepted, without objection, some £2,000 which was paid to them, in pursuance of such construction, and the husband wrote expressing his satisfaction with the decision, and deprecating any appeal therefrom by other parties. His wife having subsequently died, and he having obtained administration of her estate, instituted the present action for the construction of the same will, contending that his wife was not bound by the former decision, as she was not a party, nor adequately represented therein by the person appointed to represent the testator's next of kin. Chitty, J., however,

held that though not technically bound as a party by the judgment in the former action, yet that the plaintiff and his wife, having had full knowledge of the judgment, and having accepted the benefit of it, the plaintiff was nevertheless estopped by conduct from now calling it in question. The learned judge conceded that the order appointing a representative of a class only binds the members of the class whose interests are identical with that of the representative, and does not bind the interest of any member of the class, who has a distinct and independent right, from that of the other members of the class.

SETTLEMENT—CONSTRUCTION—"NEXT OF KIN IN BLOOD"—"INTESTATE."

*In re Gray, Akers* v. *Sears*, (1896) 2 Ch. 802, was a summary application for the purpose of construing a marriage settlement, which in a certain event provided that certain chattel property comprised therein should "go and belong to the next of kin in blood of the said (wife) at her decease, in the manner directed by the Statute of distribution of intestates' effects, as if she had died intestate and unmarried." And by the same settlement it was provided that the fund now in question, in case there should be no issue of the marriage, should be held upon trust "for the person and persons who shall be next of kin in blood to the said (wife) at the time of her decease, in case she had so died intestate and unmarried." There was no issue of the marriage, and at the time of the wife's decease she had one brother of the whole blood living—several living nephews and nieces, children of deceased brothers and sisters of the whole blood—brothers and sisters of the half blood, and—living nephews and nieces of a deceased sister of the half blood. North, J., held that the words "in case she had so died intestate and unmarried," imported that the next of kin were to be ascertained for the purpose of the distribution, according to the Statute of Distributions, and that the nephews and nieces, as well as the brothers and sisters, were therefore entitled to participate in the fund.

MORTGAGE—REDEMPTION—REMAINDERMAN—TENANT FOR LIMITED ESTATE.

*Prout* v. *Cock*, (1896) 2 Ch. 808, was an action for redemption. The equity of redemption had been devised by the mortgagor to his widow during the minority of the plaintiffs, who were infants, and after they attained 21, to the plaintiffs equally. The widow had mortgaged her interest to the original mortgagee, who objected to be redeemed. North, J., on the authority of *Ronald* v. *Russell*, Younge, 9, held that the plaintiffs, as tenants in remainder, were not entitled to redeem during the currency of the limited estate devised to the widow without, the consent of the owner of that estate, in whom the first right of redemption was vested, and he dismissed the action.

RENT CHARGE—TENANT FOR YEARS, PERSONAL LIABILITY FOR RENT CHARGE.

*In re Herbage Rents, Charity Commissioners* v. *Green*, (1896) 2 Ch. 811, was a case which involved a good deal of research into black letter law, the procedure in the action of novel disseisin, etc. The question at issue was simply whether or not a tenant for years of land, out of which a rent charge was payable, was liable to an action of debt for arrears of the rent charge. Stirling, J., after a careful review of the authorities, came to to the conclusion that though he may be liable to be distrained for the rent charge, yet he is not liable to be sued in debt therefor, except where he actually and deliberately pays the rent charge to some person not entitled.

FOREIGN LAW—LEX FORI—PARTNERSHIP—ADMINISTRATION OF ESTATE OF DECEASED PARTNER.

*In re Doetsch, Matheson* v. *Ludwig*, (1896) 2 Ch. 836. The plaintiffs were creditors of a firm carrying on business in Spain, and they sued on behalf of all other creditors of the firm the executors of a deceased partner who were resident in England, for the administration of the estate of the deceased partner, claiming that his estate, after payment of his personal and testamentary expenses and separate debts, was liable for the debts of the firm. The executors set up by their defence that the rights of the partner were governed by the law of Spain, under which the firm's creditors were not

entitled to proceed against the separate estate of a deceased partner until the assets of the firm had been exhausted or its insolvency established. Romer, J., however, held that this constituted no defence in law, and was mere matter of procedure, that the ultimate rights of the plaintiffs in the deceased partner's estate were the same in Spain as in England, and therefore that the plaintiffs were entitled to have the estate of the deceased partner administered as prayed.

COMPANY—PRINCIPAL AND AGENT—FRAUD OF AGENT—DEBENTURE STOCK CERTIFICATE - PURCHASER FOR VALUE—NOTICE—MORTGAGEE—ESTOPPEL.

In *Robinson* v. *Montgomeryshire Brewery Co.*, (1896) 2 Ch. 841, the question at issue was the right of a mortgagee to prove a claim against a company for a debt which was contracted under the following circumstances. The company, being desirous of borrowing £3,000, applied to a firm of brokers to procure the advance upon the security of debenture stock of the company to the amount of £8,000: the brokers thereupon applied to one Gillies for a loan of £6,000, which he agreed to make on a proper certificate for the stock being lodged with his banker. The brokers having communicated with the company that they could obtain the required advance, the company then authorized the issue of a certificate certifying that Gillies was the registered owner of £8,000 debenture stock of the company, and deposited it with a banker for Gillies. Gillies had no communication with the company, and had no notice of any fraud by the brokers, and advanced the brokers £6,000 in good faith. The brokers only paid to the company £3,000, and concealed the fact that they had exceeded their authority by raising a further sum of £3,000. The company having been ordered to be wound up, Gillies claimed to prove as a creditor in respect of the £8,000 stock, and to receive dividends on his claim until the £6,000 advance should be fully satisfied; on the part of the other debenture holders it was claimed that Gillies was not entitled to prove for more than £3,000, and that it was his duty to have seen that the whole £6,000 advanced by him was paid to the company, and that even if the company were

estopped the other debenture holders were not. Williams, J., was of opinion that the company having placed the certificate in the power of the brokers without any limitation, Gillies had a right to assume he had full authority to deal with the certificate, and that Gillies was under no obligation to see to the application of the money advanced by him, and therefore that Gillies was entitled to prove his claim as he contended. He was also of opinion that Gillies had the same rights in respect of the stock in question as against the other debenture holders, as he had against the company itself.

COMPANY—WINDING UP—CONTRIBUTORY—TRANSFEREE OF SHARES AFTER WINDING-UP ORDER, LIABILITY OF—COMPANIES ACT, 1862 (25 & 26 VICT. C. 89), SS. 38, 131, 133, 153—(R.S.C. C. 129, SS. 15, 44, 45).

*In re National Bank*, (1896) 2 Ch. 851. Williams, J., decided that a transferee of shares of a company ordered to be wound up, who obtains his transfer with the liquidator's sanction, after the winding-up order, though he may be liable to indemnify his transferor, is not liable himself to be placed on the list of contributories, and that there is not a novation so as to make him personally liable in the winding-up proceedings.

PRACTICE—LEAVE TO SIGN JUDGMENT—JUDGMENT CREDITOR.

*In re Gurney, Clifford* v. *Gurney*, (1896) 2 Ch. 863. A creditor who had obtained an order giving him leave to sign judgment against his debtor, which order had not been acted on, nevertheless claimed to be entitled to prove his claim and rank against the debtor's estate which was being administered, as a judgment creditor, but Kekewich, J., held that he was not entitled so to do.

COPYRIGHT—INFRINGEMENT OF COPYRIGHT—IMPORTATION OF COPIES PRINTED ABROAD UNDER FOREIGN COPYRIGHT.

*Pitt Pitts* v. *George*, (1896) 2 Ch. 866, is the only remaining case to be noted. It was an action to restrain the infringement of the plaintiffs' British international copyright. The alleged infringement consisted in importing into England copies of a book printed in Germany, where the book

was first printed, by the owner of the German copyright. Kekewich, J., refused to grant the injunction, but the Court of Appeal (Lindley, Lopes and Rigby, L.JJ.) reversed his decision and held that the effect of 7 & 8 Vict. c. 12, s. 3, is to apply to books which are the subject of British International copyright the provisions of the earlier statute, 5 & 6 Vic. c. 45, ss. 15, 17, and that as under the latter section the owner of the copyright could, if the book were first published in England, have restrained the importation of copies printed abroad, so the owner of the British international copy could do so, notwithstanding the book had been first published abroad.

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TRADE-NAME INFRINGEMENT.—The Chicago *Legal News* notes an interesting decision in *Mossler* v. *Jacobs*, 5th November (1896), by the Appellate Court there, as to what is an illegal imitation of a trade-name. The application was to restrain the use of the words "Six Big Tailors" as a trade name at the suit of the proprietors of a store advertising as the "Six Little Tailors." Judgment was given in favor of the plaintiffs on the ground that "the use of the words 'Six Big Tailors' was calculated to deceive the unwary; that confusion was likely to arise therefrom, and thus that purchasers might be entrapped into buying what they did not intend, that is, goods of appellants, when intending to buy of complainants. The appellants doubtless chose the name of 'Six Big Tailors,' with the thought that by adoption of a very similar name, they could avail themselves of the reputation of a rival. While it did not appear that any one had been deceived, it was sufficient that it was probable customers would be deceived and misled."

# CORRESPONDENCE.

## DAMAGES FOR BREACH OF CONTRACT.

*To the Editor of the Canada Law Journal.*

DEAR SIR,—A case recently argued before the Supreme Court of Nova Scotia seems to raise an entirely new point and one of great importance.

A, the plaintiff, the owner of a tug, made a contract with B, the defendant, a machinist, for a boiler for their tug, to be delivered by April 28th, when navigation opened, it being understood by both parties to the contract that the tug would be useless to plaintiff without the boiler. Under similar circumstances, the plaintiff also made a separate contract with C for an engine for the tug to be delivered at the same time. C made a sub-contract with defendant to furnish him with the castings for the engine which he was to construct for the tug.

Both B and C broke their contracts, and failed to deliver the boiler or engine for upwards of two months after the stipulated time. At the trial it was proved that C's breach was due soley to the fact that the defendant failed to furnish the castings for the engine according to his sub-contract with C. The plaintiff, by reason of the non-delivery of the boiler and engine, was unable to use his tug, and sued B for what the boat would have earned during the period of the delay, which was shown to be about $1,500.

The plaintiff claimed that the defendant was responsible for all the damages sustained, and the contention of his counsel was that the rule followed in the case of torts should be adopted, viz., that where two concurring acts of negligence produce damage, and it is impossible to show the damage referable to each, that either one or both of the tort feasors can be made responsible for the whole of the resulting damage. They cited, among other, the following cases: *Slater* v. *Mesereaux*, 64 N.Y. 147; *Burrows* v. *March Gas Co.*, L. R. 5 Ex. 67, and 7 Ex. 96; *Eaton v. Boston & L. R. Co.*, 11

Allen (Mass.) 50[illegible]; Beven on Neg. (2nd ed.), p. 90; Bigelow's Leading Cases on Torts, 611, etc., etc. It was also contended that to allow B. to set up the fact that the tug had no engine, would simply be permitting him to take advantage of his own breach of contract with C.

The contention of the counsel of the defendant was that plaintiff could recover such damage only as he could clearly show followed from defendant's breach of contract, i.e., the use of the tug without an engine, and he relied on *Hadley* v. *Baxendale*, 9 Exch. 341; *Gee* v. *Lan. & York. R. Co.*, 6 H. & N. 210; *McMann* v. *Field*, 7 Q.B.D. 591; L.R. 1 Exch. 185; 57 Penn. St. Rep. 209 (1895); 2 Q.B. 688, etc.

It was pointed out by plaintiff's counsel that if plaintiff could not recover from defendant for the loss of his tug that the same defence would be open to C., and thus the plaintiff by reason of having made two contracts was left practically without any remedy whatever. They put this case to the Court: Suppose a man to be the owner of a valuable marsh enclosed by a dyke which has two holes in it. He makes a contract with A. to repair one and with B to repair the other, and both are to complete their work by a certain time, when it is well understood by all parties that if the dyke is not repaired the tide will flood the marsh and destroy the crop. Both A and B break their contracts. Cannot the owner of the marsh recover the whole of his damage against either or both, or can A or B when sued, say "I admit a breach of contract, but the measure of damages is the loss sustained, which you can show was caused solely by my breach, i.e., simply nominal, because the marsh would have been flooded and the crop destroyed just the same by the breach of the other contract."

Only a brief outline of the argument, of course, here is given, but the writer would suggest that if the point is entirely novel, as was stated by the counsel for the plaintiff, it is a most interesting one, and this statement of the case is given in the hope that you or some of your readers may be able to throw some light on the point.

LEX.

Halifax, N.S., January 25th, 1897.

# REPORTS AND NOTES OF CASES

## Dominion of Canada.

### EXCHEQUER COURT.

BURBIDGE J.] [Jan. 11.

GOODWIN *v.* THE QUEEN.

*Public works—Contract—Progress estimate—Satisfaction of engineer—How to be expressed.*

Claim for moneys alleged to be due upon a contract with the Crown for the construction of a public work. By clause 25 of the claimant's contract it was, inter alia, provided that certain monthly cash payments should be made to the contractor as the work progressed, "on the written certificate of the engineer that the work for, or on account of which the certificate is granted, has been duly executed to his satisfaction."

*Held*, (following *Murray* v. *The Queen*, 26 S.C.R. 203) that unless the certificate expressly states that the work for which it had been given had been executed to the satisfaction of the engineer, it does not comply with the requirements of the contract.

*Osler*, Q.C., and *A. Ferguson*, Q.C., for the claimant.

*The Solicitor-General, C. H. Ritchie*, Q.C., and *F. H. Chrysler*, Q.C., for defendant.

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BURBIDGE, J.] [Jan. 18.

THE QUEEN *v.* ST. LOUIS.

*Prerogative—Res judicata—Effect of, when pleaded against the Crown.*

The doctrine of res judicata may be invoked against the Crown; and where a former judgment is pleaded to an information by the Attorney-General, such plea operates in the same way as in suits between subject and subject.

S., the defendant here, had first brought a petition of right seeking to recover certain moneys alleged to be due to him upon a contract. With its defence to the petition the Crown filed a counter-claim for the return of a larger sum of money than S. claimed in his petition, and which the Crown alleged had been improperly paid to him. By consent this counter-claim was withdrawn before judgment. The Exchequer Court dismissed the petition on the ground that S.'s claim was tainted with fraud. On appeal to the Supreme Court this judgment was reversed and S.'s petition allowed. The Crown then exhibited an information to recover the amount claimed by way of counter-claim to the original action.

*Held*, that the issues arising on the information being the same as those decided on the petition, the defendant's plea of res judicata must prevail.

*The Solicitor-General, Osler*, Q.C., and *Hogg*, Q.C., for the plaintiff.

*C. A. Geoffrion*, Q.C., and *J. U. Emard*, for the defendant.

BURBIDGE, J.] [Jan. 18.

AUER INCANDESCENT LIGHT CO. *v.* O'BRIEN.

*Patent of invention—Illuminant device—Infringement — Process — Result—Equivalents—Manufacture—Price—Importation.*

An inventor, in the specification to his first Canadian patent, after disclaiming all other illuminant appliances for burners, claimed:

"An illuminant appliance for gas and other burners consisting of a cap or "hood made of fabric impregnated with the substances hereinbefore mentioned "and treated as herein described." Eight years afterwards the owner of the original patent surrendered the same and obtained a re-issue, the specification whereof differed from that of the original only in respect of the claim, which was as follows:—"The method herein described of making incandescent "devices, which consists in impregnating a filament thread or fabric of com- "bustible material with a solution of metallic salts of refractory earths suit- "able when oxidized for an incandescent, and then exposing the impregnated "filament, thread or fabric to heat until the combustible matter is consumed."

*Held*, that inasmuch as the method or process claimed in the re-issue was described in terms identical with the description of the method or process claimed in the original patent, the mere use of the word "device" instead of the earlier word "appliance" did not enlarge the claim and so invalidate the re-issue.

2. Although in the process of manufacturing the hood or mantle of the illuminant described in the claim of the re-issue there were no words of reference or limitation to the refractory earths mentioned in the specification, yet the words "salts of refractory earths" occurring in the claim must be limited or restricted to such refractory earths as were mentioned in the preceding part of the specification, or to their equivalents.

3. That it was open to the owners of the patent to import the impregnating fluid mentioned in the specification of their patent, without violating the provisions of the law as to manufacture.

4. That although the plaintiffs had at the outset put an unreasonable price upon their invention, yet as it was not shown that during such time anyone desiring to obtain it had been refused it at a lower and reasonable price, the plaintiffs had not violated the provisions of the law as to the sale of their invention in Canada.

5. That it is not open to anyone in Canada to import for use or sale illuminant appliances made in a foreign country in accordance with the process protected by the plaintiff's patent.

*Semble*, inasmuch as the illuminant appliance which could be produced by the process described was a new and useful appliance, and as the process was also new, and useful for no other purpose than that to which the inventor has applied it, it is immaterial whether the patent was issued for the process by which the appliance was produced, or for the appliance produced by the process, or for both. The law would protect the inventor against an infringement in respect of either the precess or the appliance.

*I. F. Hellmuth* and *C. A. Duclos*, for the plaintiffs.

*J. E. Martin*, for the defendant.

# Province of Ontario.

## COURT OF APPEAL.

From DIVISIONAL COURT.] [Jan. 12.

BEATTIE *v.* WENGER.

*Bankruptcy and insolvency—Assignments and preferences—Pressure—Security—R.S.O. c. 124, s. 3, sub-sec. 3 and s. 19, sub-sec. 4.*

The doctrine of pressure may still be invoked in order to uphold a transaction impeached as a preference, when it is not attacked within sixty days or when an assignment for the benefit of creditors is not made within that time.

The liability of the endorser of a promissory note made by the debtor, held by the creditor for part of his debt, is not a "valuable security" within the meaning of sub-sec. 3 of s. 3 of R.S.O. c. 124, and if such a note is given up by the creditor to the debtor in consideration of a transfer of goods impeached as a preference, the liability cannot be "restored" or its value "made good" to the creditor or the endorser compelled to again endorse.

What is referred to in this sub-sec. is some property of the debtor which has been given up to him or of which he has had the benefit; some security upon which the creditor, if still the holder of it, would be bound to place a value under sub-sec. 4 of s. 19 of R.S.O., c. 124.

Judgment of the Divisional Court reversed.

*W. R. Riddell*, and *Mearns*, for the appellant, Wenger.

*W. C. McKay*, for the appellant, Campbell.

*Garrow*, Q.C., for the respondent.

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From ROBERTSON, J.] [Jan. 12.

JOHNSTON *v.* CATHOLIC MUTUAL BENEVOLENT ASSOCIATION.

*Benevolent society—Rule directing payment to named beneficiaries—Certificate payable to beneficiary's executors—Rights of creditors and legatees—R.S.O. c. 172.*

A certificate issued in favor of an unmarried man by a benevolent society incorporated under R.S.O. c. 172, directed payment to his executors. The rules of the society required the beneficiary to be named in the certificate, and in default provided for payment to certain named relations of the member, or his next of kin, or to the beneficiary fund of the society.

*Held*, MACLENNAN, J.A., dissenting, that the beneficiary fund did not pass to the member's executors under his will, and that neither creditors nor legatees could claim it, but that the case must be looked upon as one of default of appointment, and the money applied as directed by the rules.

Judgment of ROBERTSON, J., affirmed.

*Parkes*, for the appellants.

*Shepley*, Q.C. and *Campion*, Q.C., for the respondents.

From STREET, J.] [Jan. 12.

MCKIBBON *v.* WILLIAMS.

*Improvements under mistake of title—Mortgage by person making them—Enforcement thereof against true owner—Interest—Set-off of rents and profits—Occupation rent—Assigns—R.S.O., c. 100, s. 30.*

A purchaser of land made lasting improvements thereon under the belief that he had acquired the fee, and then made a mortgage in favor of a person who took in good faith under the same mistake as to title. Subsequently it was decided that the purchaser had acquired only the title of a life tenant. The mortgagee was never in possession.

*Held*, 1. That the mortgagee was an "assign" of the person making the improvements within the meaning of s. 30 of R.S.O., c. 100, and had a lien to the extent of his mortgage, which he was entitled to actively enforce.

2. That the value of the improvements should be ascertained as at the date of the death of the tenant for life, and that there should be as against the mortgagee a set-off of rents and profits, or a charge of occupation rent only from that date till the date of the mortgage.

3. That interest should be allowed on the enhanced value from the date of the death of the tenant for life.

Judgment of STREET, J., affirmed.

*J. W. Nesbitt*, Q.C., for the appellants.

*W. S. McBrayne*, for the respondent Williams.

*H. Cassels*, for the respondent McKibbon.

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From BOYD, C.] [Jan. 12.

IN RE FERGUSON, BENNETT *v.* COATSWORTH.

*Will—Construction—"My own right heirs"—Condition precedent.*

A testator, who left him surviving his widow and one daughter, devised by his will specifically described property to his daughter, and devised the residue of his estate to his executors upon trust for his widow and daughter in certain events, with limited power to the daughter to dispose thereof by will. He then directed that "in case my daughter shall have died without leaving issue her surviving, and without having made a will as aforesaid, my trustees shall (after the death of my wife, if she survive my said daughter,) sell all my estate, real and personal, and divide the same equally amongst my own right heirs, who may prove to the satisfaction of my said trustees their relationship within six months from the death of my said wife or daughter, which ever may last take place."

The daughter died unmarried in her husband's lifetime, having made a will assuming to dispose of the residue.

*Held*, that the daughter was entitled to take as the "right heir" of the testator.

*Bullock* v. *Downes*, 9 H.L.C. 1; *Re Ford, Patton* v. *Sparks*, 72 L.T.N.S. 5; *Brabant* v. *Lalonde*, 26 O.R. 379; and *Thompson* v. *Smith*, 23 A.R. 29, referred to.

MACLENNAN, J.A., held also that upon the language of the will, apart

from the clause above set out, the daughter took in fee, subject to the widow's rights, and that failure to make a will was a condition precedent to this clause taking effect.

Judgments of BOYD, C., in *Coatsworth* v. *Carson*, 24 O.R. 185, and *In re Ferguson, Bennett* v. *Coatsworth*, 25 O.R. 591, set aside upon grounds not argued before him.

*Macklem*, for the appellant.

*Moss*, Q.C., *W. Mortimer Clark*, Q.C., *J. W. McCullough*, *J. R. L. Starr*, and *F. E. Hodgins*, for different classes interested.

## HIGH COURT OF JUSTICE.

MEREDITH, C.J., ROSE, J., MACMAHON, J. [Jan. 12.

RUSSELL *v.* FRENCH.

*Mechanics' liens—Materials—Extent of lien—Drawback—59 Vict., c. 35. s. 6.*

In an action to enforce a mechanics' lien for materials, it appeared that $373.20 was due to the plaintiff by the contractors. The contract price was $2,358. After work had been done under the contract to the certified value of $1,593.75, of which the owners had paid $1,275 to the contractors and $23.20 to wage-earners on preferred claims, the contractors were dismissed under the terms of the contract, and the owners completed the work at a cost of $933.

*Held*, that the plaintiff was entitled under s. 10 of the Mechanics and Wage-Earners' Lien Act, 1896, 59 Vict., c. 35, to a charge upon a fund calculated at twenty per cent. on $1,593.75, after deducting $23.20.

Since the alteration in the law by s. 6, the cases of *Goddard* *Coulson*, 10 A.R. 9; *Re Cornish*, 6 O. R. 259, and *Re Sear and Woods*, 23 O. R. 474, are no longer applicable.

*J. H. Denton*, for the plaintiff.

*Snow*, for the defendants Carroll et al.

MEREDITH, C.J., MACMAHON, J.] [Jan. 12.

COUSINS *v.* CRONK.

*Amendment—Order of court—Accidental slip or omission—Rules 536, 780—Carelessness—Delay—Terms.*

In an action for the recovery of land, one of the defendants alleged that he was not and never had been in possession, and disclaimed title. At the trial the action was dismissed as against all the defendants with costs. This was reversed by a Divisional Court upon appeal, and all of the defendants except an infant, were ordered to pay the plaintiff's costs. The disclaiming defendant was not represented upon the appeal, being advised that he was not concerned in or affected by it. His position was not brought to the notice of the Court, and the order proceeded upon the hypothesis that the position of all the adult defendants was the same. His solicitors were served with minutes of the order containing the above direction as to costs, but he was not

represented upon the settling of it, and took no steps to correct the error until some months afterwards, when his goods were seized under an execution for the costs.

*Held*, upon a motion to amend or vary the order as to costs, that the Court, in the exercise of its inherent powers over its records, or the powers conferred by Rule 780, could correct an error arising from an accidental slip or omission in its order; and could now make the order as to the applicant's costs, which would have been made originally had attention been called to his position and the nature of his defence.

*Held*, also, that he was entitled to relief under Rule 536, as amended by Rule 1454, as a party who, through mistake, has not been represented upon the argument of the appeal.

*Held*, also, that the carelessness and delay of the applicant did not disentitle him to relief, though they afforded ground for imposing terms upon him. And the Court, being of opinion that his defence was sustained by the evidence at the trial, amended the order by excluding him from the direction as to payment of the plaintiff's costs by all the adult defendants, and by inserting a provision that the Court did not see fit to make any order as to his own costs, upon payment by him of the costs of the application and the sheriff's fees, and upon his undertaking to bring no action against the plaintiff or the sheriff for anything done under the execution.

*Masten*, for the applicant.

*W. R. Riddell*, for the plaintiff.

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From STREET, J.] [Jan. 12.

FAULKNOR *v.* CLIFFORD.

*Jury—Findings—Failure to answer question—Effect of—Judgment—New trial—Right to, without motion for.*

At the trial of an action for negligence, causing the death of a servant of the defendants, the jury, in answer to questions, found that the defendants were guilty of negligence which caused the accident, and assessed the plaintiff's damages, but disagreed as to and did not answer a question put to them as to whether the deceased, with knowledge of the danger, voluntarily incurred the risks of the employment.

*Held*, that judgment could not, under these circumstances, be entered either for the plaintiffs or the defendants.

Decision of STREET, J., affirmed.

*Held*, also, that as soon as a judgment was given, to which both parties yielded, no judgment could be given for either of them on the findings. There was an end of the trial, and either party was at liberty to give a new notice of trial and again to enter the action for trial, as upon a disagreement of the jury, without moving to set aside the findings and for a new trial.

Decision of STREET, J., reversed.

*McDermott* v. *Grout*, 16 P.R. 215, approved.

*Stevens* v. *Grout*, ib., 210, overruled.

*McBrayne*, for the appellants.

*Lynch-Staunton*, for the respondents.

STREET, J.] [Jan. 13.

IN RE BENFIELD AND STEVENS.

*Interpleader — Jurisdiction — Mining agreement — Construction — Lease or license—Foreigners—Foreign debt.*

Under an agrement with respect to a mining property in this Province, payment was to be made in a foreign country to foreigners residing therein, their second mortgagees in possession, by a person also residing therein, of a sum of money for each ton of ore mined by him. A large sum due under the terms of this agreement was claimed by the payees named in it, and also by the first mortgagee of the property, who was in the jurisdiction.

*Held*, that upon the true construction of the agreement, it was a mere license to mine, not conferring an exclusive possession of the property, and a mere agreement for the sale and purchase of the ore when mined; and therefore the first mortgagee had no right of action for the money, but, at the most, only a claim for unliquidated damages for the wrongful removal of ore; and the licensee was not entitled to an interpleader order.

*Held*, also, affirming the decision of the Master in Chambers, 17 P.R. 300, that the Court had no jurisdiction to compel foreigners to come here with their claim and litigate it, the debt in question having no existence here.

*Credits Gerundeuse* v. *Van Weede*, 12 Q.B.D. 171, distinguished.

*W. E. Raney*, for Benfield, the appellant.

*W. H. Biggar*, for Richardson, the claimant.

*J. Bicknell*, for Stevens et al., the respondents.

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MEREDITH, C.J., ROSE, J., MACMAHON, J. [Jan. 14.

COTE *v.* HALLIDAY.

*Division Court—Appeal—R.S.O., c. 51, s. 148—Appeal direct from judgment at trial—Jurisdiction—Costs.*

An appeal by the plaintiffs from the judgment of the 9th Division Court in the County of Huron, dismissing, as against the defendant Hunter, an action upon a promissory note.

*Held*, that there was no jurisdiction to hear the appeal, because it was taken directly from the judgment at the trial, and not from an order upon an application for a new trial: s. 148 of the Division Courts Act, R.S.O., c. 51.

*Held*, also, that this Court had jurisdiction, in quashing the appeal for want of jurisdiction, to give costs to the opposing party who raised the objection to the jurisdiction.

Appeal quashed with costs settled and allowed at $10.

*Clute*, Q.C., for the plaintiffs.

*D. Armour*, for the defendant Hunter.

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MEREDITH, C.J., ROSE, J., MACMAHON, J. [Jan. 15.

PARKES *v.* BAKER.

*Security for costs—Public officer—59 Vict., c. 18, s. 7—Pleading—Affidavits.*

Where a person who holds a public office is made defendant in an action, the pleadings must be looked at to determine whether he is sued in his

capacity of a public officer, and so entitled to security for costs under s. 7 of the Law Courts Act, 1896; and if the pleadings are of such a character that the case cannot on them go to the jury against the defendant as a public officer, he cannot claim the protection of the statute, even where he shows by affidavits that his sole connection with the matters alleged against him was in his public capacity.

*C. J. Holman*, for the plaintiff.

*R. McKay*, for the defendant Northmore.

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ARMOUR, C.J., FALCONBRIDGE, J. [Jan. 16.

MCVEAIN *v.* RIDLER.

*Arrest—Discharge—Order for—County Court—Appeal—Divisional Court—Rule 1051—Intent to quit Ontario—Intent to defraud creditors.*

Upon an appeal by the plaintiff from an order of the Judge of a County Court, in an action in that Court, discharging the defendant from the custody of his bail, it was objected by the defendant that the order was not a final one, and that no appeal lay.

*Held*, that the Court had, by Rule 1051, jurisdiction to discharge or vary the order, as explained in *Elliott* v. *McCuaig*, 13 P.R. 416.

*Held* also upon the evidence, that the defendant should not have been discharged from custody.

*Toothe* v. *Frederick*, 14 P.R. 287, not followed, having been practically overruled by *Coffey* v. *Scane*, 22 A.R. 269.

*D. R. McLean*, for the plaintiff.

*John MacGregor*, and *T. E. Williams*, for the defendant.

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ARMOUR, C.J., FALCONBRIDGE, J., STREET, J. [Jan. 18.

GRANT *v.* COOK.

*Judgment debtor—Examination—Right to issue appointment for.*

A judgment creditor is prima facie entitled to issue an appointment for the examination of his judgment debtor; and upon a motion to commit the latter for refusal to be sworn, it is for him to show affirmatively that the issue of the appointment was an abuse of the process of the Court.

*Tremeear*, for the plaintiff.

*J. J. Warren*, for the defendant.

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BOYD, C. [Jan. 25.

IN RE MCDONALD *v.* DOWDALL.

*Prohibition—Division Court—Interest—Splitting demand—R.S.O., c. 51, s. 77.*

Where the plaintiff sued in a Division Court for $100 interest upon moneys deposited with the defendants, and it appeared that she had treated the deposit receipt in her hands as one upon which the whole sum was past due and collectable.

*Held*, that the action came within s. 77 of the Division Courts Act, R.S.O., c. 51, whereby the splitting of causes of action is forbidden ; and prohibition was granted.

*In re Clark* v. *Barber*, 26 O. R. 47, followed, but commented on as irreconcilable with such cases as *Dickenson* v. *Harrison*, 4 Pri. 282, approved in *Attwood* v. *Taylor*, 1 M. & G. 307.

*J. E. Jones*, for the defendant Kirkland.

*Masten*, for the plaintiff.

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MEREDITH, C. J.] [Jan. 29.

WALTERS *v.* DUGGAN.

*Security for costs—Præcipe order—Motion to set aside—Security for costs of —Rule 1251.*

A plaintiff may move to set aside a præcipe order requiring him to give security for costs, notwithstanding the stay of proceedings imposed thereby, without giving security for costs ; and, where his writ of summons is specially indorsed, he is not compelled to follow the procedure indicated in Rule 1251, which is inapplicable unless he is moving for summary judgment under Rule 739.

*Thibaudeau* v. *Herbert*, 16 P.R. 420, distinguished.

*R. H. R. Munro*, for the plaintiff.

*W. R. Smyth*, for the defendant.

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BOYD, C.] [Jan. 30.

CAMERON *v.* MCLEAN.

MONES *v.* MCCALLUM.

*Receiver—Equitable execution—Administration action—Status of receiver—Parties—Judgment ditor—Addition of—Rule 324 (b.)*

A receiver appointed by way of equitable execution has no greater rights of action than persons for whom he is receiver, and if the judgment creditor can not proceed to administer an estate in order to make available the interest of his judgment debtor as a beneficiary therein, no more can the officer of the Court styled the receiver ; nor can the Court compel the judgment debtor to help his creditor to recover the fruits of an adverse judgment, either by adding him without his consent as a co-plaintiff in an action brought by the receiver for administration—against doing which Rule 324 (b) is conclusive—or by allowing the receiver to bring a new action in the name of the judgment debtor for the same purpose.

*Stuart* v. *Grough*, 14 O.R. 257, and *McLean* v. *Allen*, 14 P.R. 290, not followed.

*Allen* v. *Furness*, 20 A.R. at p. 40 ; *In re Potts*, 10 Mor. B.C. at p. 66 ; and *Flegg* v. *Prentiss*, (1892) 2 Ch. at p. 430, specially referred to.

*McGuin* v. *Fretts*, 13 O.R. 703, and *Bank of London* v. *Wallace*, 13 P.R. 176, distinguished.

*Idington*, Q.C., for the plaintiff, Cameron.

*E. R. Cameron*, for the defendant, McLean.

# Province of Nova Scotia.

## SUPREME COURT.

Full Court.] [Jan. 2.

THE QUEEN *v.* MAJOR.

*N. S. Liquor License Act of 1886—Affinity between magistrate making conviction and prosecutor—Held no disqualification—Certiorari—Acts of 1889, c. 17, s. 7—Objection as to want of affidavit not entertained after issue and return of writ—Defect of form—Conviction not set aside for.*

Motion to quash a conviction made by the Stipendiary Magistrate of the city of Halifax, against defendant for a violation of the N. S. Liquor License Act of 1886. The main ground upon which the conviction was attacked was relationship existing between the magistrate making the conviction and the chief inspector of licenses, who was the informant and prosecutor in the proceedings in which the conviction was made, they having married sisters.

*Held*, that the affinity existing between the magistrate and the inspector, under the circumstances disclosed by the affidavits, did not disqualify the magistrate from hearing the case, or render the conviction void.

"In no case instituted for breach of the Liquor License Act of 1886 . . . shall a writ of certiorari issue unless the party applying therefor shall make affidavit that he did not . . . sell the liquor contrary to law, as charged in the information, etc." Acts of 1889, c. 17, s. 7.

*Held*, that an objection on the part of the prosecution to the absence of the affidavit was not available after the certiorari had been issued and returned.

*Held*, also, that objection to the form of the conviction was not sufficient ground for quashing it.

*Harrington*, Q.C., in support of motion.

*D. K. Grant*, contra.

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Full Court.] [Jan. 12.

IMPERIAL BANK OF CANADA *v.* MOTTON.

*Pension to civic official—Held available for payment of debts—Appointment of receiver ordered—Equitable execution—Circumstances under which it may be ordered—N.S. Acts of 1895, c. 43.—Acts 1889, c. 9, ss. 26—29.*

Defendant, under the provisions of the N.S. Acts of 1895, c. 43, was entitled to a pension of $1,000 per annum during his life, to be assessed annually upon the ratepayers of the City of Halifax, and to be paid out of the city revenue.

The pension was given in consideration of services which had been rendered by defendant as Stipendiary Magistrate of the city, on his retirement from that office, when his official connection with the city ceased. Defendant was not liable to be called upon to perform any further duty for the city, either official or personal. There was nothing in the Act under which provision for payment of the pension was made prescribing the time and mode of payment to defendant, nor was there anything to prevent him from assigning it.

*Held*, that defendant's pension could be made available for the payment of his debts.

*Held*, also, that as defendant was residing out of the jurisdiction of the Court, and had no property within the jurisdiction, and the ordinary modes of execution were not available, plaintiff was entitled to the appointment of a receiver.

*Held* also, that since the passage of the Judicature Act (R.S. 5th series, c. 104) the Court has power to grant equitable execution by the appointment of a receiver, at the instance of a judgment creditor, against debts and sums of money payable to the judgment debtor in cases where the garnishee process is not applicable.

*Held*, also, that this was clearly a case for the exercise of such power.

*Semble*, that the County Court had power to grant such equitable relief under Acts of 1889, c. 9, ss. 26—29.

*Sedgewick*, for plaintiffs.

Nem. con.

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Full Court.] [Jan. 12.

GOULD *v.* BLANCHARD.

*Solicitor and client—Negligence in conduct of business—Loss of notes—Liability for—Measure of damages—Note returned to plaintiff after payment to solicitor—Liability of solicitor for damages resulting from unsuccessful action on note—Evidence—Burden of proof.*

Defendant, a solicitor, received a number of accounts and promissory notes for collection on account of plaintiff. In an action by plaintiff for the amount of one of the notes which, it was alleged, had not been collected or returned,

*Held*, that defendant, having admitted the receipt of the note, was bound to collect or return it, or else account for its loss on grounds relieving him from blame, and that, not having done so, he was accountable for the loss of the note and for all damages resulting therefrom.

*Held*, also, that negligence on the part of defendant having been shown, the damages were rightly fixed at the face of the note and interest, that being, prima facie, the value of the note.

In an action brought by plaintiff against C. it appeared that the amount claimed had been previously paid by C. to defendant, who was acting at the time as plaintiff's solicitor.

*Held*, that defendant was responsible to plaintiff for damages in connection with the unsuccessful result of the action against C., he having returned the note to plaintiff, but omitted to inform him of the fact that payment had been made.

At the time of the payment made by C. to defendant the latter held a claim of M. against C., and the defence to plaintiff's action was that the amount paid by C. was appropriated towards payment of M's. claim.

Per HENRY, J., dissenting,

*Held*, that the mere receipt of the money by defendant from C, under the

circumstances stated, did not relieve plaintiff from the burden of showing that the payment was made on his account, and, the evidence being conflicting, that he had failed to do so.

*J. A. Chisholm*, for plaintiff.

*Drysdale*, Q.C., for defendant.

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Full Court.] [Jan. 12.

ARTHUR ET AL. *v.* YEADON.

*Promissory notes—Collateral security for debt represented by—No defence to action unless it is alleged that further time was given in consequence.*

Defendants pleaded as a defence to an action on certain promissory notes that a chattel mortgage had been given and accepted as collateral security for the debt represented by the notes, but it was not alleged that, in consequence of the giving of the security, further time was allowed.

*Held*, that the plead was not a defence to the action on the notes.

*Held*, also, that the defence was properly struck out under O. 25, Rules 2 and 3, as being bad and insufficient in law.

*J. M. Chisholm*, for plaintiff.

*Ritchie*, Q.C., for defendant.

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Full Court.] [Jan. 12.

O'DELL *v.* THE BOSTON & N. S. COAL CO., LTD.

*Company—Held not liable on joint and several contract made by provisional directors—Ratification and implied contract—Payment for services not evidence of—Statement of claim—Where based wholly on special contract, party cannot recover on implied contract.*

Plaintiff claimed damages from the defendant company for wrongful dismissal on the ground that he was employed under a special agreement, which had not terminated when his services were dispensed with.

The agreement was in these words, "We, the undersigned, jointly and severally promise and agree to engage and hire C.M.O., engineer, for the period of one year from this date, at a salary of $250 per month, the services to be performed by the said C.M.O. to be in connection with railway and other surveys."

The agreement was dated May 8th, 1893, and was signed by three of the corporators and provisional directors of the defendant company, which was incorporated by an Act of the legislature of Nova Scotia, passed the 28th April, 1893.

The company was not organized until August, 1893, when the provisional directors, of whom there were five named in the Act, in addition to those who signed the agreement, met for the first time.

The directors who signed the agreement with plaintiff set him to work locating the line of the railway in May, 1893. Up to October of that year he was paid by R., one of such directors, but, after that date, the company assumed control of the work, and plaintiff was paid out of the treasury of the company. His employment continued up to the end of June, 1894, when he was notified by the treasurer that his services would be dispensed with, and he

was paid in full up to that date. There was no resolution of the board either in regard to his appointment or dismissal.

*Held*, that the contract of May 8th, 1893, was merely a joint and several contract of the directors who signed it, and not a contract binding upon the company, and that the directors who signed that contract had no power to bind the company, even if they so intended.

*Held* also, that the payments made to plaintiff by the treasurer of the company were not evidence of ratification of the contract of May 8th, and would not be evidence of an implied contract of general hiring.

*Held*, also, that plaintiff could not recover on a general contract, even if such a contract could be implied, his claim being based entirely upon the contract of May 8th, 1893.

McDONALD, C.J., dissented.

*Kenny*, for plaintiff.

*Ritchie*, Q.C., for defendant.

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Full Court.] [Jan. 12.

CROWE *v.* CRAIG ET AL.

*Trustee—Negligence in management of trust property—Held liable for misappropriation by co-trustee.*

The defendant C. allowed M. to have the entire management of property of which they were co-trustees, and apart from signing releases when he was asked to do so by M., and from time to time asking what had been done with the money, did not interfere in any way, M. having misappropriated funds belonging to the estate,

*Held*, that C. was personally responsible.

*Lovitt*, for plaintiff.

*McInnes* and *Kenny*, for defendant.

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Full Court.] [Jan. 12.

CHISHOLM *v.* THE CITY OF HALIFAX.

*Municipal corporation—Agreement to restore property to original condition—Evidence of omission to do so—Necessary incident of work.*

The defendant corporation constructed a pipe line through plaintiff's property under an agreement which required the soil removed for the purpose of laying the pipes to be "well and sufficiently closed up," and the land and premises so broken up to be "made good." The evidence showed that in places the soil covering in the pipes was from two to two and a half feet above the original level.

*Held*, that this was not a sufficient compliance with the terms of the agreement. But,

*Held* also, that the use of stones in filling up the trench, which interfered to some extent with the plowing and cultivation of the surface, was a necessary incident of the construction of the line.

*Harrington*, Q.C., for plaintiff.

*McCoy*, Q.C., for defendant.

# Province of New Brunswick.

## SUPREME COURT.

BARKER, J., In Equity. [Dec. 19, 1896.

MOREHOUSE *v.* BAILEY.

*Practice—Injunction—Undertaking as to damages—Dismissal of bill.*

A plaintiff had obtained an ex parte injunction on giving an undertaking as to damages. The injunction was afterwards dissolved.

*Held*, that the defendant can proceed under the undertaking and have damages assessed after bill dismissed; the undertaking not being a proceeding in the suit can be acted on after suit dismissed.

*Wilson*, for plaintiff.

*Bliss*, for defendant.

[Please cancel note of this case on p. 88, and read this instead.—Ed. C.L.J.]

VANWART, J. In Chambers. Feb. 2.

SCHOFIELD *v.* CROCKET.

*Justices' Court—Con. Stat., c. 60, s. 25—Power of justice to adjourn court—Promissory note—Bills of Exchange Act, s. 59, sub-sec. (a).*

This was a review from City of Fredericton Civil Court, on the grounds (1) that the plaintiffs could not maintain an action on the draft which had been drawn by them upon the defendant requesting him to pay the amount to the Merchants Bank of Halifax or order, and duly accepted by defendant but not paid, without the draft being indorsed to the plaintiffs; (2) that the Justice adjourned his Court from the 10th to 12th November at the request of counsel of the plaintiffs, without any affidavit as required by law, and thereby lost jurisdiction in the case.

*Held*, that the words of the Bills of Exchange Act, 1890, s. 59, sub-sec. (a), are intended to meet such a case. *Simmonds* v. *Parmenter*, 1 Wils. 185, followed.

*Held*, also that the authority of the Justice to grant adjournments is regulated by Con. Stat., c. 60, s. 25, which enacts, "a justice may adjourn his Court from day to day if necessary to finish the business before the Court; he may also, for the absence of material and necessary witnesses or other good reason, when made to appear on affidavit, adjourn the hearing of a case till a day later than the day succeeding." The learned Judge said: "I think, independently of the statute, a justice would have power to adjourn his Court from day to day to enable him to finish the business of his Court. It is a common law right, inherent in the Court. There is, however, legislation (Con. Stat., c. 118), which enacts that 'authority to a justice of any Court to do an act, shall empower any other justice of the same Court to act in his stead when necessary, and authority to hear shall include power from time to time to adjourn.' Entertaining some doubt about the effect of the provision, I have consulted

with the other members of the Court, and a majority of them at least think the justice has power, for the absence of a material and necessary witness, to adjourn for a longer period than from one day to the next, and that it is not necessary that it should appear by affidavit that the witness is necessary and material, for he may have this information from the proceedings of the trial. I think, however, this power should be exercised with great care, and when the trial has begun ought not to be exercised unless under very exceptional circumstances".

*W. VanWart*, Q.C., for plaintiff.

*O. S. Crocket*, for defendant.

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# Province of British Columbia.

## SUPREME COURT.

McCREIGHT, WALKEM, and DRAKE, JJ. [Nov. 5, 1896.

CANADIAN PACIFIC R. C. *v.* PARKES ET AL.

*Practice - Right to jury—Rules 81, 329, 330, 333 and 334.*

This was an appeal by the defendants from an order of the Local Judge of the Supreme Court at Vancouver refusing, a jury. The action was one for a perpetual injunction restraining the defendants from using, or using in such a negligent way as to damage the plaintiffs' railway, water conducted on defendants' farm for irrigation purposes.

*Held*, that as the case in question was such a one as most probably would call for a view, and a view by a judge was unsatisfactory, and upon consideration of the facts at issue upon the pleadings, a proper discretion to be exercised would be to set aside the order appealed from and direct that the trial be had with a jury.

Appeal allowed with costs.

*Davis*, Q.C., for plaintiffs.

*McPhillips*, Q.C., for defendants.

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WALKEM, J.] [Jan. 22.

POSTILL ET AL. *v.* TRAVES.

*Jurisdiction of local judge of the Supreme Court - Rule 1075 - Rule of 16th December, 1892 - Supreme Court Amendment Act, 1894.*

By Rule of 16th December, 1892, made under 1891, c. 8, and published in *B. C. Gazette* for 1892, at page 1230, it is provided that "Until further order the Local Judge of the Supreme Court of British Columbia for the County Court District of New Westminster shall, within his territorial jurisdiction, in any action, suit, matter or proceeding in the Supreme Court, have and be possessed of the same powers and jurisdiction as are now or can hereafter be exercised by any Judge of the Supreme Court of British Columbia."

By s. 2 of the Supreme Court Amendment Act, 1894, the territorial juris-

diction of the Judges of the several County Courts as Local Judges of the Supreme Court is co-extensive with any jurisdiction they may lawfully exercise as Judges or acting Judges of any County Court.

This was a motion to set aside an order for judgment made at Vancouver by the Local Judge for the County Court District of New Westminster, granting leave to the plaintiffs to sign final judgment against the defendant, and also to set aside the judgment signed in pursuance thereof on the ground that the Local Judge sitting at Vancouver had no jurisdiction to make the order, the writ of summons in the action having been issued from the Registry at Kamloops, in the County Court District of Yale.

*Held*, that the Local Judge sitting within his own jurisdiction under Rule of 16th December, 1892, may deal with an application irrespective of the fact that the action belongs to another Registry—the practice under this Rule differing in this respect from that under Rule 1075.

Motion dismissed with costs.

*P. E. Irving*, for plaintiffs.

*Robert Cassidy*, for defendant.

## FLOTSAM AND JETSAM

Lord Justice Lindley would like to add a new petition to the Litany: 'From lady litigants good Lord deliver us!" But there may be worse things than lady litigants. Lord Norbury, of Irish fame, for instance, had in his Court a monomaniac whose delusion was that he was the Chief Justice, and Lord Norbury an imposter. Long and good-naturedly did the Chief Justice tolerate the would-be usurper, till he threatened, and was proceeding, to depose the Chief Justice from the Bench. Then at last he had to appeal to the usher: "Jackson, turn *Lord Norbury* out of Court!" This reminds us of a story by Dean Ramsay of a Scotch minister, who, on going to preach, found the pulpit in the possession of the village idiot—so called, but with a glimmering of mother wit. "Come down, sir, at once!" said the irate minister. "Na, na, minister," responded the droll; "just come up beside me. A faithless and perverse generation needs the baith of us."—*Law Journal.*

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A London jury performed a thoroughly good feat in the variation of verdicts recently. A former pauper was indicted for stealing the suit of clothes in which he left the workhouse. The first verdict the jury returned was this: "We find that the prisoner is not guilty of stealing the clothes, and that he admitted his guilt (before the magistrate) through ignorance. We strongly recommend him to mercy because he has done honest work for eighteen months." But the Judge refused to accept a plea of mercy for a crime which was never committed, and sent the jury back to redraft their verdict. After an hour the foreman came back and said: "We have very reluctantly brought the prisoner in guilty, but we unanimously and strongly recommend him to mercy.—*Law Journal.*

## LAW SOCIETY OF UPPER CANADA.

### MICHAELMAS TERM, 1896.

TUESDAY, Nov. 17.

Present: Between 10 and 11 a.m. Dr. Hoskin, and Messrs. Bell, Hogg, Britton and Bayly; and in addition, after 11 a.m., Messrs. Martin, Strathy, Edwards, Ritchie, Teetzel, Robinson, Watson, Guthrie and the Attorney-General, Hon. A. S. Hardy.

Dr. Hoskin, in the absence of the Treasurer, was appointed Chairman.

The minutes of last meeting were read and confirmed.

Ordered that the following gentlemen be called to the Bar, and do receive their certificates of fitness: J. L. Killoran, L. J. Reycraft, and that Mr. P. White, jun., do receive his certificate of fitness.

On motion of Mr. Bayly, seconded by Mr. Martin, ordered that upon a special rule being passed, repealing for this case Rule number 220 requiring notice, etc., prior to call, the application of Hon. Charles Fitzpatrick, a member of the Bar of Quebec for Call to the Bar of this province, be granted, and that upon the production to Convocation of a certificate of Call to the Bar of Quebec, and the testimonials required by sub-sec. 5 of s. 1, R.S.O. 146, Hon. Charles Fitzpatrick, Solicitor-General, be called to the Bar of this province, and that the fees payable upon such call be remitted or waived by the Society.

Moved by Mr. Strathy, seconded by Mr. Bell, that Rule 220, sub-secs. 1 and 3, Rule 222, and that portion of Rule 232, relating to fees in special cases, and any other rule conflicting with the above resolution, be superseded and dispensed with in the case of Hon. Charles Fitzpatrick, Solicitor-General, on his application for call to the Bar of Ontario.

Hon. Charles Fitzpatrick, Solicitor-General, having presented his certificate of Call to the Bar of the Province of Quebec, under the signature of the proper authority, and also the certificatee of B. B. Osler, Esq., Q.C., a Bencher, stating that he has known him for eleven years, and that he is a gentleman of good character and conduct, was ordered for call to the Bar of the Province of Ontario, and was called accordingly, and was subsequently presented to the judges of the High Court of Justice.

The letter, dated 1st October, 1896, addressed to the Treasurer, in which the Hon. A. S. Hardy, Attorney-General, stated that he resigned his seat as an elected Bencher, was read. Ordered that the resignation be accepted, and that a special call of the Bench be made for Friday, 4th Dec., for the election of a Bencher in place of Hon. A. S Hardy.

Ordered that the minutes of the meeting of 18th May, 1896, be amended by the addition of Mr. Riddell's name to the list of Benchers present.

The complaint of Mr. J. C. Smith against Mr. W. T. Boyd, a solicitor, was read. Ordered that the petition be retained on fyle, but action deferred until such steps at law be taken as Mr. Smith may be advised.

The complaint of Messrs. Elliott & Elliott against Mr. L. H. Dickson, solicitor, was read. Ordered that they be informed that the matter should be dealt with by the Courts.

The complaint of Mr. Fetherstonhaugh against Mr. C. H. Riches, a patent solicitor, not a member of the legal profession, whose card is inserted in the newspapers under the heading "Patent Barristers," was read. Ordered that the complainant be informed that the Society has no power to deal with the matter.

The petition of Mrs. Jeannie McDonald, who was the complainant in the petition against Mr. John A. Robinson and Mr. C. C. Grant, asking for an allowance by Convocation of a sum on account of the expenses incurred by her in the prosecution of her complaint, was read. Ordered that the petition be not granted.

Convocation resumed consideration of the report of the Discipline Committee upon the case of Mr. W. H. Bartram.

Mr. Bartram attended and his defence was heard by Convocation.

It was resolved that Convocation is of opinion that Mr. Bartram as a barrister should not have published a letter of the character of the one in question, and they condemn such action on the part of any member of the Bar. Mr. Bertram was called in and the judgment of Convocation communicated to him by the Chairman.

Mr. Edwards then, in pursuance of notice given, moved, seconded by Mr. Teetzel: That the resolution of Convocation passed 14th Sept., 1896, directing that the Legal Education Committee be directed to frame rules providing for the admission of women as barristers-at-law, and the resolutions of Convocation passed on the 25th September, 1896, dealing with the report of the Legal Education Committee, be rescinded. Lost.

Ordered that further consideration of the case of Mr. C. C. Grant do stand until Dec. 4th.

Ordered that Mr. J. B. O'Flynn be called to the Bar under 57 Vict., c. 44.

Ordered that Messrs. Teetzel and Strathy be a Special Committee to examine Messrs. T. E. Moberly and Walter Mills under the said Act. The Committee having reported the result of their examination as satisfactory, ordered that they also be called.

The following gentlemen were then called to the Bar: Messrs. J. L. Killoran, L. J. Reycraft, T. E. Moberley, Walter Mills, J. B. O'Flynn.

Convocation then rose.

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WEDNESDAY, NOV. 18.

Present: Dr. Hoskin and Messrs. Moss, Martin, Hogg, Strathy, Bayly, Ritchie and Robinson; also after 11 a.m., Mr. Watson.

In the absence of the Treasurer, Dr. Hoskin was elected Chairman. The minutes of the meeting of the 17th inst. were read and confirmed.

Mr. Moss, from the Legal Education Committee, presented the following reports: In the case of Mr. B. A. C. Craig, who passed the second year examination, Easter, 1896, recommending that his attendance and examination be allowed. Ordered accordingly. In the case of Mr. H. C. Osborne, whose petition had been already considered, and had again made application to have his admission reckoned as of Easter Term, that the Committtee are unable to change their former recommendation. Ordered accordingly.

Mr. Moss further reported upon the cases of gentlemen who have presented special petitions praying to be admitted a students-at-law, as of Trinity Term. Ordered that the following gentlemen be entered as students-at-law of the Graduate class, as of Trinity Term, 1896: Messrs. J. R. Osborne, F. K. Johnston, R. C. McNab, A. B. Colville, Anson Spotton; and the following of the Matriculant class: Messrs. A. H. Chabot, E. W. Clement, W. D. B. Turville, F. J. Wegg, and that the notices given by Messrs. A. H. Monteith and G. J. McArthur do remain posted until the last sitting day of Convocation this term, and that they be then admitted, provided no objection be made thereto in the meantime.

At 11 a.m., Mr. Moss from the Legal Education Committee, reported upon the case of Mr. Hilton Huffman. Ordered that Mr. Huffman do receive his certificate of fitness.

Mr. Martin, from the County Libraries Committee, presented the following report: The Waterloo County Law Association has made application for an initiatory grant from the Society. The Committee find that the Association has been duly incorporated, and the conditions in the rule have been complied with. The amount contributed in money is $225; there are 24 practitioners in the County of Waterloo, and the Association is therefore entitled to the initiatory grant of $450. Ordered that cheque do issue forthwith for the amount of the initiatory grant.

The petition of Mr. L. H. Bowerman, who had recently been admitted as

a solicitor upon proof of his standing as such in the Supreme Court of New Zealand, and passing the Third Year Examination of the Law School, and who now applies for Call to the Bar, was read. Ordered that Mr. Bowerman be allowed to take his two intermediate examinations which are required to be taken by all candidates for Call to the Bar, the first in May, 1897, and the second in September, 1897, and that the rest of his petition be reserved until after these examinations are taken, except as to the special fees, which cannot be remitted.

Mr. Watson, from the Finance Committee, presented their report of new agreement with the solicitor of the Society. Adopted on a division.

Mr. Watson also presented the report of the Finance Committee upon the question of the closing of Osgoode street. The report was adopted.

The Legal Education Committee reported on the petition of Mr. F. H. Hurley that they are unable in view of Rule 179 to recommend dispensing with attendance upon lectures. Adopted.

Mr. Hurley's supplemental petition having been also read to Convocation, ordered that under the special circumstances of the case the fee of $25 paid for the Law School fee be remitted.

Ordered that further consideration of the Discipline Committee upon the complaint of J. O. Connors against Mr. T. C. Robinette, do stand adjourned until Friday, 4th December, at noon, and that Mr. Robinette and the counsel for the complainant be notified.

The letter of Messrs. Bradley & Wyld in reference to the case of Mr. F. C. Ridley, was read. Ordered that the application be not granted.

Mr. Moss, from the Legal Education Committee, reported in respect to purchases made by that Committee of books for the Phillips Stewart Library for students.

Mr. Bruce, from the Special Committee appointed to consider the advisability of having an Index of Private and Local Acts prepared, reported that they considered that while such a work would be most useful to many members of the profession, it would not be of such general service to the profession at large, as to warrant the required expenditure from the funds of the Law Society. The report was adopted.

Mr. Watson gave notice that at the next meeting of Convocation he would move to rescind or vary rule 179, and to provide that the failure of a student to pass examinations after attendance at a course of lectures during the session, shall not make it necessary for him to attend another course of lectures for the same year.

Ordered that the consideration of the report of the Building Committee, and also of the letter of Mr. Hamilton MacCarthy, be adjourned until the 4th December.

Ordered that the notice of motion given by Mr. McCarthy in relation to the powers of the Society in matters of Discipline, do stand until Friday, 4th December.

Upon motion of Mr. Moss, the Rules relating to the admission of women to the Bar, were read a second and third time, and passed.

Mr. Moss, from the Legal Education Committee, reported in the matter of Mr. G. F. Kelleher, that owing to an error in summing up the marks obtained by him he had been reported as having failed at the second year examination, but that he had really obtained the required number of marks; also recommending that his attendance upon lectures and examination be allowed. Ordered accordingly.

Convocation then rose.

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FRIDAY, Dec. 4.

Present, the Treasurer and Sir Thomas Galt, Messrs. Shepley, Britton, Martin, Idington, Kerr, Watson, Douglas, Bayly, Bruce, Osler, Moss, Robinson, Gibbons, Ritchie, Edwards, Teetzel, Clarke, Aylesworth, Riddell, McCarthy,

Guthrie and the Hon. A. S. Hardy, Attorney-General. The minutes of the 18th Nov. were read and confirmed.

Ordered that Messrs A. H. Monteith, Charles McCrea, G. J. McArthur and G. W. Spence be admitted as students-at-law (as of Trinity Term, 1896) of the matriculant class.

Ordered, also, that Miss Clara Brett Martin, who has completed her papers for Call to the Bar and has shown compliance with the Rules provided for admission of women to practice as barristers, be called to the Bar.

Ordered that Mr. Peter White, jr., be called to the Bar.

Ordered that Mr. J. K. Arnott do place himself under articles for a further period of eighteen months.

Mr. Shepley, from the Library Committee, reported recommending that a new catalogue of the library be published during the coming anniversary year, that an edition of 250 copies be printed, and that the sum of $1,200 be placed in the estimates for next year to cover the cost of this work. Ordered accordingly.

Mr. Osler, from the Reporting Committee, presented the quarterly report on the state of reporting: The work of reporting is in a forward state. In the Court of Appeal there are ten cases unreported; eight in the first division and two in the second—all of judgments delivered this month (November). In the High Court of Justice, Mr. Harman has nothing unreported. Mr. Lefroy has five, of which two are September judgments (revised) and three of October. Mr. Boomer has fifteen—five of September, of which four are ready to issue, and three of October and seven of November. Mr. Brown has six—one of September and three of October (ready to issue) and two of this month. There are six unreported Practice cases—three of October and three of November. The Digest of Vol. 27 O.R. is in type, revised, and should issue next week.

Mr. Osler gave notice that he would on Tuesday, 2nd February, 1897, move that Convocation take into consideration the subject of the plan to be pursued for the compilation of a Consolidated Digest of the Canadian Reports from the earliest period to end with the year 1899, or for any modified plan of a Digest over any less period. Ordered that the Editor's memorandum upon information as to the proposed Digest be printed and sent to members of Convocation.

Mr. Moss, from the Legal Education Committee, laid on the table the report of the Examiners on the general conduct of the examinations for 1896.

Mr. Osler presented the report of the Building Committee as follows: The alterations and repairs in the East Wing are approaching completion. The work should have been finished by the first of Nov. The delay has been occasioned in the first instance by the walls being too damp after the plastering to put in the wood work, and in the next place by the delay in the laying of the pavement by Rice Lewis & Co., who declined, in making their contract, to be bound to any particular date, owing to their having to specially import their material from England. A brass tablet is in process of execution by Rolph, Smith & Co., in memory of the late Chief Justice Osgoode; the total cost of the improvements, including the tablet, will amount to about $5,450. It has been suggested that a memorial tablet should be placed in the Hall to the late Attorney-General, John Macdonell, who was killed with General Brock at the battle of Queenston Heights, and the Committee ask that the sum of $80 be placed at their disposal for that purpose.

The Committee draw attention to the condition of Convocation Room, the appearance of which has not been improved by the recent alterations. They have refrained from expending any money in temporary decorations of the wall, until Convocation decide whether they will now proceed with the permanent decoration and fitting up of this room. The Committee ask that they may be instructed to suitably furnish the upper hall; the expense to do this properly will be probably from $200 to $300. Ordered that the tablet to the memory of the late Attorney-General Macdonell be erected. Ordered that

the repairs of Convocation Room be referred to the Finance Committee to be dealt with as said Committee deem proper. Ordered that the Building Committee do arrange for the furnishing of the upper hall, at a cost not exceeding $300.

Convocation resumed consideration of the report of the Discipline Committee on the case of Mr. Robinette. Ordered that same do stand adjourned until Tuesday, 2nd Feb., 1897. Convocation resumed consideration of the case of Mr. Charles C. Grant. Mr. E. F. B. Johnston, Q.C., appeared as counsel for Mr. Grant, and having made a statement, withdrew.

Ordered that the name of Mr. Charles Cyrus Grant, student-at-law, whose certificate of examination has been cancelled by the Department of Education, be removed from the Rolls of the Society.

Mr. A. J. Wilkes, of Brantford, was elected a Bencher in the place of the Hon. A. S. Hardy, Attorney-General, who had resigned his seat as an elected Bencher.

Mr. Watson moved that the number of reporters of the High Court be reduced to three, and that the Rule for the appointment of reporters be amended accordingly. Lost.

Mr. J. F. Smith, Q.C., was appointed Editor of the reports; Mr. Alexander Grant, Reporter of the Court of Appeal; Mr. R. S. Cassels, Assistant Reporter of the Court of Appeal; Messrs. E. B. Brown, G. F. Harman, A. H. F. Lefroy and G. A. Boomer, Reporters of the High Court of Justice; and M. T. T. Rolph, Reporter of Practice cases.

Mr. Watson then, pursuant to notice, moved, seconded by Mr. Martin, "to "rescind the resolution passed on 15th September, 1896, providing for pay- "ment to members non-resident in Toronto of their expenses in attending "meetings of Convocation and committees, and that the appointment of a "committee to frame rules and regulations therefor be also rescinded."

Mr. Bayly moved in amendment that the said resolution be amended by striking out the words "and committees."

Mr. Osler raised a point of order as to the power of Convocation to pass such resolution and thereby vote money to Benchers.

Ordered that the motion of Mr. Watson and the amendment offered by Mr. Bayly thereto, do stand until the next meeting of Convocation, and that it be referred to a Committee composed of Messrs. Robinson, Osler, Britton, Bruce, Bayly, Watson, Martin, S. H. Blake, Riddell and Moss, to enquire into and report upon the probable outlay to the Society and the powers of Convocation in the premises, and that the same Committee consider and report as to the times and number of meetings of Convocation. It was further ordered that Mr. Watson be the convener, and that three members of the Committee do form a quorum.

Mr. Bruce, from the Committee on Journals, produced the certificate of approval of the consolidation of the Rules of the Society, Trinity Term, 1896, signed by the Visitors, the Judges of the Supreme Court of Judicature.

Mr. McCarthy moved that it be referred to a committee composed of Messrs. Robinson, Moss, Britton, Martin, Hoskin, Bruce, Riddell, Shepley and McCarthy, to consider and report to Convocation on the propriety of an abridgment of the disciplinary powers now vested in the Law Society, Mr. McCarthy to be convener, and three members of the Committee to form a quorum. Carried.

Mr. Watson's motion to rescind or vary Rule 179 was ordered to stand until the next day of meeting.

Mr. Martin, from the County Libraries Committee presented the following report, which was taken into consideration and adopted:

OSGOODE HALL, Dec. 4th, 1896.

*To the Benchers:*

The County Libraries Committee beg to present their report on the working of the County Libraries for the current year.

1. There are 23 County Libraries established at this date, viz: Brant,

Bruce, Carleton, Elgin, Essex, Frontenac, Grey, Hamilton, Hastings, Huron, Leeds and Grenville, Lindsay, Middlesex, Norfolk, Ontario, Oxford, Perth, Peterborough, Simcoe, Waterloo, Welland, Wellington, York. All of these (except Huron and Waterloo) were thoroughly and carefully inspected by Mr. Eakins during the summer of 1896, and it is gratifying to know that with but few exceptions they are in a thoroughly satisfactory condition. A copy of Mr. Eakins' report is annexed; it shows the able manner in which he has done his work. A copy of the report has been sent to every Library, and no doubt the officers of the Libraries will carefully consider the points referred to in the report, and to take the necessary steps to remedy the defects pointed out, and avail themselves as far as practicable of the suggestions made for improvement. The Waterloo Library was established after the date of Mr. Eakins' report. A statement showing the expenditure on County Libraries for the year ending 31st Dec., 1895, is annexed.

2. Experience has shown that it is only where the members of a County Library make a substantial contribution to the funds, and take an active interest in its affairs, that success can be looked for. It is very difficult in the smaller towns or in counties where there are but few practitioners, to raise any considerable amount, or to provide satisfactory means for taking care of the books and preventing their being removed from the Library; and unless a good room is provided, a suitable caretaker or librarian employed, the annual subscriptions regularly paid, and the books neatly and safely kept, the Library becomes practically valueless to the members, and serves no useful purpose.

3. In accordance with the resolution of Convocation "that the County Libraries Committee be requested to consider whether any arrangements can be made for providing Law Libraries at Sault Ste. Marie, Port Arthur, Rat Portage, Bracebridge, Parry Sound and North Bay, and other places which may be similarly situated," a notice, a copy of which is annexed, was sent to the places named, and also to all the county towns in Ontario, in which no libraries had been established.

4. A number of replies have been received which tend to show that owing to various causes, some purely local, and some owing to the small number of practitioners resident at the county town, not much interest is taken in the establishment of libraries, and but little aid can be expected in any case from local sources. Further inquiries, however, will be made, and reported upon at a later date.

5. Your Committee recommend that a copy of the rules relating to County Libraries and circular be sent to all the County Libraries, calling their attention to the necessity of furnishing copies of the reports of the annual meetings and all other information called for by the rules, and intimating that hereafter the requirements of the Law Society in this respect must be strictly complied with. A new form, for the financial year has been adopted after consultation with Mr. Eakins, and this form with the circular above referred to, will, it is felt, secure in proper form all necessary information.

COUNTY LIBRARIES AID.

*Expenditure for the year 1895.—Annual Grants.*

| | | | |
|---|---|---|---|
| Bruce (for 3 years) | $ 82 00 | York | $800 00 |
| Essex | 146 17 | Middlesex | 458 34 |
| Grey | 89 34 | Carleton | 348 34 |
| Frontenac | 87 34 | Norfolk | 55 00 |
| Lindsay | 164 17 | Simcoe | 126 67 |
| Hamilton | 552 50 | Brant | 80 34 |
| Elgin | 55 00 | Leeds | 25 00 |
| Peterborough | 168 00 | Perth | 69 00 |
| Wellington | 170 00 | Hastings (for 3 years) | 270 00 |
| Total | | | $3,747 21 |

Mr. Robinson, from the Special Committee appointed to consider and report as to the expediency of establishing a library of Canadian Law Reports and Statutes—Canadian and Provincial—in London, England, for the use of Canadian practitioners on appeals to the Privy Council, reported as follows: That at a meeting of the Committee held in September last, its Secretary was directed to communicate with the Law Societies of the different provinces and with the Attorney-General of each province and with the Dominion and Provincial Governments, in order to ascertain whether they would be prepared to contribute their reports and statutes towards the formation of the proposed library, and the Chairman was requested to ascertain when in London, what provision could be made there for the object proposed. That the Treasurer, during his late visit to England, has, in the absence of the Chairman, kindly seen the Registrar of the Privy Council and Mr. S. V. Blake, a member of our Bar, who is now practising in London. It was found impracticable at present to secure accommodation in the Privy Council building, but arrangements are contemplated which in the course of two or three years, may enable a room to be obtained there. Mr. S. V. Blake was then seen, and the result of several conferences with him will be found in the letter from him herewith submitted. That the authorities of the Dominion and of the various provinces, and the Law Societies of the various provinces, have been communicated with on the subject. An abstract of their replies is here with submitted, and is, in the opinion of the Committee, satisfactory. It seems to show that they will, with the exception of New Brunswick, from which no replies have been received, join in promoting the desired object, and the Treasurer has found that the members of the Judicial Committee, and the officials connected with that body, are most favorably disposed. The Committee believe that the Dominion and Provinces will join in defraying the small expenditure required, for which applications will be made to them; but as it is important to avoid delay, they recommend that in the meantime the Law Society authorize Mr. S. V. Blake to make the arrangement proposed by him, and become responsible for the necessary payments, which will include the cost of book cases. This recommendation is made on the assumption that the other provinces and the Dominion will concur, and that the continuance of the arrangement will depend upon such co-operation. With regard to the matter of exchange of publications with the Inns of Court, which was also referred to your Committee, the Committee recommend that consideration thereof be deferred for the present. The Committee further recommend that a copy of the Ontario Digest (1880—1890) be sent to the Library of the Inner Temple, together with a copy of the Five Years Digest (1891—1895) to which that Library is entitled as a subscriber to our reports.

*To Æmilius Irving, Esq., Q.C.:*

MY DEAR SIR,—I was glad to learn that there was a disposition to honor me by the charge of the projected Canadian Law Library, and as arranged I now put on paper the proposal which under the circumstances I made to you on the subject. I am the tenant of Room 30 over the Canadian Offices, which room suffices for my business, and would as you agreed suffice for the Library, but not for both, because silence is required in the Library. . . . . Now, if it is desired, I will undertake on condition that £30 a year are paid to me towards my rent, and that glass book cases are provided for the books, to put my present room at the disposal of the Canadian practitioners, making only such use of it myself as is consistent with its use as a library; to rent the adjoining room so as to enable me to perform this obligation; to keep a clerk so that there may be more constant attendance; and to become custodian of the Library. I will undertake that for the week before and during the hearing of the Canadian Privy Council Appeals, the Library shall be open without any intermission whatever during the usual business hours, either myself or the clerk being in attendance, and that for the rest of the year it shall be open

just as my office is for business daily, subject of course to the possibility of an occasional absence for a brief space under some unexpected business pressure. My father tells me that he would lend to the Library such books as he has in London, including some useful French law books. It would of course be my effort to consult the convenience and meet the wishes of my fellow Canadian practitioners, and it is in this spirit that I have framed my proposal on terms which I hope will be considered advantageous. As this is an experiment on both sides, it would be well to have an understanding that it should be open to modification or cancellation at the expiration at the end of say two years.

Yours faithfully,
S. V. BLAKE.

The report was adopted, and the Committee were further empowered to carry out the recommendations contained in the report.

Mr. Watson, from the Finance Committee, presented the following report: Convocation having on the fifteenth day of September, 1896, referred to your Committee the question of entering into negotiations with the Dominion Government for a new contract for the supply of the Supreme Court Reports, Mr. Watson, in accordance with the wish expressed by Convocation and by your Committee, attended at Ottawa, and had interviews with the Hon. Sir O. Mowat, Minister of Justice, and afterwards in pursuance of the subject addressed to them letters, whereof copies are hereunto attached. After a short delay, the letter dated 14th Nov., addressed to Mr. Watson, Chairman of the Committee, was received from the Deputy Minister of Justice, in which it is stated that the Minister is prepared to recommend the price of $1.25 per volume (i. e. copy) upon an agreement of three years, or a longer term if desired. Ordered that the Finance Committtee be authorized to conclude the arrangement on the terms proposed.

Ordered that Mr. Eakins be paid $200 for his services and expenses inspecting the County Libraries for the year 1896.

Mr. Mo , from the Special Committee appointed to report as to the observance of the centennial anniversary of the Law Society, reported that having considered the matter, they recommend: 1. That the organization of the Law Society in the year 1797 be celebrated and commemorated as follows: (*a*) By a public reception to be held at Osgoode Hall on the 1st of July, 1897, given by the Society, to which the members of the profession and their friends be invited, and at which amongst other things an address be delivered by the Treasurer; (*b*) The preparation and publication of a memorial volume, giving a short historical account of the Society and of the leading members of the profession connected with the Society during its early days, with such other information as may be deemed of interest. 2. That the details be left to the Committee. The report was adopted.

Ordered that the Osgoode Legal and Literary Society be granted the use of the Great Hall for the purpose of holding a Bar dinner on Thursday, 16th Dec., 1896.

The letter of Mr. Hamilton MacCarthy, dated 13th Nov., in reference to a bust of the late Col (afterwards Judge) Taylor, which he offered to donate to the Law Society, was read. Ordered that the Secretary write Mr. MacCarthy informing him that the Benchers, while fully sensible of the kindness of his offer, are obliged respectfully to decline.

Convocation then rose.