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THE appointment is just announced of Mr. Désiré Girouard Q.C., of the Montreal Bar, to the Bench of the Supreme Court, Mr. Justice Fournier retiring. We will refer to the change in a subsequent issue.

THE judicial haste which sometimes marks proceedings in our courts of justice in Ontario is not always conducive to the proper disposition of business. No doubt judges are often very sorely put about to get through, within the limited time at their disposal, the amount of business which they are expected to discharge; but we very much doubt whether it is wise, or even just to suitors, to attempt to perform in one hour what should reasonably take two. Every suitor is entitled to have his case carefully and deliberately considered: and it is a denial of justice for a judge to deal with any case in a perfunctory or hasty manner. The fact that there is a remedy by appeal is no answer, for a suitor is entitled to have his case carefully weighed and considered by every judge before whom it is brought; and it seems to us that a judge who contents himself with giving hasty and ill-considered judgments is falling very far short in his duty to the public, and the excuse that he can be set right by a Court of Appeal, if he is wrong, is no justification whatever for such a course. But if judges of first instance are bound to exercise care and deliberation in the trial and adjudication of cases, the duty so to do in the case of appellate courts must, if anything, be stronger. While reasonable expedition in the administration of

TITLE UNDER WAREHOUSE RECEIPTS AND UNREGISTERED ASSIGNMENTS.

The case of *La Banque d' Hochelaga* v. *Merchants Bank*, reported in the current volume of the Manitoba Reports, at page 361, "gives rise," in the words of Mr. Justice Killam, "to some new and rather difficult questions under the new Bank Act. That case, as stated in the headnote of the report, is as follows:

"One A., a wholesale purchaser and shipper of dead stock and the products thereof, obtained certain advances of money from the defendants on the security of assignments of certain hog products in the form in Schedule C to the Bank Act; and agreed with the manager of the bank to ticket the goods so as to identify them, and not to sell the goods. He then set apart certain of the goods as belonging to the defendants, and placed tickets over them to indicate this; but afterwards he sold all these goods in the ordinary course of business, and substituted other goods of a like character in their place, placing the same tickets upon them. Subsequently, the plaintiffs, as security for a then pre-existing debt due them from A., obtained an assignment of the same kind as the defendants had taken, covering, *inter alia*, 10,000 lbs. of bacon, but no appropriation of any particular bacon as hypothecated to the plaintiffs was made until about seven weeks later, when, at the instance of an officer of the plaintiffs, A. set apart 10,000 lbs. of bacon out of the pile which had been appropriated to the defendants in the manner above described, and this quantity was ticketed with the name of the plaintiff bank, the defendants' tickets being removed. Shortly afterwards A. absconded, and the defendants took possession of this 10,000 lbs. of bacon under their securities. It was held that they were entitled to hold it against the plaintiffs; and that, notwithstanding the language of s. 75 of the Bank Act, a bank may take securities of the kind provided for by s. 74, even for pre-existing debts, as the general provisions of s. 68 should not be held to be restricted by the language of s. 75 so as to prevent it."

The question arising in the above decision may be stated as follows: If the goods covered by a warehouse receipt or bill of lading indorsed to, or made directly in favour of, a bank under section 73, or by an assignment from the owner under section 74, are fraudulently sold or disposed of to other persons, and other goods

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of the same or some other kind substituted therefor, can the bank hold the substituted goods as against a subsequent *bona fide* purchaser or mortgagee thereof without notice of the claim of the bank? And can a bank acquire and hold such a security for a pre-existing debt? If Mr. Justice Killam's decision be correct, both these questions must be answered in the affirmative.

There seems to be no longer any doubt that sections 73 and 74 of the Act, which empower banks to acquire title to goods, wares, and merchandise by taking warehouse receipts, bills of lading, or assignments in the form of Schedule C, without registration under any Provincial enactments, are constitutional: *Merchants Bank of Canada* v. *Smith*, 8 S.C.R. 512; *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31. But one would have supposed that such title would be confined to the identical goods, wares, and merchandise described in the documents, except that as against the warehouseman, carrier, or owner who should himself fraudulently or otherwise substitute other goods of a like kind for the original goods, an estoppel would, no doubt, arise, preventing him from taking advantage of his own wrong. It has been held that a warehouse receipt ordinarily does not cover goods substituted for those originally warehoused: *Lado* v. *Morgan*, 23 U.C.C.P. 525 (1874), though there are some exceptions caused by the usages of trade. (See "Gormully on Banks and Banking," 2nd edition, pp. 100 and 101, and cases there cited.)

The bank having a perfect legal title to the original goods could follow and take them from any subsequent purchaser or mortgagee even without notice, and, as to the substituted goods, they would have a good title as against their customer, because he could not be heard to dispute it. If, however, the decision in the case under review can be supported, would not the bank have a legal title against all the world both to the original and the substituted goods? which seems a rather startling result.

In the judgment the following passages occur: "Yet when Allen set aside and appropriated the (substituted) bacon to the plaintiff (bank), and the bank's officers accepted the appropriation, it appears to me that, at common law, as between Allen and the bank, the property passed to the bank. . . . The plaintiff bank was certainly a transferee for value in good faith, and without notice of the claim of the other bank."

At that time, according to the findings of fact, there was not

in Allen's warehouse a pound of the bacon that was there at the time the Merchants Bank took its security, and yet the learned judge held that the latter bank was entitled to hold all the substituted bacon to the amount mentioned in their earlier security.

An interesting point might here be raised: Would this decision hold good in case the substituted goods were not of a like kind—for instance, if they were hams, or poultry, or flour, or hides? It would seem so, on the same principles, for how could the legal title to the substituted goods depend on their mere similarity to the original?

The circumstances in *Bank of Hamilton* v. *John T. Noye Manufacturing Co.*, 9 O.R. 631, one of the cases relied on, were very different: for there, before the defendant's title arose, the miller who had given the plaintiffs the warehouse receipts in question pointed out to the plaintiffs one carload of flour made from the wheat covered by the receipts, and admitted that the wheat and flour in the mill were covered by the receipts, and the plaintiffs had taken possession: and Boyd, C., expressly held that, having done this while able to dispose of his property, the warehouse receipts attached upon the property so indicated by him.

G.W. Ry. Co. v. *Hodgson*, 44 U.C.R. 187, is also distinguishable, for Hodgson had obtained possession of the goods with full knowledge of the plaintiffs' claim, and, therefore, acquired no better title than G. & Co., who had made the substitution relied on to defeat the plaintiffs' claim.

The point decided is one of great and far-reaching importance, not only to bankers, but also to the whole mercantile community: and it is submitted that the decision contravenes the principle of law which was supposed to be well established, viz., that a person who acquires a perfect legal title as the purchaser of goods *bona fide* and without notice cannot be deprived of his right by the holder of a purely equitable claim prior in point of time. See the rules as stated by Snell in connection with the maxim that where the equities are equal the law must prevail, it being there laid down that a purchaser for valuable consideration without notice will be protected whether he obtains the legal estate at the time of his purchase, or subsequently gets in the outstanding legal estate, or even where he has the best right to call for the legal estate.

As to the other point decided by the learned judge, it is a judicial construction which seems almost to amount to legislation, in the face of the apparently positive prohibition of section 75 of the Bank Act against the acquisition of any warehouse receipt or bill of lading or security, under section 74, to secure any pre-existing debt; but allowing such a security to be taken where a bill, note, or debt is negotiated or contracted at the time of the acquisition thereof by the bank, or where there is a written promise or agreement made at the time of the negotiation of the bill, note, or debt, that such warehouse receipt or bill of lading or security would be given to the bank.

The learned judge, in holding that, notwithstanding this provision, such a security might be taken for a pre-existing debt, proceeded upon the reasoning that the policy of Parliament appears to be to prohibit any lending or advance made either directly or indirectly upon the security, mortgage, or hypothecation of any kind of property (s. 64); but to give banks the fullest opportunity of recovering old debts by taking securities upon any kind of property (s. 68). It appears to us, however, that ss. 73, 74, and 75 of the Act very clearly indicate that the intention of Parliament was just the reverse in case of warehouse receipts, bills of lading, and assignments in the form of Schedule C., viz.; that banks may lend money directly upon these securities, but may not take them as securities for pre-existing debts. As to this point the judgment says: "When section 75 says that a bank is not to acquire a security under section 74, except to secure payment of a note, etc., then negotiated, or on the written promise of such a security, it seems intended to prohibit advances upon uncertain verbal promises of such security."

Surely the bank can make advances upon verbal promises of such security, but the question is, can they afterwards legally acquire such security? If they can acquire it without any prior promise at all, as the learned judge has held, there seems no reason for saying that they could not acquire it if there had been a prior verbal promise.

On the whole, however, if the learned judge was wrong on this latter point, the plaintiffs' security was prohibited by the Act, for it was taken to secure a pre-existing debt due to them; and even if both points were incorrectly decided, on the principle that two wrongs may make a right, the verdict entered may be a

just one, and the defendants properly held entitled to the goods. We may add that it has been expressly held in *Dominion Bank* v. *Oliver*, 17 O.R. 402, that a warehouse receipt taken for a part due debt is not valid.

CURRENT ENGLISH CASES.

COMPANY—DIVIDEND PAYABLE ONLY OUT OF PROFITS—DEPRECIATION OF CAPITAL, EFFECT OF, ON RIGHT TO DECLARE DIVIDENDS.

Wilmer v. *McNamara*, (1895) 2 Ch. 245; 13 R. June 127, was an action by a shareholder against a joint stock company to restrain the declaration of a dividend. By the articles of association no dividend was to be paid except out of profits. The property in which the capital of the company was authorized to be invested was of a wasting character, and, on taking the yearly accounts, it appeared that the assets of the company, including the good will, fell short of the paid-up capital by about £43,000; but the profit and loss account for the same year showed a profit to have been made of £5,816, which the company proposed to apply in payment of a dividend. The plaintiff contended that no dividend could be declared until the depreciation in the capital had been made good; but following *Verner* v. *General and Commercial Investment Trust*, (1894) 2 Ch. 239, Stirling, J., held that the dividend might lawfully be paid, and that the depreciation in the value of the good will of the business of a company is to be treated as a loss of "fixed" capital, and not of "floating or circulating capital."

COMPANY—WINDING UP—PROFITS EARNT BEFORE LIQUIDATION—UNDRAWN PROFITS—PREFERENCE SHAREHOLDERS—LOSS OF CAPITAL—COSTS OF LIQUIDATION—PRIORITY.

Bishop v. *Smyrna & Cassaba Ry. Co.*, (1895) 2 Ch. 265; 13 R. July 159, is another case on a question of company law. At the time of a joint stock company going into voluntary winding up a sum was standing to the credit of its revenue account representing profits previously earnt, but not distributed. The present action was brought by a preference shareholder claiming, on behalf of himself and others of the same class, that this sum should be applied in payment of a dividend to the preference shareholders, and not treated merely as ordinary assets in the liquidation. The contest was between the preference and ordi-

nary shareholders, and, as between them, Kekewich, J., held that the claim of the former must prevail, and that the fund in question was applicable to the payment of the preference dividends, rather than to the payment of a deficit on the capital account.

The Law Reports for August comprise (1895) 2 Q.B., pp. 173-238: (1895) P., pp. 273-286; (1895) 2 Ch., pp. 273-467; (1895) A.C., pp 325-456.

PRACTICE—MORTGAGE DEBT, ACTION FOR—RECEIVER—SPECIAL INDORSEMENT—LIQUIDATED DEMAND—SPEEDY JUDGMENT—ORD. XIV. (ONT. RULE 739).

In *Lynde* v. *Waitham*, (1895) 2 Q.B. 180; 14 R. Aug. 217, the action was brought to recover a mortgage debt, and the demand was specially indorsed. The mortgage deed contained a power enabling the mortgagee to appoint a receiver of the rents and profits, which had been done before action. The plaintiff applied for an order for speedy judgment under Ord. xiv. (Ont. Rule 739), and the Court of Appeal (Lord Esher, M.R., and Kay and Smith, L.JJ.), although holding that the fact of a receiver having been appointed did not prevent the court from making an order for judgment under Ord. xiv., yet held that, as there appeared to be a *bona fide* dispute as to the state of the account, the defendant should have leave to defend.

DEFAMATION—PRIVILEGED COMMUNICATION—COMMUNICATION BY OFFICER OF STATE IN COURSE OF DUTY—VEXATIOUS ACTION.

Chatterton v. *Secretary of State for India*, (1895) 2 Q.B. 189: 14 R. Aug. 232, was an action for libel, contained in a communication made by the Secretary of State for India to an under-secretary, reflecting on the plaintiff. The action, on the filing of the statement of claim, was, on the defendant's application, dismissed as vexatious, and the Court of Appeal (Lord Esher, M.R., and Kay and Smith, L.JJ.) upheld the order, holding that the communication was absolutely privileged, and that it was not competent for the court to entertain the action at all, or to inquire whether or not the defendant acted maliciously.

GAMING—PLACE USED FOR BETTING—CLUB—BETS BETWEEN MEMBERS OF A CLUB—"BETTING WITH PERSONS RESORTING THERETO"—BETTING ACT, 1853 (16 & 17 VICT., C. 119), SS. 1, 3—(CR. CODE, S. 197).

In *Downes* v. *Johnson*, (1895) 2 Q.B. 203; 15 R. Aug. 276, an appeal was brought from the decision of a magistrate refusing to

convict the respondent of a breach of The Betting Act (15 & 16 Vict., c. 119), (see Cr. Code, s. 197). The evidence disclosed that the place where the alleged offence took place was a *bona fide* club, and that the respondent was a member of the club, and had betted with other members who resorted to the club, and it was held that this was not an offence against the Act.

MARRIED WOMAN—RESTRAINT ON ANTICIPATION—JUDGMENT AGAINST MARRIED WOMAN—MARRIED WOMAN'S PROPERTY ACT, 1882 (45 & 46 VICT., C. 75), S. 1, SS. 1, 2, 3, 4, S. 19—(R.S.O., C. 132, SS. 2, 20).

In *Loftus* v. *Heriot*, (1895) 2 Q.B. 212; 14 R. Aug. 238, the Court of Appeal (Lord Esher, M.R., and Kay and Smith, L.JJ.) have determined, following their decision in *Hood Barrs* v. *Cathcart*, (1894) 2 Q.B. 559 (noted *ante* vol. 30, p. 678), that where a married woman is entitled to property subject to a restraint against anticipation the arrears of income which have accrued, but have not been paid to her when judgment is recovered against her, cannot be made exigible to answer the judgment. The effect of these decisions is that where there is property subject to a restraint against anticipation, there is no means for a judgment creditor of the wife making it available in execution, no matter when the income accrues. The restraint is good, and protects the fund from the creditor until it actually reaches the hand of the married woman. Whether it could even then be seized by the sheriff remains yet to be determined.

INTERPLEADER—SEPARATE CLAIMS BY DIFFERENT PARTIES.

In *Greatorex* v. *Shackle*, (1895) 2 Q.B. 249; 15 R. Sept. 195, the question was raised whether an interpleader could properly be granted under the following circumstances: The plaintiffs, who were auctioneers, sued the defendant for £35 12s. agreed commission for the sale of a house. A second firm of auctioneers also claimed £25 from the defendant for commission in respect of the same sale of the same house. The Divisional Court (Wills and Wright, JJ.) were of opinion that it was not a proper case for an interpleader.

MASTER AND SERVANT—WRONGFUL DISMISSAL—DISSOLUTION OF FIRM OPERATES AS A DISMISSAL OF SERVANT OF FIRM—DAMAGES.

Brace v. *Calder*, (1895) 2 Q.B. 253; 14 R. Aug. 201, was an action by a servant for wrongful dismissal. The facts of the case

were that the plaintiff had been employed by a partnership consisting of four members as manager of a branch of their business for a certain period. Before the expiration of this period two of the partners retired, and the business was transferred to and carried on by the other two partners, who were willing to employ the plaintiff on the same terms as before for the remainder of the period, but he declined to serve them. Wright, J., held at the trial that the dissolution of the firm did not operate as a dismissal of the plaintiff, and he therefore dismissed the action; but on appeal a majority of the Court of Appeal (Lopes and Rigby, L.JJ.) held (Lord Esher, M.R., dissenting) that the dissolution of the firm did operate as a dismissal of the plaintiff, or a breach of the contract to employ him for the specified period: but that under the circumstances he was only entitled to nominal damages. The appeal was therefore allowed, but without costs of the appeal or in the court below. It appeared that the plaintiff had actually served the defendants for a period of two months beyond the date up to which he had been paid, for which he was entitled to recover £50; but as he had not stated his case in that way, but had claimed for the full unexpired period, the Court of Appeal held that he could not even get the lesser relief, because if he had confined his claim to the £50 the defendants might have paid the money into court and avoided further litigation: but that hardly seems a reasonable or satisfactory way of disposing of the case, or one that is in accordance with the spirit of the Judicature Act.

CHEQUE—PAYE A FICTITIOUS OR NON-EXISTING PERSON — BILLS OF EXCHANGE ACT (45 & 46 VICT., C. 61), S. 7, S-S. 3; S. 73 (53 VICT., C. 33, S. 7, S-S. 3; S. 72 (D.)).

Clutton v. *Attenborough*, (1895) 2 Q.B. 306, was a case arising under the Bills of Exchange Act. A clerk of the plaintiffs had procured the plaintiffs to sign a number of cheques in favour of "George Brett," whom the clerk represented to be a person who had done work for the plaintiffs. There was, in fact, no such person as George Brett, and no work had, in fact, been done by anybody as represented by the clerk, who forged the name of George Brett and negotiated the cheques with the defendant, who obtained payment thereof. The plaintiffs claimed to recover the amount of these cheques from the defendant as

money paid under a mistake of fact. Wills, J., however, who tried the action, held that the plaintiffs could not recover on the ground that the payee was a "fictitious or non-existing person" within the meaning of s. 7, s-s. 3 (see 53 Vict., c. 33, s. 7, s-s. 3 (D.)), and, therefore, the cheque was, under that section, payable to bearer; and the fact that the plaintiffs were ignorant that the payee was a fictitious or non-existing person was held to be immaterial.

MASTER AND SERVANT—IMPLIED OBLIGATION OF SERVANT—SERVANT IMPROPERLY USING INFORMATION GAINED DURING SERVICE—BREACH OF CONFIDENCE.

In *Robb* v. *Green*, (1895) 2 Q.B. 315; 14 R. Sept. 184, the Court of Appeal (Lord Esher, M.R., and Kay and Smith, L.JJ.) have affirmed the judgment of Hawkins, J., (1895) 2 Q.B., p. 1 (noted *ante* p. 472), the Court holding that, even where there is a written contract of service, which is silent on the point, there is, nevertheless, an implied stipulation that the servant will act with good faith towards his master, and the defendant's conduct complained of amounted to a breach of that stipulation.

PRACTICE—ADDING PARTIES—DEPOSIT OF FREIGHT WITH WAREHOUSEMAN—ACTION BY SHIPOWNER—ORD. XVI., R. 11 (ONT. RULE 324)—MERCHANT SHIPPING ACT, 1894 (57 & 58 VICT., C. 60), SS. 493-6.

There are several cases reported in this number of the Q.B. Reports on the law relating to shipping to which we have not thought it necessary to refer here, because it is a branch of law which in Ontario is not of very general interest. *Montgomery* v. *Foy*, (1895) 2 Q.B. 321; 14 R. Sept. 179, though a case of this kind, involves a point of practice which it may be useful to notice. Under the Merchant Shipping Act a shipowner placed a cargo in the custody of a warehouseman, with notice of a lien for freight. The consignees, who had no beneficial ownership, but were merely agents for sale, in order to obtain possession of the cargo, deposited the freight with the warehouseman, with a notice to retain it under s. 496 of the Merchant Shipping Act. The present action was brought by the shipowner against the consignees to obtain a declaration that the plaintiff was entitled to the money so deposited. The consignees and the shippers applied under Ord. xvi., r. 11 (Ont. Rule 324), to add the shippers as defendants, in order that they might set up a counterclaim against the

plaintiff for damages for short delivery and injury to cargo, and the application was granted by Mathew, J., and his order was affirmed by the Court of Appeal (Lord Esher, M.R., and Kay and Smith, L.JJ.).

PRACTICE—THIRD PARTY NOTICE—INDEMNITY—ORD. XVI., R. 48 (ONT. RULE 328).

The Jacob Christensen, (1895) P. 281, although an Admiralty case, may be referred to with utility, as Bruce, J., there held that a third party notice cannot be properly served except when the claim for indemnity or contribution arises out of a contract, express or implied, and that the Rules do not authorize the service of a notice merely because, in the event of the plaintiff being found entitled to recover against the defendant, the latter may have a right of action against the person proposed to be made a third party.

CONSENT ORDER, JURISDICTION TO SET ASIDE—MISTAKE.

In *Huddersfield Banking Co.* v. *Lister*, (1895) 2 Ch. 273; 12 R. July 107, the action was brought, among other things, to set aside a consent order on the ground of a common mistake. Williams, J., before whom the action was tried, was of opinion that the court has jurisdiction to set aside a consent order upon any ground that would warrant the setting aside of an agreement, and being of opinion that there had been a mistake of fact common to both parties he set the order in question aside, but without prejudice to the interests of third parties, and this order was affirmed by the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.). We notice that according to the judgment of Williams, J., a previous motion in the action in which the consent order had been made to set it aside on the same grounds had been unsuccessful: see p. 276.

BUILDING SOCIETY—POWER TO LOAN ON FIRST MORTGAGES ONLY—POSTPONING SECURITY—ULTRA VIRES—SUBROGATION—EQUITABLE RELIEF—IMPOSITION OF TERMS BY COURT.

Portsea Building Society v. *Barclay*, (1895) 2 Ch. 298; 12 R July 100, is an appeal from the decision of Romer, J., (1894) 3 Ch. 86 (noted *ante* vol. 30, p. 754). The plaintiffs were a building society having power to lend upon first mortgages only.

They had lent £17,000 upon a first mortgage to one House. The society's borrowing powers being exhausted, and, it having need of money, it was arranged between House and the defendants and the plaintiffs that the defendants should advance House £6,000 upon the security of the property covered by the plaintiffs' mortgage, which should be applied on the plaintiffs' mortgage debt, and that the plaintiffs should consent to the defendants having priority for the mortgaged property to the extent of the amount so advanced. Conveyances to carry out this arrangement were accordingly executed; but it was held by Romer, J., that the attempt thus to give the defendants priority was practically making the plaintiffs' security for the residue of their claim a second mortgage, and that therefore it was *ultra vires* of the company and void. This decision the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.) have affirmed, and the defendants are also held disentitled to be subrogated to the plaintiffs or allowed to stand on an equal footing with them as to their £6,000 advances; or to have any terms whatever imposed on the plaintiffs. The doctrine of subrogation laid down in *Re Cork & Youghal Ry.*, L.R. 4 Chy. 748. was held not to be applicable because the loan of the defendants was made to House. and not to the plaintiffs.

INFANT—MAINTENANCE—CONTINGENT GIFT—INTERMEDIATE INCOME ACCRUING AFTER DEATH OF TENANT FOR LIFE, AND BEFORE VESTING—WILL—CONSTRUCTION.

In re Woodin, Woodin v. *Glass*, (1895) 2 Ch. 309; 12 R. July 78, a testator had given certain leasehold property to trustees upon trust to pay the income to his daughter for life, and after her death upon trust to pay or transfer the same to her children in equal shares, the shares of sons to be vested at twenty-one, and of daughters at twenty-one or marriage. The testator made other specific bequests, and then gave his residuary estate upon certain trusts for his children. The daughter having died leaving infant children, the question was whether the income of the leasehold estate specifically bequeathed which should accrue between her death and the vesting of the shares of her children could be applied for the maintenance of the latter. North, J., conceiving himself bound by *Turneaux* v. *Rucker*, W.N. (1879) 135, held that the infants were not entitled to the income for their maintenance, but that it fell into the residuary estate: bu

the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.) reversed this decision, and expressed their disapproval of cases imperfectly reported in the Weekly Notes being relied on as authorities, especially when opposed to reported cases. The fact that the fund had been severed from the rest of the testator's personal estate was held to carry the interest accruing between the death of the tenant for life and the vesting in the remainderman.

COMPANY—EXECUTION CREDITOR—DEBENTURE-HOLDERS—FLOATING SECURITY—SALE OF GOODS UNDER EXECUTION STAYED BY DEPOSIT OF MONEY.

In *Taunton* v. *Sheriff of Warwickshire*, (1895) 2 Ch. 319, the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.) hold that where a sale of the goods of a company under execution is stayed, by the deposit with the sheriff of a sum sufficient to satisfy the execution by persons claiming the goods under a lien created by debentures of which they were holders, and in whose favour a receiver had been appointed, and which deposit accompanied by a notice of their claim and a protest against the goods being sold under the execution, they, the debenture-holders, and not the execution creditor, are entitled to the money so deposited, on the debenture-holders subsequently establishing their claim to the goods seized.

PRIVATE COMPANY—ONE-MAN COMPANY—LIMITED LIABILITY—SOLE TRADER—WINDING UP—LIABILITY TO INDEMNIFY COMPANY IN RESPECT OF DEBTS.

Broderip v. *Salomon*, (1895) 2 Ch. 323; 12 R. Aug. 89, is an illustration of the failure of an attempt to pervert the law relating to joint stock companies. The defendant, being a solvent trader, and being desirous of carrying on his business with limited liability, caused a limited company to be registered with a nominal capital of £40,000 in £1 shares. The memorandum was subscribed by himself, wife, and five children, for seven shares in all. Twenty thousand pounds were allotted to the defendant, but no other shares except the above 20,007 were ever taken. Debentures forming a floating security on the capital were issued to the defendant in payment of the amount for which he purported to sell the business to the company. The business went on under the management of the defendant as managing director for a few months, when a compulsory order for winding up was made. Williams, J., held that, under these circumstances, the company was a mere nominee of the defendant, and

that if his nominee had been an individual the nominee could have called on him as principal to indemnify him from the business liabilities, and that the company had the same right, and that the defendant was, therefore, bound to indemnify the company against the debts which the assets were insufficient to pay. From this judgment the defendant appealed, but the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.) took the view that the formation of the company was a fraudulent scheme to enable the defendant to carry on business without liability, contrary to the true intention of the Act, and they, therefore, affirmed the judgment of Williams, J., though not quite adopting his reasoning. This case is a very important one, and will doubtless mark an era in company law.

WILL—CONSTRUCTION—PERSONALTY LIMITED AS IF IT WERE REALTY—PERPETUITY—GIFT OVER OF PERSONAL ESTATE AFTER FAILURE OF ISSUE—WOMAN PAST CHILD-BEARING.

In re Lowman, Devenish v. *Pester*, (1895) 2 Ch. 348; 12 R. Aug. 56, was an action in which the construction of a will was in question. The testator was entitled to a fund, the proceeds of real estate. By his will he devised the land from which the fund was derived, with other lands, to trustees to the use of his nephew Hugh for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of Hugh successively in tail male, with remainder to the first and other sons of his niece Ellen successively in tail male, with remainder to the use of the first and other sons of his niece Flora successively in tail male, with remainder over. Hugh survived the testator and died a bachelor; Ellen was still alive and unmarried, and 70 years of age; Flora had two sons, the eldest of whom died before the testator. Kekewich, J., held that the testator's interest in the fund did not pass under the devise of the land, but formed part of his residuary estate; but the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.) reversed his decision, and held that, under the devise of the land, the proceeds of the sale thereof passed, and, in determining the effect of the various limitations, came to the conclusion that, where there are successive limitations of personal estate in favour of several persons absolutely, the first person entitled who survives the testator takes absolutely, although he would have taken nothing had any

previous legatee survived, the effect of the failure of the earlier gift being to accelerate, and not destroy, the later gift. Applying these principles to the construction of the will in question, it was held that there was no lapse on the death of the first son of Flora before the death of the testator, and that the second son of Flora, although he would have taken nothing had his elder brother survived the testator, took the fund absolutely, subject to the contingency of Ellen having a son. It was also held that the gift to the second son of Flora was not void under the rule against perpetuities because, by the terms of the gift, the estate must vest, if at all, in the lifetime of a person living at the death of the testator; also, that the second son of Flora was entitled to the income which had accrued since the death of the tenant for life, because it appeared that Ellen was past child-bearing.

WILL—CONSTRUCTION—PRECATORY TRUST—"I WISH THEM TO BEQUEATH THE SAME."

In re Hamilton, Trench v. *Hamilton*, (1895) 2 Ch. 370: 12 R. Aug. 49, the Court of Appeal has once more shown their intention of restricting the doctrine of precatory trusts within narrower limits than some of the older cases seemed to warrant. By the will in question the testator gave legacies to her two nieces, and added: "I wish them to bequeath the same equally between the families of S. Oliver and Mrs. Pakenham." The Court of Appeal (Lindley, Lopes, and Kay, L.JJ.), affirming Kekewich, J., held that the nieces took absolutely, and that there was no precatory trust in favour of the families of Oliver and Pakenham; and, in arriving at this conclusion, the court followed *In re Adams*, 27 Ch.D. 394, and *In re Diggles*, 39 Ch.D. 253, in preference to the earlier case of *Malim* v. *Keighley*, 2 Ves. 333, 529 (*a*). Lopes, L.J., says: "The current of decisions with regard to precatory trusts is now changed, and the result of the change is this, that the court will not allow a precatory trust to be raised unless, on the consideration of all of the words employed, it comes to the conclusion that it was the intention of the testator to create a trust."

UNDER-LEASE—COVENANT TO KEEP IN REPAIR—MEASURE OF DAMAGES.

Ebbetts v. *Conquest*, (1895) 2 Ch. 377; 12 R. Sept. 72, was an appeal from a referee to whom had been referred the assessment of damages payable for breach of a covenant by a lessee to keep the

demised premises in repair. The covenant was contained in an under-lease, of which four years were unexpired; the lessor's reversion was only for ten days. There was evidence that at the expiration of the superior lease the property would probably be useless except as a building site, and the defendant contended that the measure of damages was the difference between the value of the buildings for the purpose of removal, if put in repair, and their value for that purpose if not repaired. The referee, however, held that the proper mode of estimating damages was to ascertain what it would cost to put the buildings in repair, deducting therefrom a discount in respect of the unexpired term, and this principle the Court of Appeal (Lindley, Lopes, and Rigby, L.JJ.) held to be correct.

PRACTICE—SUSPENSION OF INJUNCTION GRANTED BY COURT OF APPEAL—EXTENSION OF TIME—JURISDICTION.

In *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 2 Ch. 388; 12 R. Sept. 83, the Court of Appeal had varied a judgment directing an inquiry as to damages occasioned by a nuisance, and had granted an injunction, but suspended its operation for a certain time. The defendants desired to obtain a suspension of the injunction for a further period, and applied to Kekewich, J., who doubted whether he had jurisdiction; the application was then made to the Court of Appeal, who granted, but in doing so intimated that Kekewich, J., could entertain the motion

AIR—RIGHT TO ACCESS OF AIR—NUISANCE.

In *Chastey* v. *Ackland*, (1895) 2 Ch. 389; 12 R. Sept. 62, the defendant had erected on his premises a building which had the effect of preventing the free access of air to the plaintiffs' premises, and, in consequence, the effluvia from a urinal in the neighbourhood of the plaintiffs' premises and from the closets on their own premises were not so effectually carried off as prior to the erection of the defendant's building. Cave, J., granted an injunction to remove the building; but the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.) were unanimously of opinion that, in the absence of contract, or proof of immemorial user, the erection in question gave no right of action, and the decision of Cave, J., was reversed.

ERRATA.—P. 435, 5th and 13th lines, for "Ont. Rule 332" read "Ont. Rule 276." P. 479, 8th line from bottom, for "not" read "now."

Reviews and Notices of Books.

The Practice of the Exchequer Court of Canada. By Louis Arthur Audette, LL.B., Advocate, Registrar of the Court. Ottawa: Thoburn & Co., 1895.

This is a most useful book to such of the profession as have to do with revenue, admiralty, and patent and trade-mark cases. In the introduction to the work will be found an exhaustive historical review of the origin and development of Exchequer jurisdiction in England and the British American colonies, together with an interesting monograph on the doctrine and practice of that great remedy, so little understood by the ordinary practitioner—the petition of right. All the statutes affecting the jurisdiction of the court are epitomized in a convenient form, and they, as well as the rules of court on the Exchequer side, are copiously annotated. The Admiralty rules are also given in their entirety. The precedents of pleadings in patent cases, framed by the author, are a valuable feature of the work. Taken as a whole, the book is an excellent one, and should find a ready sale.

Notes and Selections.

In the present day, when so much is said about women's rights, it will delight many to know that, although the judicial bench is now monopolized by the sterner sex, we believe at least once in the history of England a woman has acted as judge. This was in the reign of Henry VIII., and the woman to whom the unique honour fell was the Lady Ann Berkeley, of Yate, in Gloucestershire. She had appealed to the king to punish a party of rioters who had broken into her park, killed the deer, and fired the hayricks, and His Majesty granted to her and others a special commission to try the offenders, armed with which she opened a commission, empanneled the jury, heard the charge, and, on a verdict of "Guilty" being returned, pronounced sentence.—*Albany Law Journal.*

CAN PHOTOGRAPHS LIE?—It seems, from the following note in the *American Law Review*, signed with the initials of Judge

Bradwell, that this question must be answered in the affirmative. It will be recalled that Judge Bradwell, in addition to his learning as a lawyer, and his ability and aptitude as an editor, is a skilful photographer and half-tone engraver. "The law as to how far photographs may be used in evidence is not settled. It is sometimes asked, 'Can the camera lie, and are photographs reliable?' This depends upon circumstances. A short time since, in connection with another artist, we focused two cameras upon a court of three judges, and used for a flash-light blitz pulver, which lasted only the hundredth part of a second. When one of the plates was developed it was found that the eyes of the Chief Justice were closed as if in sleep, while in the other they were wide open. If the question had been to prove whether the Chief Justice was asleep at the fraction of a moment of the taking, all that would be necessary to do would be to introduce a print from one of the negatives; if to prove that he was wide awake and attending to business, to produce a print from the other negative, or, in other words, 'Look on this picture and on that.' The difference in these negatives is easily explained by those who took them, but not by the ordinary judge or lawyer."

THE RIGHT OF SELF-DEFENCE.—The Supreme Court of the United States just before adjournment handed down a decision which establishes the principles of the right of self-defence. The decision was given on the appeal of Babe Beard from a judgment of conviction and sentence of eight years' imprisonment for manslaughter. The facts of the case, it seems, were that Beard had three brothers-in-law, who came to his house with the express determination of driving away a cow, the ownership of which was in dispute between the parties. One of the brothers-in-law advanced upon Beard, who had a gun in his hands, and made a motion as if to draw a revolver from his pocket. Beard struck this brother-in-law over the head, inflicting a wound from which he died. On the trial the judge instructed the jury in regard to the law of self-defence, and said that Beard was compelled by that law to avoid danger at the hands of the person who threatened him by going away from the place, that the only place where he need not retreat further was his dwelling place. Judge Harlan, in delivering the opinion of the court, says that

the charge was defective in point of law on several grounds, and in discussing this question in his opinion he says:

"The court, several times in its charge, raised or suggested the inquiry whether Beard was in the lawful pursuit of his business, that is, doing what he had a right to do, when, after returning home in the afternoon, he went from his dwelling house to a part of his premises near the orchard fence, just outside of which his wife and the Jones brothers were engaged in a dispute—the former endeavouring to prevent the cow from being taken away, the latter trying to drive it off the premises. Was he not doing what he had the legal right to do, when, keeping within his own premises and near his dwelling, he joined his wife, who was in dispute with others, one of whom, as he had been informed, had already threatened to take the cow away or kill him? We have no hesitation in answering this question in the affirmative, . . . In our opinion, the court below erred in holding that the accused, while on his premises, outside of his dwelling house, was under a legal duty to get out of the way, if he could, of his assailant, who, according to one view of the evidence, had threatened to kill the defendant, in execution of that purpose had armed himself with a deadly weapon, with that weapon concealed upon his person went to the defendant's premises, despite the warning of the latter to keep away, and by word and act indicated his purpose to attack the accused.

"The defendant was where he had the right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or to do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he at the moment honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.

"As the proceedings below were not conducted in accordance with these principles, the judgment must be reversed and the cause remanded, with directions to grant a new trial."—*Albany Law Journal.*

DIARY FOR OCTOBER.

1. Tuesday.....Supreme Court of Canada sits. Wm. D. Powell, 5th C.J. of Q.B., 1877. Meredith, J., Chy. Div., 1890.
6. Sunday .....*17th Sunday after Trinity.*
7. Monday.....County Court and Surrogate Sittings, except in York. Henry Alcock, 3rd C.J. of Q.B , 1802.
8. Tuesday .....Sir W. B. Richards, C.J.S.C., 1875. R. A. Harrison, 11th C.J. of Q.B., 1875.
9. Wednesday.....De la Barr, Governor, 1682.
11. Friday.....Guy Carleton, Governor, 1774.
12. Saturday.....America discovered, 1492. Battle of Queenston Heights, 1812.
13. Sunday..... W. R. Meredith, C.J. of C.P.D., 1894.
14. Monday.....County Court and Surrogate Sittings in York.
15. Tuesday.....English law introduced into U.C., 1791.
17. Thursday.....Burgoyne's surrender, 1777.
20. Sunday.....*19th Sunday after Trinity.*
21. Monday.....County Court Non-Jury Sittings in York. Call, last day for notice of Michaelmas Term.
23. Wednesday ....Lord Lansdowne, Governor-General, 1883.
24. Thursday.....Sir J. H. Craig, Governor-General, 1807. Battle of Balaclava, 1854.
26. Saturday .....Battle of Chateauguay, 1813.
27. Sunday.....*20th Sunday after Trinity.* C. S. Patterson, J. of S.C., 1888. Jas. Maclennan, J. Court of Appeal, 1888.

Reports.

ONTARIO.

MUNICIPAL CASES.

IN THE MATTER OF THE APPEAL OF F. H. ANNES AND OTHERS, AND THE TOWN OF WHITBY.

Consolidated Assessment Act, s. 7a—"Farm lands" within towns and villages —Meaning thereof—Method of assessment.

Under s. 7*a* of the Consolidated Assessment Act the farm property "held and used as farm lands only" therein mentioned should be assessed separately and distinctly from the residence.

Where the residence and such farm lands have not been so separated, but have been assessed as one property, the rebate or percentage of reduction, if any, must be based upon the total assessment.

In estimating the benefit or advantage derived, the personal benefit or convenience of the owner or occupant should not be considered.

[WHITBY, October 2nd, 1895. DARTNELL, J.J.

These were appeals under the Consolidated Assessment Act, s. 7*a*.

DARTNELL, J.J.: At the argument, I expressed the opinion, which reflection has confirmed, that the mode of assessment and the form of the by-law do not carry out what appears to me to be the intention of the legislature in framing the Act.

It is apparent that the Act creates, as far as towns and incorporated villages are concerned, a separate and distinct class of property, liable to be

rated as such, and in respect of which a more favourable rate of taxation is to be levied than upon all other property within the corporation. This distinct class is defined to be "lands held and used as farm lands only."

I therefore think it was the duty of the assessor to assess all property, appurtenant to the farm lands, used for residential purposes, with a reasonable amount of land attached thereto, as a separate parcel, and to rate the remaining portion "held and used as farm lands only" in another and distinct parcel. I am confirmed in this view by the provision of s-s. 3, by which any person, claiming exemption in whole or in part, is required, in his notice of claim, by some intelligible description, to indicate the land and quantity as nearly as may be in respect of which such exemption is claimed. This has not been done, and the effect is that lands upon which costly residences are erected are classified and rated as "farm lands," and so become entitled to the benefit of the exemption. In many cases farm lands may be regarded as appurtenant to a residence, rather than the house and premises be an appurtenance of the farm.

The council, by their by-law, have practically declared that *all* the lands of the appellants, set out in the schedule, are entitled to exemption, and have endeavoured to get over the difficulty by establishing a percentage of rebates thereon, varying from zero to 80 per cent.

On the other hand, the appellants are in equal fault, for they have omitted in their appeals to "indicate the land and quantity in respect of which exemption is claimed."

I do not feel inclined to endeavour to put the assessment of these appellants' property upon what I consider to be a proper basis. I am not a skilled assessor, and any interference with the assessment would not be satisfactory, and least of all to myself.

Practically, then, I have to limit my duty to considering whether the percentages established by the by-law are fair, under the circumstances, to the parties affected as well as to the ratepayers generally; for it is to be remembered that these rebates are lifted from the shoulders of the appellants and placed upon those of the remaining ratepayers.

This matter is a fair illustration of the difficulties which arise from entrusting matters of law and legal construction to the members of a lay tribunal. Such a body, if not swayed by caprice, prejudice, or combination, is apt to act by way of compromise.

It is difficult to otherwise account for some of the rebates, except as disclosed by the argument, by which it appears that the committee in charge discussed and took into consideration the personal benefit or convenience of the parties, owners or occupants. This, I think, was an error. The personal element should be altogether eliminated. It is not proper to endeavour to estimate how much or how often the owner or his family use or are benefited by the sidewalks, sewers, or lighting. The ownership or occupancy is continually shifting; the lands remain unchanged from year to year. It is the "advantage, direct or indirect, to the *lands*, arising from improvements," that is alone to be considered in determining the exemptions.

The words in the Act, "exempt or partly exempt," justify a scheme of percentages. This should apply only to such lands as the by-law designates as

"lands held and used for farm purposes." As this latter has not been done, other than as stated, there is no other course than to make it applicable to the whole assessment.

The judgment then proceeded to amend the by-law and the percentages of rebate.

J. F. Farewell, Q.C., *J. B. Dow*, and *David Ormiston* for the various appellants.

James Routledge for the respondents.

Notes of Canadian Cases.

ONTARIO.

COURT OF APPEAL.

[Sept. 25.

THOMPSON *v.* GRAND TRUNK RAILWAY COMPANY OF CANADA.

Railways—Highways—Cattle—"At large"—51 Vict., c. 29, s. 271 (D.)—Non-suit—Jury.

Cattle are "at large" within the meaning of s. 271 of 51 Vict., c. 29 (D.), when the herdsman, in following one of the herd that has strayed, gets so far from the main body that he is unable to reach them in time to drive them over a railway crossing when he sees a train approaching.

The question whether cattle are at large or not need not, under all circumstances, be submitted to the jury, if the case is being tried before one. The judge is entitled to hold that there is no evidence that the plaintiff is not within the prohibition of the Act.

Judgment of the County Court of Wentworth affirmed.

D'Arcy Tate for the appellant.

Moss, Q.C., for the respondents.

[Sept. 25.

BROWN *v.* LENNOX.

Lease—Assignment without consent—Assignee's liability to indemnify assignor.

Where a lease containing a covenant against assignment, without the consent of the lessors, is so assigned, the assignment containing a covenant by the assignee to pay the rent and indemnify the assignor, and the assignee goes into possession of the demised premises, he is bound by his covenant, and is liable, notwithstanding the non-assent of the lessors, to repay to the assignor rent accruing due after the assignment, paid by the assignor to the lessors under threat of legal proceedings.

Judgment of the County Court of York reversed.

E. D. Armour, Q.C., for the appellant.

J. H. Denton for the respondent.

[Sept. 25.

FIELD *v.* HART.

Exemptions—Execution—R.S.O., c. 64, s. 2—Bills of sale and chattel mortgages—Description.

An execution debtor can do as he pleases with the statutory exemptions, and his execution creditor cannot take advantage of the fact that they are insufficiently described in a bill of sale thereof by the execution debtor.

Where in an interpleader issue the claimant alleges that the goods seized include the statutory exemptions, that is a question for trial in the issue, and is not to be left to the sheriff to deal with.

Judgment of the County Court of Ontario reversed.

"One piano, Dominion make, number 2773," is a sufficient description in a bill of sale.

Judgment of the County Court of Ontario affirmed.

F. J. Travers for the claimant.

Moss, Q.C., for the execution creditor.

HIGH COURT OF JUSTICE.

Common Pleas Division.

Div'l Court.] [July 13.

BROUGHTON *v.* THE TOWNSHIP OF GREY.

Municipal corporations—Drainage by-law—Obligations of initiating and contributory townships respectively—Consolidated Municipal Act, 1892—55 Vict., c. 49, ss. 579, 580, 585.

Where a township municipality has passed a by-law, purporting to be under s. 585 of the Consolidated Municipal Act, 1892, for the purpose of making certain alterations and improvements in a drain, and has served an adjoining municipality, which is to be benefited by the work, with a copy of the engineer's report, etc., showing the sum required to be contributed by the latter, as directed by s. 579; and the by-law of the initiating township is, as a fact, irregular and invalid;

Held, per MEREDITH, C.J., the contributory township is, nevertheless, not only entitled, but bound, within the four months prescribed by s. 580, to pass the necessary by-law to raise their share of the estimated cost.

Held, per ROSE, J., the contributory township cannot be required to pass a by-law raising its shares till the initiating municipality has passed a valid by-law adopting the report providing for the doing of the work, including the raising of its proportion of the funds. But in this case the portion of the by-law of the initiating township adopting the engineer's report and directing the construction of the work might properly have been sustained on motion to quash by a ratepayer of that township, and an order quashing have been confined to the portion providing for raising the funds, as to which an amending

by-law might have been passed; and, therefore, the contributory township might well proceed, relying on the good faith of the initiating township to make all necessary amendments.

Semble, *per* MACMAHON, J.: The contributory township had no power to pass a by-law for raising its share of the proposed expenditure until the initiating municipality had passed its by-law for the construction of the works.

Mabee for the plaintiff.

Garrow, Q.C., for the Township of Grey.

McPherson for the Township of Elma.

Practice.

ROSE, J.] [Sept. 12.

RICE *v.* KINGHORN.

Costs—Mortgage action—Appearance—Judgment—Rule 718 (1349).

Where a defendant in a mortgage action desires only to dispute the amount claimed, but, instead of giving the notice referred to in Rule 718 (1349), enters an appearance in which he disputes the amount, judgment cannot be entered on *præcipe*; a motion to the court becomes necessary, and the defendant so appearing must pay the additional costs of it.

W. H. Blake for the plaintiff.

No one appeared for the defendant.

Court of Appeal.] [Sept. 27.

CHAMBERS *v.* KITCHEN.

Revivor—Order for, after judgment—Motion to set aside—Rule 622.

Order and decision of STREET, J., 16 P. R. 219, refusing to set aside order of revivor, affirmed.

L. F. Heyd for the appellant.

H. J. Scott, Q.C., for the respondent.

NOVA SCOTIA.

SUPREME COURT.

GRAHAM, J.]

REGINA *v.* MOREAU.

Habeas corpus—Seaman's Act, R.S.C., c. 74, s. 91 (a)—Imprisonment—Hard labour—Insufficient penalty.

One Louis Moreau, having been brought before the stipendiary magistrate and recorder for the town of Pictou, charged with desertion from the s.s. *St. Olaf*, confessed the charge, and was convicted and sentenced "to be imprisoned

in the county jail at Pictou for eight weeks, forfeiting wages as provided in Act."

A writ of *habeas corpus* was applied for and obtained, and the argument heard before GRAHAM, J.

For the prisoner, it was contended that the warrant was bad under s. 91 (*a*) of the Seaman's Act, which declares that, (*a*) "For desertion, he shall be liable to imprisonment for any term not exceeding twelve weeks and not less than eight weeks with hard labour, and also to forfeit all or any part of the clothes and effects he leaves on board, and all or any part of the wages or emoluments which he has then earned," inasmuch as the warrant of commitment merely required the "keeper of the said county jail to receive the said Louis Moreau into your custody in the said county jail, there to imprison him for the term of eight weeks," no hard labour being awarded in the sentence or contained in the warrant as required by the terms of the statute, and the warrant was therefore bad as containing an insufficient penalty, the minimum penalty authorized by the statute being "eight weeks imprisonment with hard labour," etc.

Contra, the word "liable" in s. 91 (*a*) conferred a discretion in the amount of penalty to be awarded.

GRAHAM, J., (*hesitante*) *held* the warrant bad under s. 91 (*a*) as omitting hard labour, and granted the discharge of the prisoner.

In designating Mr. Lennox as the architect of the new library at Osgoode Hall, we find we were mistaken. The Law Society's architect is Mr. Edmund Burke, and it is to him the credit of the new building is due.