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DIARY FOR NOVEMBER.

16. Wed....Appointment of election judges on rota.
17. Thur...Lord Chancellor Erskine died 1823, æt. 73.
20. Sun.....*24th Sunday after Trinity.*
21. Mon....Michaelmas sittings begin. J. Elmsley, 2nd C. J. of Q. B. 1796.
27. Sun.....*Advent Sunday.*
30. Wed....Moss, J. A., appointed C. J. of Appeal, 1877,

TORONTO, NOVEMBER 15, 1887.

"ONE by one the leaves fall," but death has been of late years more than ordinarily busy in the ranks of our judges. Only a few months ago we had to chronicle the death of Sir M. C. Cameron, then his old friend Chief Justice Wallbridge dropped off, and now we have to chronicle the sudden death of Mr. Justice O'Connor, of the Queen's Bench, on the 3rd inst, while holding the assizes at Cobourg.

A REPORT of the case of *Shaw* v. *Northern Railway Co.*, which will be found in another place, has not appeared in the regular series, inasmuch, we presume, as the judges of the Court of Appeal gave no judgment other than merely to affirm without comment the judgment of the learned judge of the County Court of Simcoe. It does not, of course, follow that the Appellate Court adopts the reasons, but merely the results arrived at in the judgment of the court below. But in this case the argument of the County Judge is so satisfactory that we may assume it commended itself to the judges in the court above.

THE following clause is to be found in "An Act respecting domestic and other animals," now in force in the Province of Manitoba, and was enacted with a view of striking terror into the breasts of certain evil doers who had the "pernicious" habit of "catching animals at large and using them without the owner's consent." It reads as follows:

"3. No person catching or detaining, or causing to be caught or detained, any animal that has been advertised by the owner, or by any person on his behalf, as lost or strayed shall be liable to fine or imprisonment under this Act, unless he shall establish to the satisfaction of the court in which the charge is made, that he took immediate and proper measures to inform the owner of the animal, or his agent, of its having been caught."

This is lovely—comment would be barbarous.

SINCE our last issue the report of the Board of Trade of the city of Toronto in the matter of J. B. McKay & Co. has been published in the daily papers, and amongst others, in the Toronto *Mail* of the 26th inst. We call attention to this report on account of the admirably judicial way in which the council of the Board of Trade have handled the unpleasant matter before them, and also on account of the fearless and conscientious manner in which they have in the conclusion to which they arrived enforced honourable dealing among business men within their control. Who the actual author of the report was we have no means of knowing, but all we can say is that he has a judicial mind, and has admirably expressed the sound views entertained by the council. We think also that a good moral may be derived from the report by our own Law Society, who, it is to be hoped, will always enforce with equal firmness any crooked or

unprofessional dealings among members of the profession which may be brought to their notice. We publish the report referred to in full in another place (p. 395 *infra*).

The precise difference between a rule of law, and a rule of construction was very clearly and neatly stated by Fry, L.J., in the recent case of *Re Coward, Coward* v. *Larkman*, 57 L. T. N. S., 285. In one sense a rule of construction may be said to be a rule of law, inasmuch as it is a rule laid down by the law for the construction of written instruments, but the terms, "rule of law," and "rule of construction," have acquired a definite technical meaning, and are intended to express two radically different ideas.

According to Fry, L.J., "rules of construction" and rules of law differ in this respect—the one being a rule which points out what a court shall do in the absence of any express or implied intention to the contrary; the other is one which takes effect when certain conditions are found, although the parties to the instrument under consideration may have indicated an intention to the contrary. It will thus be seen that a "rule of construction" is a flexible rule yielding to a contrary intention, and that a "rule of law" on the other hand is inflexible, and its application is unaffected by any intention of the parties.

This distinction, when clearly kept in mind, will serve as a safeguard against any confusion of thought as to the relative nature of "rules of law" and "rules of construction."

JUDICIAL APPOINTMENTS.

Owing to the retirement of Sir Adam Wilson to his well earned repose, the presidency of the High Court of Justice is now transferred to the Chancellor as the senior chief, and as he is still a young man, in all probability, it is likely long to remain there; unless, indeed, he receive promotion to a higher court.

We heartily congratulate Mr. justice Taylor upon his appointment to the Chief Justiceship of Manitoba. He has won the position fairly, and none will grudge him the honour, except apparently some of the race who, holding too much the balance of power politically, think that every plum should fall into their mouths. The Government has made a wise selection. The learned Chief Justice whilst in Ontario was a great success as Master in Ordinary of the Court of Chancery, and also made some valuable additions to our legal literature. He has given, we understand, great satisfaction to the profession and the public as a judge in Manitoba, and will, we are satisfied, be as useful in his new position as he has been in the more subordinate ones where he acquired his judicial training.

It is also here in order to congratulate Mr. Justice Galt and Mr. Justice Armour upon their promotion, the former to the Chief Justiceship of the Common Pleas Division, rendered vacant by the untimely death of Chief Justice Cameron, and the latter to the seat lately resigned by Sir Adam Wilson as Chief Justice of the Queen's Bench Division. The friends of the genial Chief Justice of the Common Pleas are legion. In the natural course of things it is not unlikely that he may soon seek relief from the arduous duties which devolve upon our judges. But

whether on or off the Bench may he long live to enjoy the honour conferred upon him. The appointment of Mr. Justice Armour is a fitting recognition of his great ability, and as such will be recognized by all. He has in all human probability a long career of usefulness before him.

NOTHING definite has transpired as to the persons likely to be elected to fill the vacancies on the Bench in this Province. It is amusing to read the strings of names which are from time to time put forth by the newspapers as possible appointees. The more so as these lists seem usually framed on the principle of selecting the most unlikely persons for the distinction. In very few have we observed the names of men whose long standing and reputation at the Bar naturally mark them as men on whom the choice of the profession would almost instinctively fall. For instance, Mr. Christopher Robinson, Q.C., Mr. Maclennan, Q.C., Mr. Dalton McCarthy, Q.C., Mr. B. B. Osler, Q.C., Mr. Hector Cameron, Q.C., Mr. Moss, Q.C., are each and all among the foremost from whom one would expect judicial appointments to be made. The fact that our contemporaries almost invariably hit upon the names of men of inferior standing at the Bar, as the persons most likely to be appointed, arises from a general conviction that the greater stars in the firmament look upon the judicial office as either unworthy of their acceptance, or as involving too great a pecuniary sacrifice. If this is the reason, what a sad commentary it is on the effect of our parsimonious conduct as a people, in the matter of judicial salaries? The fact that it seems to be agreed by almost universal consent, that we must look to the second rank of the Bar from which to recruit the Bench, is a misfortune so great that no sensible person can contemplate it without grave apprehension for the future.

MR. JUSTICE O'CONNOR.

THE Hon. Mr. Justice O'Connor died at Cobourg on the 3rd of November inst., aged 62 years. He was born in Boston, U.S., in January, 1824, his father and mother having emigrated from Kerry, Ireland, to Boston the previous year. He, with his parents, subsequently removed to the county of Essex, in Ontario, where he received his education. When about twenty years of age, while working on his father's farm on a cold winter day, a falling tree pinned him down and jammed one of his legs between the falling tree and a stump, and this accident resulted in the loss of the limb. But for this, he might still be following the plough, but as it was, his attention was directed to the study of the law, and he was called to the Bar in Hilary Term, 1854. He was also admitted to practise law in the State of Michigan, and he was an instance of a person who could be an American citizen and a British citizen at the same time. Born of British parents he could claim, and was recognized as a British subject, and being born in Boston was a native-born American citizen. This point was tested in an election trial between him and William McGregor in the year 1874. His legal attainments soon caused him to occupy a leading position at the Bar in the Western Peninsula. He held at different times the position of Reeve of Windsor and the Wardenship of the county.

In 1863 Mr. O'Connor entered Parliament, and in 1872 joined the Administration of Sir John Macdonald as a representative of the Irish Roman Catholic inhabitants of Ontario (though why they

should have a representative any more than any other class we are at a loss to see). He there held the different positions of President of the Council, Minister of Inland Revenue and Postmaster-General.

He was created a Q.C. in 1873. On the 17th September, 1884, he was appointed one of the Judges of the Queen's Bench Division on the elevation of Sir Matthew Crooks Cameron to the Chief Justiceship of the Common Pleas Division.

As Mr. O'Connor had for some time previously to his appointment to the Bench, devoted his time chiefly to politics, his labours as a Judge were specially arduous, but he never flinched from his work and he died in harness. Contrary to the advice of his physician, he went on the Autumn Circuit, realizing that the work had to be performed and the persons to do it had been diminished by death and illness. He went to Cobourg to hold the assizes, but not being able to perform his duties Judge Benson acted for him, and while still there he was attacked by an illness which caused his death in a few hours.

The Hon. Mr. Justice Rose referred to the death at the opening of his court the following day, in the following words:

"Before entering upon the business of the Court, I desire to refer to the very sad and sudden death of the Hon. Mr. Justice O'Connor. Thus another of our judicial brethren has been removed from our side. Since my appointment, four years ago this present month, four of the judges of the Superior Court of this Province have been removed by death—Chief Justice Spragge, Mr. Justice Morrison, Chief Justice Sir Matthew Crooks Cameron and Mr. Justice O'Connor, an average of one a year. Truly life is but a span, and very soon the night cometh wherein no man can work. Our deceased brother no doubt, like the rest of us, had his faults, but in the short period he was amongst us as a brother Judge we learned that he was a man of kind heart, clear head, broad common sense, fair minded, impartial, with a strong will, always determined to do his duty as he understood it and to administer justice without fear, favour or affection. Taken from the midst of political life, not fresh from the Bar, he was of course not as familiar with the recent decisions as otherwise he would have been. This made his labour more arduous, and, with the weight of advancing years and at times much physical infirmity, caused his burden to be greater than appeared to most. His indomitable pluck and perseverance enabled him to overcome many difficulties, and he was ever ready not only to perform the work which in ordinary course fell to his lot, but also to volunteer assistance when required to relieve others who might be unduly pressed. Ever kind and cheerful, he brought to our councils no unpleasant word, no disturbing element. In sadness we turn away from his vacant seat, and join with many others in saying, 'Requiescat in pace.'"

REPORTS.

ONTARIO.

IN THE COURT OF APPEAL.

APPEAL FROM THE COUNTY COURT OF THE COUNTY OF SIMCOE.

Reported for the CANADA LAW JOURNAL.]

SHAW V. NORTHERN AND NORTHWESTERN RAILWAY COMPANY.

Action against railway company—Right to flood land to obtain water for engines—Damages—Injunction.

The defendants' road crossed a stream on plaintiff's land which they dammed back to get head enough to work a turbine wheel to pump the water into a tank for supplying their engines. This caused an overflow on plaintiff's land for which he brought this action. The jury having assessed damages, a verdict was entered for the plaintiff. Against this defendants moved, contending, amongst other things, that under the statutes cited they had the right to take the water in the way they did; and that in any case, plaintiff's remedy was by arbitration.

Held, that though defendants might have the right to use the water of the stream, they could not dam it back (and so flood the plaintiff's land), so as to work their turbine wheel, when they could get a sufficient supply by using a pump worked by steam or by hand, the using of which would not overflow plaintiff's land.

Held, also, that plaintiff's remedy was by action, and not arbitration, and that he was entitled to an order for the removal of the dam, and an injunction against its being built.

The facts of the case sufficiently appear in the judgment of the court below by

ARDAGH, Co.J.—This is an action of trespass for flooding the plaintiff's land, and was tried by a jury at the June sittings of this court.

The evidence showed that the plaintiff, in February, 1884, purchased the land in question subject to the right of way previously acquired by the defendants from a prior owner. At the time of the purchase by plaintiff the defendants had constructed and were using their line of railway, trains running regularly over it. They had also, in 1881 or 1882 (some years after the railway was constructed), built a dam on a small stream which ran through plaintiff's lot—that mentioned in the pleadings—for the purpose of gaining a supply of water for the use of their engines. This dam was partly on plaintiff's land—more than half of it, he said in his evidence (though defendants' engineer said it was all on their road),—and is about four feet high. A year or two ago the defendants raised this dam by laying down a 2-inch plank. The effect of this was to raise the water still higher on plaintiff's lot, and to double the area of overflowed land. This overflowed land lay to the north of the defendants' road, and is nearly an acre in extent. Most of this acre is overflowed, and all of it rendered useless by the water being backed. The plaintiff also complained that the defendants had cut a sort of tail race alongside of the stream on the south side of the railway, 120 feet long and 12 or 14 feet wide, and 3½ or 4 feet deep in some places, for the purpose of carrying off the waste water, and this made it very dangerous for his cattle, as likely to fall in. The object of making the dam was to get enough water to run a turbine wheel, which pumped the water up into a large tank, thus doing away with the necessity of using steam or hand-power for that purpose.

Plaintiff also complained of a small portion of land on the opposite side of the stream having been washed out by this dam breaking away. The area of this is small, but the tail-race and the land between it and the stream (rendered useless) is about one-quarter of an acre.

Previous to action brought the defendants had offered plaintiff $100 for the land flooded, said by them to be about one-half an acre.

The evidence of the value of the land, and of the damage done by the defendants was sufficient to support the verdict for the plaintiff, which is not complained of on that ground.

For the defence, Mr. Holgate, defendants' chief engineer, was called. He stated when and how this dam came to be constructed by defendants. He said that it was necessary to work a turbine wheel to pump the water, and that no unnecessary damage was done in carrying this out. That a tank was placed at this particular point (Hawkstone Station) on account of the facilities of the water. If this stream had not been there they would have put a tank at Oro Station, about half way between the Allandale and Orillia tanks. He also said that they had tanks in other places where there were no streams.

Mr. Reeve, Q.C., for the defendants, objected to the case going to the jury on the ground that no action would lie against the company, as the act complained of was not a wrongful act, having been done by them under the powers conferred by the statute, so that the plaintiff's remedy was only by arbitration. He also objected on the ground that

the plaintiff was not entitled to any compensation for what was done by the defendants before the plaintiff became the owner of the land, as it must be presumed that what was done was done with his (plaintiff's vendor's) consent, and that in any case plaintiff could only recover damages for the six months prior to the bringing of the action.

Mr. Strathy, Q.C., for the plaintiff, asked for an injunction against the defendants (that having been prayed for in the statement of claim) to prevent them continuing the flooding, and for an order compelling them to remove the dam.

The jury were directed to assess damages:

1st. For the two and a half years the plaintiff has been in possession as owner, for which they found $50.

2nd. For the six months before the action was brought. For this they found $20.

3rd. The total damage to the plaintiff in case the defendants did not remove the dam. For this they allowed $125, and for this latter sum the verdict was entered.

The defendants now move absolute an order *nisi* to set aside this verdict, and to enter one for the defendants or a non-suit.

The plaintiff also took out an order *nisi* to enter a verdict for the $50, with an injunction and order as prayed for in plaintiff's claim, and both motions were argued together.

Mr. Boulton, Q.C., for defendants:—

When the dam was built the plaintiff was not the owner, nor till two years afterwards. Also that there was no dissent by the other owner, and that the plaintiff bought with the dam on the place, and so has no right now to complain.

The defendants, in erecting this dam, were acting within their powers, and so cannot be treated as trespassers, arbitration under the statute being the proper course in such a case.

Even if this action is maintainable, plaintiff ought not to recover for more damages than have accrued during the six months before the commencement of the action.

He referred to the Consolidated Railway Act, 42 Vict. chap. 9, sec. 9, ss. 38 and 39, and also to the Northern Railway Company Act, 1875, 38 Vict. chap. 65, sec. 28.

By the last mentioned Act this company are empowered to make use for the purposes of its railway of the water of any stream or water-course over or near which its railway passes, doing, however, no unnecessary damage thereto and not impairing the usefulness of such stream or water-course.

Mr. Strathy, in reply, contended that any powers the defendant undertakes to exercise must be only such as the statute confers on them; that the statute cited gave them power to use water, and not to flood land, and therefore, the injury complained of is not one which should be the subject of arbitration. That the plaintiff took this land subject to the right of way only (as he swore at the trial) and that only a right of way was reserved in his deed. He also argued that the words "injury sustained by reason of the railway," in section 27 of the Act (where the six months' limitation is spoken of) refer to what was done under the authority of and in pursuance of the Act (see the closing words of the 1st section), and therefore cannot be held to refer to a case of this sort, where the injury was not so done.

The questions to be considered are, it seems to me, these:—1st. Has plaintiff any right of action at all? 2nd. Was the construction of this dam something which the defendant had the right to do under either of the Acts cited? If not (3rd), is the plaintiff to be restricted to damages for the injury complained of for the six months preceding the action being brought? 4th. Is this a proper case for the order and injunction asked for?

I must say I do not see why the plaintiff has not a right of action, apart, of course, from the question of arbitration, which will be considered presently. It is true that the dam in question was erected before the plaintiff bought the land, but he says he bought subject only to the defendants' right of way, and that that was the only thing reserved in the deed from his grantor. This dam had been erected long after the defendants had bought this right of way, and there is neither evidence nor inference that there had ever been any compensation to plaintiff's grantor on account of it. Could his grantor have maintained an action for it? If so, why not he? In the case of *Wallace* v. *Grand Trunk Railway*, 16 U. C. R. 551, the plaintiff's grantor had been paid by the defendant, not only for the land, but for all damage done, and it was said that as his grantor could not have maintained an action for it, so the plaintiff (his vendee) could not.

If then this injury was done by the erection of the dam without the consent of the plaintiff's grantor (for in the absence of some evidence to the contrary this might fairly be assumed, and also that it was done without his knowledge) why should not the defendants pay this plaintiff for it? But apart from that, it was in evidence that the area overflowed before the plaintiff bought, was doubled by the addition (small though it was) made to the height of the dam by the defendants, after the plaintiff bought the land, and that the wash-out

caused by the dam breaking was made during plaintiff's ownership.

Of course, the plaintiff would have had his action at common law for the injury done by the defendants, were it not for the protection afforded them by the Railway Act cited. The powers given by these statutes are very ample, but they must not be construed to give more than they actually do, and I think the wording of them should be strictly followed, so as not to take away plaintiff's common law right. They would no doubt have the right to use the water of this stream under the limitations given in their special Act, but, if they could use it without damaging the plaintiff, that is no reason why they should overflow his land so as to save themselves expense; without any dam at all they could have pumped up the water into the tank either by hand or steam, as they do and have to do at other places. It is not necessary for the maintenance of the railway that they should construct a turbine wheel to pump up the water and to flood the plaintiff's land. If they can erect the dam they can also raise it high enough for a ten foot wheel, and so do all the flooding they like.

The general Act speaks of their purchasing the water required by them. Must this involve the erection of a mill pond where the water can be obtained in some other way, though it may be at greater expense to them?

In *Pendergast* v. *Grand Trunk Railway Co.*, 25 U. C. R. 193, the defendants had set fire to some refuse on their railway (which they had a right to do), and it broke out in some way unknown and spread to the plaintiff's land adjoining, and it was held that he could not be deprived of his common law right to an action for the damage done.

In *Cameron* v. *Grand Trunk Railway Co.*, 14 U. C. R. 612, it was held that the injury complained of should have been the subject of arbitration, inasmuch as the embankment, the cause of the injury, was erected during the construction of the railway, and there was no complaint in the declaration of "want of care or skill in the manner of performing the work," but that as it was a continuing injury the plaintiff would not be limited to the six months.

In *Wallace* v. *Grand Trunk Railway Co.* (supra.) there was no natural outflow for the water causing the plaintiff injury through the ravine spoken of, and nothing was done but the making of the road. There was no allegation of improper construction. In such a case arbitration was held to be the proper course.

In *Knapp* v. *Great Western Railway Co.*, 6 U. C. C. P. page 187, the injury complained of was done at the time of the construction of the railway and as a necessary consequence thereof, and, it was said, compensation must therefore be assumed to have been made and paid to the plaintiff. But plaintiff did not complain of the construction of the road, but of a consequential injury arising from time to time. The court assumed that compensation had been agreed upon and paid. Two years had elapsed between the construction of the road and the injury complained of. While the damage claimed for was the result of the original construction of the road, the nature of the injury must have been then perfectly apparent, and the claim must be assumed to have been advanced, because the acts which formed the foundation of the claim were then completely done. DRAPER, C.J., says:—"I think that when a damage is the direct consequence of an act authorized by the statute on compensation being made, and a subsequent claim for that damage as a continuing damage is set up, in a form which must be taken to admit that a compensation for the act itself had been made, such subsequent claim is barred. In this case the damages are attributed to the construction of the railway upon and immediately adjacent to the plaintiff's land, and therefore might have been considered and their value estimated and determined when defendants made compensation for the rights they acquired from the plaintiff."

This case goes to show that the court will only go the length of assuming compensation to have been made where it is a fair presumption, arising from the work causing the injury having been done at the construction of the road, or else as being a natural consequence of its construction.

In *McGillivray* v. *Grand Trunk Railway Co.*, 25 U. C. R. 69, an embankment was constructed by the defendants without a proper culvert, so causing the injury complained of. It was held that an action would lie, but the plaintiff was limited to the damages arising during the six months preceding the action.

In *L'Espérance* v. *Great Western Railway Co.*, 14 U. C. R. 173, the action was held not maintainable, as the injury done was attributable to the mere construction of the railway, which should have been taken into consideration at the time of the contract or at the reference, if the parties had disagreed.

In *Patterson* v. *Great Western Railway Co.*, 8 U. C. C. P. 89 the injury complained of was for diverting water, which used to flow on to plaintiff's land. It was held that the injury was permanent at once, and therefore the action should have been brought within six months.

All these last mentioned cases are alluded to in that of *Vanhorn* v. *Grand Trunk Railway Co.*, 18

U. C. R. 356. That was an action for causing the overflow of plaintiff's land by obstructing a stream. *Held*, maintainable and not to be a case for arbitration. The railway was built in 1856, while the injury complained of did not take place until 1858, when on a single occasion the water was kept back for some weeks on the plaintiff's land and destroyed his crop. It was said there, that the cases of *Knapp* v. *Grand Trunk Railway Co.*, *Patterson* v. *Great Western Railway Co.*, *and Wallace* v. *Grand Trunk Railway Co.* (cited above), were all distinguishable, as the injury in those cases was complete when the act was done, and capable of an entire satisfaction. See also another case of *Vanhorn* v. *Grand Trunk Railway Co.*, 19 U. C. C. P. 264.

In *Wallace* v. *Great Northern Railway Co.*, 16 Q. B. (Ad. & E.) 643, the plaintiff's lessor had obtained an award for a certain sum for all injury and damage done to his estate by severance or otherwise by the construction of the defendant's road. This was held only to include all damage known or contingent, by reason of the construction of the road, which was apparent, and capable of being ascertained and estimated at the time when the compensation was awarded, and not such as could not have been foreseen.

The case of *Follis* v. *Port Hope, etc., Railway Co.*, 9 U. C. C. p. 50, was cited by the defendants in favour of the contention that this action was barred altogether; but, in that case, only a single act of trespass, more than six months before the action was brought, was laid in the declaration.

In *Snure* v. *Great Western Railway Co.*, 13 U. C. R. 376, brought under 16 Vict., chap. 99 (section 10 of which is almost identical with the corresponding section of the present R.W. Act), ROBINSON, C.J., says, after quoting the section:—"The effect of this is to save the right of action for the whole damage, where the suit is brought within six months after the injury has ceased, and of course the action is saved as to all damage so long as the injury continues."

In *May* v. *Ontario and Quebec Railway Co.*, 9 Ont. R. 70, the meaning of the words in the Act, "by reason of the railway," and the closing words of the section are commented on.

In *Beard* v. *Credit Valley Railway Co.*, 9 Ont. Reports 616, it was held that the six months limitation clause did not apply to a case where the defendants had taken earth from some of the plaintiff's land lying outside the siding of the line. Mr. Justice Ferguson in giving judgment, refers to the case of *Brook* v. *Toronto and Nipissing Railway Co.*, 37 U. C. R. 372, as being in point, and in favour of the plaintiff's contention, and he upheld the principles laid down in that case, where the defendants took earth from a part of the plaintiff's land which had not been taken for the purposes of their railway. The fact that the defendants did not take or profess to take any land, but only took the material they found there, is commented on.

So far then as I can judge from the above cases, and a consideration of the words of the statutes referred to, I am of the opinion that:—

1st. The plaintiff has a right to recover, not only for what has been done by the defendants since he acquired the land, but also for the injury done before that, as there is no evidence, but rather the contrary, that any compensation was made therefor.

2nd. That arbitration was not the course to be pursued, but that the plaintiff has his right of action for the trespass at common law.

3rd. That the plaintiff is not limited to the damage for the six months previous to action brought.

There remains then only the question of the injunction asked for by the plaintiff.

This court has the power to grant such an injunction, but is it expedient to do so?

In *Graham* v. *Northern Railway Co.*, 10 Grant, 259, it is said that injunction depends very much on the reality and irreparable nature of the injury complained of, and obstructing ancient lights was held to be this nature.

In *Wright* v. *Turner*, 10 Grant, 67, where an acre and a quarter of the plaintiff's land was overflowed by the defendants, annual value $7 an acre, it was held that the plaintiff was entitled to the injunction, and that he was not to be forced to exercise his common law right of bringing an action yearly, and that the court was not at liberty to refuse the ordinary relief administered by it, merely because it might think the plaintiff unreasonable in insisting on it.

The plaintiff has the right to deal with his own land as he pleases and no court could recognize a right in any stranger to deprive him of it, or the use of it, though the quantity might be but an acre, for he might thus lose his land acre by acre.

The defendants will of course appeal from the common law to the statute, and claim the right to get what they want under that statute (42 Vict. c. 9). If this were so, and the defendants could acquire the right to flood the plaintiff's land under the powers given by that Act, I do not think the injunction ought to go. But on an examination of section 7, sub-sections 38, 39 and 40 of section 9 and section 10, I do not feel satisfied that the power to flood a man's land in the manner the defendants have done in this case, is conferred by that statute, nor yet by the private act of the defendants, 38 Vict. chapter 65, section 28.

By section 7 of the Public Railway Act, subsection 6, the company are empowered to construct, maintain and work their road across, along or upon any stream or water-course which it intersects, but the same must be restored by the company to their former state, or to such state as not to impair their usefulness.

Where these statutes affect the common law rights of the plaintiff, I do not care to construe them so as to confer the power to do what the defendants have done, unless I feel myself compelled to do so, and therefore I cannot refuse the order and injunction asked for. At the same time I would suggest that the plaintiff would only be doing what is reasonable, if he would accept what the jury have assessed as his damage, if the present state of things continues—that is, to make over to the defendants the piece of land on the north side of the railway, on payment of the verdict of $125 and his costs of suit.

Should he refuse to do this, and insist on his strict legal rights, he will be entitled to judgment for $50 and his full costs of suit in this court, together with an order directing the defendants to remove the obstruction, and restraining them from any repetition of the acts complained of.

To this extent the plaintiff's order *nisi* will be made absolute, and the defendant's order *nisi* will be discharged.

From this judgment the defendants appealed, and assigned the following reasons for appeal:—

The appellants submit that the judgment appealed from should be reversed for the following amongst other reasons:

1. The appellants are not trespassers; they erected the dam in question with the assent of the respondent's grantor for the purpose of obtaining water, which they were entitled to do under their statutory powers, and the respondent purchased the land, knowing that the appellants had constructed the dam thereon.

2. That the respondent's right to compensation, if any, is by arbitration, and not by action.

3. That if the respondent has any right to recover he is only entitled to damages for six months before action.

Consolidated Railway Act, 1879, 42 Vict. chap. 9, section 9, sub-sections 38 and 39; Northern Railway Act, 1875, 38 Vict. chap. 65, sec. 28.

Knapp v. *Great Western Railway*, 6 U. C. C. P., 187; *Patterson* v. *Great Western Railway*, 8 C. P., 97; *Clark* v. *Grand Trunk Railway*, 35 U. C. R., 57; *Cameron* v. *O. S. & H. R. R.*, 14 U. C. R., 612; *Follis* v. *Port Hope*, 9 U. C. C. P., 50; *McLean* v. *Great Western Railway*, 33 U. C. R., 198; *Welland* v. *Buffalo, etc., Railway Co.*, 31 U. C. R., 539.

On the 12th July, 1886, the appeal was heard by the Court of Appeal.

Boulton, Q.C., for the appellants.

Strathy, Q.C., for the respondent.

After argument the Court unanimously dismissed the appeal with costs.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

DUFFUS v. CREIGHTON.

Sheriff—Action against—Execution of writ of attachment—Abandonment of seizure—Estoppel.

A writ of attachment against the goods of M. in the possession of S. was placed in the sheriff's hands and goods seized under it. After the seizure the goods, with the consent of the plaintiff's solicitor, were left by the sheriff in charge of S., who undertook that the same should be held intact. The sheriff made a return to the writ that he had seized the goods. The sheriff subsequently sold the goods under execution of the creditors. In an action against the sheriff,

Held, reversing the judgment of the court below, that the act of leaving the goods in the possession of S. was not an abandonment of the plaintiff's solicitor of the seizure and if it was the sheriff was estopped by his return to the writ from raising the question.

Held, also, that the act of plaintiff's solicitor acting as attorney for S. in a suit connected with the same goods was not evidence of an intention to discontinue proceedings under the attachment.

Russell, for the appellants.

Gormully, for the respondent.

UNION BANK OF LOWER CANADA v. BULMER.

Promissory note—Accommodation—Made by partner without authority—Renewal—Knowledge of holder.

In an action on a promissory note the defence was that the note of which it was a renewal was given for the accommodation of the payee by the defendant's partner who had no authority to make it, and that the plaintiffs when they took the renewal knew of its defective character.

Held, that as it did not appear that such knowledge attached when the original note came into plaintiff's possession they were entitled to recover.

Irvine, Q.C., for the appellants.

A. W. Atwater, for the respondent.

CASSELS v. BURNS.

Ships and shipping—Charter party—Damage to ship—Nearest port—Deviation.

A ship sailed from Liverpool in September under charter to load lumber at Bathurst, N.B. Having encountered heavy weather the captain found it necessary to make repairs and proceeded to St. John for that purpose. By the time the repairs were completed it was too late to go to Bathurst and carry out the charter. In an action against the owners for breach of charter the plaintiff obtained a verdict, the jury finding that the repairs could have been made at Sidney, C.B., and if made there could have been complete in time to load at Bathurst.

Held, affirming the judgment of the court below (20 N.B. Rep. 13,) that going to St. John to repair the ship was such an unnecessary deviation from the voyage as to render the owners liable for breach of charter party.

Skinner, Q.C., for the appellants.

W. Pugsley, for the respondents.

ELLS v. BLACK.

Trespass—Disturbing enjoyment of right of way—User—Easement.

E. and B. owned adjoining lots, each deriving his title from S. E. brought an action of trespass against B. for disturbing his enjoyment of a right of way between said lots and for damages. The fee in this right of way was in S., but E. founded his claim to a user of the way by himself and his predecessors in title for upwards of forty years. The evidence on the trial showed that it had been used in common by the successive owners of the two lots.

Held, affirming the judgment of the court below (19 N.S. Rep. 222), RITCHIE, C.J., and GWYNNE, J., and dissenting, that as E. had no grant or conveyance of the right of way, and had not proved an exclusive user, he could not maintain his action.

Sedgewick, for the appellant.

Drysdale, for the respondent.

MOONEY v. MCINTOSH.

Trespass—Title to land—Boundaries—Easement—Agreement at trial—Estoppel.

In an action for damages by trespass by McI. on M.'s land and by closing ancient lights defendant claimed title in himself and pleaded that a conventional line between his lot and the plaintiff's had been agreed to by a predecessor of the plaintiff in title. On the trial the parties agreed to strike out of the pleadings all reference to lights and drains and to try the question of boundary only.

Held, affirming the judgment of the court below, RITCHIE, C.J., and GWYNNE, J., dissenting, that independently of the conventional boundary claimed by the defendant the weight of evidence was in favour of establishing a title to the land in question in the defendant and the plaintiff could not recover, and that by the agreement at the trial the plaintiff could not claim to recover by virtue of a user of the land for over twenty years.

Semble, that if it was open to him such user was not proved.

Sedgewick, Q.C., for the appellants.

Henry, Q.C., for the respondents.

EXCHANGE BANK v. SPRINGER.

Surety—Cashier of bank—Buying and selling stocks—Negligence of Directors.

In an action against the sureties of an absconding cashier it appeared that the bank had become possessed of certain stock on the security of which advances had been made, and to save loss the stock was put on the market and other stock bought to affect the price. An account was kept in the books of the bank called the "C. R. M. Trust Account," in which these stock transactions were recorded. The cashier used this account to assist him in some private speculations, and having become a defaulter in a large amount he absconded.

Held, affirming the judgment of the court below (13 Ont. App. R. 390), that even if this dealing in stocks by the bank was illegal it would not relieve the sureties of the cashier from liability on their bonds.

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

Bain, Q. C., for the respondents.

GREENE v. HARRIS.

Practice—Set off—Not pleaded in action—Right to set off judgment—Equitable assignment.

G. and H. brought counter actions for breaches of agreement. In March, 1884, G. obtained a verdict with leave to move for increased damages, which was granted, and in June, 1885, he signed judgment. In April, 1884, G. assigned to H. all his interest in the suit against H. and gave notice of such assignment in May, 1884.

In February, 1885, H. signed judgment against G. on confession.

Held, reversing the judgment of the court below (25 N.B. Rep. 451), STRONG, J. dissenting, that H. could not set off his judgment against the judgment recovered against him by G. and assigned to H.

Weldon, Q.C., for the appellant.

THE EXCHANGE BANK OF CANADA v. THE PEOPLE'S BANK.

Bank cheques—Acceptance by cashier and president at a future date—Liability of bank.

In 1881 G. having business transactions with the Exchange Bank agreed with C., president and manager of the bank, that in lieu of further advances, the bank would accept his cheque, but made payable at a future date. On the 19th October, 1881, G. drew a cheque on the Exchange Bank after having it accepted as follows: "Good on 19th February, 1882." T. Craig, president, got the cheque discounted by the People's Bank, and deposited the proceeds to his credit in the Exchange Bank. This cheque was renewed on the 23rd of May, and it was presented at the Exchange Bank and paid. Thereupon another cheque for the same amount was accepted in the same way and discounted by the People's Bank on the 7th September, 1883. At the time of the suspension of the payment by the Exchange Bank, the Peoples' Bank had in its possession four cheques signed by G. and accepted by T. Craig, President of the Exchange Bank, which were subsequently presented for payment on the dates when they were payable and duly protested and also after the three days of grace.

The total amount of these cheques amounted to $66,020.64, and one of them, viz., the one dated 7th September, 1883, for $31,000, was a renewal of the cheque, the proceeds of which had been paid to the credit of G. in the Exchange Bank. C. was manager as well as president of the Exchange Bank.

On an action brought by the People's Bank against the Exchange Bank for the recovery of the sum of $66,020.74, based on the four cheques in question, the Exchange Bank pleaded *inter alia* that C. had not acted within the scope of his duties and within the limits of his powers, and that the bank had never authorized or ratified his acceptance of G's cheque.

Held, affirming the judgment of the Court of Queen's Bench (STRONG, TASCHEREAU and GWYNNE, JJ., dissenting), that under the circumstances the Exchange Bank was liable for the acceptance by their President and Manager of G.'s cheques discounted by the

People's Bank in good faith and in due course of business.

Appeal dismissed without costs.

Macmaster, Q.C., for appellants.

Geoffrion, Q.C., for respondents.

GILLESPIE v. STEPHENS.

Reddition de comptes—Settlement by mandator with his mandatory without vouchers, effect of—Action en redressement de compte.

Held, affirming the judgment of the court below, that if a mandator and a mandatory, labouring under no legal disability, come to an amicable settlement about the rendering of an account due by the mandatory without vouchers or any formality whatsoever, such a rendering of account is perfectly legal; and that if subsequently the mandator discovers any errors or omissions in the account his recourse against his mandatory is by an action *en redressement de compte*, and not by an action asking for another complete account.

Appeal dismissed with costs.

Fleming, Q.C., and *Nicolls*, for appellant.

Carter, for respondent.

COURT OF APPEAL.

C. C. Oxford.] [September 29.

MURRAY v. HUTCHINSON.

Waiver of breach of contract.

The statement of claim alleged that the plaintiff purchased from the defendant some cattle, on the terms that the defendant should keep them on his premises until they should be in a condition fit to export; that the plaintiff paid the defendant $200 on account of the purchase; that the plaintiff afterwards demanded a delivery of the cattle, which the defendant wholly refused; and in breach of his contract sold and delivered the cattle to another person; and the plaintiff claimed to recover back the $200 deposit, which he had demanded before action, but which had been refused.

The defendant's version of the bargain was that the plaintiff was to pay the balance of the price and remove the cattle from the defendant's premises by a date certain, but that he failed to do so, and the defendant was obliged, after the date certain had passed, to sell the cattle at a much lower price; and he counter-claimed for damages in excess of the $200 in his own hands.

The jury found a verdict for the plaintiff for the $200 upon conflicting testimony.

Held, upon the evidence, that there was no ground for interfering with the findings of the jury; and that the plaintiff could waive the breach of contract, and, assenting to the improper disposition of the cattle, merely require the defendant to repay to him the money paid on account.

Aylesworth, for respondent.

Holman, for appellant.

C. C. Middlesex.] [September 29.

GRAHAM v. O'CALLAGHAN.

RUSSELL v. O'CALLAGHAN.

Replevin—Damages can be recovered for eloyned goods.

In an action of replevin, where the sheriff has been unable to replevy the articles mentioned in the writ by reason of their having been lost or eloyned by the defendant, the plaintiff may recover the value of the goods as damages where the count is in the detinet as well as the detinent.

Special damages are recoverable for the trespass to the goods actually replevied, and the plaintiff is not confined to nominal damages, usually given for the costs of the replevin bond.

Moss, Q.C., for appellant.

R. M. Meredith, contra.

C. C. Elgin.] [September 29.

LOGG v. ELLWOOD.

Question of fact for jury.

In an action for wages there was a dispute between the parties as to the nature of the agreement for hiring. There was evidence at the trial which would have supported a finding for either party. The question was wholly one of fact and of the credibility of witnesses. The jury found in favour of the plaintiff, but the judge set aside the verdict and sent the case to a referee, who found substantially as the jury had done. Upon motion the judge made an order sending the case back to the referee with instructions to find against the plaintiff upon one branch of the case.

Held, that the case was one specially proper for the decision of a jury, and that the verdict and finding of the referee should not have been interfered with.

J. Robinson, for appellant.

Doherty, for respondent.

C. C. Norfolk.] [September 29.

FORSE v. SOVEREEN.

Distress for rent—Lease may be reformed in favour of bona fide purchaser for value.

In an action for replevin of goods seized under a distress for rent, the plaintiff claimed that there was nothing in arrear, and proved the payment of certain sums to the solicitor of a first mortgagee, and also claimed a deduction of $15 for a quantity of manure expended on the demised premises under an alleged agreement with the lessor. The seizure was made by the defendant S., to whom the landlord had assigned the plaintiff's lease as collateral security for payment of a second mortgage. The lease did not express what was held at this trial to be the true agreement, that manure was to be supplied and $15 deducted from the rent during each year of the tenancy.

Held, that the lease ought not to have been reformed as against S., who was a *bona fide* purchaser for value without notice of the facts on which the plaintiff's equity depended.

Held, also, that although a new contract of tenancy may be inferred from a notice by the mortgagee to pay rent to him, acquiesced in by the tenant by payment of the rent, yet, as the circumstances of the case showed that it was not intended to create such a contract, but rather that, the interest being paid, the possession of the mortgagor and his co-tenants was to remain undisturbed, it could not be said that the plaintiff's tenancy had been put an end to by the intervention of the first mortgagee.

Aylesworth, for appellant.

W. N. Douglas, for respondent

CHANCERY DIVISION.

Ferguson, J.] [October 1

RE STEVENS.

STEVENS v. STEVENS.

Will—Legacies—Time for vesting.

S., by his will, devised four legacies to his daughters in four different clauses worded as follows: "I bequeath to my daughter (name) the sum of five hundred dollars." By a subsequent clause he provided "I also order that should any of my daughters die their portion to be equally divided among the remaining ones." The legacies were charged on his lands. Directions were also given that after a certain farm which he had purchased in his lifetime, but had not paid for, was paid for, and all his debts paid, his two sons, E. and A. "shall each pay my daughter M. A. S. the sum of $50, which she shall receive together with the rent of Lot 126 from the executors, to apply on her legacy. The other three daughters to be paid in the same manner; E. in one year after M. A., etc." A direction was also given that in case of any of the daughters dying, their funeral expenses were to be paid out of their legacies, and in case of sickness their physician's bill to be paid from the same source.

Held, on an appeal from a Master that these provisions, and all others of a like kind in the will, had reference at most to the mode and time of payment of the legacies, and not to the substance of the gift, and that as the tes-

tator had not clearly, and with certainty expressed the intention that the legacies should not vest until the times of payment, the legacies were given in the ordinary way to vest upon the death of the testator.

Moss, Q.C., and *Hoyles*, for the appellants.

Maclennan, Q.C., for the infant.

Cassels, Q.C., for the respondent.

PRACTICE.

Dalton, Q.C.] [October 13.
Galt, J.] [October 17.

GARNER v. TUNE.

Counter-claim—Close of pleadings—Notice of trial—Rule 180.

The defendants by counter-claim delivered a reply, which contained more than a mere joinder of issue, to the statement of defence and counter-claim of the original defendants. No subsequent pleading having been delivered the defendants by counter-claim after the lapse of four days, served notice of trial.

Held, that the pleadings were not closed, and the notice of trial was therefore irregular The plaintiffs by counter-claim were entitled under Rule 180 to twenty-eight days from the delivery of the defence and counter-claim in which to amend.

Beck and *German*, for the defendants by counter-claim.

Echlin, for the original defendants.

Proudfoot, J.] [October 26.

STRUTHERS v. GLENNIE.

Voluntary conveyance—Subsequent creditor—Indebtedness of grantor.

Action by a subsequent creditor to set aside a voluntary deed executed about five years before the debt to the creditor was incurred. It appeared that the deed was not impeachable on the ground of any fraud or fraudulent intent on the part of the debtor or grantee, but that there was a debt due at the date of the deed which had not been paid. It, however, also appeared that this debt had become barred under the Statutes of Limitation.

Held, that the plaintiff could not succeed.

The only reason that a subsequent creditor is allowed to maintain such an action merely on the ground of the settler's indebtedness is that if a prior creditor set aside the settlement a subsequent creditor would be entitled to participate *pro rata*, so that he has an equity to participate, and may bring his action to enforce that equity. And if the antecedent creditor cannot impeach such settlement, neither can a subsequent creditor impeach it, merely on account of a settler's indebtedness to him.

Meredith, Q.C., for the plaintiff.

S. H. Blake, Q.C., and *G. C. Gibbons*, for the defendants.

Armour, J.] [November 3.

REGINA v. MCGAULEY.

Indian Act, sec. 108—"Appeal brought"—Time.

The Indian Act, R. S. C. c. 43, s. 108, provides that no appeal shall lie from convictions under that Act, except to a judge of a Superior Court, etc., "and such appeal shall be heard, tried, and adjudicated upon by such judge, . . . without the intervention of a jury, and no such appeal shall be brought after the expiration of thirty days from the conviction."

Held, that the words "appeal brought" are satisfied by the notice of appeal having been given, and the appeal having been perfected by the giving of the security provided for by the Summary Convictions Act; and that it is not necessary for the appellant to bring his appeal to a hearing within the thirty days.

In re Hunter v. *Griffiths*, 7 P. R. 86, not followed.

Laidlaw, Q.C., for the defendant.

Kehoe, for the prosecutors.

Galt, J.] [November 5.

HILLIARD V. ROYAL INSURANCE CO.

Arbitration — Costs — Taxation — Time and expenses in travelling—Amount of fees.

Upon an appeal from the taxation of costs of an arbitration which the plaintiffs were ordered to pay,

Held, that items in respect of the loss of time in travelling, and travelling expenses of an arbitrator, were properly disallowed.

Held, also, that the amount to be allowed *per diem* to arbitrators and counsel was a matter peculiarly within the province of the taxing officer, and his decision should not be interfered with.

A. H. Marsh, and *Hilton*, for the defendants.
Kappele, for the plaintiffs.

Proudfoot, J.] [November 9.

IN RE MCRAE AND THE ONTARIO AND QUEBEC RAILWAY CO.

Arbitration—Railway—Costs—Taxation—R. S. C. c. 109, s. 8, sub-secs. 22, 23—Appeal—Witnesses—Subpœnas.

By the Dominion Railway Act, R. S. C. c. 109, s. 8, sub-secs. 22, the costs of an arbitration as to the value of land expropriated for a railway may be taxed by the judge. The judge in this case, by an order not appealed against, referred the taxation to a taxing officer.

Held, that the question whether the judge had power to delegate the taxation could not be raised, and that an appeal lay from the taxing officer to the judge. By sub-sec. 23 of s. 8 of the Act, "the arbitrators . . may examine on oath . . the parties, or such witnesses as may voluntarily appear before them." In this case subpœnas were issued and witnesses attended upon them and were examined.

Held, that there was no power to compel the attendance of witnesses, and those who attended must have done so voluntarily; there was no power therefore to tax the subpœnas as such, but as they operated as notices, the proper costs of notices should be allowed, and also the costs of the attendance of the witnesses.

Aylesworth, for the land-owner.
J. M. Clark, for the railway company.

Court of Appeal.] [November 10.

BULL V. NORTH BRITISH CANADIAN INSURANCE CO.

Appeal to Court of Appeal—Order of judge in court—Interlocutory order.

An order was made by a judge of the High Court of Justice, sitting in court, for the execution by the defendants (mortgagees) of a reconveyance or discharge, directed by a previous judgment, or in default for a sequestration.

Held, that an appeal to the Court of Appeal lay without leave, whether it was to be regarded as interlocutory or not.

Semble, *per* HAGARTY, C.J.O., and PATTERSON, J.A.—That such an order is not in its nature interlocutory.

C. Millar, for the plaintiff.
J. Maclennan, Q.C., and *D. Urquhart*, for the defendants.

REPORT OF THE COUNCIL OF THE BOARD OF TRADE IN THE MATTER OF J. B. M'KAY & CO.

The following is the report of the Council of the Board of Trade in the matter of Wm. J. and Ed. B. McKay, members of the board and members of the firm of J. B. McKay & Co., grain and commission merchants, doing business in the city of Toronto:—

The attention of the council having been formally directed to the conduct of Messrs. W. J. and E. B. McKay, members of the board and of the firm of J. B. McKay & Co., as it came out in evidence in certain arbitration cases recently held in these rooms, an investigation was instituted by the council in accordance with by-law No. 4. The Messrs. McKay have been duly charged with certain offences and having appeared before the council were heard at length in their own defence. The charges made against these members may be summed up briefly under three heads, viz.:

REPORT OF THE BOARD OF TRADE IN THE MATTER OF J. B. McKAY & Co.

1. That at various times between December, 1886, and April, 1887, they sold to several grain firms quantities of peas, wheat and barley delivered f. o. b. at Cavanville station, and by their express instructions verbally and in writing, the cars were billed several bushels each (ranging from two to ten bushels) in excess of the quantities loaded therein, and payment obtained for the full quantity the several cars were said to contain.

2. That the said McKays sold to George A. Chapman & Co. a quantity of marrowfat or black eyed peas, and by their express instructions verbally or by letter to their agent, a large quantity of an inferior quality or small peas was loaded in the cars along with the marrowfat peas, and payment was obtained therefor as if they were all marrowfat peas.

3. That in loading a quantity of barley for export the said McKays gave instructions in writing to their agent at Cavanville to load No. 2 barley, and to put in a quantity of No. 1 barley on the top and at the doors of the cars for the purpose of deceiving those who were buying the barley as to its real quality, etc.

In explanation and defence of these charges the said McKays denied any intention of defrauding. They alleged that the cars were underloaded and overbilled for the purpose of testing the accuracy of the measure made by the various elevators which the grain reached, and not for the purpose of obtaining payment for that for which they had not given value, and that they meant to refund the amounts overpaid so soon as the claims were made and the correct weights at the elevators established. They contended it was customary in the trade where the marrowfat peas were of an extra good quality, and perfectly justifiable for the purpose of bringing them to a merchantable standard, to mix a certain quantity of small peas with them, and that in so doing they were guilty of nothing wrong or unusual, and that there was no intent to deceive or defraud. And so in the mixing of the two qualities of the barley, they only did what is customary in the trade, and for the purpose of creating a good impression at the outset on the minds of those unloading the barley in the foreign market, and not with intent to deceive or defraud, and that in all these matters they have not been guilty of conduct unbecoming members of this board. Admitting for the moment the correctness of the plea that it was for the purpose of a test, and only a test, that the cars were loaded short, and that payment was obtained for a larger quantity of grain than was known to have been delivered in each car, the council does not hesitate to affirm that a most unusual and objectionable method was adopted for making this test, and the Messrs. McKay must not be surprised if the purity of their motives is called in question and a construction placed upon their course not at all creditable to them.

They had their doubts, it appears, as to the accuracy of the weighing and measuring done by the elevators and thought there was reason to believe shortage of some five bushels was claimed on every carload, whether the same was under or overloaded. To test this may have been a perfectly proper thing, and an opportunity might very well have been taken when they were exporting their own grain, but if the test were to be made with grain sold to others, the consent of the owners of the grain ought first of all to have been obtained; they should have been made privy to the experiment, and payment should not have been exacted from them for that which the McKays knew perfectly well had been wilfully withheld, and the council does not hesitate to say that such is not a practice in the trade, and that the same could not fail to produce disputes and annoyances, and to cast doubts on the uprightness and honesty of any who engage in it. But however plausible the plea of the "test," the evidence before the council does not admit of its acceptance as entitling the McKays to an acquittal on the charge of conduct unbecoming members of this board. They have stated that the shipping of peas is a new business to them in which they have had no experience. The suggestion of the test was made to them by an employé named Hunt, who was afterwards dismissed, and with whom they had a quarrel, but Hunt, according to the evidence, only asked for permission to make a test with one car. The whole correspondence with Hunt, wherein instructions are given him to load one lot after another short, does not bear out the plea of the test as the sole motive. In none of these letters is the test even mentioned. In invoicing and obtaining payment for a quantity of grain underloaded, the absence of all sensitiveness on the McKays' part when mention of shortages was made by one after another of the purchasers of the short grain, their neglect, delay and refusal to refund the amount overcharged, are all against the test theory, and before restitution could be had, four separate and distinct cases of claim have to be referred to the Board of Arbitration, causing loss of valuable time, annoyance and costs. If claims were made for more shortages than the McKays were ready to admit, it was no more than might have been expected. If underloading and overbilling took place at one point where they were shipping it was presumptive evidence it was going on at other points, and that this was the probable way of accounting for short-

age. The council holds therefore that the plea of the "test" is insufficient, and inadmissible as justifying this course, the consequences of which have been so annoying and destructive of that goood feeling and confidence which should exist between members of this board having large business transactions together, and adjudge that Messrs. McKay should be disciplined for the same. As to the mixing of the peas, the council is of opinion that the plea of the custom of the trade is not well founded, nor is it a custom they can commend as one calculated to facilitate transactions of this kind where sales and purchases are made of an article of commerce known and dealt in by a specific name. That there may be different grades of marrowfat peas may be admitted, but if an extra price cannot be obtained for an extra fine sample, the cure is not to be found in reducing the average quality by a mixture with an entirely different kind and inferior quality of pea. The council deems it just, therefore, to condemn the McKays for their procedure in this case, and holds them worthy of discipline therefor. As to the charge summed up under No. 3, the council would be sorry to have it go forth to the world that it is a custom in the trade so to load and ship grain as to deceive the receivers in the foreign market as to the actual quality or grade purporting to be delivered to them. It does not appear from the evidence that the McKays were guilty of anything under this count which calls for action on the part of the council or board. The verdict of the council therefore is, that the said W. J. and E. B. McKay have been guilty of conduct unbecoming members of this board and highly to be reprehended, and the sentence of the council is, that they be suspended from all the privileges and uses of this board—W. J. McKay for the period of six months, and E. B. McKay for the period of twelve months, from this date—and that this report be printed and a copy mailed to each member.

Painful as has been the duty imposed upon the ouncil in this case, and unfortunate as it may be that the good name of the members as a body should be impugned thereby, it may not be without its uses, that it should be clearly understood the council will not flinch from carefully investigating every such case properly brought under its notice, and will impose such penalty as the nature of the offence may require, with a view to enforcing that straightforward honesty and rectitude so essential to the proper conduct of business everywhere, and so becoming the members of this large and important body.

FLOTSAM AND JETSAM.

SOME of the criminal sentences imposed by English magistrates seem very inconsistent and capricious. Here are a few samples:—A man for stealing a hand-cart, five years' penal servitude; and another man for assaulting a fellow-workman and knocking out his eye, forty shillings fine! A man for begging bread when he was unable to obtain employment, ten days' imprisonment at hard labour; and another, for going to the workhouse rather than accept employment at three shillings a day, a month's servitude and twelve strokes of the cat-o'-nine-tails! Again, a man for stealing a cotton shirt, five years' penal servitude; and another man for criminal assault upon two infants, three months' imprisonment! The *Law Times* says:—"We are not surprised to see some comments in the press on the sentences inflicted by Mr. Justice Day. Eighteen months' imprisonment of a clergyman for marrying a person who was under age without due publication of banns; penal servitude for life on a boy for attempting to extort money by threats of false accusation; and eighteen months' imprisonment of the young man called Rowden, or Rawden, for falsely publishing in a newspaper that he was engaged to marry a young lady of high rank, are really a group of sentences which must excite amazement in the ordinary mind. Indeed, when we compare them with the punishments often awarded by judges for offences complicated with violence, they would appear to be eccentric, and passed with a view to invite the interference of the Home Secretary." Down in Texas, as we may have remarked before, they sometimes punish a man more for stealing a mule than for killing a man; but then perhaps the mule is worth more. All this matter of sentences depends on the magistrate's digestion. If he makes a good breakfast, and his wife has not nagged him, the criminals get the benefit. Sometimes we are inclined to believe in the practice of letting the jury assess the punishment. It may be that one man is as little fit to decide continually on the measure of punishment as he is to pass upon disputed questions of fact.—*Albany L. J.*

Law Society of Upper Canada.

OSGOODE HALL.

CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, four weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

19. No information can be given as to marks obtained at examinations.

20. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM FOR 1887 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33)

1890
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical reading of a Selected Poem:—

1887—Thomson, The Seasons. Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.

1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics and Somerville's Physical Geography; *or* Peck's Ganot's Popular Physics and Somerville's Physical Geography.

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-Keeping.

RULE RE SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office

or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1. containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Copies of Rules, price 25 cents, can be obtained from Messrs. Rowsell & Hutchison, King Street East, Toronto.

THE illustrations of *The Illustrated London News* (American edition) for November 5th, present as usual instruction as well as entertainment, and cover the customary broad range of this long established and widely known publication. They are indicated by the following titles: Sketches of the Bulgarian Elections; The Disputes Between Fishermen at Plymouth; State of Ireland; The Late Mrs. Craik; H.M.S. Wasp; Sketches on the River Congo; Sketches at the Cat Show; Crystal Palace; The Late Lady Brassey; Grand Durbar at Mandalay; In the Semois Valley; Ardennes; A Tame Lion, Algiers; and The Kali Ghaut, Calcutta. Reading matter in abundance is also provided, while now it is becoming quite generally known that newsdealers everywhere sell the paper for ten cents. Subscriptions can be sent direct to the New York office, which is in the Potter Building.

The issue of November 12th furnishes their many readers, in connection with a wide variety of reading, the following timely illustrations: A very spirited picture of the unemployed in London, entitled "The Police and the Mob"; three pictures upon the State of Ireland; one of How Some of the London Poor Spend the Night; and another of the Poor Helping the Poor, as well as the meeting of the unemployed in London. There are also sketches from the Burlesque of "The Sultan of Mocha," at the Strand Theatre, and one page devoted to the Sultan of Morocco, while the opposite page presents J. L. Seymour's drawing of "A Favourite Slave." Besides these attractions there is a double-page picture of Buffalo Hunting in North America.