Canada Law Journal.

VOL. XXXVI. DECEMBER 1, 1900. NO. 23.

One of our County Court judges in a judgment reported in a recent issue (p. 642) alludes to a matter which it would be well for Justices of the Peace to take note of, remembering that the position they hold is an honourable one, and one which should be held as a public trust, and not as is too often the case, as a means whereby to eke out a living by charging excessive and illegal fees. Those who have had conferred upon them the powers which justices possess should remember that it is their duty to make the law respected and that to that end they must be scrupulous in respecting it themselves. There should be no attempt by bargain or otherwise to obtain fees the right to which is not clear. If in doubt a justice should not give the benefit of the doubt to himself, but to the other side. Anything derogatory to the dignity of the position or unbecoming in the conduct of magistrates should at once be brought to the attention of those in charge of the administration of the laws.

The position of Clerk of the County Court of the County of York is still vacant. That it should be filled by a professional man goes without saying. Naturally it has to do with the practice of the Court, and the occupant of the position should of course be familiar with that practice. The late Clerk was a layman, and, de mortuis nil nisi bonum. There was much merriment, however, when a baker was appointed Surrogate Registrar of the County of York, and an auctioneer put in charge of the Registry Office of West Toronto; but then they were prominent politicians and had, we presume, to be provided for. That legal men should conduct the business of legal offices would seem not to require proof; and, if the members of the profession were to pull together and insist upon their rights, and if they had a representative body to look after their interests, the Government would doubtless see the propriety of paying attention to their reasonable demands. The country does not want a "corpse" or a figure-head, either as a Judge or as a Clerk of a Court.

UNDUE INFLUENCE.

"The relation of husband and wife is not one of those relations to which the doctrine of *Huguenin* v. *Baseley* applies." (*a*)

In view of the fact that a different doctine has been adopted in Ontario a short review of the state of the law in England will, perhaps, demonstrate that the judgment in *Barron* v. *Willis* lays down a proposition that is not borne out by the cases, and is quite at variance with the trend of judicial opinion not only in England, but in the United States and Canada.

The doctrine of *Huguenin* v. *Baseley*, shortly stated, is, that, in the case of peculiar, confidential, or fiduciary relations between the parties, where influence is acquired and abused or confidence is reposed and betrayed, equity will give relief by taking away any advantage which has been acquired by such undue influence. The principle is independent of any admixture of imposition, being based upon a motive of general public policy. It is asserted in *Barron* v. *Willis* that the doctrine does not apply to the relation of husband and wife.

As early as *Milnes* v. *Busk* (*b*) Lord Chancellor Loughborough stated that the relation between husband and wife was well compared to the case of parent and child, and he points, as an evidence of the court's solicitude for the protection of the wife, to the fact that, when it was sought to establish a deed between husband and wife upon her separate estate it was necessary to produce the wife in court, the reason being, no doubt, that the court might satisfy itself by enquiry as to whether undue influence had been exercised by the husband over the wife. And it was laid down that the rule that a feme covert is to be considered as feme sole, as to her separate property, did not extend to transactions with her husband.

The principle upon which the court acts is lucidly stated by Sir John Romilly, M. R., in *Cooke* v. *Lamothe* (*c*) (decided a year before the decision in *Nedby* v. *Nedby* which forms the basis for *Barron* v. *Willis*,) as follows:

(*a*) Per Cozens-Hardy, J., in *Barorn* v. *Willis*, (1899) 2 Ch. 578; reversed on a question of fact (1900) 2 Ch. 121.

(*b*) (1794) 2 Ves. Jun. 488-498.

(*c*) (1851) 15 Beav. at p. 240. See, also, *Hoghton* v. *Hoghton*, 15 Beav. 298.

"When those relations exist by means of which a person is able to exercise a dominion over another, the court will annul a transaction under which a person possessing that power takes a benefit, unless he can shew that the transaction was a righteous one . . . . That relation exists in . . . . every case in which two persons are so situated that one may obtain considerable influence over the other. The rule of the court, however, is *not* confined to such cases. Lord Cottenham considered that it extended to every case in which a person obtains by donation a benefit from another to the prejudice of that other person, and to his own advantage; and that it is essential in every such case, if the transaction should be afterwards questioned, that he should prove that the donor voluntarily and deliberately performed the act, knowing its nature and effect."

In *Billage* v. *Souther*, (*d*) Vice-Chancellor Turner says: "The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no hesitation in saying it ought to be applied whatever may be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised . . . to be merely instances of the application of the principle."

Smith v. *Hay* (*e*) determined that the principle applied to "every case where influence is acquired and abused or where confidence is reposed and betrayed."

In the cases the relations that are most frequently mentioned are those of solicitor and client, parent and child, trustee and cestui que trust, and guardian and ward, but, as stated by the Master of the Rolls (*f*), the rule is not confined to those cases; the reason of the relation of husband and wife not being referred to oftener being, no doubt, on account of the merger, at common law, of the existence of the wife in the husband.

In *Corbett* v. *Brock* (*g*), which was the case of an engaged couple, Sir John Romilly said: "I fully adhere to what I expressed in the cases of *Cooke* v. *Lamothe* and *Hoghton* v. *Hoghton*. If this were

(*d*) (1852) 9 Hare at p. 540.

(*e*) (1859) 7 H. L. C. 751.

(*f*) Sir John Romilly, in *Cooke* v. *Lamothe*, supra.

(*g*) (1855) 20 Beav. 524.

between husband and wife, I should require him to prove all the requisites I have pointed out in those cases as necessary to give validity to the transaction."

Where a widower married the sister of his deceased wife it was held that the relation thus constituted imposed upon the widower, claiming the benefit of a settlement made on him by his wife's sister, the onus of shewing that, at the time of entering into the transaction she was fully, fairly and truly informed of its character and of her legal status (*h*).

If the rule is enforced in the case of a purely tentative arrangment, such as an engagement, it would seem to apply, a fortiori, where the parties have entered into an indissoluble union, such as marriage. The common law was so fully alive to the influence of the husband over the wife that, where she committed a felony in the presence of her husband, she was presumed to act under his coercion, and the onus was on the Crown to prove that she acted independently (*i*). This presumption was so strong, that, in Canada, it required a statutory enactment to dispose of it (*j*). There seems no good reason to dispute that motives and opportunities for the exercise of undue influence are as available between husband and wife as between guardian and ward or any of the other fiduciary relationships known to the law.

The learned judge who delivered the judgment in *Barron* v. *Willis*, says (*k*) that the text-writers are opposed to his view; but the opposition is not confined to them. In *Parfitt* v. *Lawless* (*l*), Lord Penzance expressly includes the relation of husband and wife in the same category as guardian and ward, etc His words are: "In equity persons standing in certain relations to one another—such as parent and child, *man and wife*, doctor and patient, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favour of him who holds the position of influence is impeached by him who is subject to the influence, the courts of equity cast

(*h*) (1860) *Coulson* v. *Allison*, 2 DeG. F. & J. 521.

(*i*) *Queen* v. *Torpy*, 12 Cox C. C. 45.

(*j*) Criminal Code, s. 13.

(*k*) At p. 585.

(*l*) (1872) L. R. 2 P. & D. 462, at p. 468.

upon the former the burden of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the influence of the stronger, or the inexperienced overreached by him of more mature intelligence."

In the United States the same opinion is held. The cases there determine that "No relation known to the law affords so great an opportunity for the exercise of undue influence as that existing between husband and wife . . . Under the head of actual undue influence, it may be said that it is always competent to shew the relation of the parties and the surrounding circumstances, and that in case the contracting parties sustain to each other the relation of husband and wife, and the agreement is such as to operate to the advantage of the former, equity will most closely scrutinize the transaction, and will set it aside upon evidence which might be insufficient were the parties in no confidential relation to each other. This principle is independent of any presumption, and is universally recognized. Nearly all courts, however, go further than this, and bring the matter in line with the decisions as to agreements between other parties to fiduciary relationship, viz.: that a presumption of undue influence exerted by the husband arises which is rebuttable by proof of the fairness of the transaction, full understanding and free agency on the part of the wife, and that there was no fraud, concealment, or imposition on the part of the husband" (*m*).

In *Barron* v. *Willis* the court based its opinion upon *Nedby* v. *Nedby* (*n*), which was the case of an appointment by the wife to the husband, and the onus was held to be on the wife, the decision being founded upon a deduction from the words of Lord Hardwicke in *Grigby* v. *Cox* (*o*). In the case last cited Lord Hardwicke, after stating that, where anything is settled to the wife's separate use, she is considered as a feme sole, and may appoint in what manner she pleases, says: "And this will hold though the act done by the wife is *in some degree* a transaction along with the husband." The real contest was between the wife and a stranger, the husband being interested only because of a declaration by the wife that the plaintiff had colluded with her husband. It is quite clear from

(*m*) Am. and Eng. Ency. of Law, Vol. 27, pp. 480, 481 and 482.

(*n*) (1852) 5 DeG. & Sm. 377.

(*o*) (1750) 1 Ves. Sen. 517.

a perusal of the case that the learned judge was concerned chiefly with the question between the wife and the stranger, but, notwithstanding this, Parker, V.-C., in *Nedby* v. *Nedby*, extended the decision to the case where the transaction was *entirely* between husband and wife, *in cases of appointment*, and *Barron* v. *Willis* has swept away the last qualification and lays down the broad proposition that the doctrine of *Huguenin* v. *Baseley* does not apply to the relation of husband wife. The decision may, therefore, be said to be one of first impression. It is a matter not devoid of importance that considerable doubt is thrown upon the relation of facts in *Grigby* v. *Cox* by Lord Thurlow, who says the defect in that case is that it does not state the trust (*p*).

With the well-accepted doctrine of *Huguenin* v *Baseley* (*q*) before it, and the remarks of Sir John Romilly in *Cooke* v. *Lamothe*, decided only a year before, still in its ears, it is not unreasonable to suppose that the court in *Nedby* v. *Nedby* must have had before it some element other than those mentioned in the report that made it inequitable in that particular instance to apply the principle of *Huguenin* v. *Baseley*. *Cooke* v. *Lamothe* was not cited, and it may be that the court was acting upon a restricted idea of the principle, a restriction which, as appears from *Cooke* v. *Lamothe*, did not exist. If neither of these suppositions be correct, then it is not too much to say that, as argued by Hughes, Q.C., in *Barron* v. *Willis* (*r*), *Nedby* v. *Nedby* is inconsistent with the other authorities. It may or may not be indicative of the opinion in which it was held that *Nedby* v. *Nedby* was not cited from 1852 until, by the ingenuity of counsel, it was made to do duty in 1899.

In Ontario the question came up squarely for decision in *McCaffrey* v. *McCaffrey* (*s*), and the conclusion would seem to be justified that the decision of the Court of Appeal is more in accordance with the principles of equity, and more in consonance with public policy, than that in *Barron* v. *Willis*. In *McCaffrey* v. *McCaffrey* a voluntary conveyance of his property by a husband to his wife, a woman of good business ability and having great influence over him, executed without competent and independent advice,

(*p*) (1778) *Hulme* v. *Tenant and wife*, 1 Bro. C. C. 16.

(*q*) 2 W. & T. L. C., 6th ed., 597.

(*r*) Page 584.

(*s*) (1891) 18 A. R. 599.

when his physical and mental condition were greatly impaired, he subsequently becoming an incurable lunatic, was set aside. Chief Justice Hagarty dissented, but explicitly stated that he treated the case as one of fact.

In ***Trusts and Guarantee Co.*** v. ***Hart*** (*t*), Mr. Justice Street, delivering the judgment of the Queen's Bench Divisional Court, says: "The rule has not been confined to the more common and obvious cases of trustee and cestui que trust, but has been treated as applying to every case where confidence has been reposed."

McCaffrey v. *McCaffrey* was cited in argument before the Chancery Divisional Court in *Casey* v. *Maloughney* (*u*) and some discussion occurred as to the law in cases of husband and wife, but the judgment of the court did not deal with the point.

Altogether it is submitted that the cases of *Nedby* v. *Nedby* and *Barron* v. *Willis* must be regarded as being in a state of "splendid isolation," and intended only to act as warnings to importunate wives and husbands that, where a particular equity requires it, the court will not be bound by any hard and fast rule, but will endeavour to apply the law so as to do justice to all concerned.

JOHN G. O'DONOGHUE.

Toronto, Ont.

In connection with the above article we would note a case of *Hopkins* v. *Hopkins*, decided since it was written, at the last sittings of the Court of Appeal. Whilst, as Lord Penzance says, "Persons standing in certain relations to one another, such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward are subject to certain presumptions when transactions between them are brought in question"—it nevertheless seems clear that whilst the relations of husband and wife are included in the list, there would not be the presumption against a gift by a husband to his wife which there would be in the case of attorney and client, etc., and the matter becomes largely one of evidence and onus probandi.

(*t*) (1900) 31 O. R. at p. 420.

(*u*) Not reported. Judgment delivered 19th Feb., 1900.

The Forum.

A CAUSERIE OF THE LAW.

CONDUCTED BY CHARLES MORSE, D.C.L.

In the recent case of *The People of the State of New York* v. *The Buffalo Fish Company* (*Limited*) the New York Court of Appeals was called upon to decide whether the Act of the State legislature for the protection of Birds, Fish and Wild Animals, etc., (ch. 488, Laws of 1892) applied to fish *possessed* during the close season, although *taken* from waters outside the State. The *Albany Law Journal* states that the question had been the subject of controversy for a long time from the fact that people were in the habit of importing fish from Canada in ice during the close season. The question was decided in the negative by a majority of the Court. O'Brien, J., in delivering the opinion of the majority says:

"We all agree that our statute does not forbid a person to 'catch or kill' fish of any kind in Manitoba, but it is said that when one brings the fish so caught or killed into this State, the penalties of our statute attach to him at once. With all respect, I am constrained to say that this is not a reasonable or tolerable interpretation of a penal statute. What it means, and all it means, is to forbid any person to catch, kill or be possessed of the fish described from the waters of this State. The word 'possessed' obviously refers to those fish, the catching or killing of which is forbidden, that is to say, fish in the waters of this State, and not those procured in any foreign country. It is simply a perversion of the statute to hold that the mere possession by any person within this State of the fish described in the statute, during the close season, is a violation of it, without regard to the place where they were procured, or to the manner obtained."

Since the object of the legislature was undoubtedly to preserve the fish in the waters of New York State, and not to tie up piscatorial enterprise in the waters of the whole American continent, this opinion strikes us as being an eminently sane one.

* * * Just why 'conventio,' the generic term of the Roman Law for agreements between persons to do or abstrain from doing a particular thing (Dig. II., 14, 1), should have been restricted in early English law to denote only that species of contracts which were evidenced by writing under seal, is not easy to determine. Probably the solution of the question lies in the fact that he

earliest 'conventiones' (covenants) appearing in English juridical history were leases of land, and that when commerce developed and simple contracts came into vogue, it was found convenient to leave specialties in undisputed possession of the phrase. Glanvil (X., 8) uses the term 'conventio' in its generic import; and so do Bracton (De Leg. et Cons. Ang. II., ch. 5) and Fleta (ch. 9). In the Year Books we find the term 'covenant' used in the restricted sense so early as the year 1338. (See Y.B. XII., Edw. III). Austin, however, claims that 'contract' is a term of uncertain extension in English law, and that it is sometimes used in exactly the same sense as that in which the Roman lawyers employed the word 'conventio.' (Prov. Juris. Det. II., 982). He admits, on the other hand, that 'conventio' (covenant) is never synonymous with 'agreement' in the terminology of our own legal system, but is confined to the class of contracts above described. Matthew Bacon ("Abridgment") derives 'covenant' from the Latin convenire, or conventus, and says that in its largest sense it is identical with the term contract. The author of the ancient "Mirror of Justices" defines 'contract' as follows: "Contract est purparlance dentre gentz qe chose nient fet se face;" which the editor of the Selden Sociey's edition of the work translates: "Contract is a *discourse* between persons to the effect that something that is not done shall be done" (ch. 27, p. 73). But in an undertaking purporting to present an archaic authority in a modern dress, why employ the term 'discourse' which only in a remote, and now entirely obsolete sense, conveys the idea of 'dealing' or 'transaction,' and in its ordinary signification is, quoad hoc, absolutely meaningless? What the old writer probably meant by 'purparlance' was 'treaty' or 'negotiation,' and while his definition at its best is inadequate enough, it is a thousand pities that his shortcomings should be intensified by inapt interpretation

* * * Englishmen are wont to pride themselves in the fine scholastic attainments of their great statesmen of the past, and certainly the record from Sir Thomas More to Gladstone is a magnificent one. But the political history of the United States also discloses a list of some of the best trained minds in the world's chronicle of statesmen. Daniel Webster was accorded first place as a student when he attended Dartmouth College, and his speeches attest the breadth of his academic training. President

Madison remained in Princeton a year after his graduation for the express purpose of making himself proficient in Hebrew. It is said that his studies in theology predisposed his mind to the support of Jefferson's measures for religious tolerance in Virginia. Jefferson, himself, was an ardent student. The curriculum which he framed for himself and his friends was so exacting that Hamerton ("Intellectual Life") doubted that the human mind could stand such a strain. One of his granddaughters said of him that he read Homer, Virgil, Dante, Corneille and Cervantes with as much facility as he did Shakespeare. It is also related of him that he disliked Scott's novels and Hume's history, and cordially hated Blackstone's Commentaries—the latter being a matter in which he has our lively sympathy. Then there is that fine old pedant John Randolph of Roanoke, who soundly rated his doctor on his death-bed because the latter unhappily tripped in his orthoepy. What a way for the boasted descendant of Pocahontas to treat his medicine-man on the eve of his departure for the happy hunting-grounds! Randolph is said to have rambled through every field of English literature. John Quincy Adams was a "monster of erudition." He left behind him a library of 12,000 volumes, and a chest of manuscripts of original and translated matter. He was a veritable heluo librorum, having devoured Rollin's Ancient History at ten years of age. John C. Calhoun was another American statesman of broad scholarship. Nor was his learning confined to the humanities; on one occasion he disgusted a naval officer, and on another charmed a celebrated photographer by demonstrating that he knew more than either of them concerning their respective avocations. Benjamin Franklin played chess under a penalty in case of defeat of making a translation from some Italian author. He reversed the usual order of progression in the study of languages by learning French, Italian and Spanish first, and thereafter acquiring a knowledge of Greek and Latin. We cannot exclaim in this particular: Transeat in exemplum! William Pinkney was another statesman of wide erudition and culture. Chief Justice Marshall said of him that he was the greatest man he had ever seen in a court of justice. In his forensic addresses, by the universality of his knowledge and the tribute he adroitly levied upon every department of intellectual achievement when occasion demanded or justified it, he exemplified the truth of Burke's saying that the sparks of all the sciences are to be

found in the ashes of the law. When we are thinking of great American statesman Rufus Choate does not fail to 'swim into our ken.' Like Webster, he was a graduate of Dartmouth College. It was commonly said of him that while he was an under-graduate he was eminently fitted to take a professorial chair in arts in any university in the country. After he became the foremost American lawyer of his time, and a prominent statesman, he did not fail to daily haunt the Muses' home and quaff the waters of Aganippe. It was his wont to spend the early hours of the morning with the Greek and Latin authors who had appealed to his youthful fancy with so potent a charm. His chief speeches in the United States Senate, and on public occasions, shew how carefully he had sown his mental garden with the seeds of ancient and modern learning. As an orator he had no equal amongst his contemporaries; and of him it may have been truly said by his countrymen at his death: "Take him for all in all, we shall not look upon his like again." And with Choate we must close our survey of this very interesting subject, not because we have exhausted our material, but because we have arrived at the limit of our space. In quitting our theme, however, we feel it due to the legal profession to point out that all but one of the great statesmen we have mentioned were lawyers.

* * * "Law so dry—I deny it," said Lord Bramwell, but is there anything more anhydrous in the whole legal domain than the late lamented judge's own forensic and journalistic lucubrations?

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

PRACTICE—SPECIAL LEAVE TO APPEAL—APPEAL IN FORMA PAUPERIS—PRIVY COUNCIL—STAY OF EXECUTION.

Quinlan v. *Child* (1900) A.C. 496, is a somewhat peculiar case. Quinlan had sued the defendant Child, who was Chief Justice of St. Lucia, for £500 damages, to which claim the defendant had filed a demurrer and defence with the result that the plaintiff was non-suited by the acting Attorney-General sitting as a judge. The Court of Appeal for the Windward Islands dismissed an appeal of the plaintiff from that decision, but gave leave to appeal to the Queen in Council, but refused the appellant leave to prosecute his appeal in forma pauperis on the ground of want of jurisdiction. The appellant then applied to the Judicial Committee of the Privy Council for leave to prosecute his appeal against Child in forma pauperis, on the ground that he had not been able to obtain a fair hearing, and in consequence of all his property having been levied on under orders made by the respondent, he was totally without means. He also applied for leave to appeal from judgments rendered in two other cases against him by the said Child as Chief Justice, and also to stay execution under one of such judgments. The Committee granted leave to prosecute the first mentioned appeal in forma pauperis, and also gave leave to appeal in forma pauperis from the judgments in the other cases but held that they had no jurisdiction to stay the execution. The order was made ex parte and the appellant was warned that he must be prepared to meet any motion the respondent might see fit to make to rescind the order. The Committee probably was to some extent influenced by the fact that the integrity of a judge was in question.

VENDOR AND PURCHASER—TITLE OF VENDOR, THAT OF TRUSTEE WHO HAS PURCHASED FROM HIMSELF—BENEFICIARIES, CONSENT OF.

In *Williams* v. *Scott* (1900) A.C. 499, an appeal was had from the Supreme Court of New South Wales in an action by a purchaser to rescind a contract for the sale of land. The question at

issue was whether the vendors title was a good and marketable one. The sale took place under a power of sale in a mortgage and it appeared that the plaintiff's mortgagor was a trustee for sale of the land in question under the will of his mother, and had acquired title as purchaser under a deed from himself and co-trustee. The purchaser objected to the title upon the ground that the mortgagor was incapable of purchasing from himself and his co-trustee. The vendor produced a copy of an alleged release from all the beneficiaries which was objected to as not showing that the beneficiaries were aware of the effect of the transaction in question, and the purchaser required a deed of confirmation which the vendor refused to procure, and alleged that they had since discovered that the sale had not been in fact made to the trustee but to one of the beneficiaries, and that subsequent to the contract the trustee had agreed to take the bargain off his hands, and the conveyance had, in pursuance of the latter contract, been made direct to the trustee. The Judicial Committee of the Privy Council (Lords Davey, Robertson and Lindley, and Sir H. DeVilliers and Sir F. North) held that the title was one which could not be forced on an unwilling purchaser. The alleged intermediate sale was held not to avail to make the sale to the trustee good as it was not a completed one, and the committee adopted the decision in *Parker* v. *McKenna* (1874) L. R. 9 Ch 96, to the effect that a trustee cannot validly adopt for his own benefit an executory contract to purchase to which he is himself a party as vendor. The appeal was accordingly allowed and judgment awarded rescinding the contract with costs.

To those who are desirous of abolishing the right of appeal to Her Majesty in Council, the batch of appeals allowed in this number of the reports may afford some ground for reconsidering their views.

BANK—CROSSED CHEQUE—"NOT NEGOTIABLE"—PAYMENT—BANKER, LIABILITY OF—"CUSTOMER"—BILLS OF EXCHANGE ACT, 1882, (45 & 46 VICT. C. 61) S. 82—(53 VICT. C. 33, SS. 80, 81, D.)

In *The Great Western Ry. Co.* v. *The London & County Banking Co.* (1900) 2 Q.B. 464, the Court of Appeal (Smith, Williams and Romer, L.JJ.) have upheld the judgment of Bigham, J., (1899) 2 Q.B. 172 (noted ante vol. 35, p. 704). It may be remembered that the facts were as follows: A rate collector had induced the plaintiffs to send him a cheque for taxes alleged to be, but which

were not in fact due. The drawers crossed the cheque and marked it "not negotiable." The collector had been in the habit for years past of cashing cheques received for rates at a country branch of the defendants' bank. He indorsed the cheque and obtained part of the cash for it at the defendants' branch, and the balance was applied according to his direction. The defendants received payment of the cheque at the bank on which it was drawn before the collector's fraud was discovered. The drawers of the check sought to recover the amount of it from the defendants. It was found as a fact that the defendants had received the payment in good faith and without negligence. The Court of Appeal agreed with Bigham, J., in holding that, under the circumstances, the collector was a "customer" of the defendants within the meaning of s. 82 of the Bills of Exchange Act (s. 81 of Can. Act) though he had no account with the defendants, and, also, (Williams, L.J., doubting this), that the defendants received payment of the cheque for the collector and not for themselves, and that therefore they were protected under s. 82, and were not liable to refund.

BILL OF SALE—REGISTRATION—VALIDITY—GRANTOR KNOWN ONLY BY ASSUMED NAME—NAME OF GRANTOR.

Stokes v. *Spencer* (1900) 2 Q.B. 483, was a rather unusual case touching the validity of a bill of sale. An unmarried woman named Ott lived with a man named Spencer, whose name she assumed. After his death she continued to be known as Mrs. Spencer, and whilst so known she executed a bill of sale in her name of Ott, and without any reference to her assumed name. Its validity was attacked by a creditor of Mrs. Spencer. Grantham and Channel, JJ., held, that the bill of sale was valid, as there is nothing in the English Bills of Sale Act requiring the grantor's correct name to be mentioned in the register.

CHARGING ORDER—APPLICATION TO DISCHARGE EX PARTE ORDER—LACHES—(ONT. RULE 358).

In re Deakin (1900) 2 Q.B. 489, was an application to discharge a charging order obtained by a solicitor ex parte. The motion was not made until after the lapse of two months from the service of the order, and no sufficient cause was shewn for the delay. The Court of Appeal (Webster, M.R., and Rigby and Collins, L.JJ.) agreed with Wright, J., that the application was too late, and should not be entertained.

Correspondence.

LAW REFORM.

To the Editor of The CANADA LAW JOURNAL.

SIR,—In spite of some words of yours at the conclusion of Colonel Denison's letter in your issue of November 1st, appearing to deprecate further discussion of the matters therein contained, I venture to think that when a gentleman of the standing and with the experience of our Police Magistrate formulates in the pages of a legal journal something like a definite scheme of law reform, and when his letter, as has been the case here, finds its way into the daily papers, to the bewilderment, doubtless, of many of the lay public, some attempt at a specific answer to the points made by him will not be altogether out of place.

I will not dwell upon the first part of the letter, in which the supposed normal fate of a litigant in our courts is sketched, but will merely observe that Colonel Denison seems to have entirely overlooked the undoubted fact that our law is at all events sufficiently definite to prevent the vast majority of the disputes which actually arise in the community from coming into the courts at all, while it is equally undoubtedly the case that of those who do come into the courts not one in a thousand has the career indicated by him.

Coming down to what I may call the constructive part of Colonel Denison's letter, his proposed reform in the administration of civil justice consists of three suggestions:

(1.) "Musty precedents, perhaps the mistakes of men gone by should not be worshipped or followed to create injustice;"

(2.) There should be only one appeal, which should be final;

(3.) The State should do away with all fees of every kind, and hire lawyers at fixed salaries to assist the judges in bringing forward evidence.

There was a Constitution of the Emperor Justin (A.D. 518-27) which would, I take it, entirely meet Colonel Denison's approval. It ran as follows: "Let no judex or arbiter deem that he should follow cases which he has thought wrongly decided, much more let him not think that he should follow the opinions of magistrates or other rulers; for the fact that a point has been wrongly decided is

no reason for extending the folly to other judges, for judgment should be given not according to precedents but according to the law."

The only words which Colonel Denison would disapprove of, I take it, are the last five, for he would apparently have no law whatever.

It is perfectly true that nowhere else than in England, and in countries which have derived their legal systems from England, have decisions of judges been systematically treated as authoritative. But the Romans were far from consigning litigants to the mere discretion of the magistrate. They, however, attached but small importance to decided cases, resting their law not upon them but upon the opinions of patented jurists possessed of the jus respondendi. But whatever advantages this system might have over our own in the direction of a more even and logical evolution of law, it certainly cannot have done much to remove the difficulty of ascertaining the law applicable to actual disputes arising amongst men. Indeed, we know that at various times attempts were made to meet this difficulty, until at last Roman jurisprudence sank to the point of "counting heads;" the famous Law of Citations of Valentine III. (A.D. 426) selecting five of the classical jurists of the greatest repute, and directing all judges to adopt for the decision of questions arising before them the law laid down by the majority of them, with a casting vote, so to speak, in favour of the excellent Papinian. But it stands to reason that there remained abundant opening for endless argument as to the applicability of citations from the writings of these sages to practical cases. And at any rate the difference between such a system and our own may be likened to the difference between drawing your water from a stagnant reservoir and taking it from a living stream.

However, the continental view of the matter, which looks for the law rather in the commentaries of jurists than in the decisions of the courts, is an inheritance from the law of Rome. In England cases have been cited in court as authoritative at all events from the time of King Edward I. And we are told by Sir Frederick Pollock that where the two systems have come into competition, as they have done in the Province of Quebec, the Cape Colony, and other British possessions originally settled under continental systems of law, the method of ascribing exclusive authority to judicial decisions has invariably been accepted. Under this system

has been built up the wonderful fabric of our common and equity law. Under it the law of England has developed as an organic growth in close touch with the practical requirements of those for whose use it exists, and with the development of the national life. So that it has been well said that a closer connection between the springs of law and the springs of life it is impossible to find, look we the whole world over, than the common law of England.

With one fell swoop of his sword, however, Colonel Denison would cut off this heritage of centuries. He would reduce our whole system of administration of justice to the state in which equity was in the first half of the seventeenth century in England, when old John Selden declared: "Equity is a roguish thing. For law we have a measure. We know what to trust to: equity is according to the conscience of him that is Chancellor, and as that is larger or narrower so is equity. 'Tis all one as if they should make the standard for a measure a Chancellor's foot. What an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot; it is the same thing in the Chancellor's conscience."

It was not long, however, before equity law in England rose almost, if not quite, as far beyond such a state of things as the common law, and Blackstone dates from the chancellorship of Lord Nottingham, in the reign of Charles II., the foundation of a regular and connected system of equity jurisprudence and jurisdiction, governed by established rules and bound down by precedent.

It might be admitted, indeed, that if we could multiply our Police Magistrate a thousand fold, and at the same time render him and all his duplicates immortal, so that one of them might preside over every tribunal throughout the country, we should at least have only the variations between two feet to reckon with, while at the same time all cases would come before an acute and thoroughly honest and impartial judge; but in no other conceivable way that I can imagine, could the system advocated by Colonel Denison fail to plunge the community, so far as the settlement of their disputes is concerned, into a condition of uncertainty far greater and infinitely more exasperating than anything which exists under our present system.

I can ask but a few lines to deal with the other two points.

(2.) How many courts of appeal there are to be is certainly a mere matter of convenience. If, however, there was only one

court of appeal, it stands to reason that the work that would come before it would be so heavy that it would have to consist of many different divisions, and comprise an immense number of judges. It is difficult, in fact, to see how the number of judges could be any less than under our present system, although no doubt it would not be essential that they should all be of the same mental calibre, if one may presume to draw a distinction of that sort between judges. Nevertheless, to deal with all the superior court cases alone that went to appeal, an immense number of appellate judges would be required, and all of them would have to be, (sitting, as they would do, as the one final tribunal), men as far as possible of equal distinction and ability. This would certainly involve an enormous expense to the State, for in the long run the market value has to be paid for ability wherever its services are required. As to the litigant, it may be doubted whether on the whole he would gain in the matter of expense. The tendency, I take it, would be for great particularity and elaboration to characterize the procedure in such a final court, and to necessitate resort being had to the highest legal ability in the matter of counsel, since each case would represent the one last chance of the parties to get what they considered their rights.

(3.) But Colonel Denison would have all counsel paid officials of the State. I do not think the experience of bureaucracy will commend this proposal to anybody. In fact, it is simply appalling to think of litigants having to submit the conduct of disputes, in which, perhaps, all their fortune is involved, to the tender mercies and salaried sympathy of paid officials. The thought is too painful to dwell upon.

A. H. F. LEFROY.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Meredith, C.J.] CHALLONER *v.* TOWNSHIP OF LOBO. [June 18.

By-law — Drainage — Petition for—Qualification of petitioners—"Last revised assessment roll"—"Exclusive of farmers' sons not actual owners"—Invalid by-law—Damages.

In an action for an injunction to restrain a municipality from proceeding with the work under a drainage by-law.

Held—1. The assessment roll last revised previous to the passing of the by-law is the one to be looked at for the purpose of ascertaining whether the petition for the work was sufficiently signed to authorize the passing of the by-law.

2. The words "exclusive of farmers' sons not actual owners" in subs 1 of s. 3, R.S.O. c. 226, does not refer to farmers' sons who are not actual owners in fact, but to farmers' sons so shewn by the last revised assessment roll.

3. Two sons to whom a father was willing and promised to grant his farm taking back a life lease had an interest in the land of a freehold nature entitling them to be assessed as joint owners and were not "farmers' sons not actual owners."

4. Following *Connor* v. *Midagh* and *Hill* v. *Middagh* (1889), 16 A.R. 356 and *McCulloch* v. *Township of Caledonia* (1898), 25 A.R. 417, that the by-law not having been quashed the plaintiff was not entitled to damages for work done under it although invalid.

T. G. Meredith, for plaintiff. *Macbeth*, for corporation. *Alex. Stuart*, Q.C., for defendant Oliver.

Street, J.] LOVE *v.* LATIMER. [Oct. 5.

Trade name—Sale of business—With right to use for limited period—Right to use after period expired.

The proprietor of a firm name of no pecuniary value per se, and not being merely his own name, who has sold the business with which it was connected, and with it the right to use the firm name for a limited period cannot, after the expiry of the time, prevent the user of such name when he himself does not carry on or intend to carry on business under it.

Meek, for plaintiff. *Heighington*, for defendant.

Street, J.] WILLIAMS *v.* TOWN OF CORNWALL. [Oct. 10.

Words — "Porch or projection attached to any dwelling" — Verandah — 47 Vict., c. 50, O.

A survey of the Town of Cornwall was confirmed by 47 Vict., c. 50 (O). This Act declared the survey to lay down correctly the lines of the street as originally laid out, and provided that:—"Where any dwelling house or shop . . . had been before January 1st, 1888, partly built upon any street as ascertained by said survey, it shall not be incumbent upon the owner or occupant of such dwelling house, shop or building to remove the same off such street until the rebuilding of such dwelling house, shop or building or the repairing thereof to the extent of 50 per cent. of the then cash value thereof; but this proviso shall not apply to any fence, steps, platform, sign, porch or projection attached to any such dwelling house or shop." The said survey shewed that a certain dwelling encroached four feet upon the street and that the verandah attached to it encroached three feet six inches farther upon the street. The verandah was made of wood, resting on stone pillars, having its own roof and being firmly attached to the house.

Held, that the verandah was an integral part of the dwelling house and not a porch or projection attached to it, and was not to be considered an obstruction on the street which should be removed within the above proviso of 47 Vict., c. 50.

Held, therefore, that the position of the dwelling house and verandah did not bar the owner from applying for compensation under the Municipal Act for damage sustained by reason of the Corporation having lowered the grade of the street in front to an extent interfering with his access.

D. B. Maclennan, Q.C., for plaintiff. *Jas. Leitch*, Q.C., for Town of Cornwall.

Rose, J.] [Nov. 2.

IN RE GEDDES AND GARDE, AND IN RE GEDDES AND COCHRANE.

Renewal lease—Increased rent—Construction.

A clause in a lease providing for a renewal stated that the renewal lease was to be "at such increased rent as may be determined upon as hereinafter mentioned, payable in like manner and under and subject to the like covenants, provisions and agreements as are contained in these presents, including the covenant for renewal, such rent to be determined by three different disinterested persons as arbitrators." The lease further provided for payment of the yearly rent as follows: "For the first ten years of the said term eighty dollars per annum; for the remaining eleven years one hundred dollars per annum, all the said payments to be made half yearly on the first day of January and July in each year."

Held, that the proper manner by which the rent should be increased

during the renewal term was by adding to each payment during the twenty-one years, that is to say, adding to the rent of eighty dollars per annum for the first ten years of the renewal term and to the rent of one hundred dollars per annum for the remaining ten years of the renewal term, and not by adding together the annual payments for twenty-one years and making an addition to that, nor by adding to the sum payable during the last year before the renewal.

Held, also, that the condition as to the rent for the new term, being an increased rent, might be satisfied by making a merely nominal addition, there being no increase in the rental value of the premises.

Riddell, Q.C., and *J. McGregor*, for tenants. *Gamble*, for landlord.

Meredith, J.] CONLEY *v.* CANADIAN PACIFIC RAILWAY. [Nov. 4.

Railways—Consignor and consignee—Delivery to wrong person—Liability.

The plaintiff consigned to the defendants certain goods to the "I. C. Company," simply. He knew that the company had not yet been incorporated; he also knew that the defendants' practice was never to deliver the goods consigned "to order" without the production and endorsement of the shipping bill, but that when not consigned "to order" they did sometimes deliver the goods without the production of the shipping bill. The defendants did not deliver the goods to a person carrying on business under the name of the I. C. Company and at the ostensible office of the company.

Held, that the plaintiff was most to blame for such delivery, and that the defendant was not liable by reason of their having delivered the goods without first requiring the production of the shipping bills. There is no law here requiring carriers to take up the shipping bills before the delivery of goods.

Davis, for plaintiff. *Aylesworth*, Q.C., and *Denison*, for defendant.

Boyd, C., Falconbridge, C. J., Street, J.] [Nov. 5.

PRITCHARD *v.* PATTISON.

Evidence — Motion — Security for costs — Nominal plaintiff — Insolvency — Affidavit — Notice of Motion.

The decision of ROSE, J., ante 423, affirmed on appeal; STREET, J., dissenting.

Held, per BOYD, C., that an application for security for costs on the ground that the plaintiff is insolvent and is only nominally interested in the action should be based on an affidavit of belief on the defendant's part that such are the facts, and such an affidavit should at least be furnished by the defendant before he attempts to establish the facts by examining the plaintiff.

Semble, that the proper practice in such a case is to have the grounds set forth in the notice of motion, as was done in *Port Rowan and Lake Shore R. W. Co.* v. *South Norfolk R. W. Co.*, 13 P. R. 327; and if this method were adopted, an affidavit of belief might be dispensed with if it was proposed to establish the facts alleged out of the mouth of the plaintiff.

Held, per FALCONBRIDGE, C. J., that the finding of ROSE, J., that the plaintiff had a substantial interest, should be adopted, and such being the position the defendant had no right to prove the plaintiff's poverty out of his own mouth on this application.

Per STREET, J., dissenting, that the defendant was entitled to examine the plaintiff for the purpose of shewing that he was a mere nominal plaintiff suing for the benefit of another, as well as for the purpose of shewing his insolvency; and the defendant could not be required to establish each particular proposition involved in his motion, in its logical order, before proceeding with the next.

Leave was given to the defendant to proceed in proper form with his application for security.

Rose, J.] GRAVES *v.* GORRIE. [Nov. 6.

Copyright — Works of fine art — Imperial Act — The Colonies — Imp. 25 & 26 Vict., c. 68.

The Imperial Act, 25 & 26 Vict., c. 68, being an Act for amending the Law relating to Copyright in Works of Fine Art, and for repressing the commission of fraud in the production and sale of such works does not extend to the Colonies, but the copyright therein and thereby conferred is confined to the United Kingdom.

J. T. Small, for plaintiffs. *J. H. Denton*, for defendants.

Boyd, C.] [Nov. 6.

STURGEON FALLS ELECTRIC LIGHT AND POWER CO. *v.* TOWN OF STURGEON FALLS.

Costs — Taxation — Affidavits — Irregular filing.

The costs of affidavits for use on a motion in the Weekly Court filed with the Clerk in Chambers, instead of in the Registrar's Office, as required by rule 102, should nevertheless be taxed, if otherwise taxable, where such affidavits have been before the Court on the motion and are recited in the order made thereon.

A. M. Stewart, for plaintiff. *H. E. Rose*, for defendants.

Ferguson, J.] McHUGH *v.* GRAND TRUNK R. W. Co. [Nov. 6.

Executors and administrators — Lord Campbell's Act — Action by administrator — Death of sole beneficiary.

An action was brought under Lord Campbell's Act by the administrator of the estate of a person whose death was alleged to have been caused by the negligence of the defendants to recover damages occasioned by such death for the benefit of the mother of the deceased, who was the only person for whose benefit an action could be brought. She died pending the action, before it came to trial.

Held, that, assuming that the plaintiff was entitled to recover for the benefit of the mother, had she not died, the effect of her death was only to reduce the amount to be recovered, and there was some sum of money which at the time of her death she was beneficially entitled to receive when recovered, and this sum when recovered would constitute part of her estate and be payable to the administrator thereof. And therefore the action could be proceeded with, notwithstanding her death, but the appointment of an administrator was necessary.

W. E. Middleton, for plaintiff. *D. L. McCarthy*, for defendants.

Falconbridge, J., Street, J.] IN RE CROSS. [Nov. 12.

Elections—Corrupt practices — Proceeding by summons — Limitations — Several charges.

Cross was convicted before two judges sitting under ss. 187, 188 of the Ontario Election Act, R.S.O. c. 9, for the trial of corrupt practices, committed at an election, for three several corrupt practices, and the penalty of $200 for each offence was imposed with imprisonment on default of payment.

Held, 1. The fact that the proceeding had not been commenced until after the expiration of one year from the time the corrupt practices were committed was no bar to them, inasmuch as that limitation applies only to actions for penalties under s. 195 of the Act.

2. It was no valid objection to the conviction that the judges constituting the court reserved judgment after hearing the evidence on one of the charges until they had heard evidence on the others.

Lynch Staunton, for defendant. *Dymond*, for Attorney-General.

MacMahon, J.] WILDMAN *v.* TAIT. [Nov. 12.

Municipal corporation—Assessment—Sale for taxes—Imperfect description—R.S.O. c. 224, s. 13.

Some lots were assessed in the following way:

Occupant.	Owner.	Size of lot.
Water lots.	John Maughan.	436 x 660.

Held, that the assessments were invalid as containing no description of the locality of the lots.

Though the water lots in question were numbered according to a registered plan giving the dimensions, instead of being assessed as numbered lots according to such plan, they were assessed en bloc as having a frontage of 436 feet on the shore line of Lake Ontario, by a depth south into the lake of 660 feet. Lots as numbered on the plan were owned by different people; moreover, the plan only shewed a depth of individual lots on it of 100 feet.

Held, that the assessment was invalid as disregarding the essential requirements of R.S.O. c. 224, s. 13.

Beck, for plaintiff. *A. C. Macdonell*, for defendant Magann.

Falconbridge, C. J., Street, J.] [Nov. 13.

MURRAY *v.* WURTELE.

Revivor — Substituted plaintiff — Absence of consent — Liability for costs — Transfer of right pendente lite — Stay of proceedings.

It may, in rare cases such as *Chambers* v. *Kitchen*, 16 P. R. 219, be "necessary or desirable" under Rule 396 to add or substitute a person as plaintiff, without the consent required by Rule 206 (3), upon the application of the opposite party; but where it becomes necessary to substitute a person as plaintiff without his consent, to prevent injustice, he should not be exposed, without some further action on his part or adoption by him of the position into which he is forced, to any liability for damages or costs.

Under the circumstances of this case, the fact that F. had become pendente lite the transferee of the promissory note sued on did not entitle the defendants to an order substituting him as plaintiff and making him liable for the costs of the action.

But the original plaintiff could not be allowed to prosecute the action further, because he has no longer any interest in it, and F. could not be allowed to do so because he had not caused himself to be substituted as a plaintiff, nor obtained leave to proceed in his own name upon the judgment pronounced in favour of the plaintiff, which had not been entered, but from which the defendants sought to appeal; and all further proceedings in the action should, therefore, be stayed, but without costs.

J. H. Moss, for plaintiff and Thomas Fraser. *J. E. Jones*, for defendants.

Trial of Actions, Boyd, C.] [Nov. 14.

BROWN *v.* TORONTO GENERAL TRUSTS COMPANY.

Donatio mortis causa — Banker's pass book.

Held, that a banker's pass book given upon receipt of a deposit which was numbered, and in which it was stipulated that the deposit will not be

repaid without production of the said pass book is a good subject of donatio causâ, The book was contemporaneous with the debt, was delivered to the creditor, was essential to the proof of the contract, and the production of it essential before the money could be redeemed. The delivery of such a pass book of money on deposit in anticipation of death operates as a transfer of the debt to take effect upon death.

Parker, for plaintiff. *A. L. Colville*, for defendants.

Falconbridge, C.J., Street, J.] [Nov. 17.

MACDONALD *v.* SHEPPARD PUBLISHING CO.

Discovery—Defamation—Justification—Immorality—Disclosure of name of paramour.

The defendants having in their newspaper charged the plaintiff with immorality, the plaintiff sued them for libel, and the defendants pleaded that the charge was true. The plaintiff having required particulars, the defendants set forth that the plaintiff lived at a house of ill-fame; that he lived at a particular place in adultery; that a child was born to the woman with whom he lived; and that he brought to his house and kept with the members of his family a woman who had lived in a house of ill-fame. The plaintiff, being examined for discovery, admitted that he had lived in adultery with a woman who had previously lived in a house of ill-fame, and that she bore a child of which he was not the father, but denied the other allegations of the particulars.

Held, that the plaintiff was bound to disclose the name of the woman, although such disclosure might injure her.

Bradford, for plaintiff. *Riddell*, Q.C., for defendants.

Falconbridge, C.J., Street, J.] [Nov. 17.

MILLAR *v.* THOMPSON.

Attachment of debts — Fraud—Issue — Amount in controversy—County Court jurisdiction—Residence of garnishee—Rules 917, 918, 919—Order for receiver.

Where it was charged by a judgment creditor that a fraudulent arrangement had been made between the judgment debtor and his employers, the garnishees, whereby a third person had been substituted for the debtor as the servant of the garnishees, and money paid to such third person, while the debtor continued to do the work,

Held—1. The judgment creditor was entitled to have an issue directed, to which the third person should be a party, to determine whether there was at the time of the service of the attaching order any debt due or accruing from the garnishees to the debtor, without bringing home a case of fraud to the persons against whom it was charged; it was sufficient to

shew unexplained facts and circumstances so unusual as to create a strong suspicion that fraud has been practised.

2. Upon the proper construction of rules 917, 918 and 919, the judge of a County Court in which the judgment has been recovered has power, when the amount claimed to be due from the garnishee is so large as not to be within the jurisdiction of a County Court, to make the garnishing summons returnable before himself, even where the garnishee resides in another county.

3. An order for a receiver should not be made in respect of a fund which may be reached by garnishing process.

Idington, Q.C., for plaintiffs. *R. N. Ball*, for defendants and others interested.

Meredith, C. J.] MANN *v.* GRAND TRUNK R. W. Co. [Nov. 22.

Deed--Construction—Gravel—Subsequent deposit.

In 1856 the owner of land by deed conveyed to a railway company "the gravel situate and being on and comprised within a certain part" of the land, with the right of way for a railway track, and the free and unobstructed use thereof, and covenanted for quiet possession, free from incumbrances, of the gravel and other the premises conveyed.

Held, that gravel deposited on the land since the date of the deed, owing to the action of the waters of a lake, did not pass by the deed.

J. H. Moss and *Swayze*, for plaintiffs. *Wallace Nesbitt*, Q.C., for defendants.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] THE QUEEN *v.* MACCAFFERY. [March 13.

Theft—Criminal Code ss. 743, 746, 747—Evidence to support conviction—Case reserved—Question not properly before court—New trial—Remedies open to party accused.

The defendant was tried before the Judge of the County Court for the Metropolitan District of the County of Halifax on the charge of having stolen a sum of money, the property of a fellow seaman. The evidence shewed that the prosecutor and defendant, with a number of other seamen employed on board the steamship "Minia," lived and slept, and had their belongings, including several chests, in a place in the fore part of the ship called the "square." Defendant in common with others of the ship's

hands was paid the balance of wages due him, amounting to $7.96, on the 23rd December. On the same day he obtained an advance of $7, alleging that he had spent all his previous pay. He endeavoured to obtain a loan of $5 from the prosecutor, and stated to one of the officers of the ship that he was short of money. He stated to a fellow seaman that the officer in question had loaned him a sum of money, but it appeared the statement was untrue. At noon on the 25th December the prosecutor placed a wallet containing the sum of $26 in his chest and locked it up. On the same afternoon the defendant, who had been about the room where the chest was, was seen in possession of a roll of paper money including two $5 bills, and on the same evening he loaned $5 and $2 in paper money to two of the ship's hands who were in his company. The following day the prosecutor went to look for his money and found that his chest had been opened and the money taken. No attempt was made to identify the money seen in the defendant's possession with that stolen from the prosecutor, nor was it shewn that the defendant had knowledge that the prosecutor had placed the money in his chest.

The learned judge of the County Court having convicted defendant, reserved the two following questions for the opinion of the Court: (1) Whether or not there was any legal evidence to support the conviction. (2) Whether he was justified in drawing from the facts stated a presumption sufficiently strong to justify him in finding a judgment of guilty.

Held, 1. In answer to the first question that there was evidence to support the conviction.

2. In answer to the second question, that the question was not properly before the Court.

Per TOWNSHEND, J.—The question as to the weight to be given to the evidence and the inferences to be drawn from it was for the trial judge, and could only be brought before the Court by appeal.

Per GRAHAM, E.J.—(Who concurred that there was evidence to justify a verdict of guilty) the case was one in which the Court should exercise its power under the Code s. 746 by ordering a new trial.

Per MEAGHER, J.—It was not the intention of Parliament that the remedy by case reserved under the Code s. 743, and the one by application for a new trial, under the Code s. 747, should both be open to the accused at the same time: *The Queen* v. *McIntyre*, 31 N.S.R. 422.

W. A. Henry, for Crown. *J. J. Power*, for prisoner.

Full Court.] SHAND *v.* EASTERN CANADA SAVINGS CO. [March 13.

Practice and precedent—Security for costs of appeal ordered to be given by plaintiff in insolvent circumstances.

On an application made by defendants for security for costs of an appeal asserted by plaintiff, it appeared that plaintiff's action had been

dismissed with costs but that no costs had been paid, and that to an execution issued therefor return had been made that plaintiff had no property within the jurisdiction or elsewhere to respond the execution. It also appeared that plaintiff had made an assignment for the general benefit of creditors, and that on an examination before commissioners it was shewn that he had no real or personal property, book debts or assets, that none of his creditors had been paid, and that anything recovered in the action would belong to his creditors.

Held, (following the practice laid down in Chitty's Archbold p. 399) affirming the order made at Chambers, that the case was one in which the plaintiff should be ordered to give security.

A. Whitman, for plaintiff. *R. L. Borden*, Q.C., and *A. E. Silver*, for defendants.

Full Court.] HAMILTON ET AL. *v.* GRANT ET AL. [March 13.

Railway company — Action against shareholder — Defence of previous transfer of shares to directors — Transfer held valid notwithstanding failure of transferees to register — Decisions under English Companies Act distinguished — Transfer prepared by director assumed to have been in proper form — Remedy against shareholders lost through delay — N.S. Railway Act, R.S., 5th series, c. 53, s. 23, sub-s. 1 — N.S. Companies' Act, 5th series, c. 78 — Acts 1886, c. 155 — Acts 1890, c. 63.

In 1887 H., and others associated with him for that purpose, undertook to buy up a majority of the stock of the S. V. and L. Ry. Co., and entered into an agreement with M. and G. under which the latter were to procure and transfer to them a sufficient amount of stock in the company for that purpose. The stock so acquired and transferred was to become the property of H. and his associates in the proportion of one-fourth each. On September 3rd, 1887, G. received a transfer of 500 shares of stock in the company owned by D., and on the same day these, with other shares held by M., were transferred to the Board of Directors (H. and his associates), and the transfer was approved and accepted by them. Sometime subsequently H. sent to G. a transfer to H. and his associates of all the interest of G. in the stock of the company which G. signed and returned. H. acted as president and a director of the company for some years after, and took a chief part in all the meetings and subsequent transactions, and was a party to proceedings taken by the directors and shareholders to borrow money on the security for the franchise of the company. By the act of incorporation of the company (1886, c. 155, s. 4) it was enacted that "the transfer of shares in this company shall be valid and effectual for all purposes from the time such transfer is made and entered in the books of the company." In an action brought by plaintiffs as trustees representing bondholders against the executrix and executor of

G. to recover the sum of $9,000 alleged to be due by G. in respect of the shares held by him, it appeared that no entry of any transfers, except those to M. and G., was to be found in the books of the company, and there was no proof that any book existed in which such transfers could or should have been entered.

Held. 1. G. having done all that was in his power to make the transfer good and effectual, the irregularities and omissions of H. and his associates —the directors—over whom he had no control, could not so operate as to continue him as a shareholder.

2. The transfer executed by G. having been prepared by H., the president of the company, it would be unreasonable to assume that it was not in proper form.

The provisions of the N.S. Railway Act, R.S., 5th series, c. 53, being materially different from those of the English Companies' Act, there being nothing in the former act to require a similar strict construction as to the liability of a shareholder who was made a bona fide transfer of his shares, and done what he could to make such transfer effectual, the cases decided under the English Act as to transfers of stock are applicable in this province.

Per WEATHERBE, J.—Under the wording of the Railway Act R.S., 5th series, c. 53, s. 23, sub-s. 1, any man who can be said to be the "holder of the stock" is the person liable, and is the only person liable, and there is nothing to prevent a creditor from following the stock into the hands of a stockholder who is not registered.

In 1890 (Acts of 1890, c. 63) H. and his associates procured the passage of an act to amend and consolidate the original act of incorporation and the acts in amendment thereof, under which H. and his associates were incorporated under the same name as in the original act but with different powers and increased capital. By the amended act it was enacted that the company having already organized and gone into operation in accordance with the original act, such organization and operation were thereby confirmed; and all acts and parts of acts inconsistent with the amended act were thereby repealed.

Per TOWNSHEND, J.—As the words "organization and operation" would clearly cover the appointments of president and directors who were acting as such by virtue of stock transferred to them at the time in fact if not in law, the provision of the statute would legalize the transfer in question, assuming that the stock had not already been legally transferred. Also, that inasmuch as the effect of the Act of 1890 was to extinguish the company incorporated under the Act of 1886, except in so far as the Act of 1890 specially affected the position and assets of the company. Creditors who had claims against the old company would require to proceed under the provisions of the Act respecting corporations, R.S., 5th series, c. 78, ss. 10, 11, within three years after the dissolution of the corporation, and

that the plaintiffs having failed to do this, lost all rights that they might have had against shareholders in the old company

R. E. Harris, Q.C., for plaintiffs. *J. McGillivray*, *H. McInnes* and *H. Mellish*, for defendants.

Full Court.] MOORE *v.* RITCHIE. [March 13.

Trespass to land—Interference with dam and flow of break—Evidence of plaintiffs' title held insufficient.

Plaintiffs claimed to be lessees and in possession of a water course running through a pond in the vicinity of the town of L., and as such entitled to the flow of the brook and the use of a dam at the pond to regulate the flow of water in connection with the working of a grist mill, situated upon a lot of land owned by plaintiffs further down the stream. In an action by plaintiffs against defendants, claiming damages for opening the dam and interfering with the flow of water, and an injunction, it appeared that plaintiffs' claim, as lessees, was based upon a resolution passed August 12th, 1895, at a meeting of the "proprietors' committee" of the township of L. There was no evidence to shew who the persons were who called themselves the "proprietors' committee" at that time, nor how, or when, or by what authority the "proprietors' committee" was appointed. The township grant, which bore date Nov. 26, 1764, under which both parties claimed, shewed that the township contained 200 rights or shares of 500 acres each, of which only 157 appeared to have been granted at the time.

It appeared from the grant that, before it was issued, a division was made, but none was proved, and it was impossible to say whether the land covered by the brook passed under the grant or was included in the ungranted shares or rights. Evidence was given, however, to shew that from the first the grantees had assumed to control the management of the brook and that from time to time they had passed resolutions for that purpose, but no authority was shewn for these proceedings and it did not appear that the grantees had any.

Held, assuming that the original grantees had authority to so deal with the brook and pond, that, in the absence of evidence that their rights were transferred to the persons who, in 1895, assumed to exercise such authority, no right or title to the brook, pond, or dam passed to the plaintiffs, as lessees or otherwise, and they must fail in their action.

F. B. Wade, Q.C., and *H. A. Lovett*, for appellant. *J. A. McLean*, Q.C., for respondent.

Full Court.] LEONARD *v.* SWEET. [March 13.

Practice and procedure—Paragraphs of reply to grounds of defence struck out at Chambers as tending to prejudice fair trial of action—O. 19, R. 27—Order, on appeal, sustained in part and reversed in part.

Plaintiffs' statement of claim alleged detention by defendants of an engine the property of plaintiffs. In the alternative, plaintiffs alleged detention by defendants of an engine delivered by plaintiffs to F. Under a special agreement that it was to remain the property of plaintiffs until certain promissory notes, etc., given by F. for the price of the engine were paid, none of which had been paid. In further alternative it was alleged that plaintiffs were entitled to the engine in question under a bill of sale given by F. to plaintiffs. Defendants pleaded among other things, that S. & Co. issued a writ of attachment against F. as an absent or absconding debtor, and that the sheriff attached the engine in question as the property of F. Also that S. & Co. recovered judgment against F. in the action brought by them against him, and issued executions thereon, and that the engine was detained under the last of said executions. Plaintiffs replied (4) that when the writ of attachment was issued F. was not an absent or absconding debtor; (5) that the summons and attachment were never personally served upon F., that F. did not owe S. & Co. the whole amount of their judgment, but a much smaller sum; and that the judgment was obtained by S. & Co. in collusion with F.; (6) that the judgment against F. obtained by S. & Co. was paid before the commencement of plaintiffs' action; (7) that since the recovery of the judgment by S. & Co. against F. large sums had been paid by F. which had not been credited thereon; and that in addition to such payments F. gave S. & Co. certain stock as collateral security for all amounts due by him, which stock should have been sold and the price credited upon said judgment, which, with the amounts paid by F., would have fully paid all amounts due under said judgment to S. & Co. Pars. 4, 5, 6 and 7 of plaintiffs' reply having been struck out by the Chambers judge, under O. 19, R. 27, as irrelevant and tending to prejudice, embarrass and delay the fair trial of the action.

Held, that as to pars. 4, 5 and 6 the learned judge was in error, and plaintiffs' appeal from his order should be allowed; but as to paragraph 7 he was right and his order should be sustained.

F. H. Bell, for plaintiffs. *A. MacGillivray* and *F. T. Congdon*, for defendants.

Full Court.] CITY OF HALIFAX *v.* FARQUHAR. [March 17.

Municipal corporation—Action for rates and taxes—Defence of excessive amount—Held question for Assessment Appeal Court—Proof of assessment—Evidence wrongly received—Facts admitted on pleadings.

Defendant was assessed in the City of Halifax for City, Poor, County, and School rates and taxes for the years 1894 and 1895, the property upon

which the rates were assessed being the SS. "Newfoundland," then lying in Halifax harbour, of which defendant was alleged to be owner, and the valuation of which, for the purposes of the assessment, was placed at the sum of $5,000. Under the provisions of the Halifax City charter, Acts 1891. c. 58, s. 341, a Court is established for the purpose of hearing all appeals from assessments, and is empowered, under subsequent sections of the Act, to determine and hear all objections of ratepayers, who shall have duly appealed, to the valuations or assessments which have been made upon such ratepayers and their properties, and to reduce or increase the valuations, etc. In an action by plaintiff to recover from defendant the amount claimed to be due for rates and taxes, defendant pleaded among other things that at the time of said assessments defendant was not the owner of more than a one-quarter interest in said ship.

Held (following *Town of Westville* v. *Munro*, 32 N.S.R., p. 54), that defendant having received notice of the assessment, if he was dissatisfied therewith, should have brought the matter before the Assessment Appeal Court, established for that purpose, and, having failed to do so, that the assessment was conclusive, and could not be attacked in an action to recover the amount assessed.

The only evidence before the Court of the assessment and the rate due thereon was the city collector's certificate of taxes unpaid, and sec. 362 of the City charter, which provides that all rates and taxes shall become due the 31st day of May in each year, and that it shall be the duty of the city collector immediately thereafter to take proceedings, etc. There was no evidence to prove the collector's signature to the certificate or that he was collector.

Held, that the paper tendered was wrongly received in evidence. But, nevertheless, that as defendant, in his defence, admitted that he was assessed for the amount claimed, and that the rate alleged to be due on such assessment was correct, it was not necessary for plaintiff to prove the assessment or the rate due thereon.

R. L. Borden, Q.C., for appellant. *W. F. MacCoy*, Q.C., for respondent.

Full Court.] McDONALD *v.* GILLIS. [March 17.

Promissory note—Joint and several makers—Action against makers jointly —Recovery of judgment against one held a bar to proceedings against the other—Form of action—Amendment—Right to, affected by lapse of time.

The defendants, G. and N., were sued jointly as makers of a note for $25. The writ which was issued in January, 1885, was served on the defendant N., and the defendant G. accepted service. N. appeared and pleaded, but by arrangement nothing was done in relation to the claim against the defendant G. In November, 1885, N. withdrew his defence

and confessed the action, and final judgment was entered against him, on which some payments were made. In 1899 plaintiff commenced proceedings against the defendant G., who, under an agreement reserving his rights appeared and pleaded.

Held, reversing the judgment of the County Court Judge for District No. 6, that the judgment entered on confession against the defendant N. was an answer to the claim subsequently made against the defendant G. *McLeod* v. *Power* (1898) 2 Ch. 295, followed.

Held, further, that the action having been brought against defendants as joint debtors only, the position of G. in this suit was not affected by the fact that the note in question was a joint and several one, and that plaintiff in another suit might have some claim against G. alone.

Per MEAGHER, J., dissenting. As the reception of the note was not objected to on the trial, or the existence of the judgment against N. urged as an answer, a stage had been reached when the form of action was not material.

Held, also, that as either objection, if raised upon the trial, could have been cured by amendment, the facts should be looked at rather than the form, and the defendant G. should not be permitted to succeed on a mere technicality.

Per TOWNSHEND, J., concurring. G. could not succeed without an amendment and no amendment should be permitted after the lapse of fifteen years.

R. L. Borden, Q.C., and *J. A. Chisholm*, for appellant. *W. F. O'Connor*, for respondent.

Full Court.] McKENZIE *v.* ROSS. [March 17.

Action to have property in name of defendant declared vested in plaintiffs as assignees of party advancing purchase money—Proof that money was mere advance and that defendant acted independently—Doctrine of resulting trust held inapplicable—Case withdrawn from jury—Waiver.

Plaintiffs as assignees of M. sought to obtain a declaration that certain lands held in the name of defendant were at the time of the assignment the property of M. and by reason of the assignment, became vested in the plaintiffs.

The evidence shewed that the money required by defendant for the purchase of the properties in question was obtained from M., but that M. had nothing to do with any of the purchases except to advance the money to defendant by whom the negotiations were conducted, and in whose name the deeds were taken and recorded, and who in all cases acted independently of M. in negotiating for and acquiring the properties from the respective owners.

Held, 1. The doctrine of resulting trusts was not applicable, and there being no issue of fact for the jury on this phase of the case the trial judge was justified in withdrawing it from them.

2. The trial judge having at the close of the trial announced his intention of withdrawing the case from the jury counsel for plaintiffs should at that time have indicated the facts or issues that they wished the jury to pass upon, and, having neglected to do so, it was now too late for them to object.

3. The objection was without merit as the jury was applied for by defendant and not by plaintiffs.

A. Drysdale, Q.C., for appellant. *H. Mellish*, for respondent.

Full Court.] MESSENGER *v.* THE TOWN OF BRIDGETOWN. [July 18.

Municipal corporation—Action claiming damages for obstruction in highway—Contributory negligence—Defence of sustained—Improper rejection of evidence—New trial refused where no substantial wrong or miscarriage—O. 37, R. 6.

An excavation made by defendants in the highway for the purpose of laying a small pipe, when filled in, left a mound of earth from four to five feet in width at the base, and from eight to nine inches above the surface.

Plaintiff's horse, in passing over the place where the pipe had been laid, and the earth filled in, stumbled and fell, throwing plaintiff out, and causing him to sustain serious bodily injury.

In an action by plaintiff claiming damages the evidence shewed that plaintiff had driven over the place where the accident occurred, in daylight, a few hours before, that in returning, at about ten o'clock at night, he was driving at the rate of seven miles an hour, that his horse was seventeen years old, and was lame at times, that it had been known to stumble, that it was without shoes at the time of the accident, and that the springs of plaintiff's waggon were in a defective condition.

Held, that, on the whole case, the earth construction was not negligently made, and was not a more serious obstruction than was usual on such roads at such places, and that the stumbling was due to plaintiff not using proper care with this horse and carriage in approaching, at that time of the night, a place which he had seen before.

On the trial, evidence having been given of the individual opinion of plaintiff's neighbours as to his general reputation for veracity, defendant's counsel proposed to ask the witness the question "whose opinion do you know?" The evidence having been excluded,

Held, that the question should not have been disallowed.

Held, notwithstanding, that as, assuming plaintiff's testimony to be perfectly true, no case was made out against the defendant, there was no necessity for sending the case back for a new trial, for rejection of evidence, there having been no substantial wrong or miscarriage, within O. 37, R. 6.

Per WEATHERBE, J. As defendant had undertaken to support the exclusion of evidence that was clearly admissable there should be no costs.

W. E. Roscoe, Q.C., for appellant. *J. J. Ritchie*, Q.C., for respondent.

Full Court.] RE ESTATE OF JOHN FARQUHARSON. [March 18.

Will—Proof in solemn form—Insane delusion—Where delusion established burden to shew lucid interval on party setting up will—Interested party—Evidence of corroboration—Witnesses and Evidence Act, R.S., c. 107, s. 17, not applicable.

In March, 1897, testator made a will revoking a prior will made in 1890, materially reducing the bequests made by the prior will to his wife and son, and giving away large portions of his estate to collateral relatives.

The evidence shewed that at the time of the making of the second will defendant was suffering from certain insane delusions as to the relations existing between his wife and son, and that the disposition of his estate made by such will was affected by such delusions.

Held, that the decree of the Surrogate Judge of Probate, on petition for proof in solemn form, admitting the second will to probate, must be set aside, and the will declared inoperative and void.

Per TOWNSHEND, J., GRAHAM, E. J. concurring The existence of the delusion being established, the burden rested upon the parties setting up the second will to shew that it was made during lucid interval.

Held, also, that the objection that important testimony had been given by the wife and son, who were interested parties, lost the force that it would otherwise have had, where their testimony was corroborated in all essential particulars by disinterested witnesses.

Held, also, that the provision of the Witnesses and Evidence Act, R.S. c. 107, s. 17, excluding parties from giving exidence of dealings, transactions, or agreements with the deceased on the trial of any issue joined, or on any inquiry arising in any suit, action or other proceeding in any court of justice, etc., has no application to any investigation of this kind as to questions of testamentary capacity.

C. S. Harrington, Q.C., for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

Province of New Brunswick.

SUPREME COURT.

In Equity, Barker, J.] LAWTON SAW CO. *v.* MACHUM.

Partnership—Agreement—Construction—Losses—Contribution inter se.

By an agreement between plaintiffs and defendant it was provided that the defendant, who was carrying on the business of manufacturing wire fencing, should furnish machines, in which he had patent rights, for the purpose of carrying on the business of manufacturing and selling wire

fencing; that he should devote his time and energy in furthering the intersets of the business; that the machines and patent rights therein should be security for money advanced by the plaintiffs; that the plaintiffs should advance to the defendant $500, purchase wire needed for manufacturing, and pay wages, etc., in consideration of a commission of five per cent. on all purchases and advances; that the plaintiffs should furnish space on their premises for the business at a yearly rent; that the defendant should receive a weekly salary; that the plaintiffs should attend to the office work of the business, for which they should be paid a weekly sum; that the net profits of the business should be divided; that the business should be conducted under a company name, and that the agreement should continue for one year, when plaintiffs could purchase a half interest in the business and patent rights of the defendant or continue the business for a further term. The business resulted in a loss.

Held, that the parties were partners inter se, and should share equally in the losses of the business.

J. D. Hazen, Q.C., for plaintiffs. *A. I. Trueman*, Q.C., and *E. R. Chapman*, for defendant.

In Equity, Barker, J.] BLACK *v.* MOORE.

Fraudulent conveyance—Statute 13 Eliz., c. 5—Foreign assignment of personal property in New Brunswick—"Mobilia sequuntur personam"—Conflict of laws—Onus of proof—Garnishee—Equitable execution.

A share in the annual income of an estate in Ireland, payable under a will through the hands of an executor living in New Brunswick, to the beneficiary living and domiciled in Massachusetts, was assigned by the beneficiary by assignment executed in Massachusetts to trustee in trust, first, to maintain the assignor and his family, and secondly to pay his creditors a limited sum. In a suit in this province to set aside the assignment as fraudulent and void against a judgment creditor of the assignor, under the statute 13 Eliz, c. 5.

Held, 1. The validity of the assignment should be determined by the lex domicilii of the assignor;

2. Assuming the validity of the assignment should be determined by the law of Massachusetts, the onus of proving that the assignment was invalid by that law was upon the defendant, and that in the absence of such proof it must be assumed that the law of Massachusetts was the same as that of New Brunswick;

3. As the money coming into the hands of the executor was liable to attachment under 45 Vict., c. 17, s. 21, or to equitable execution, the plaintiff was prejudiced by the assignment within the statute, 13 Eliz., c. 5.

F. St. John Bliss, for plaintiff. *G. W. Allen*, Q.C., for defendants.

IN RE WIGGINS' ESTATE.

Trustee—Commission—Personal estate—Income—Investments.

No fixed rule can be laid down as to the commission trustees will be allowed by the court, as each case must be governed by its own circumstances, and by a consideration of the trouble experienced in the management of the estate.

Where trustees of an estate consisting of stocks and mortgages received under the deed of trust a commission of 5 per cent. on income, a commission on the estate was refused, but a commission of one per cent. was allowed on investments made by them.

A. O. Earle, Q.C., for trustees. *G. C. Coster*, for estate.

IN RE STACKHOUSE.

Drunkard—Allowance to family—Payments out of principal—53 Vict., c. 4, s. 276.

Where the estate of a drunkard did not yield sufficient income to maintain him, and to partly maintain his family, the court under Act 53 Vict., c. 4, s. 276, ordered a yearly sum to be paid out of principal by the drunkard's committee to the family for their support.

J. B. M. Baxter, for committee. *W. W. Allen*, Q.C., for family.

Province of Manitoba.

QUEEN'S BENCH.

Dubuc, J.] STOBART *v.* FORBES [Oct. 23.

Company—Assignment of chose in action—Trading corporation acting as trustee—Assignments Act, R. S. M. c. 7, s. 3—Objections by debtor to assignment.

Two objections to the plaintiffs' claim were raised by the defendant;

(1) That it included the claims of other parties which had been assigned to the plaintiffs merely for the purpose of collection and that the plaintiffs were not beneficially entitled thereto or interested therein.

(2) That the plaintiffs, being a company created under the Manitoba Joint Stock Companies Act, had no power to take such assignments and bring suit thereon.

Held, 1. Following *Mussen* v. *The Great N. W. C. Ry. Co*, 12 M. R. 594, that, under The Assignments Act, R.S.M. c. 7, s. 3, the first objection could not be sustained.

2. A trading company created by letters patent under the Manitoba Joint Stock Companies Act has power to take an assignment of a chose in action and hold and collect it by suit for the benefit of the assigner. *In re Rockwood, etc., Agricultural Society*, 12 M. R. 655; *The Queen* v. *Reid*, 5 Q.B.D. 483; and, *Ashbury Railway Carriage Company* v. *Riche*, L.R. 7 H.L. 653, distinguished.

3. The defendant, having no interest in the assignments and being no way prejudiced by them, could not raise any objection to them. *Walker* v. *Bradford Old Bank* (*Limited*), 12 Q.B.D. s. 11, followed.

Howell, Q.C., for plaintiffs. *Crawford*, Q.C., for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] IN RE COWAN. [March 19.

Practice—Costs—Taxation of—Solicitor and client.

Appeal from MARTIN, J., dismissing a summons for a review of the taxation by the District Registrar at Vancouver of a bill of costs rendered to John MacQuillan by Mr. G. H. Cowan, a barrister and solicitor. Item 45 in the bill of costs "Counsel fee perusing same (*i.e.*, statement of defence) . . . . $5.00," was objected to as being excessive.

Held, dismissing the appeal, that a charge in a bill of costs although not justified by the item under which it is framed may nevertheless be allowed if it can be sustained under any other item of tariff. The charge in question although not justified under item 147 of the tariff could be sustained under item 229.

Duncan, for appellant. *Kappele*, for respondent.

McColl, C.J.] [June 11.

YORKSHIRE GUARANTEE CORPORATION *v.* EDMONDS.

Land Registry Act—Registered judgment—Whether mortgage given by debtor affected by or not—C.S.B.C. 1888, c. 67, s. 26, 27, 33 and 34, and c. 42, s. 32.

This was an action for foreclosure. None of the defendants contested the action save the Bank of British Columbia. The question to be decided

was as to the priority of the two claimants on part of the lands mortgaged. The plaintiffs claimed by virtue of a mortgage executed by the defendant, H. L. Edmonds, on 6th March, 1893. Application for registration of same was filed on March 7th, 1893, at 11.40 a.m., and the mortgage was registered on 6th July, 1894. The defendants, the Bank of British Columbia, claimed by virtue of a judgment obtained by them against the said defendant, H. L. Edmonds. Application for registration of same was filed in the Land Registry Office on 7th March, 1893, at 11.10, a.m., and the judgment was registered on 27th March, 1893. Execution issued on this judgment and on 14th December, 1894, the sheriff sold, at public auction, the land in question to E. A. Wyld, an officer of the Bank of British Columbia, and executed a conveyance to him, and the said Wyld thereupon conveyed the land to the Bank of British Columbia, and the Registrar issued a certificate of title to the Bank free from all encumbrances.

Held, that a registered judgment binds only the interest of the debtor existing at the time of registration, and therefore cannot affect a mortgage already given by the debtor, although such mortgage is not registered before the judgment. Judgment for plaintiffs against the Bank with costs.

L. G. McPhillips, Q.C., for plaintiffs. *Davis*, Q.C., for Bank of British Columbia.

Book Reviews.

An Exposition of the Principles of Estoppel by misrepresentation, by John S. Ewart, Q.C., Winnipeg, Manitoba, Canada. Toronto: The Carswell Company, Limited, Law Publishers, 1900.

The writer claims as the chief characteristic of the above work (1) a completer and more scientific analysis and classification of estoppel; (2) a clearer apprehension and appreciation therefore of the basis and methods of estoppel; and (3) a successful substitution in various departments of the law of the principles of estoppel for others now in vogue, and he holds the view that much perplexity has arisen from the absence of the distinction which he makes by dividing the subject into these two most obvious classes, namely estoppel by personal misrepresentation and estoppel by assisted misrepresentation.

The writer's method is to investigate and establish the essential requisities of estoppel by misrepresentation so as to apply them to all the departments of the law in which estoppel operates. He then discusses and amplifies the rule laid down in the old case of *Lickbarrow* v. *Mason* (1787) 2 T. R. 63 which lays down the broad principle that whenever one or two innocent persons must suffer by an act of a third, he who enables such third person to occasion the loss must sustain it. In the next two chapters he discusses the nature and effect of estoppel and the relation of estoppel

to deceit. The remainder of the book is devoted to the application of these principles to different forms of property and the various department of the law under the following heads:—Ostensible ownership and agency—Matters connected with land, divided into legal estate, possession of the deeds, qui prior est tempore potior est jure—Matter connected with goods, in relation to their possession, documents of title and legislation—Choses in action—Execution of documents—Principal and agent—Partnership.

In the above scheme it will be seen that Mr. Ewart has laid down a scientific and certainly an entirely new arrangement of the doctrine treated of. His treatment of it shews much originality of thought, a clever handling of a very difficult subject as well as careful research. His style is all his own, and in its freshness and individuality smacks of the Prairie Province, which he has made his home. His work will be a valuable addition to the lawyer's library.

The table of contents is exhaustive and satisfactory, but the index not quite up to the mark.

Flotsam and Jetsam.

UNITED STATES DECISIONS.

ELECTRIC WIRES — NEGLIGENCE. — In *Brush Electric Light and Power Co.* v. *Lefevre*, 67 S.W. Rep. 640, decided by the Supreme Court of Texas, it appeared that two exposed electric light wires were stretched across a street, about sixteen feet above the pavement and about two feet over the top of a wooden awning, containing no railings, and not used as a place of resort. A person went upon such an awning to raise the wires so that he could pass thereunder a house he was moving, and while there lost his footing, and, to steady himself, grasped the wires, and was killed. It was held that as the top of the awning was not a place where people could be expected to resort, and the wires were not improperly placed with respect to the surface of the street, no negligence could be imputed to the lighting company, and a verdict against the company was set aside.

A railroad employee injured through the negligence of a co-employee is held, in *Smith* v. *St. Louis & S. F. R. Co.* (Mo.), 48 L.R.A. 368, to have no right of action because of negligence in employing him, if his negligence was not with respect to acts for the performance of which he was employed. With this case there is a review of the decisions as to the duty of a master with respect to the employment of his servants.

The servant of a truckman who is sent by his master, who pays him, with a horse to a warehouse, to use the horse in operating tackle for hoisting goods, is held, in *Murray* v. *Dwight* (N.Y.), 48 L.R.A. 673, not to be a fellow servant of the warehouseman's servants, by whose negligence he is injured when putting the blocks and tackle in place, although he works under the direction of the warehouseman's foreman.

ANALYTICAL INDEX

of the Contents of this Volume.