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On the 28th ultimo, full of years and of honour, Sir Thomas Galt, late Chief Justice of the Common Pleas, Ontario, passed away in his eighty-sixth year. On his retirement from the Bench in 1894 we referred to the career of this most estimable gentleman (30 C.L.J 489). His memory will be lovingly cherished by all who knew him; enemies he had none, for none could resist the charm of his large-hearted kindliness. With a quick apprehension of men and things, a strong desire to be just and fair to all and a most generous disposition was combined a boyish simplicity and directness of character, quaintly mixed with an impulsive temperament, making up a unique personality which won all hearts and silenced all criticism. He was, the last link binding the Bench and Bar of the past to that of the present. The strong points and the weak points of his career as a Judge we have already referred to. But those who stood round his coffin as he was laid to rest in St. James' Cemetery on the 2nd inst., thought not so much of the upright Judge as of the kind and loving father, the genial true-hearted friend and the courteous gentleman.

Hon. Arthur Sturgis Hardy, K.C., who passed away last month, will, undoubtedly, be best remembered in connection with political matters in this Province in which he took a distinguished part as leader of the Government for many years, but had he continued to devote himself with the same industry and zeal to his profession, as he did in the beginning of his career, and as he afterwards did to the public service, there can be no doubt but that he would have occupied a very high place as counsel, and especially so in jury cases. His forensic abilities were undoubtedly very considerable, and in his contests with the great leaders of the Bar, when he was in active practice, he held his own with marked success. He was a man of strong and sterling character; a true friend and a generous foe.

Medical expert evidence is discussed by Mr. E. F. B. Johnston, K.C, in another place in an interesting article which will receive at least the commendation of the medical fraternity. The latter have been rather hardly dealt with from time to time, and the writer draws attention to and combats the prejudice which largely pervades the professional as well as the judicial mind in reference to expert evidence by medical men. The suggestion he makes for the appointment of a board of medical witnesses is worthy of discussion. As we understand his suggestion, it is not that their duties should be the same as those who, for example, in collision cases in the Admiralty Court, in England, under the name of assessors, are occasionally called in to advise a judge in relation to nautical matters. They would rather be officials who would in appropriate cases be appointed to look into the matter in dispute and give evidence therein from a non-partisan medical standpoint, and be subject to examination by either party. There is certainly need for something of this sort, if only from the fact that the volume of medical evidence given in important cases has of late years often become very burdensome, and occasionally would seem to result in giving an unfair advantage to the litigant with the longest purse.

The *Albany Law Journal* remarks that Justice of course never sleeps, but her ministers, being merely human, sometimes do, and occasionally take "forty winks" while litigation is in progress. The above remarks refer to the fact that a judge before whom a case was recently tried in Chicago fell asleep and so remained for several minutes. An appeal from the verdict was dismissed, the Appellate Court holding that the circumstance of the trial judge having slept for four or five minutes during the hearing of the case did not constitute what is in that country called "reversible error." There have been occasions when, both in England and in this Dominion, similar applications might have been made, but, so far as we know, no attempt has been made such as has recently failed in the comparatively "wide-awake" country to the south of us.

The annual dinner of the Hardwicke Society, held last month in London, is specially worthy of note, in that it was graced not only by the presence of a brilliant assembly of English judges and counsel, but also by that of Maitre Labori, whose grand advocacy

of Captain Dreyfus is fresh in the memory of our readers. The President, in proposing his health, very truly said: "No advocate within living memory had had to conduct the cause of a client ıder circumstances of greater difficulty, and surely no advocate ever performed his duty to his client more fearlessly or conscientiously. . . . The torch of justice would never be extinguished in any country whilst eminent members of the Bar were prepared to do their duty as fearlessly as had the great advocate whose health he was proposing." Though M. Labori avoided all reference to the issues of the above cause celebre, his connection with it and the gross injustice he strove to prevent were doubtless in the minds of his audience, but their cheers were, perhaps, more the effect of his eloquence and well-expressed sentiments as to the independence of the Bar in safeguarding and protecting the interests entrusted to its care. As he truly said: "Without independence there was no Bar, and without a Bar there was no independence for the nation."

On the 12th of June the Cuban Constitutional Convention, by a vote of 1(to 11, accepted the "Platt Amendment" without qualification, and attached it to the new Constitution as an appendix. By so doing it satisfied to the full the demands of the United States government touching the right of Cubans to self-government. We extract the following from the Platt Amendment: "The President is hereby authorized to leave the government and control of the Island of Cuba to its people as soon as a government shall have been established in said island under a Constitution which, either as a part thereof or in an ordinance appended thereto, shall define the future relations of the United States with Cuba substantially as follows:" Then follows a statement of the several conditions upon the fulfillment of which independence will be recognized. The convention is now engaged upon the work of framing an electoral law, and it is expected that elections will be held throughout the island and a Congres· nd permanent government established by the beginning of the new year at latest. We shall then await with interest the withdrawal of the American troops from the island. We observe in the press evidences of a very decided disinclination on the part of the American people to allow the Cubans a free hand to work out their national destiny; but the civilized world expects to see

the solemn compact of the United States carried out to the letter. It must not be forgotten, too, that the President of the United States, the Secretary of War and General Wood promised the Cuban Commission, which visited Washington, to use their influence to promote a treaty of commercial reciprocity between the two countries. We fancy that the Senate, judging from some of its recent performances, will hardly be in so altruistic a mood as to swallow the proposed treaty at a gulp. Nous verrons.

MEDICAL EXPERT EVIDENCE.

Owing to the increased number of actions founded on negligence and the modern methods of conducting criminal trials, evidence of experts has become an important factor in cases at Nisi Prius. Thirty years ago, the presence of a number of medical men as witnesses for the plaintiff and defendant respectively, was very unusual. The plaintiff called the medical attendant, and his report was generally accepted as sufficient on that branch of the case. His evidence has now to be supported by several medical experts, by reason of the fact that the defence is certain to call several doctors, either to combat the allegation that the loss is due to the injuries complained of, or to minimize the amount of damage which the plaintiff seeks to recover. The same practice to its fullest extent, holds good in cases involving mechanical construction and operation, and has also been adopted in the trial of issues turning upon disputed handwriting. Perhaps the increase in the volume of this class of evidence is more marked in criminal prosecutions and defences, when death is alleged to be the result of poison or external injury, than in other trials. It is not unusual at the present time, to find in criminal trials, a dozen doctors on each side, and in many instances, medical opinions for the defence are found to be totally opposed to those on behalf of the Crown.

The reason for this condition of matters becomes apparent when we consider the methods of modern practice. Cases are now prepared more minutely, if not more thoroughly, than they were many years ago. Every detail is worked out, and every point of the adversary is anticipated. More money is expended in preparation and trial than formerly, and counsel are now dealing much more with the scientific elements of a case than they once did. Indeed, to be a successful counsel, a thorough knowledge of

surgery and mechanics seems to be as requisite as familiarity with the law. This being so, it becomes a serious question to consider what weight ought to be attached to this kind of evidence, and whether the judge who relies greatly upon its value in charging a jury, or the judge who entirely ignores it, is in the safer channel.

Some judges, here as well as in England are, it is well known, apt to criticise adversely opinion evidence, and they point to the undisputed fact that ten medical men, for instance, will swear to certain causes and corresponding results, only to be flatly contradicted by eleven other equally eminent practitioners, and they, not unnaturally perhaps, come to the conclusion that the evidence of medical men is moulded in the interest of the partisan. This conclusion may occasionally, but, I think, very rarely, be justifiable.

Members of the medical profession in Canada stand quite as high, and are actuated by as pure motives, as members of the Bar, and it very often happens in practice, that medical experts who have gone into the case with the counsel or solicitor engaged, are not called, because their conclusions are adverse to the party in whose interest they have been consulted. Medicine is not an exact science—perhaps not so much so as law. In numberless cases, the symptoms of the patient are purely subjective, and he misleads his doctor much more easily than the client misleads his legal adviser, either by the suppression of facts or by the coloring of matters wholly within his own knowledge.

Opinions must differ, and it would be as reasonable to make sweeping charges against judges who differ from each other, as to make similar charges against medical experts. Neither the judge nor the expert is speaking from a knowledge of actual facts as distinguished from evidential facts. Certain facts may be reasonably proved; others remain in more or less doubt. The medical man forms his opinion according to his best judgment on the facts as they are disclosed to and appreciated by him. The judge does the same thing. Both are liable to be mistaken. Other medical men and other judges differ from these opinions, and it would be cruel and unjust to say that those who differ are actuated by improper motives. The fact that one opinion is given under oath, and the other only indirectly so given, can make no difference, because the conclusions in each case are opinions at best, and the procedure in arriving at such conclusions is similar in both instances. Out of ten judges, five may find for the plaintiff and

five for the defendant. All of them may be, and no doubt are, honest in their opinions. If therefore judges differ, with abundance of precedents and legal lore in unbiassed black and white before them, and with certain fixed principles, which cannot in themselves be guilty of motive or feeling, to guide them in forming a judgment, how much more may it be expected that medical experts will differ in their opinions, when so much depends on the diagnosis, the foundation for which often lies entirely within the control of the patient?

The ordinary lay witness is called to testify to a fact. Do we always or ever get the actual fact, or is it only the opinion of the witness which we get?—an opinion which depends for its value on many factors, such as observation, opportunity, circumstance, appreciation, the senses, preconceived ideas, mental condition, etc.

In the late unfortunate occurrence of shooting a constable, several apparently truthful and personally disinterested witnesses were called to give a description of the man who supplied the weapons. No two of these witnesses agreed, and yet each was supposed to be describing an actual fact which occurred before his eyes and within a few hours prior to the evidence being given. What is this but opinion evidence? A car is running at fifteen miles an hour, and we will suppose this is capable of being established by scientific means as a certainty. Twelve men, the most reputable in the neighborhood, testify as to the speed of the car. They will be found to vary from perhaps ten to twenty or twenty-five miles an hour in their evidence on the question of speed. This again is opinion evidence, its correctness being dependent upon some of the many factors above alluded to. The mere repetition of a conversation is often more the result of opinion as to what the speaker said, than it is of the actual words spoken by him. One reason for this state of things is that our appreciation and knowledge of facts are purely relative, and to the extent to which the relation is defective or in error, to that extent the evidence is distant from the line of exactness.

In dealing with a question of this nature, we cannot overlook the principle necessarily underlying all evidence. Facts, as such, in reality cannot, as a rule, be presented to the Court. They can only be established through witnesses, and the facts that are proved are those established by the evidence, and not the real facts themselves. The real fact may be, and doubtless often is, quite differ-

ent from that proved. A judge or jury pronounces on evidential facts. These facts reflect to a greater or less extent, the mental bias and feeling as well as the imperfections of the witnesses. The evidence is but the impression made by the reality. It is a conclusion arrived at by mental process through the senses. Is it, therefore, much higher after all, than what is known as mere opinion evidence?

If this argument be correct, there is, therefore, but little distinction to be drawn between the evidence of the medical expert and that of the ordinary witness, assuming both to be equally honest. The testimony of either is generally to be more relied on than that of the party litigant. Medical men differ in the witness box in no greater degree than they do in the treatment of a patient, and it would hardly be safe to argue that they administer medicine with a bias or from improper or interested motives. Very great weight ought to be given to the evidence of medical experts who stand well in their profession, even when grave differences exist in their opinions; just as a counsel attaches a high value to the opinions of judges, whose judgment may be against the counsel's contention.

It is because medical men honestly differ that they are called as witnesses, and in that difference, the jury may often reach the truth. Upon a question with which the lay mind is not familiar, what after all is the best evidence? Take the case of an accident as an illustration. First, the mechanical side of the question comes up for discussion. Who is better qualified to speak on the subject,—the counsel and the lay witness, or the man whose whole life has been devoted to working or perfecting the machine in question? Then the medical or surgical phase must be dealt with. Shall the locomotive engineer or the man who runs the saw in the mill, be taken as a witness in preference to the physician or surgeon, whose education, practice, and experience have made him eminent in his profession? If truth is the objective point, one would naturally go to those who should know most concerning the matter. If a verdict only is looked for, then the verdict might as well be given without evidence as with it. What would any court say if a blacksmith were called to testify as to the law in force in a foreign state? What would the same court say if a judge were called as a witness to speak as to the extent and consequences of the bodily injuries complained of? It is always of vital importance that the exact

character of bodily injury or disease should be established. How can this be established except by the opinions of medical men? We trust our lives and the lives of our families to these medical men. Why should we not trust our private rights of a civil or criminal character, to the same judgment? It is of the greatest importance to the man who is prostrated by disease to have honest and careful opinions regarding his position and treatment. We accept these opinions from our attendant physician. Why should we impute wrong motives to medical men, when only a few hundred dollars are at stake, instead of a life? Why should we harshly criticise or ridicule the evidence of those who are highly respectable members of the community and well-known reputable men in their profession, when we trust them in the ordinary business transactions of life, and in whose hands we are willing in time of trouble to place our physical and mental safety? Under such circumstances, it seems reasonable that the evidence of such men ought not to be lightly treated, nor should their opinions be looked upon as of less weight or value than the evidence of any other witness.

It is true there is a rare specimen of the medical expert witness who sees nothing but that for which he is paid to see. He is a partisan of the worst description, and doubly dangerous, because he knows he is beyond the reach of the law as regards perjury. Not content with giving an opinion which is measured by the money of his employer, he is ready to invent all kinds of reasons, theories, and excuses to controvert well established principles or clearly proved facts. Instead of answering a question, he proceeds to deliver a lecture from the box. It is almost impossible, from such a witness, to get a definite answer to any question however simple. This specimen of the medical expert is the most dangerous of expert witnesses. His glibness is equalled only by his moral obliquity. His readiness in explanation is largely the result of an unscrupulous, scheming mind. Falsehood under oath is a matter of no moment to him. He may at times, accidentally tell the truth, but it may be safely conceded that he should on all occasions be discredited. The man who wilfully admits nothing except that which tells in favour of his client, is dishonest and should not be believed. Such evidence, fortunately, is very rare in our courts, and it would not be fair to condemn the whole medical profession by reason of the crookedness of one or two individual members. No continued

harm can be done by such a witness, as the judges need only one or two repetitions of such conduct to enable them to place witnesses of that character in a proper light before a jury.

In order to remove this class of expert evidence from the region of discussion and put it beyond any imputation of partisanship, several proposals have been made. The most feasible would appear to be that providing for the appointment of a medical board of witnesses. The first qualification of the members would be competence and experience, and the second, their moral standing in the profession. We have now in practice, a very limited application of this principle. A medical man is frequently appointed by the court to make an examination and report with regard to the injuries and condition of the person complaining. This, however, is not of any great practical value, because in many instances, his evidence may be literally swamped by a large volume of equally credible testimony, adduced on behalf of the party affected adversely by the report. In cases of crime where insanity is urged as a defence, a board of say five medical men would be very satisfactory. Appointments to the board would be made by the court, but the law would no doubt make provision for all parties interested being represented before the judge making the appointment. In negligence actions, the same principle might apply, but limiting the membership of the board to three medical men. With reference to issues involving mechanical or scientific construction or operation of machinery, a similar board of skilled artisans, engineers, or machinists might be constituted. These boards would pass upon the questions specially submitted to them, and the members would be subject to cross-examination to the same extent as the expert witness is under our present practice. The evidence required in these cases partakes somewhat of the nature of the judgment of the court, and the appointment of a board of skilled witnesses is analagous in principle. Two men cannot agree upon the facts necessary to determine their respective interests, or upon the law governing their relative rights. Figuratively speaking, they call in a judge to determine the matters in issue. He determines the matter in the capacity of a skilled expert. The party dissatisfied goes to a court composed of several judges, and there seeks what he thinks is the redress to which he is entitled. The proposition as to expert evidence takes the opinion of the larger court of three or five experts in the

beginning instead of at the end, but the same result is reached. If this or some similar scheme were adopted, there would be a great saving of expense, and the evidence would perhaps be more satisfactory to the judges. Under some such system, there would certainly be no ground for suspicion as to the honesty of medical expert evidence, and there can be no doubt that the parties to the action would continue to receive the full benefit of those differences of opinion, which do now, and always should, exist between medical men, who are called upon to make practical application of a science beset with grave difficulties and fraught with the most serious problems of life.

E. F. B. JOHNSTON.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

MUNICIPAL ELECTION—DISQUALIFICATION—CONTRACT WITH COUNCIL—RELEASE BY COMMITTEE—RATIFICATION BY COUNCIL.

In re Gloucester Election, Ford v. *Neath* (1901) 1 Q.B. 683, a candidate for election as a town councillor had in answer to an advertisement by the municipal corporation, offered to supply for twelve months, to the corporation, certain goods at specified prices, and his offer was accepted. Afterwards he applied to a committee of the council to be released from the contract, and the committee resolved that, subject to the approval of the council, he be released from the date of the resolution. He was afterwards nominated as a candidate and elected a town councillor. After his nomination the council approved the resolution of the committee releasing him from his contract. His election was contested on the ground that he was disqualified by reason of the contract, and it was held by Darling and Channell, JJ., that the advertisement, tender and acceptance constituted a contract, and that the respondent had an interest therein, and that he was not effectually released until the passing of the council resolution confirming the resolution of the committee, and that the release did not relate back to the date of the resolu-

tion, because the interest of persons other than the parties to the contract might be affected, and the election was therefore declared void.

PRACTICE—JUDGMENT—AMENDMENT—ERROR ARISING FROM ACCIDENT, SLIP OR OMISSION - RULE 319 - (ONT. RULE 640).

In *Chessmen* v. *Gordon* (1901) 1 Q.B. 694, Rule 319 (Ont. Rule 640) was applied. Judgment had been recovered for an amount to be ascertained by a referee. The referee made his award which the plaintiff took up and paid his fees. Judgment was then drawn up and entered for the amount of the award with costs to be taxed. The plaintiff taxed his costs and the defendant paid the amount of the award and taxed costs. The plaintiff then discovered that by mistake he had omitted from his bill of costs as taxed the fees paid to the referee, and he then applied for an order on the defendant to pay the fees. Day, J. made an order referring the amount of the referee's for taxation and that the taxing officer's certificate should be amended by including therein the amount which should be allowed for such fees. The Court of Appeal (Smith, M.R. and Collins and Romer, L.JJ.,) held that there had been an accidental slip or omission within the meaning of the rule, and that the consequent error in the judgment could be corrected "at any time" even after payment, and the order of Day, J. was therefore affirmed.

COMPANY—CONTRACT TO ISSUE DEBENTURES—CHARGE—EXECUTION CREDITOR—PRIORITY.

Simultaneous Colour Printing Syndicate v. *Foxcraker* (1901) 1 Q.B. 771, is an illustration of the doctrine that an execution creditor, as a rule, is only entitled to such interest as the debtor himself has in the property seized in execution. In this case the execution was against a company which had made a contract for valuable consideration to issue debentures charging all of the property of the company, as security for part of the purchase money agreed to be paid for a business transferred to the company. Before the debentures were issued, an execution was issued against the company, and the execution creditor claimed to be entitled to the property seized thereunder freed from the charge agreed to be created by the debentures; but Wright, J., held that the rights of the execution creditor were "subject to all equities," and therefore his claim was subject to the agreement to issue the debentures

GOODS, SALE OF—PASSING OF PROPERTY UNDER UNENFORCEABLE CONTRACT—SALE OF GOODS ACT, 1893 (56 & 57 VICT., C. 71) S. 4, SUB-S. 1—STATUTE OF FRAUDS, S. 16 (commonly called s. 17).

Taylor v. *Great Eastern Ry. Co.* (1901) 1 Q.B. 774, appears to be reported not for the point actually decided, but rather for the expression of opinion, which appears to be obiter, of Bigham, J., as to the legal effect of a contract for the sale of goods which does not comply with the Sale of Goods Act, s. 4, sub-s. 1. That subsection is in effect a reproduction of the Statute of Frauds, s. 16 (otherwise called s. 17), but with this variation the Statute of Frauds provided that "no contract . . . shall be allowed;" the Sale of Goods Act says: "a contract for the sale of goods . . . shall not be enforceable by action." Bigham, J., does not say whether or not he considers the expressions "no contract shall be allowed," and "no contract shall be enforceable by action" are equivalent terms, as was argued by the defendants, but he does say, that although a contract may not comply with the above-mentioned section of the Sale of Goods Act, it may, nevertheless, be valid to pass the property in the goods to the purchaser. But, as has been already remarked, this was not necessary for the decision of the case, as he found there had, in fact, been an acceptance of the goods by the purchaser sufficient to satisfy the statute. The facts of the case were briefly as follows: In October Barnard Bros. sold to Saunders a quantity of barley which they shipped to him by the defendants' railway, and on 24th October Barnard Bros. gave defendants an order to transfer it to Saunders and he was notified of the arrival of the barley, and tried to sell it, but he never inspected the barley, nor sampled the bulk. Towards the end of November following Saunders became bankrupt, and the plaintiff was his assignee, and on 30th November Barnard Bros., as unpaid vendors, claimed to stop the goods in transitu, and demanded the barley from the defendants, who gave it up to them. The plaintiff then sued them for conversion, and it was held he was entitled to recover.

WILL—CONSTRUCTION—SPECIFIC CLAUSE—RESIDUARY DEVISE—LAPSED DEVISE—WILLS ACT (1 VICT. C. 26), S. 25—(R.S.O. c. 128, s. 27).

In re Mason Ogden v. *Mason* (1901) 1 Ch. 619. The decision of Kekewich, J. (1900) 2 Ch. 196 (noted ante vol. 36, p. 625) has been reversed by the Court of Appeal (Rigby, Williams and Stirling, L.JJ.), the first impression of Kekewich, J., turning out to be the

right one. The testator, it may be remembered, having several houses at Wimbledon gave one to his son (which devise lapsed by reason of his son being a witness to the will) and then devised all the remainder of his freehold lands at Wimbledon and elsewhere. The Court of Appeal held that this was a residuary devise within the Wills Act, and carried the lapsed devise.

PRINCIPAL AND AGENT—IMPLIED WARRANTY OF AUTHOTITY—ATTORNEY INNOCENTLY ACTING UNDER FORGED POWER—AGENT, LIABILITY OF TO THIRD PARTY—TRANSFER OF STOCK UNDER FORGED POWER—FORGERY—COSTS.

Oliver v. *The Bank of England* (1901) 1 Ch. 652, was a contest between two innocent parties as to which of them should suffer for the consequences of a forgery committed by a third party. The facts were as follows: A firm of Starkey, Leveson & Cooke, carrying on business as stock brokers, were employed by a solicitor, purporting to act for himself and plaintiff, to obtain from the Bank of England a form of power of attorney to transfer stock standing in the name of the solicitor and the plaintiff. The stock brokers procured the form in favour of two of the members of the firm, which was sent to the solicitor, who returned it to them, purporting to be executed by the solicitor and plaintiff. It subsequently turned out that the solicitor had forged the plaintiff's name. Acting under the power one of the members of the firm of stock brokers, without notice of the forgery, made the transfer of the stock received the proceeds, and paid them to the solicitor, who misappropriated them. The present action was brought to compel the Bank of England to replace the stock, and the Bank claimed relief over against the the firm of stock brokers, on an implied warranty by them of the genuineness of the power under which the transfer was made. Kekewich, J., gave judgment in favour of the plaintiff against the Bank, but as to the third party claim, he held that only the member of the firm of brokers, who had actually acted under the forged power, was liable to indemnify the Bank, and that his action did not render the other members of the firm liable, the principle of law applicable being that laid down by Lindley, L.J., in *Firbank's executors* v. *Humphrey*, 18 Q.B.D. 54, viz, where an agent assumes an authority which he does not possess, and induces another to deal with him on the faith that he has an authority which he assumes, he is liable for the damage which may arise from his not having in fact such authority, which is an exception to the rule that an action

will not lie against a person who honestly makes a misrepresentation which misleads another. Starkey, the member of the firm who was held to be liable, was ordered to pay, not only the amount the Bank were ordered to pay the plaintiff for damages and costs, but also the Bank's costs of defending the action.

LUNATIC—FOREIGN COMMITTEE.

New York Security Co. v. *Keyser* (1901) 1 Ch. 666, was an action brought by a lunatic by her next friend and the plaintiff company, which had been appointed committee of her person and property by a New York tribunal, she being resident in, and found lunatic, by a Court in that State. The object of the action was to recover property belonging to the lunatic, part of which was in the hands of bankers who were made defendants and other part in the hands of trustees who were also defendants. Cozens-Hardy, J., held that neither the plaintiff, suing by her next friend, nor the company had right to recover the property of the lunatic and that it was in the discretion of the Court as to whether or not, under the circumstances, the property in question should be paid over to the company; and in the exercise of that discretion he ordered the balance of the moneys in question, after deducting the defendants' costs, as between solicitor and client, to be paid to the committee.

DISTRESS FOR RENT—PATENTED CHATTEL SALE OF, UNDER DISTRESS PURCHASER OF PATENTED CHATTEL, UNDER SALE FOR DISTRESS.

In *British Mutoscope Co.* v. *Homer* (1901) 1 Ch. 671, Farwell, J., decided that where a person buys at a sale under a distress for rent a patented chattel in possession of the tenant as licensee, the purchaser does not thereby acquire a right to use it, because the right of the patentee to make and use the patented chattel and to license others to use it is a right of an incorporeal nature, and is a right distinct from the right of property in the chattel itself, and incapable of seizure or sale under distress for rent. The chattel in question belonged to the plaintiffs and was let to the tenant subject to certain conditions as to user, and the purchaser bought with notice of the plaintiffs' rights, and thereafter claimed to use it as he pleased, but an injunction to restrain him from using it was granted, the plaintiff not disputing the defendant's right of property in the chattel.

LIMITED POWER—EXERCISE OF POWER BY WILL—"APPOINT, DEVISE AND BEQUEATH"—EVIDENCE.

In re Mayhew, Spencer v. *Cutbush* (1901) 1 Ch. 677, is a decision of Farwell, J., on a subject which he has made peculiarly his own. A testatrix having a limited power of appointment by will in favour of her nephews and nieces, of a share of personal estate, by her will, which contained no direct reference to the power, made the following disposition: "I appoint, devise and bequeath any real estate and the residue of any personal estate to my trustees upon trust to sell or convert the same into money and to pay and divide the proceeds (after paying my debts and funeral expenses) equally between" four named nephews and nieces, "or such of them as shall be living at my decease." Evidence was held to be admissible to shew that the testatrix had no other power except the limited power above referred to. Farwell, J., held that the will was a good execution of it.

LEGACY—APPROPRIATION OF SPECIFIC ASSETS TO PAYMENT OF LEGACY - LAND TRANSFER ACT, 1897, (60 & 61 VICT., C. 65) S. 4, SUB-S. 1 - (R.S.O. C. 127, S. 4).

In re Beverly, Watson v. *Watson* (1901) 1 Ch. 681, it became necessary to consider the principle upon which trustees and executors under a will which contains a trust for sale and conversion, have power to appropriate any specific part of the residuary estate towards satisfaction of a legacy, or share of the residue, and whether or not that power is confined to pure personal estate or extends to chattels real and real estate, which is subject to the trust for sale or conversion, and whether or not that power is affected by the Land Transfer Act, 1897, s. 4, (see R.S.O. c. 127, s. 4.) Buckley, J., held that the power of appropriation is in effect an exercise of the power to sell the particular asset to the legatee and to set off his purchase money against his legacy, and that it is unaffected by the Land Transfer Act and applies to chattels real, and it would seem also to real estate which is subject to the trust for sale.

THELLUSSON ACT (39 & 40 GEO. III. C. 98)—ACCUMULATION.

In re Gardiner, Gardiner v. *Smith* (1901) 1 Ch. 697, it was decided by Buckley, J., that a direction in a will to apply a yearly sum out of the rents of leaseholds held for a term of more than twenty-one years from the testator's death, in effecting and keeping

on foot a policy of insurance to secure the replacement at the end of the term of the capital that would be lost through not selling the leaseholds, is not a direction to accumulate, and does not come within the provisions of the Thellusson Act.

PARTNERSHIP—CONVERSION INTO COMPANY—JURISDICTION OF COURT—EXCHANGE OF TESTATOR'S INTEREST IN A BUSINESS FOR SHARES IN A COMPANY—EXECUTORS.

In re Morrison, Morrison v. *Morrison* (1901) 1 Ch. 701. A testator was interested in a partnership business, which it was proposed to convert into a limited company, on the terms that the executors of the deceased partner should accept in exchange for the interest of the testator a certain number of shares in the company, which the executors were not authorized by the will to hold. The executors were prepared to carry out the arrangement, and applied to the Court to sanction it, but Buckley, J., held that the Court had no jurisdiction so to do, the proposed arrangement being in effect either a sale and an investment of the proceeds in unauthorized securities, or an exchange of property of the testator, for other property which the executors were not authorized to hold.

CHARITY—MORTMAIN—INVALID GIFT FOLLOWED BY GIFT OF RESIDUE.

In re Rogerson, Bird v. *Lee* (1901) 1 Ch. 715, it is decided by Joyce, J., that where a testator makes an invalid gift followed by a valid gift of the residue to a charity, the charity takes the whole.

WILL—CONSTRUCTION—RULE IN SHELLEY'S CASE.

In re Youmans (1901) 1 Ch 720, is a case which turns on the construction of a will. The testator gave certain freehold estates to trustees upon trust to manage and receive the rents and profits, and, after payment of necessary repairs and outgoings, to pay thereout to each of his eight first cousins £60 per annum for their lives, and to pay the residue of the rents and profits half yearly to W. Douglas for his life, and after the decease of the annuitants and W. Douglas to convey the estates, together with any accumulation of rents in their hands, to the right heirs of W. Douglas. All the annuitants were dead except two and they released their interest to the trustees and W. Douglas. The trustees, with the consent of W. Douglas, had agreed to sell the land, and the question was, whether W. Douglas was entitled to have the purchase money paid to him. This, of course, depended on the extent of his estate in the lands, and Joyce J., held that by the opera-

tion of the rule in Shelley's case the fee was vested in him, and consequently that he was entitled to the immediate payment to himself of the purchase money.

PARTNERSHIP—BOOKS OF PARTNERSHIP—PARTNER, RIGHT OF, TO INSPECTION OF BOOKS BY AGENT.

Bevan v. *Webb* (1901) 1 Ch. 724, deserves a passing notice, because Joyce, J., decided that under the general law of partnership a partner has no right to introduce a stranger to inspect the partnership books against the will of his co-partners, except where there is litigation pending.

COMPANY — DIRECTOR — REMUNERATION — RESOLUTION WAIVING RIGHT TO REMUNERATION—VACATING OFFICE OF DIRECTOR.

In re London and Northern Bank (1901), 1 Ch. 728, this was a winding up matter in which the claim of a director to remuneration was under consideration. The articles of association provided that the directors were each to be paid £500 per annum for their services. They also provided that if a director absented himself from directors' meetings for a period of three calendar months he should vacate his office. The claimant was appointed a director in August, 1898, and attended meetings down to and including February 3, 1899, on which day a board of directors passed a resolution foregoing their right to remuneration until a dividend should be declared on the ordinary stock of the company. The next meeting of the directors was held on March 3, 1899, which the claimant failed to attend, and on May 8 he received a notice that his office as director was forfeited for non-attendance; he wrote protesting against the forfeiture as being a breach of faith, but not claiming that it was void, or that he still desired to be a director, and he never attended any more meetings. The dividend was never declared on the ordinary stock, and the company was, in December, 1899, ordered to be wound up. Wright, J., held that the three calendar months' absence must date from the first meeting which the director failed to attend, which was on March 3, 1899, and therefore he held that the notice of forfeiture given in May was premature and invalid; but he held that the resolution foregoing the claim to remuneration was valid and binding on the claimant; and that, in any case, the claimant had ceased to act before the remuneration was payable, and that there could be no apportionment, nor was the claimant entitled to a quantum meruit for services actually rendered.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N. S.] C. P. R. Co. v. Smith. [May 18.

Negligence — Railway company — Injury to passenger in sleeping berth.

S., an elderly lady, was travelling on a train of the C. P. Ry. Co. from Montreal to Toronto. While in a sleeping berth at night, believing that she was riding with her back to the engine, she tried to turn around in the berth, and the car going round a curve at the time, she was thrown out on to the floor and injured her back. On the trial of an action against the company for damages it was not shewn that the speed of the train was excessive, or that there was any defect in the roadbed at the place where the accident occurred to which it could be attributed.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that the accident could not be attributed to any negligence of the servants of the company which would make it liable in damages to S. therefor. Appeal allowed with costs.

Nesbitt, K.C., and *Harris*, K.C., for appellant. *Drysdale*, K.C., for respondent.

Ont.] King *v.* Bailey. [May 21.

Statute of Limitations — Criminal conversation — Damages.

The Statute of Limitations is not a bar to an action for criminal conversation where the adulterous intercourse between defendant and plaintiff's wife has continued to a period within six years from the time the action is brought.

Quære. Does the statute only begin to run when the adulterous intercourse ceases or is the plaintiff only entitled to damages for intercourse within the six years preceding the action? Appeal dismissed with costs.

Lobb, for appellant. *Heyd*, K.C., for respondent.

Ont.] Imperial Bank *v.* Bank of Hamilton. [May 21.

Marked cheque — Fraudulent alteration — Payment by third party — Liability for loss — Negligence.

A man dealing with others is under no duty to take precautions to prevent loss to the latter by the criminal acts of third persons' and the omission to do so is not, in itself, negligence in law. B. having an account for a small amount in the Bank of Hamilton had a cheque for five dollars marked good, and altering it, so as to make it a cheque for $500, had it

cashed by the Imperial Bank. The same day it went through the clearing house and was paid by the Bank of Hamilton to the Imperial Bank. The error was discovered next day by the former and re-payment demanded from the Imperial Bank and refused. The Bank of Hamilton then brought an action to recover from the Imperial Bank $495, the sum overpaid on the cheque. The defendant contended that the note as presented to be marked good was so drawn as to make the subsequent alteration an easy matter, and the plaintiff's negligence in marking it in that form was negligence which prevented recovery.

Held, affirming the judgment of the Court of Appeal, 27 O.A.R. 590, which affirmed that at the trial (31 O.R. 100) that there was nothing in the circumstances to take the case out of the rule that money paid by mistake can be recovered back and the Bank of Hamilton was, therefore, entitled to judgment. Appeal dismissed with costs.

Lash, K.C., and *Bicknell*, for appellant. *Douglas*, K.C., and *Stewart*, for respondent.

B.C.] HOUSTON AND WARD *v.* MERCHANTS BANK. [May 21.

Banks and banking—Advances—Security—Bank Act, sec. 74—Chattel mortgage.

H. held a chattel mortgage on a sawmill belonging to G. with the machinery and lumber therein, and all lumber that might at any time thereafter be brought on the premises. The mortgage not being registered gave H. no privity over subsequent incumbrancers. Two months later G. gave H. a second mortgage on said property to secure a note a $794. Shortly after this a contractor applied to G. for a large quantity of lumber for building purposes. G. being unable to purchase the logs asked the Merchants Bank for an advance. The bank, knowing G. to be financially embarrassed, refused the advances to him, but agreed to make them if some reliable person would purchase the logs, which was done by G.'s bookkeeper, and in consideration of an advance of $3,500 G. assigned the contractor's order to the bookkeeper and agreed to cut the logs at a price fixed, and deliver them to the bookkeeper at the mill-side. The latter then assigned to the bank all monies to accrue in respect to the contract which assignment was agreed to by the contractor and a day or two after also assigned to the bank three booms of logs by numbers in addition to one assigned previously. This purported to be done under sec. 74 of the Bank Act. Two or three days later G. made an assignment for benefit of his creditors previous to which, however, the logs had arrived at the mill and were mixed with other logs of G. The greater part had been converted into lumber when H. seized them under his chattel mortgage.

Held, affirming the judgment of the Supreme Court of British Columbia, 7 B.C. Rep. 465, that no property in the logs assigned to the bank had passed to G., and H. having no higher right than his mortgagor could not claim them under his mortgage.

Shortly before G.'s assignment for benefit of creditors his bookkeeper transferred to the bank a chattel mortgage given him by G. to secure payment of $800. The judgment appealed from ordered the assignee in bankruptcy to pay the bank the balance due on said mortgage.

Held, reversing said judgment, that the assignee had been guilty of no acts of conversion and was not liable to repay this money. The mortgage was not given to secure advances and did not give the bank a first lien on the property. The bank was in the same position as if it had received the mortgage directly from G. when he was notoriously insolvent. Appeal of Houston dismissed with costs. Appeal of Ward allowed with costs.

Taylor, K.C., for Houston. *Garrow*, K.C., for Ward. *Sir C. H. Tupper*, K.C., for respondent.

N. B.] WESTERN ASSURANCE CO. v. TEMPLE. [June 5.

Insurance against fire — Conditions in policy — Sole and unconditional owner — Mortgagor — Other insurance — Estoppel.

T. insured property against fire, the policy containing a condition that "if the insured is not the sole and unconditional owner of the property, or if any building intended to be assured stands on ground not owned in fee simple by the assured, or if the interest of the assured in the property whether as owner, trustee, assignee, factor, agent, mortgagee, lessee or otherwise is not truly stated in this policy . . . . this policy shall become void unless consent in writing by the company be indorsed thereon." At the time the policy was issued there was a mortgage on the insured property for a small amount, the existence of which was not disclosed to the company, T. insuring as owner.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the mortgage did not avoid the policy under the said condition.

Another condition of the policy provided that it should become void unless consent was indorsed on it "if the assured have or shall hereafter obtain any other policy or agreement for insurance, whether valid or not, on the property above mentioned or any part thereof." While the policy was in force the insured's son, without his knowledge, applied to the Quebec Fire Insurance Co. for a policy on the same property, but before he was notified of the acceptance of his application the property was destroyed by fire. In an action on another policy containing a similar condition (except that it provided for notice to the company issuing the policy of such other insurance) the Supreme Court of Canada held the policy not avoided. *Commercial Union Assurance Co. v. Temple*, 29 S.C.R. 206. In one count of his declaration in the present case (drawn before said decision) T. admitted having obtained the other insurance, but alleged that endorsement of consent thereto had been waived. At the trial (after said decision was given) no evidence was offered under this count, but counsel for the company consented to the record in the Commercial Union Case being put

in evidence and the facts stated therein being taken as proved. In that record were the answers to questions by the jury to the effect that the risk in the Quebec Insurance Co.'s policy did not attach until it was approved by the head office, and that the first knowledge T. had of acceptance by that company of his application was the receipt of a letter from the head office two days after the destruction of the insured property. On the argument of the present appeal, counsel for the company contended that T. was estopped by his admission in the declaration from claiming that there was no other insurance under the last mentioned condition, and that the notice required in the condition of the policy of the Commercial Union distinguished the present from that case, and the decision mentioned above did not govern.

Held, that from the course pursued at the trial the claim that T. was estopped could not prevail.

Held, also, that the condition in this case was substantially the same as that in the Commercial Union policy, and the question of avoidance of the policy for other insurance without consent indorsed is concluded by the former decision of the Court. Appeal dismissed with costs.

Leighton McCarthy, for appellant. *Pugsley*, K.C., Atty.-Gen., New Brunswick, and *Masters*, K.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE

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

REX *v.* GAGNON.

Summary conviction—Prior conviction for same offence—Reception thereof in evidence by justices—Second conviction invalid.

The defendant on the information and complaint of one Angus Macdonald, had been convicted by two justices of the peace in and for the United Counties of Stormont, Dundas and Glengarry, for having on the 3rd day of February, A.D. 1901, at the Village of Alexandria, unlawfully sold liquor without the license therefor by law required, and fined $100 and costs, the maximum penalty authorized by the statute. At the hearing before the magistrates he produced in bar of the prosecution then being conducted, a conviction by two other justices of the United Counties, following a charge laid against him by the License Inspector, which alleged that he did at the Village of Alexandria, on the 1st and 25th days of February, A.D. 1901, and on each and every day between the said dates, unlawfully sell liquor without the license therefor by law required. The justices having declined to treat such prior conviction as relieving him from the

fresh prosecution, defendant brought the case before the court by way of certiorari; availing himself in his order nisi of the various objections.

Held, that defendant, by the later, was pronounced guilty of the same offence as that shewn in the first conviction, and that his plea of autrefois convict preferred before the justices should have been allowed. It was therefore, without reservation of judgment, quashed with costs against the magistrates and informant.

Du Vernet, for the defendant. No one contra.

ELECTION CASE.

NORTH WATERLOO ELECTION (PROVINCIAL).

ARNOLD *v.* BREITHAUPT.

Election—Provincial—Corrupt practices—Agency—Tampering with ballot—Right of voter to declare how he voted—Inspection of ballots—Switching ballots—Costs.

Held—1. The counterfoil of a ballot may be inspected in proper cases, and the printed number thereon compared with the printed number on the ballot and with the number opposite the voter's name in the poll book, for the purpose of selecting and identifying the ballot of a particular voter.

2. A voter may be shewn his ballot for the purpose of giving evidence as to whether it is in the same condition as when given by him to the D.R.O. to deposit in ballot books.

3. Spoiling ballots is not specially an election offence or corrupt practice under the Election Act, but is an offence punishable under Crim. Code, s. 505.

4. The evidence in this case shewed that in a large number of cases ballots were altered after delivery thereof to the D.R.O., and the evidence of agency of various persons was held to be sufficient.

[Berlin and Toronto, Oct., 1898.—OSLER J. and MEREDITH J.

This election was held May 23, 1898, the respondent being declared elected by a majority of 119 votes. At the opening of the trial before MR. JUSTICE OSLER and MR. JUSTICE MEREDITH at Berlin it was conceded that subject to general recount and scrutiny the majority should be reduced to 58 or 60 votes. The substantial questions arising out of this protracted trial may be sufficiently stated in the following four short questions:—

1. Can a voter disclose how he voted for the purpose of shewing that his ballot was tampered with after it was deposited in the ballot box; and how far can his ballot be traced and inspected for the same purpose?

2. Have the charges of fraudulently tampering with the ballots been proven, and, if so, to what extent?

3. Have corrupt practises been proved?

4. What effect do the findings upon these questions have on the election in question, and on the question of costs?

As a matter of convenience the judgment of MR. JUSTICE MEREDITH is given first.

W. D. McPherson and *Edmund Bristol*, for petitioner. *Aylesworth*, Q.C., *W. A. Macdonald*, Q.C., *C. Bitzer*, and *J. C. Haight*, for respondent.

MEREDITH, J.:—I shall deal with these questions in the order in which they have been stated.

The respondent's contention upon the first question is this: That no evidence whatever can be given which tends to disclose how anyone voted; that the policy of the law requires absolute secrecy upon that subject in election trials, except in the one case expressly mentioned of the ballot of a voter whose vote has been declared by a competent tribunal to be invalid.

It will be observed that this contention is limited to election trials; it was not contended that such evidence could not be given in other cases, such as criminal prosecution for instance, though so far as the ballot itself is concerned there seems to be no plain ground for any such distinction.

So that whichever way it is looked at the contention amounts substantially to this: That the wrongdoing by tampering with the ballot can never be righted in an election trial; and possibly can never be punished in a criminal court. This, to my mind, is an extraordinary contention, and one that requires pretty plain legislation to support it. Look at its effect even in the one particular involved in this case. Practically it amounts to this, that you cannot detect, you cannot prove, the disfranchisement of voters by what may perhaps be termed forgery of the deputy returning officer, by which the result of the poll has been materially altered in favour of the respondent, and it follows that such wrongs may be effective so as to give the seat to a candidate against the will and votes of the electors without redress.

It would be strange, indeed, if legislation in favour of secret voting should have reached that state or brought about such a state of affairs. As I understand the purpose and intention of ballot legislation, it was and is the protection of the voter and the prevention of bribery, but not the disfranchisement of voters, the encouragement of election frauds, and the protection of the wrongdoers. It is said that public policy requires secrecy, but public policy of greater importance requires the prevention, the detection, and the punishment of crime and the purity of elections.

So that unless there is some clear enactment preventing such evidence, it seems to me very clear that it ought not to be rejected.

Mr. Aylesworth relies upon ss. 158 and 159 of the Ontario Elections Act as requiring its rejection. The former section is the more important one, as it is directly to the point; but it is entirely consistent with the view that the purpose of the Act is secrecy for the benefit of the voter and for the prevention of bribery, not secrecy for all purposes and under all circumstances. No person shall in any legal proceedings questioning the election or return "be required to state for whom he voted." Protection from disclosure if desired, but no prevention from disclosure if protection be not desired. What right have we to change the words "shall be required" into "shall be permitted?" Nothing in this section requires it, nor, as I think, is it required elsewhere in the Act or any other statute respecting such elections.

Then the other section does not affect the rejected ballots in question in this case. I find nothing in this section, nor elsewhere in the Act, preventing a voter who has been fraudulently deprived of his vote after the marking and depositing his ballot as the law requires, or the candidate for whom it was cast, from having the fraud detected and proved, or, indeed, the wrong set right. If that be not one of the purposes of the traceable ballot system, what other purpose can it have, beside the tracing and removing of invalid votes?

[After referring to some authorities the Judge continued:]—

And lastly, the case of *Queen* v. *Beardsall*, 1 Q.B.D. 452, is an authority strongly against the respondent's contention. In that case an order had been made for the inspection, amongst other things, of rejected ballot papers and counterfoils under a rule providing, just as our Act does, that, "on making or carrying into effect any such order care shall be taken that the mode in which any particular elector has voted, shall not be discovered until he has been proved to have voted, and his vote has been declared by a competent court to be invalid." The order expressly providing that all such proper means and precautions as should be deemed necessary should be taken and used in order that the mode in which any particular elector had voted should not be discovered, and that no person should see the face of any counted ballot paper; so that the court there had to deal with quite as great an obstacle as that which the respondent contends stands in our way. The trial judge (Blackburn) seems to have doubted whether he should have allowed the counterfoils and marked register to be given in evidence on the face of the voting papers to be inspected in a prosecution against a deputy returning officer for fraudulently tampering with the ballot papers, but the court were clearly of the opinion that, notwithstanding the rule and order, the learned trial judge had properly allowed the counterfoils and marked register to be given in evidence and the face of the ballot to be seen. In dealing with the obstacle which it was contended before us the wording of the Act presents, the present Master of the Rolls made these very pertinent remarks:—"The order further says that the papers shall not be shewn, but the rational construction is, the document must be produced at the trial, but, except for the purposes of the trial, must not be disclosed." I hold that the whole of the evidence taken upon this subject was properly admitted, and must be given its proper weight, whatever that may be, in considering the next question.

Admitting that evidence, there seems to me to be no room for doubt that the deputy returning officer, Wildfong, or someone in connivance with him, did wilfully and fraudulently alter the ballots in his polling division in question which were all duly marked and cast for the candidate Lackner so as to appear as if marked for both candidates, and wilfully and fraudulently treated them as rejected ballots in order to reduce the number of votes legally cast for that candidate. Admitting this evidence and excluding that of Witness Shantz altogether, the same result is reached. The

ballots were tampered with while under the officer's control, and being counted by him. All other persons who might have any interest in doing the act denied on oath having done it; he alone has avoided an examination and evaded the witness-box.

It is not necessary to say what the result would have been if this evidence had been excluded, but it is right to say that the evidence afforded by the marks upon these ballots goes very far indeed in itself in connection with the evidence of all other persons upon whom suspicion might lie in support of the extraordinary story of election depravity related by the witness Shantz, whose evidence standing alone might well go for nothing, though it is but fair to repeat the remark that if it were not for the disclosures made by such persons, many wrongs and many crimes would go undetected, and without remedy and unpunished; and it is but fair to add, too, that neither of the officers against whom he made such serious accusations had the courage to go into the witness-box and deny or admit them, but both, though subpoenaed, evaded it.

The like conclusion must be reached in Cummings' case. It is incredible that the miscounting of the ballots was unintentional. There is but one way of accounting for it under all the circumstances detailed in the evidence, and that is that it was wilfully and fraudulently done by him. And the same conclusion must be reached in regard to the two ballots tampered with in the same manner as, in the other polling division, the other ballots were tampered with by Deputy Returning Officer Wildfong.

Then, are these persons, Wildfong and Cummings, agents of the respondent? That Wildfong was, is I think, clear enough. He was a delegate at the convention that brought out the respondent as a candidate. It was solely through the action of these delegates that he became the candidate: he owes his election, therefore, to them; he was their nominee—their agent, as it were; it was their duty to support him, and to procure his election; that must have been an expressed or tacit bond between them. But it by no means follows that that is conclusive; a delegate may be dissatisfied with the nominee or may afterwards become so, the bond may be broken in many ways, and there may have been subsequent relationship between him and his candidate; for instance, if the delegate denies his agency and shews that he ceased to act in any way for the candidate after the nomination, it may well be found that there was no subsequent agency, but that is not, as a fact, the position of this delegate: he was afterwards employed by those who managed the respondent's "campaign" in the central committee-room, assisting in the thoroughly organized work of the respondent's election. I have no doubt about the agency in his case.

As to Cummings, there is not any evidence of employment such as in Wildfong's case, but he, too, was a delegate; his father was in the employment of the respondent in his business; he was engaged in canvassing for the respondent with the witness Cormack, and had a livery conveyance for that purpose, which was charged to the Reform Association in the same

manner as other conveyances hired by those who were managing the campaign for the respondent to convey public speakers to the respondent's public meetings were charged to it; and it was two of the more prominent of the respondent's supporters and agents who saw the returning officer about reinstating him as deputy returning officer after he had been dismissed from office; and this man has given no explanation regarding the $100 in $5 bills which he was seen counting after coming out of Bossard's hotel on the evening of the polling; and though the witness Shantz swore that was the sum he was to receive for tampering with the ballots to the extent to which he is proved to have tampered with them.

It may be well here to repeat the observation made during the trial, that if returning officers would remember always their oath to "act faithfully," without partiality, fear, favour, or affection, and would in all things act in accordance with its letter and spirit, there would be far less chance of such nefarious practices as we have had to deal with in this case, and far less ground for suspicion of unfair play than otherwise must be. A returning officer who favours or defers to one side or the other can have little regard for the high duties of his office or conscientious thought of his oath. I speak of the subject generally, not of this particular case.

Though not as clear a case as Wildfong's, the agency in this case is, in my opinion, sufficiently made out, and is supported by the fact that the man was not called as a witness to deny it. This, like the charges of deliberate misconduct proved against him, was permitted to go as if confessed by him. These things demand an answer from him upon his oath and they called upon the respondent for a like answer from the man who was his agent and officer.

What the effect of these findings ought to be upon the election need not now be considered, further than as they affect the number of votes legally cast, and I pass on to the next question—whether the Bossard charges are proved. That Bossard was a party to audacious and reckless bribery is proved beyond question, and is not denied; that the witness Lewis was a party to it is also established—notwithstanding his denial on oath—by an overwhelming weight, in quality as well as quantity, of evidence. His account of the manner and purpose of his coming to and remaining in the constituency, and of his wasted weeks there, was entirely unsatisfactory; indeed, it would have been rather surprising if there had not been such tales to be told as those related by the witnesses Scheitz, Wernke, Boll, and Polomski. After hearing his own evidence, one is not surprised to hear of his being engaged in bribery and other like corrupt practices. The only surprise is in the revelations of the witness Shantz. However, there is direct and positive testimony of his misdeeds by the witnesses Scheitz, Wernke, Boll, Polomski, and Bossard and Shantz. There is no room whatever for discrediting any of the first-named four of them. The last-named presented himself in a very much less favourable light.

There is indeed no room upon the whole evidence for any reasonable kind of doubt that Bossard and Lewis were engaged in audacious and reckless bribery in the respondent's behalf, and it is quite immaterial where the money comes from--though I may say I have no doubt it was not Bossard's--so that the only question is, has agency been proven? If so, the bribery was of so extensive a character that it is not contended or pretended that the election can stand. It is immaterial whether Bossard was an agent or not if Lewis were, and I have no doubt he was. The control and management of the campaign of the respondent was taken out of local hands by the witness Smith, representing the Reform Association. He and those associated with him took in hand the work of registration of voters, arranged for the respondent's meetings and public speakers, and, indeed, the whole work of management and organization, using the local officers' names when desired, and having the assistance of local organizations, but being the controlling and guiding head throughout. They sought and obtained outside skilled assistance, and it was through them that Lewis came into the riding. He came and remained, and was throughout actively engaged, as I find, in working in the respondent's interest with the knowledge and approval, and upon some understanding with the witnesses Smith and Vance, and was one of those associated with Smith in effecting the respondent's election. We start, as far as the evidence has disclosed the facts, with a telegram to Vance, signed "Jack," announcing the fact that "Tom" and another will come from London on Monday. What for? To aid Smith and those associated with him to elect the respondent. The words of the telegram suggest some previous understanding by which some person or persons was or were to be sent from London for the purposes mentioned. Lewis came on the day mentioned, and remained until the evening of the day after the polling, neglecting his business and home during that time for the sole purpose of procuring the respondent's election, and did nothing else. He attended the central committee rooms, the Waterloo committee rooms, and in company with the assistant of the secretary of the local association, visited chairmen of committees of the sub-divisions, and, according to one of them, brought and placed another organizer in his sub-division to oversee his work. It is idle to say that his presence was not desired, and it is equally idle to say that he was seriously told so; if so told it must have been for the purpose of being able to say that he had been so told without any intention that it would be acted upon. The same day that the message signed "Jack" was received by Smith, the latter went to London and saw the sender of the message, but the coming of "Tom and another" was not prevented or discouraged, nor was any message sent to prevent a useless journey of persons not wanted, persons for whom there was nothing to do. There are but two ways of looking at the question, having regard to the whole evidence: either Lewis came and remained on an understanding with Smith to aid him in the lawful work of the campaign for the respondent, or he came and remained for the unlawful purposes, with the

knowledge and approval of Smith, but under the assumed discountenance and disapproval. I prefer to hope the former, but whichever it was, the result is the same.

It is a matter of considerable significance in this connection that Lewis was a person at the time charged with corrupt practices in another constituency, and the witness Smith's statement that the purpose of his visit to London in response to the telegram signed "Jack" was to confer with the witness O'Gorman with regard to the charges of corrupt practices in that constituency; and also that attention was publicly called to the presence of Lewis and others named in some of the newspapers and otherwise as known bribers invading the constituency for the purpose of securing the respondent's election by corrupt practices, and yet he remained, visiting the respondent's committee-room, and with the assistance of the secretary of the local party association visited other committee rooms seeing about the organization of the respondent's support

extensive corrupt practices in the respondent's interests, and on polling day was driving about with him, and taking some part in the election, and using conveyances charged to the Reform Association.

In my judgment extensive corrupt practices were committed by the witness Lewis, and he was an agent of the respondent.

I also find that the witness Bossard was an agent of the respondent, that he was a tool in the hands of Lewis and others in the reckless bribery in which he was implicated, and of which his house was made the centre. It seems to me preposterous to suggest that all that was done by him and in his house was done of his own motion, with his own money, and without the knowledge of Lewis, Vance, Brant, and others who associated with him and frequented his house. Not only was Lewis directly engaged in reckless bribery there, but it was to Bossard's house that Cormack directed those he sought to bribe to go and get the price of their votes, and it was there he went to meet the five cigarmakers who wanted money for their votes, according to his own story, but where they were sought to be bribed, according to one of them, who gave evidence at the trial. One must indeed be incredulous of wrong-doing, and must be willing to surrender his common sense, before he can acquit the witness Lewis of a very active part in the Bossard corrupt practices—if he were not altogether the instigator of them—or the witnesses Vance and Brant of any knowledge of what Lewis, Bossard and Cormack were doing to secure the respondent's election. It is very plain to me that the scheme and the money came, not from Bossard, but from persons professing to be friends of the party, but who were in reality its worst enemies. But even though Bossard did not thus become an agent, he had been in attendance at the Young Liberal Club meeting, and the respondent had furnished those present with cigars through him some time before the convention, and he was one of the delegates through whose action the respondent obtained his nomination and candidacy, and so his election; he was present once, at all events, in the respondent's commit-

tee-rooms, and even according to the evidence of those who sought to minimize his acts as much as possible, he took one voter to the polls, and made some effort to get another vote in, and he certainly was active in promoting the respondent's election by illegal means.

Then as to the Bruce charges; upon general principles quite apart from the individuality of the witnesses involved in this enquiry, one's first impressions naturally favour the story of two apparently innocent and intelligent cottagers attending to their own affairs, and one of them to her devotions on Sunday night, when opposed to the story of two men who professs on the same Saturday night to have been engaged in breaking the liquor license laws, and in drinking and card-playing in the witness' Kuntz's tavern until four o'clock in the following morning, where, for some reason or other, the witness Bruce remained the rest of the night, instead of returning to his own home. And when one comes to deal with the demeanour of the witnesses and the probabilities of their stories, first impressions are, in this case, confirmed. That two persons went to Richm's house on that Sunday night to bribe him to vote for the respondent is very certain. It is hardly disputed; the briber—a stranger—met with difficulty. The men seemed inclined to fall before the temptation, but reversing the old story, the women resisted; the tempter then fell back upon his companion, who, he said was waiting outside, and was Mr. Bruce; and soon after he departed, and the witness Bruce came to the door. The man and wife had known him for many years; they both swore positively to him, and, on the following morning the man says, she met him again and spoke to him upon the subject, so that there is no room for mistake; either they have or the witness Bruce has stated what is untrue, for the witness Bruce denies having been at the house, and also having spoken to the man on the following morning. Indeed, he said that though he had known him for many years he had never spoken to him at all. The stranger identified by the man and wife as the witness Wylie. I find this charge proven, and agency was, I understand, admitted, but whether or not it is undisputable. It follows that the Uttley case is also proven, and this strengthens the other.

Lastly, as to the Cormack charges. That this witness was engaged for some time in frequent and persistent reckless attempts to bribe is very clearly proven. As to agency there is not, in my opinion, enough legal evidence to require us to find that he was.

The election therefore must, in my judgment, be set aside with costs.

OSLER, J.A.:—[After referring to the charge of bribery, which he held to be proved, the learned Judge continued] As to agency in respect of the foregoing charges, Bruce and Cummings were two of the Berlin delegates to the nominating convention by which the respondent was brought out, and were also members of the North Waterloo Liberal Association. The former said that he attended the respondent's committee room, and did what he could in the respondent's behalf; he solicited votes whenever he could, almost daily. I did not understand that his agency was really

disputed. Cummings' activity does not appear to have been so great, but he did attend at the committee room, and, as Alex. Smith, the organizer, said, was apparently engaged there.

I have not taken into consideration that the mere fact of a man being a delegate to the nominating convention by itself makes the delegate an agent. Perhaps, as elections now seem to be conducted in this country, it would be more reasonable that a candidate, accepting a nomination tendered him in that manner, should be responsible for the acts of those who place him in the field.

I think it is impossible to doubt that the respondent was willing to avail himself of the services of persons in the position of Bruce and Cummings, and expected them to work for him. He cannot, under such circumstances, avoid responsibility for their acts by avowing his ignorance of what they were doing, or that they were actually working in his behalf.

With respect to Bossard, I think that, apart from his illegal acts, there is nothing to establish agency; with regard to Lewis it is different. I think he was brought or came to Berlin by, or at the instance of Vance, who was undoubtedly an agent, for the purpose of being employed about the election, and in one matter at least he was, I find, expressly so employed.

In addition to the significant evidence furnished by the telegrams, "Jack" (O'Gorman) to "Jim" (Vance) as to "Tom" (Lewis), "Tom's" telegram to "Jack" as to the result in Berlin and Waterloo, I refer to the testimony of a number of witnesses. I cannot believe that he was wasting his time, from his point of view, in Berlin or Waterloo on May 8th, and from May 12th to 24th, or that Vance and other active workers for the respondent did not know that he was working—honestly, no doubt, they hoped and believed, but nevertheless working—in the same interests. Lewis was one of the numerous outside workers, an organizer who was brought into the riding by those who were in connection with and, as directing and aiding the local workers, managing the election campaign.

Where all the money Bossard handled came from I cannot say. Partly, I find, from Lewis; but it is not so clear that Bossard's statement as to O'Gorman having paid him anything should be accepted. That any of it, however, was Bossard's own money is well nigh incredible. Men do not spend their own money, even in bribery, in the profuse and wasteful manner in which he spent his.

[The learned Judge then described the modus operandi of "switching" ballots, as done in this case, *i.e.*, by putting a ballot marked for Arnold on the pile of ballots marked for Breithaupt, and refusing to let the scrutineers see it, on the ground that he had to keep the marking secret; and "spoiling" by an ingenious device—making a cross on the ballot opposite a voter's name as he turned it over, and then shewing it to the scrutineers as a "spoiled" ballot.]

Spoiling ballots is not specially an election offence or corrupt practice under the Election Act, but is, no doubt, an offence punishable under the Criminal Code, s. 503.

The election must be set aside for the corrupt practices above found to have been committed, and with costs to be paid by the respondent, other than those the parties came to an agreement about at the trial.

NOTE.—Respondent appealed from this judgment to the Court of Appeal, but finally abandoned it, and it was dismissed with costs.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] HAWLEY ADM'R *v.* WRIGHT. [April 13.

Negligence—Passenger elevator—Failure of operator to obey instructions—Liability of owner for accident resulting—Finding of contributory negligence—Effect of—Refusal of trial Judge to put question—Must be submitted in writing if made ground for new trial.

Deceased in attempting to leave an electric elevator in defendant's building as the boy in charge started it to carry a passenger from the fifth to the third floor, was caught between the top of the elevator and the floor and sustained injuries which resulted in his death.

Deceased had called at the building a short time previously for the purpose of seeing a tenant whose office was on the fifth floor, and on being informed that the person he desired to see was out, entered the elevator cage and had made several trips up and down before the accident happened. Immediately prior to the happening of the accident the occupant of an office on the fifth floor rang the bell for the elevator to come up and as soon as it arrived stepped in quickly and asked to be taken down to the third floor. The boy at once turned the wheel to descend and attempted to close the door, and as he did so deceased made the attempt to get out. The boy in charge of the elevator had received instructions to close the door before starting the cage, and in this case attempted to do so simultaneously with turning the wheel to cause the cage to descend.

The jury found, in answer to questions submitted (1) that the accident was due to the carelessness of the deceased in attempting to get out when he did, and (2) that the boy in charge of the elevator could not at the time have done more than he did to prevent the accident.

A question as to whether defendant was guilty of negligence in the operation of the elevator was left unanswered.

Per RITCHIE, J., GRAHAM, E. J., concurring, dismissing plaintiff's appeal.

1. The jury having found under proper directions from the trial Judge that the accident was due to the carelessness of deceased in attempting to get out when he did, and the question being peculiarly for the jury, plaintiff could not recover even assuming that negligence in the operation of the elevator was proved.

2. The question as to whether deceased at the time of the accident was in the elevator on business or merely for his own pleasure, and as to whether the elevator was or was not a proper place for him to await the arrival of the person he wished to see, was also for the jury, but that the answer to this question was immaterial in view of the answer to the question respecting the negligence of deceased.

3. Where counsel on either side intends to make the refusal of the trial Judge to put a question, or to put a question in a particular way, one of the grounds for a new trial, he must submit the question in writing, and in the form in which he desires to have it put.

Per WEATHERBEE, J., dissenting.

1. As the accident could not have happened if the rule which required the door of the elevator cage to be closed before starting had been adhered to, the accident was due solely to the carelessness of defendant's servant and defendant was liable, and that the burden of proving contributory negligence rested on defendant.

2. The passenger might reasonably rely on the elevator cage not starting until the door was closed.

3. In view of all that took place, defendant could not treat deceased as a loiterer in the absence of distinct notice to leave the cage.

4. The finding that deceased was loitering was consistent with his being lawfully present for business purposes.

5. So long as it was left undecided whether defendant was guilty of negligence, any decision as to contributory negligence was inchoate.

6. There being an admission on the record that deceased was there on business, the question as to whether he was there merely for his own pleasure should not have been submitted to the jury.

W. F. O'Connor, for appellant. *R. E. Harris*, K.C. and *W. E. Thompson*, for respondent.

Full Court.] COMMERCIAL BANK OF WINDSOR *v.* SMITH. [April 27.

Promissory note—Accommodation maker—Conditional delivery—Bank held bound by notice to agent—Findings of jury set aside.

In an action brought by the plaintiff bank against the plaintiff M. as indorser of a promissory note made by S., and as joint and several maker with S. of two other promissory notes, the defence chiefly relied on was that the notes were signed by M. and delivered to plaintiff's agent under a special agreement, of which plaintiff had notice, that they were not to be used until they had been indorsed or signed by certain other parties, as co-

sureties. The evidence shewed that the defendant S. was largely indebted to plaintiff for advances made by plaintiff's agent, for which plaintiff was anxious to obtain collateral security, and that the notes were taken for that purpose and not as ordinary discounts. The signature of the defendant M. to the notes was obtained by plaintiff's agent under instructions from the cashier of the bank. At the time the notes were signed plaintiff's agent was told by M. not to take them unless the other signatures were obtained, and replied "that is all right." The notes were signed in defendant's office, and that no part of the transaction took place in the office of the bank.

Held, setting aside the findings of the jury, that the signature of M. was clearly obtained in the course of the business of the agency, and within the scope of the agent's authority, and that his knowlege of the condition upon which the signatures were obtained must be held to be the knowledge of the bank.

Held, also, that if the agent, acting under the authority of the cashier, applied to the defendant M. to sign the notes, and, in order to induce him to do so, agreed to any condition, or did anything to lead M. to believe that they would not be used by the bank until another person had signed them, the bank would be bound although the conduct of the agent was unauthorized and knowledge was concealed from its officers.

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

Province of Manitoba.

KING'S BENCH.

Richards, J.] ABELL *v.* MCLAREN. [May 28.

Deed of land—Description—Ambiguity—Charge on homestead before patent—Dominion Lands Act, s. 42.

The written contract signed by defendant for the purchase of machinery from the plaintiff provided for a lien or charge upon the "N.E. ¼, section 2, township 4, range 14," without stating whether the range meant was 14 west or east of the principal meridian, both of which ranges are in this province; but the evidence shewed that it was range 14 west that was intended.

Held: 1. That the expression N.E. ¼ sufficiently designated the north-east quarter, as such contractions are in daily use.

2. That in this case the description was sufficient to warrant the order for a charge on the N.E. ¼, 2—4—14 W., for—(*a*) if judicial notice should be taken of the surveys that had been already made in Manitoba, and of those which had not been made, then, as township 4 in range 14 east had not been surveyed, township 4 in range 14 west must have been

tne one intended by the contract, and there was no ambiguity requiring evidence to explain; and (*b*) if judicial notice of such surveys could not be taken, then the ambiguity, if any, was a latent one, and oral testimony was admissible to ascertain what land was meant.

It was suggested in argument that defendant was merely a homesteader under the Dominion Lands Act, and had not received his patent, and that, under s. 42 of that Act, he could not validly creat a charge on the land.

Held, that the defendant could not raise such an objection in this action, and that the plaintiff was entitled to an order for the charge on the land and the chance of realizing on it, though he might afterwards be defeated by the action of the Dominion Government.

Howell, K.C., for plaintiff. *Bonnar*, for defendant.

Full Court.] KING *v.* TODD. [June 1.

Criminal law—Evidence—Confession.

This was a case reserved for the opinion of the Court as to whether the evidence of certain confessions of the prisoner obtained by a detective in the manner described below was admissible.

The accused was suspected of having been guilty of the murder of one John Gordon, and the Chief of Police employed detectives to associate with him and try to secure an admission of his guilt. These detectives, who were not peace officers, worked themselves into the confidence of the accused, and represented to him that they were members of an organized gang of criminals, who were engaged in operations that would yield large profits to those participating therein, and induced the accused to make overtures for admission to the gang. They then intimated to him that it would be necessary for him to satisfy them that he was qualified for such membership by shewing that he had committed some crime of a serious nature, whereupon, according to their evidence, he claimed that he had killed Gordon as the result of an altercation with him. No charge was then pending against the prisoner, and he did not know that the detectives were such.

Held, that an inducement held out to an accused person, in consequence of which he makes a confession, must be one having relation to the charge against him, and must be held out by a person in authority, in order to render evidence of the confession inadmissible, and that both these grounds of objection were wanting in this case, and that, therefore, the evidence was rightly received, and that the conviction of the prisoner should be affirmed.

Bonnar, for Crown. *Howell*, K.C., for prisoner.

Full Court.] GARRIOCH *v.* MCKAY. [June 1.

Fences—Obligation to keep cattle from trespassing—Boundary Lines Act, R.S.M. c. 12, s. 4—Possession as against trespasser—Right of action—Parties to action.

Appeal by defendant from judgment of a County Court awarding damages to plaintiff for injury to his crops by defendant's cattle which broke through a defective part of the line fence between their two farms. It was not disputed that at common law the owner of cattle is liable for their trespasses except such as are due to defects in fences which the complainant is bound as between himself and such owner to keep up, but defendant contended that the common law liability has been done away with by section 4 of The Boundary Lines Act, R.S.M. c. 12, which is as follows: "Each of the parties occupying adjoining tracts of land shall make, keep up and repair a just proportion of the division or line fence on the line dividing such tracts, and equally on either side thereof." There was no evidence to shew that the plaintiff had become in any way bound to keep up any particular and defined portion of the division fence between his land and defendant's.

Held, following *Buist* v. *McCombe*, 8 A.R. 600; *Tewksbury* v. *Buchlin*, 7 N.H. 518; *Thayer* v. *Arnold*, 4 Met. 589; *Rust* v. *Low*, 6 Mass. 90; and *Barber* v. *Meusch*, 157 Pa. St. 390, that the common law rule is not displaced by a joint liability to keep up fences, but where two men own adjoining lands with an undivided partition fence which both are equally bound to keep in repair, each is bound to keep his cattle on his own land at his peril.

The injured crops were raised by plaintiff, who was in possession, but another person had a half interest in the crop and defendant's counsel argued that the co-owner should have been joined as a plaintiff in the action and that plaintiff could not recover alone.

Held, that sole possession by plaintiff was sufficient to support an action of trespass, and it was not necessary to make the co-owner a party or to obtain any release from him: *Star* v. *Rookesby*, 1 Salk 335; *Graham* v. *Peat*, 1 East, 246.

Appeal dismissed with costs.

Howell, K.C., for plaintiff. *Aikins*, K.C., for defendant.

North-West Territories.

JUDICIAL DISTRICT OF NORTHERN ALBERTA.

SUPREME COURT.

Rouleau, J.] IMPERIAL BANK *v.* HULL. [April 19.

Bank Act, s. 73—Sight draft with bill of lading attached—Surrender of bill without acceptance of draft—Perishable goods spoiled in transit—Liability of drawee.

The defendant agreed to purchase from the Parsons Produce Company, who were doing business at Exeter, Ont., and Winnipeg, Man., a carload of poultry to be delivered to him at Calgary. The poultry was shipped from Centralia, Ont., and a bill of lading taken in favour of the Molsons Bank. At the request of the shippers the Molsons Bank endorsed the bill of lading to the plaintiff bank and returned it to the shippers. The Parsons Produce Company, who, at their Winnipeg branch, drew at sight on the defendant for $2,885.89 through their plaintiff bank. The bank cashed the draft at Winnipeg and took the bill of lading as collateral security. The draft was forwarded to the plaintiff's Calgary branch with the bill of lading attached, with instructions to surrender the bill of lading only on payment of the draft. The plaintiff bank presented the draft several times to the defendant at Calgary for acceptance but were told that the g. had not arrived. On Dec. 18th, 1899. the carriers, the Canadian Pacific Railway Company, informed the defendant that the carload of poultry had arrived, and the defendant went to the plaintiff bank, where he kept an account and did a large business, and asked for the bill of lading, saying that he wanted it in order to obtain inspection of the goods. The acting manager of the plaintiffs then endorsed the bill of lading to the defendant and handed it to him, saying at the time, "You will let us have a cheque as usual," to which the defendant did not reply, but left the bank. He went to the railway company's office, and finding that he would have to surrender the bill of lading before being allowed to inspect the goods, he therefore surrendered it and it was cancelled by the company's agent. The defendant then unloaded the poultry, took it to his shops and warehouses and reshipped a large portion of it to his branches at other towns on the same day, viz., 18th December. On he afternoon of the 19th he wired the Parsons Produce Company at Winnipeg that the poultry was defective, and on the 20th sent a further wire saying that he held the poultry at their disposal and demanding compensation. He did not inform the plaintiff bank until the

20th, when he was asked for a cheque to pay the draft by the acting manager. He then said he could not pay it, as the goods were not satisfactory. He was then asked to return the bill of lading, which he promised to do. On the 21st, when again asked for the bill of lading, he said he could not return it as the carriers, the railway company, would not give it back, and he refused to give a cheque for the amount. The draft was returned to Winnipeg, but the Parsons Produce Company refused to take it up on the ground that the bill of lading had been surrendered contrary to their instructions.

The plaintiffs then sued the defendant for the amount of the draft, setting forth the above facts in their statement of claim.

The defendant paid into court $1,204.08, the money received for the part of the goods sold by him, and denied all further liability on the ground that the balance of the goods were worthless, which was the fact.

Held, 1. The bank had the same but no other rights, under s. 73 of the Bank Act, than those of the Parsons Produce Company.

2. The defendant had a right to inspect the goods before accepting them and was entitled to get the bill of lading for that purpose, but that as he had a right to reject them he should have done so, instead of dealing with them as his own, and that the plaintiffs should therefore have sued in trover or conversion for the goods or their value.

3. The pleadings should be amended accordingly and judgment entered for the plaintiffs for the amount paid into court, and that the plaintiffs should pay the costs of the action to the defendant on the ground that they had sued upon the draft instead of for conversion.

McCarthy, K.C., and *C. A. Stuart*, for plaintiffs. *Lougheed*, K.C., and *R. B. Bennett*, for defendant.

This case is now in appeal.

SLIPS AND BLANKS IN DEEDS.

The present moment seems opportune to present a few remarks upon the modern, and in part unique, law of the rectification of a slip in instruments under seal by a clerical alteration. For the subject is brought into notice by the result of Mr. Justice Joyce's decision in the case where mortgaged property was reconveyed to the use of the mortgagor "in fee." As many readers have doubtless noted, that learned judge said that, notwithstanding *Flight* v. *Lake* (2 Bing. N.C. 72), he is compelled to hold that to supply the word "simple" by construction, from a consideration of the obvious intention as expressed in other parts of the instrument, would not be a compliance with the terms of sec. 51 of the Conveyancing Act 1881; and, therefore, the reconveyance in question did not pass the legal estate in fee simple to the mortgagor: *Re Ethells and Mitchells and Butlers' Contract*, noted 110 L. T. 495; (1901) W. N. 73.

As any junior conveyancing or engrossing clerk will be ready to tell you, the date of a deed is commonly, and the names of the occupiers of the property conveyed, or the agreed date in the proviso for redemption is often, filled in after the deed is executed. And *Keane* v. *Smallbone* (17 C. B. 179), *Eagleton* v. *Gutteridge* (11 M. & W. 465), *Aldous* v. *Cornwell* (L. Rep. 3 Q.B. 573, and *Adsett* v. *Hives* (9 L. T. Rep. 110; 33 Beav. 52) is authority that any such formal addition, if consistent with the purposes of the deed in question, will not render the deed void, even though the addition is, in fact, made by the party to whom it has been delivered. Moreover, several years before *Aldous* v. *Cornwell*, where a bond conditioned for the payment of £100 had been prepared by a schoolmaster and after execution was left in his custody as a friend of the parties, and he, discovering that the word "hundred" had been accidentally omitted in the second place in which the sum was mentioned, interlined the word omitted without the knowledge of either party, it was decided that the sense, being sufficiently manifest before the alteration, the insertion of the word did not alter the sense, and was, therefore, immaterial and did not destroy the bond: (*Waugh* v. *Bussell*, 5 Taunt. 706). And within the past few years the Divisional Court has held that the execution of a deed of arrangement by creditors after its registration under the Deeds of Arrangement Act 1887 (50 & 51 Vict., c. 57) does not amount to an alteration of the deed so as to avoid it, or to vitiate the registration of it; (*Re Batten; Ex parte Milne*, 60 L. T. Rep. 271; 22 Q. B. Div. 685); and so, more conveniently for practical business purposes, set at rest what was a moot point in legal circles.

But all who are old enough to have read Ten Thousand a Year will call to mind how an objection to a deed on account of an erasure made, by a copying clerk, in a material part of the deed is made to play an important and dramatic part in the celebrated trial scene at York; and that as the incident excited much public attention and comment, to the later editions of that popular novel the author, Mr. Samuel Warren, added a learned note on the then state of the law as to a blemish in a deed. And the rule that an alteration in a material part of a deed made by a party, or even by a stranger, after its execution by the grantor renders it void is still the law of England. In so recent a case as *Ellesmere Brewing Company* v. *Cooper* (73 L. T. Rep. 567; (1896) 1 Q. B. 75), for instance, we find four persons, as sureties, executed a joint and several bond of suretyship, by the terms of which the liability of two of them was limited to £50 each, and that of the other two £25. After three of them have executed the instrument, the fourth, whose liability was limited to £50, executed it, but added to his signature the words "£25 only." The obligee accepted the bond so executed without objection; and subsequently the principal having been in default, the Divisional Court, in dismissing an appeal from the County Court judge with costs, held that the effect of the added words was to make a material alteration in the bond, and that the first three signatories were, accordingly, thereby discharged from their obligation.

It is, therefore, still pertinent first to distinguish a material and immaterial alteration; and, secondly, to observe how a post execution material alteration in a deed will affect a conveyance of property expressed to be assured by the deed, or the liabilities under a covenant contained in the deed.

Now on the first point, we may, perhaps say that a material alteration is one that causes the deed to speak a language different, in legal effect, from that which it originally spoke; (see Taylor on Evidence, sec. 1882). The late Sir James Stephen in his Digest of the Law of Evidence put it that "an alteration is said to be material when, if it had been made with the consent of the party charged, it would have affected his interest or varied his obligations in any way whatsoever," while "an alteration which in no way affects the rights of the parties, or the legal effect of the instrument, is immaterial: (Stephen on Evidence, art. 89).

Secondly, it has for years been settled that when once an estate has been conveyed by a deed, the deed has done its work, and the subsequent alteration of the deed cannot operate to reconvey the estate; and the deed, even though cancelled, may be given in evidence to shew that the estate was conveyed by it while valid: (*Lord Ward* v. *Lumley*, 5 H. & N. 87, 656, and cases there cited). It should, however, be observed that it seems to follow from an old case in 1615 that there would be an exception where the estate lies in grant—*e.g.*, a watercourse—and so cannot exist without a deed, for in such case an alteration by a party claiming the estate will avoid the deed as to him, and the estate itself is gone: (*More* v. *Salter*, 3 Buls. 79). However that may be, it is firmly settled, on the principle that when an agreement is once embodied in a deed, such deed becomes itself the agreement, and not evidence merely, that if the deed becomes void by alteration, no action can be brought upon a covenant contained in it: (*Pigot's* case, 11 Rep. 27*a*; *Hall* v. *Chandless*, 4 Bing. 123; *Ellesmere Brewing Company* v. *Cooper*, *ubi sup.*). At the same time, though the deed may be void for the purpose of enforcing it, it may nevertheless be admissible to prove a collateral fact: (*Hutchins* v. *Scott*, 2 M. & W. 816). The possible hardship of the part of this rule that enunciates that every material alteration made by a stranger, even without the privity of any party, avoids a deed to the extent above explained, is readily apparent; and we could wish an opportunity would arise to have the question discussed and tested in the Appeal Court before modern judges. In the meantime it is interesting to observe that before Queen Victoria's reign commenced it had been held in the Court of Exchequer in Ireland that an alteration of this character so made did not avoid the deed, but that the court was at liberty to look at the deed as it was before it was altered: (*Swiney* v. *Barry*, 1 Jones Ex. 109). So apparently English and Irish law on the subject disagree in this detail: indeed, we believe we are right in thinking our law is herein unique.

In passing, it may be mentioned that a material alteration may necessitate restamping. That is to say, if a deed is altered by consent after execution so as to form a new contract between the parties a new stamp is required: *French* v. *Patten*, 9 East 351; *Coie* v. *Parkin*, 12 East 47; *London, Brighton, and South Coast Railway Company* v. *Banclough*, 2 M. & G. 675.

Another interesting topic—one clearly demanding the attention of a commercial lawyer, but one that, we fear, we have no space left to enter into—is the operation and virtue of transfers of shares in blank. The law of the matter is conveniently stated by Mr. Brodhurst in his treatise on the law of the Stock Exchange (p. 223 *et seq.*); and here it must suffice to remind the reader that where the name of the grantee is introduced into a deed after delivery, the deed, unless redelivered, is void (*Hibblewhite* v. *M'Morine*, 6 M. & W. 200); that where a transfer of shares is required to be by deed, one in blank is void at law, and is, in fact, as a deed wholly inoperative; and that when the deed of transfer is void and incomplete, registration will not perfect the transferee's title: (see *Powell* v. *London and Provincial Bank*, 69 L. T. Rep. 421; (1893) 2 Ch. 555). Perhaps it is for this reason that the Companies Act 1862 does not require transfers to be made by deed, but only "in manner provided by the regulations of the company": (25 & 26 Vict., c. 89, s. 22).

Where the contract expressed in a deed is not well understood, but the subject of negotiation, the solicitor sometimes finds that one party at the last minute requires a lengthy new term or stipulation introduced; and with the deed engrossed, he is in a fix what to do. If circumstances do not admit of delay or re-engrossment, one way, if an inelegant one, out of the difficulty seems to be to make an appropriate reference at the proper place ("see rider A" or "see back A"), to add the new covenant or clause to the foot or back of the deed, and to note the alterations in the attestation clause. For apparently such memorandums made previous to execution are considered, in construction and effect, as part of the instrument, although they add to or change the provisions of the deed: *Griffin* v. *Stanhope*, Cro. Jac. 456; *Goodright d. Nicholls* v. *Mark*, 4 M. & S. 30; *Frogley* v. *Earl Lovelace*, 1 Johns. 333; *Ellesmere Brewing Company* v. *Cooper*. Since a *deed* cannot be altered after execution without fraud or wrong and fraud or wrong is never assumed without proof, the court will presume, if an alteration or indorsement appear, that it was made prior to execution: (*Doe d Tatum* v. *Catomore*, 16 Q. B. 745). It is useful, however, to remember that it does not follow that it is pedantic to call for evidence to remove the suspicion created by a material alteration which is neither noticed in the attestation clause nor initialled. On the contrary, it is wisdom to do so, because the presumption the court will make in such a case may, like any other presumption, be rebutted. If the vendor desire to be excused supplying such evidence, he should make it a condition of his sale.—*London Law Times.*