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LIABILITY OF VALUERS FOR UNTRUE VALUATIONS.

THE liability of valuers for damages consequent on their making untrue valuations, may be founded either in contract or in tort. When the person who suffers damage by the false valuation is the person by whom the valuer was employed and paid, there is a privity of contract, and the valuer is bound to use reasonable skill and diligence, and if he fails in either he is guilty of a breach of his contract, and is responsible in damages to the person with whom he contracts. Cases, however, arise, when there is no privity of contract between the valuer and the person who sustains damage in consequence of trusting to his valuation. In such cases the valuer may have been paid by the person who reaps the benefit of his false valuation, or he may have acted gratuitously, but in either of these cases, as regards any third party injured by relying on his valuation, he is in the position of an unpaid valuer, and if liable at all, is liable only on the ground of tort.

It has been decided in the Courts of Ontario that in order successfully to maintain an action against an unpaid valuer for a false valuation, it is absolutely essential to establish *mala fides* on his part: *French* v. *Skead*, 24 Gr. 179. In this case an unpaid valuer valued property for the purpose of the plaintiff making a loan of money upon it, at $1,200, when in fact it was not worth more than $400 or $500, and actually realized only $130 at a sale under execution. But the Court of Chancery nevertheless absolved the valuer from liability, because there was no evidence of *mala fides*, and this decision was affirmed by the Court of Appeal: see 24 Gr. 413. Spragge, C., however, dissented, and considered the defendant had been guilty of such gross negligence as to render himself liable; an opinion in which we are inclined to agree, and which we think will be found to be sustained by the later cases to which we shall presently refer.

This decision was followed in *Silverthorn* v. *Hunter*, 26 Gr. 390; 5 App. R. 157, but whether that was the case of a paid, or an unpaid valuer, seems open to doubt. One, McLellan, at the plaintiff's request, procured the valuation and paid the defendant, Hunter, $4 for his services, but Burton, J.A., in *Canada Landed Credit Co.* v. *Thompson*, says the head note of *Silverthorn* v. *Hunter* is misleading, and that "in that case Hunter was not acting as the paid agent of the plaintiff." . . . "The defendant in that case was paid for his services by the witness McLellan, but it was not pretended that he was the paid agent of the plaintiff." But, however that fact may be, the defendant, Hunter, valued the property in question at $2,000; but through the fraud of McLellan, who procured the valuation at the plaintiff's request, he actually signed a certificate whereby he certified

the value to be $3,000; and it was held by Blake, V.C., that he was not liable, and this decision was affirmed by the unanimous judgment of the Court of Appeal. Without venturing to impugn the correctness of this decision in point of law, having regard to the peculiar facts of that case, we think it is nevertheless open to doubt whether all the reasons assigned by Burton, J.A., for the decision can now be regarded as law. For instance, he lays down in general terms that in no case can a valuer be made liable for damages resulting from a false valuation, unless fraud can be established. Thus he says: "I assume it can admit of no doubt that if a declaration were framed charging that the defendant falsely and negligently made a representation, knowing that it was intended to be acted upon by the plaintiff, and that it was so acted upon to his injury, without any averments that it was false to his knowledge or fraudulently made, it would be bad on demurrer." And again he says: "In fact all the cases from *Pasley* v. *Freeman* downward, lay down the general rule that fraud must concur with the false statement to give a ground of action,"- and in support of this proposition he refers to *Evans* v. *Collins*, 5 Q.B.D. 820; *Ormrod* v. *Huth*, 14 M. & W. 651, and *Thorn* v. *Bigland*, 8 Ex. 731; (and see per Blake, V.C., in *French* v. *Skead*, 24 Gr. 187); and though from the later case of the *Canada Landed Credit Co.* v. *Thompson*, we learn, as we shall presently see, these observations of Burton, J.A., are intended to apply only to the case of unpaid valuers, yet according to the views of Courts of Equity, which appear to us to be founded on a somewhat higher standard of morals than that on which the common law decisions proceed, it may reasonably be doubted whether the rule which Burton, J.A., invokes has now any existence at all, even as regards unpaid valuers. In *Gowan* v. *Paton* 27 Gr. 48, which had been previously decided by Blake, V.C., but which, strange to say, was not referred to by either the bar or the bench in *Silverthorn* v. *Hunter*, that learned judge had held that an unpaid valuer was liable in damages for a false valuation which he had negligently, but innocently, given under a mistake as to the identity of the lot; and this decision was approved by Spragge, C., in *Hamilton Provident & Loan Society* v. *Bell*, 29 Gr. 206; and in the late case of *Cann* v. *Wilson*, 39 Ch. D. 39; 59 L.T.N.S. 723, Chitty, J., has come to a like conclusion, basing his decision upon the principles laid down by Cotton, L. J., in *Peek* v. *Derry*, 37 Ch. D. 541; 59 L.T.N.S. 78, where he says: "Although in my opinion it is not necessary that there should be what I should call fraud, yet in these actions (*i.e.*, *of deceit*), according to my view of the law, there must be departure from duty; and in my opinion, where a man makes an untrue statment with an intention that it shall be acted upon, without any reasonable ground for believing that statement to be true, he makes default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right which those to whom he makes the statement have, to have true statements only made to them. And I should say that when a man makes a false statement to induce others to act upon it, without reasonable ground to suppose it to be true, and without taking care to ascertain whether it is true, he is liable civilly as much as a person who commits what is usually called fraud, and tells an untruth knowing it to be an untruth." Chitty, J., also cites the statement

of the law by the President of the Probate Division in the same case, viz: "I take the principle to be that, if a man takes upon himself to assert a thing to be true which he does not know to be true, and has no reasonable ground to believe to be true, in order to induce another to act upon the assertion, who does so act, and is therefore damnified, the person so damnified is entitled to maintain an action for deceit." And acting upon the principles thus enunciated, Chitty, J., held the valuer to be liable to the plaintiffs, who were mortgagees, although he had been employed and paid by the mortgagors and not by the plaintiffs, between whom and the defendant no privity of contract existed. The Court of Appeal of Ontario in the case of *Canada Landed Credit Co.* v. *Thompson*, 8 App. R. 696, to which we have referred, have virtually receded to some extent from the position taken by that Court in *Silverthorn* v. *Hunter*, for although insisting in that case that proof of fraud was of the essence of the right to recover in actions of that kind, they in *Canada Landed Credit Co.* v. *Thompson*, ordered a new trial because Proudfoot, J., had adopted that very view. Spragge, C.J., at p. 702, says: "It thus appears that the learned judge made fraud on the part of the defendants the test of their liability. There can indeed be no doubt that such was the learned judge's view of the law, for in the earlier part of his judgment, after referring to authorities, he says, 'they lay down the general rule of the law to be, that fraud must concur with the false statement to give a ground of action.' . . . He dealt with the case viewing it from a standpoint which, in my judgment, was erroneous." And yet it will be observed the language of Proudfoot, J., which the learned Chief Justice cites, is identical with that used by Burton, J.A., when giving the unanimous judgment of the Court of Appeal in *Silverthorn* v. *Hunter*.

Burton, J.A., distinguishes the case from *Silverthorn* v. *Hunter* on the ground that in the latter case the judgment of the Court of Appeal proceeded on the assumption that it was the case of an unpaid valuer, whereas in the *Canada Landed Credit Co.* v. *Thompson* a fiduciary relationship of principal and agent existed between the parties, and this fact he considered rendered it unnecessary to prove that the defendants had acted fraudulently. The result of the latter case is therefore to establish, that at all events, valuations made by persons who owe a duty arising from a fiduciary relationship, or who are paid for their services, are an exception to what in *Silverthorn* v. *Hunter* is assumed to be the general rule, "that fraud must concur with the false statement to give a right of action."

But though the decision of the Ontario Court of Appeal in the *Canada Landed Credit Co.* v. *Thompson*, has only established this exception to the assumed general rule, it seems to be abundantly clear that, if the principles enunciated by the English Court of Appeal in *Peek* v. *Derry*, 37 Ch. D. 541; 59 L.T.N.S. 78, and applied by Chitty, J., in *Cann* v. *Wilson*, are sound, the assumed rule of law has no existence, even as regards unpaid valuers, but on the contrary, a valuer, whether paid or unpaid, is liable in damages if knowing that his valuation is intended to be acted upon, he certifies it without reasonable ground for believing it to be true. But in view of the decision of the Court of Appeal in *Silverthorn* v. *Hunter*, it is open to doubt whether in Ontario an action can be success-

fully maintained against an unpaid valuer except on proof of fraud, unless the litigant is prepared to carry his case to the Supreme Court.

When the valuer is not informed and does not know that his valuation is procured for the purpose of being acted on, or inducing some other person to act on it, it would seem that according to the principles on which *Moffatt* v. *Bank of Upper Canada*, 5 Gr. 374, and *Cook* v. *Royal Canadian Bank*, 20 Gr. 1, were decided, that he would not be liable in damages, should his valuation prove untrue. These were not cases of valuation, it is true, but cases in which persons dealing with mortgagors sought to hold the mortgagees liable for representations made in respect to the amount due on the mortgage; and it was held that the representations relied on not having been made with notice of any intention to act upon them in dealing with the owner of the equity redemption, they did not estop the mortgagee from disputing their correctness.

Before concluding, we may observe that the amount of skill and judgment required to be exercised by a paid or unpaid valuer in making a valuation, to some extent depends on whether or not he holds himself out to the world as a valuer by occupation, for while in the one case he will be liable for loss if he fails to exercise the skill and judgment which a professional valuer may be reasonably expected to possess, in the other case he will not be liable unless he has been guilty of gross negligence or fraud. This distinction is pointed out by Spragge, C., in *Hamilton Provident & Loan Society* v. *Bell*, 29 Gr. 203. That case was determined on a hearing *pro confesso*, but the judgment is a considered judgment. The case was one of a paid valuer, but the principle on which the learned judge based his decision of the case appears equally applicable to unpaid valuers. He cites with approval the following passages from Evans, Principal and Agent, p. 238, viz.: "An agent is liable for misfeasance in performing a gratuitous undertaking, if he fails to exercise that degree of skill which is imputable to his situation or employment. Any failure on his part to fulfil the obligation imposed upon him as being possessed of the skill which he holds himself out to the world as possessing, is actionable negligence;" and again: "Lord Loughbrough agreed with Sir *William Jones* (Law of Bailments, p. 120) that when a bailee undertakes to perform a gratuitous act from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. His Lordship acknowledged, too, that if in this case (*Shields* v. *Blackburn*, 1 H. Bl. 158) a ship broker or a clerk in a custom house had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries, but when an application, under the circumstances of this case, is made to a general merchant to make an entry at the custom house, such a mistake as this is not to be imputed to him as gross negligence." These principles Spragge, C., held were applicable to the case of persons employed to act as valuers.

The mere fact that after the valuation, the property depreciates in value,

cannot, of course, render a valuer liable. The sole question must be whether the valuation was correct, at the time it was made, for it is impossible to render a valuer liable for any subsequent depreciation which could not, by the exercise of reasonable judgment, have been foreseen—and where a valuer gives a conditional valuation, the conditions must have been complied with, before he can be made liable. Thus, where a paid valuer gave a valuation for the purpose of a loan, in which he said, "the houses are unfinished, and my valuation of $4,980 is on the supposition that they will be finished in a manner similar to those adjoining; a final inspection should, I think, be made," and the houses were not finished, as contemplated by the certificate, and no final inspection was made, but the money was advanced; and afterwards the property very seriously depreciated in value, and only realized $1,800—it was held that the valuer was not liable.

In the recent case of *O'Sullivan* v. *Lake*, 15 O.R. 544, it has been held by the Common Pleas Division, (Galt, C.J., dissenting), that it is not negligence on the part of a paid valuer to rely on his own judgment entirely, and that his omission to inquire of other persons as to the value of land in the neighborhood cannot be imputed to him as negligence. But all the judges agreed that the omission to inquire as to previous sales afforded evidence of negligence on the part of a paid valuer; and if there have been no sales, and property has not changed hands in the locality for a lengthened period, it appears also to be the duty of such a valuer to inquire and ascertain the cause, with a view to ascertaining whether the neighborhood is objectionable, or for any other cause property is unsaleable. This case, we believe, has been carried to the Court of Appeal.

COMMENTS ON CURRENT ENGLISH DECISIONS.

THE Law Reports for March comprise 22 Q.B.D., pp. 237-393; 14 P.D., pp. 25-41, and 40 Chy. D., pp. 213-385.

PRINCIPAL AND AGENT—INDEMNITY—STOCK EXCHANGE, USAGE OF—DEFAULTING BROKER.

In the Queen's Bench Division the first case we find calling for attention is *Harlas* v. *Ribbons*, 22 Q.B.D. 254. The action was brought by the plaintiff, a stockbroker, against his client, to compel the latter to indemnify him against a liability he had incurred in respect of shares bought for the defendant under the following circumstances: The plaintiff was a broker on the Stock Exchange, employed by the defendant to purchase shares, which he did. Before the settling day the plaintiff became a defaulter on the Stock Exchange, and in accordance with the rules of the Exchange, the accounts which were open against him were closed as between himself and the jobbers at the then current prices as fixed by the official assignee of the Stock Exchange. The account in respect of the shares bought for the defendant when closed in this way, showed a balance in favor of

the jobbers against the plaintiff; but according to the practice of the Stock Exchange, such closing of the account does not affect the client, if he desires to have the contract completed, and is not in default to the defaulting broker, and the jobber in that case is bound to complete on the settling day. Later on the same day the plaintiff was declared a defaulter. The plaintiff informed the defendant that he had been declared a defaulter on the Stock Exchange and his accounts closed, and that the defendant could either accept the prices fixed by the official assignee, or, if he desired, he could take the shares up, that is, pay for them on the settling day. The plaintiff said he would accept the official prices; and it was held by the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) that the defendant having ratified the closing of the account before the settling day, was bound to indemnify the plaintiff against the amount for which the plaintiff was liable to the jobbers on the closing of the account.

PRACTICE—CAUSE SET DOWN FOR TRIAL—CHANGE OF SOLICITOR—NOTICE TO OFFICER—ORD. 7, R. 3 (C.R. 463).

Hunt v. *Fineberg*, 22 Q.B.D. 259, shows the serious consequences which may result from not giving proper notice of a change of solicitor. After the cause was set down for trial the plaintiff's solicitor was suspended from practice; thereupon the plaintiff changed his solicitor, and notice of such change was filed at the central office, but no notice was given to the officer with whom the record was entered for trial. The case came on for trial, and the learned judge presiding, finding the name of a solicitor on the record who had been suspended from practice, and there being no evidence before him of any change of solicitor, declined to hear the case and dismissed the action with costs. This order was subsequently varied by the Divisional Court and the cause reinstated on the terms of the plaintiff paying all costs which had been thrown away, and this order was sustained by the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.), who overruled the plaintiff's contention that he was entitled to have the cause reinstated without any terms.

PRACTICE—PRODUCTION OF DOCUMENTS IN HANDS OF THIRD PARTIES—ORD. 37, R. 7—(SEE C.R. 578, 579, 580).

In *Starker* v. *Reynolds*, 22 Q.B.D. 262, a Divisional Court (Huddleston, B., and Wills, J.) decided that under Ord. 37, r. 7, which provides: "The Court or judge may in any cause or matter at any stage of the proceedings order the attendance of any person for the purpose of producing any writings or other documents named in the order which the Court or judge may think fit to be produced: provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial," the Court has no power to make an order upon a person not a party to the action to produce documents for the purpose of enabling a party to the action to inspect the same before trial. The Ontario

Rules are not exactly in the same words, but C.R. 578-580, which deal in effect with the same branch of practice, would no doubt receive a similar construction. The effect of the decision is to limit the operation of the Rules above referred to, to the case of third parties called as witnesses to give evidence upon interlocutory motions, and not to permit them to be used for the purpose of obtaining discovery or inspection of documents in the hands of third parties. Wills, J., says at p. 265: "In my opinion the rule was intended by those who framed it to be strictly construed, and I think it gives the Court or a judge power to order the production of documents for the purpose of the preliminary examination of witnesses before the trial, but does not give the Court or a judge power to order inspection, properly so called, before the trial, of documents in the hands of persons who are not parties to the action."

PRACTICE—TIME—DELIVERY OF PLEADINGS—COUNTER CLAIM—REPLY—ORDS. 19, R. 2; 21, R. 6; 23, RR 1, 4 (C.R 380, 381).

Rumley v. *Winn*, 22 Q.B.D. 265, is a case which shows that where a defendant delivers both a statement of defence and a counter claim, the plaintiff has twenty-one days to deliver and reply to the defence and counter claim under Ord. 23, r. 1 (C.R. 381), notwithstanding that if a counter claim alone had been pleaded the plaintiff must, under Ord. 21, r. 6 (C.R. 380), have delivered his defence thereto within the same time as is allowed for delivering a defence to a statement of claim.

PRACTICE—APPEAL—LEAVE TO APPEAL—APPEAL FROM DECISION REFUSING LEAVE TO APPEAL.

In *Kay* v. *Briggs*, 21 Q.B.D. 343, the Court of Appeal (Lord Esher, M.R., and Fry, L.J.) held that where a Divisional Court refused leave to appeal from their decision given in an appeal from a County Court, no appeal would lie to the Court of Appeal from the refusal to grant such leave.

SALE OF GOODS—MEMORANDUM IN WRITING—STATUTE OF FRAUDS (29 CAR. 2, C. 3), S. 17.

Lucas v. *Dixon*, 22 Q.B.D. 357, was an action brought to recover damages for the non-acceptance of goods on a contract coming within sec. 17 of the Statute of Frauds. At the trial the plaintiff put in an affidavit made by the defendant in the course of the action, as being a note in writing sufficient to satisfy the statute. Stephen, J., though of opinion that the affidavit sufficiently proved the contract, nevertheless rejected the evidence because the affidavit was not in existence at the commencement of the action, and this decision was upheld by the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) Fry, L.J., says, at p. 363: "The statute requires the memorandum as evidence, but requires that evidence to be in existence at the commencement of the action which is brought to enforce the contract. If, then, it only comes into existence after the commencement of such an action, and the plaintiff desires to avail himself of it, he can only do so by discontinuing the action and commencing another.

BUILDING SOCIETY—MORTGAGE—REDEMPTION—ALTERATION OF RULES AFTER DATE OF MORTGAGE.

Rosenberg v. *Northumberland Building Society*, 22 Q.B.D. 373, was an action for redemption of a mortgaged estate, in which the dispute between the parties was as to the terms on which the plaintiff was entitled to redeem. The mortgage contained a covenant by the plaintiff to pay to the defendants all subscriptions, fines and other moneys, which, according to the rules for the time being of the society, should from time to time become due and payable by him in respect of the security or the shares by virtue of which the advance was made to him. And the proviso for redemption was in similar terms. The rules in force at the date of the mortgage did not render members borrowing from the society liable to contribute to the losses of the society. But the rules were subsequently altered imposing this liability. The question therefore, was, whether the plaintiff was bound by this alteration in the rules, and the Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.) overruling Day, J., held that he was so bound.

NUISANCE—HEAP OF EARTH NEAR HIGHWAY—EVIDENCE.

Brown v. *Eastern and Midlands Ry. Co.*, 22 Q.B.D. 391, was an action to recover against the defendants damages for negligence in allowing a heap of earth and refuse to remain on their premises near the highway, whereby the plaintiff's horse was frightened and upset the cart it was drawing, injuring the plaintiff thereby. At the trial the plaintiff tendered evidence of other horses having shied at the heap. Pollock, B., at the trial rejected the evidence and non-suited the plaintiff, but the Divisional Court (Denman and Stephen, JJ.), set aside the non-suit and granted a new trial, holding if the heap was of such a nature as to be dangerous by causing horses passing on the highway to shy, it was a public nuisance, and that the evidence showed that the heap was likely to cause horses to shy, and was therefore admissible. This decision was affirmed by the Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.)

None of the cases in the Probate Division call for any notice here.

LEGITIMACY—ILLEGITIMATE CHILD—SUBSEQUENT MARRIAGE OF PARENTS—LEGITIMATION OF CHILD—INTERVENING MARRIAGE OF FATHER WITH ANOTHER WOMAN—DOMICIL.

Proceeding now to the cases in the Chancery Division, *In re Grove, Vaucher* v. *The Solicitor of the Treasury*, 40 Chy. D. 216, is the first which calls for notice. The action was brought for the administration of the estate of Caroline E. Grove, a domiciled Englishwoman, who died on 29th Oct., 1866, at the age of 88, a lunatic and intestate, and possessed of considerable property. Two families claimed to be her next of kin, the Vaucher family and Falquet family, and both claimed through the grandfather of the intestate, Marc Thomegay, and the same woman, Martha Powis, under the following circumstances :—Marc Thomegay was born in Geneva, of Swiss parents, in 1712, his domicil of origin being Genevese. In 1728 he was received as a burgess of Geneva, and in 1729 his father died in Geneva. In 1734 Marc went to England and resided there until his death in 1779. Some time

after his arrival there he formed a connection with an Englishwoman, Martha Powis, by whom he had three illegitimate children—Sarah, born 5th Feb., 1744, a son born 11th Feb., 1745, and another daughter born 14th Nov., 1747—who were all baptized shortly after birth under their father's name and as his children. Sarah married, and was the ancestress of the Vaucher family. On 22nd May, 1749, Marc Thomegay married an Englishwoman named Elizabeth Woodhouse; of this marriage one child was born, who was the parent of Caroline E. Grove, the intestate. Elizabeth Woodhouse died 26th March, 1752, and on 2nd Feb., 1755, Marc married Martha Powis, by whom he had previously had the three illegitimate children above mentioned, and by this marriage he had four children, only one of whom left issue, and she was the ancestress of the Falquet family. In 1773 a special Act of Parliament was passed naturalising several foreigners, among them Marc's brother, but not himself. Martha Powis died in 1772. In the year 1774, Marc Thomegay presented a petition to the Council of Geneva, apparently in the interest of his three illegitimate children, in which he stated his illicit intercourse with Martha Powis and the birth of three children, that his intention to marry her was thwarted, and he married Miss Woodhouse, and her death and his subsequent marriage with Martha Powis. The petition further stated that the petitioner was informed that according to the laws of Geneva, his native country, subsequent marriage legitimized illegitimate-born children, and praying that the Council might grant him record of his proofs, etc., so that no one might question the legitimacy of his three children in Geneva, his native country. An order was granted by the Council granting record accordingly. Marc Thomegay made his will in English form in 1779, describing himself as of Tottenham, in the County of Middlesex, and died the same year. According to the laws of Geneva, children born out of wedlock were legitimated by the subsequent marriage of their parents. In order to determine the conflicting claims of the parties therefore, it became necessary to determine the domicil of Marc Thomegay at the time of his marriage with Martha Powis. Stirling, J., held that his domicil at the time of his marriage with Martha Powis was English, and therefore that the descendants of Sarah were not entitled to inherit as next of kin, and this decision was affirmed by the Court of Appeal (Cotton, Fry and Lopes, L.JJ.), who were of opinion that the whole evidence showed that Marc had come to England with the intention of changing his domicil, and that the Act of Parliament and the petition to the Geneva Council did not displace this evidence. As Lopes, L.J., observed, the non-naturalisation of Marc, while it indicated a wish to preserve his nationality, in no way disproved his having an English domicil. And Cotton, L.J., says at p. 232: "What is really necessary, I think, is that the father should at the time of the birth of the child be domiciled in a country allowing legitimation, so as to give to the child the capacity of being made legitimate by a subsequent marriage. But it is the subsequent marriage which gives the legitimacy to a child who has, at its birth, in consequence of its father's domicil, the capacity of being made legitimate by a subsequent marriage." And on the next page he says: "In my opinion the domicil must give a capacity to the child of being made legitimate, but then the domicil at the time of the marriage,

which gives the status, must be domicil in a country which attributes to marriage that effect."

PRACTICE—COSTS—TAXATION—COSTS PAYABLE OUT OF ESTATE.

In *Brown* v. *Burdett*, 40 Chy. D. 244, Kay, J., adopted the somewhat unusual course of refusing to allow to trustees as against an estate their taxed costs, and directed such sum only to be allowed as the taxing officer considered would have been a reasonable compensation had the proceedings been duly conducted without any unnecessary delay. The circumstances calling for this exercise of jurisdiction were, that on the hearing of the action on further directions, it appeared that it was one for administration which had been commenced in 1875, and had consequently been pending about fourteen years; that gross delay had characterized the conduct of the cause; that the estate was worth about £4,000, and that the whole of it nearly was required to pay the taxed costs. In adopting the course he did, Kay, J., laid down two principles: "1. The Court will not permit the costs occasioned by improper litigation, or by the negligent conduct of administration proceedings, to be paid out of an estate under its care. 2. The amount of costs allowed by a taxing master as between the client and his solicitor, is not conclusive of the amount which the Court will allow out of the estate," and these principles were approved by the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.), who affirmed his decision.

RAILWAY COMPANY—DISPUTED INTEREST—INJUNCTION—JURISDICTION.

In *Birmingham & District Land Co.* v. *London & N.-W. Ry. Co.*, 40 Chy. D. 268, the plaintiffs were in possession of land under a binding agreement, determinable if the buildings were not completed by 30th November, 1885. They were informed in 1880 of the promotion of a bill for a railway which would affect the lands, and they thereupon had an interview with the agent of the landlord, who told them to suspend building operations till the result of the railway scheme was known, but no express agreement was made for the extension of the time for building. In 1883 the defendant company obtained their Act, and on the 31st July, 1883, purchased from the landlord such part of the land as was required, subject to the building agreement. On the 16th September, 1884, the defendants sent the plaintiffs notice to treat. The plaintiffs sent in no claim, and in January, 1886, the defendants took possession without making a deposit or giving any bond as required by the Railway Act; thereupon the plaintiffs brought the present action for an injunction, and to have it declared that the building agreement was subsisting, and that they were entitled to have their interest assessed on that footing, The action was resisted by the defendants on the ground that the plaintiff should have proceeded under the Railway Act to get compensation; and, second, that the plaintiffs' interest under the agreement had expired. But the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.) affirming, Kekewich, J., held that as the defendants had, without complying with

the Railway Act, entered upon the land of which the plaintiffs were lawfully in possession, the action would lie, and that it was competent for the Court to make a declaration of the plaintiffs' title; and that although the term named in the agreement had expired, yet that the agent's direction to suspend building raised an equity in their favor against the landlord to prevent his ejecting the plaintiffs at the end of the term, until they had a reasonable time after notice to complete the building, and that the railway company took subject to that liability.

WARD OF COURT—MARRIAGE OF WARD WITHOUT LEAVE OF COURT—SETTLEMENT—INFANTS' SETTLEMENTS ACT (18 & 19 VICT., c. 43)—R.S.O., c. 44, s. 32.

In re Leigh Leigh v. *Leigh*, 40 Chy. D. 290, the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.) determined that where a male infant ward of Court had married without the leave of the Court, the Court had no power under the Infants' Settlement Act to compel him to execute a marriage settlement of his property. In this case the plaintiff while an infant ward of Court had married without leave, and fearing he would get into trouble and that his allowance for maintenance might be suspended, executed under the direction of the Court a settlement of his property. The present application was made by him on his attaining his majority by way of appeal from the order directing the settlement, and to cancel the settlement made thereunder; the Court being unanimously of opinion that the Infants' Settlement Act gives the Court no power to compel an infant to execute a settlement of his property against his will.

UNFAIR DEALING—PURCHASE OF REVERSIONARY INTEREST—SALE—UNDERVALUE—31 VICT., c. 4 (R.S.O., c. 100, s. 35).

In *Fry* v. *Lane*, 40 Chy. D. 312, Kay, J., set aside a purchase of a reversionary interest from a poor, ignorant man, having no independent advice, and the sale being made at a considerable undervalue, holding that the circumstance of the vendor being poor and ignorant and without independent advice, cast the onus on the purchaser of showing that the transaction was fair, just and reasonable. It appeared that the same solicitor had acted for both parties, but the learned judge found that he was more concerned to get a good bargain for the purchaser than to protect the interest of the vendors. Respecting this aspect of the case, Kay, J., observes at p. 323: "The most experienced solicitor, acting for both sides, if he allows a sale at an undervalue, can hardly have performed his duty to the vendor. To act for both sides in such a case, and permit a sale at an undervalue, is a position in which no careful practitioner would allow himself to be placed." The Imperial Statute, 31 Vict., c. 4, from which R.S.O., c. 100, s. 35, is taken, provides that "no purchase made *bonâ fide* without fraud or unfair dealing of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on the ground of undervalue," was held not to prevent the Court from setting aside the transaction, "where the undervalue is so gross as to amount of itself to evidence of fraud"; and yet it may be observed the purchaser in this case was

acquitted by the judge of any moral fraud, but found guilty only of unfair dealing, "which Equity considers a fraud." It may be well to notice that the words "unfair dealing" are omitted in R.S.O., c. 100, s. 35.

COPYRIGHT—PHOTOGRAPH—IMPLIED CONTRACT—BREACH OF FAITH—INJUNCTION.

Pollard v. *Photographic Company*, 40 Chy. D. 345, was a novel kind of action. The plaintiff had been to the defendant to have her likeness taken by photograph. From the negative so taken the defendant constructed a Christmas card which he exhibited in his shop and offered for sale. There was no copyright registered of the photograph. The action was brought to restrain the defendant from offering for sale, or exposing by way of advertisement or otherwise, the photograph of the plaintiff, and North, J., granted the injunction, holding that a photographer who takes a negative likeness of a lady customer in order to supply her with copies for money, may be restrained both from selling or exhibiting copies, both on the ground that there is an implied contract not to use the negative for such purposes, and also on the ground that such sale or exhibition is a breach of confidence.

CONDITION—DEBENTURE—TIME AND PLACE OF PAYMENT.

Thorn v. *City Rice Mills*, 40 Chy. D. 357, was an action to recover the amount due on a debenture. By the debenture the principal sum was payable at a future date, and interest was payable thereon half yearly, subject to conditions that if default should be made for fourteen days in payment of the interest, the principal should be immediately payable, and that principal and interest should be payable at one of two places. A half year's interest was not paid within fourteen days of the time appointed, but the plaintiff did not appear at either place at the time named for payment. The company offered to pay the interest in default, but the plaintiff claimed to recover the principal also by reason of the default. But it was held by North, J., that no demand having been made by the plaintiff at either of the places named for payment, there had been no default, and consequently that the plaintiff was not entitled to recover the principal money as he claimed.

TRUSTEE, PAYMENTS MADE BY, FOR COSTS—BREACH OF TRUST—CLAIM TO HAVE COSTS PAID REFUNDED TO ESTATE.

In re Blundell Blundell v. *Blundell*, 40 Chy. D., 370, a question arose as to whether a solicitor whom a defaulting trustee had suffered to retain money out of the trust estate for costs, could be ordered to refund it to the estate on the ground that the trustee was in default to the trust estate. In this case at the time the trustee allowed his solicitors to retain costs out of the trust estate, the solicitors had notice that the trustee had committed a breach of trust in secretly buying for himself part of the trust estate. The action was for administration of the trust, and the

trustee having made default in paying into Court the balance fund against him, an application was made against the solicitors to compel them to refund the costs they had so retained; but it was held by Stirling, J., that in order that a solicitor of a trustee may be debarred from accepting payments out of the trust estate in respects of costs properly incurred, notice must be brought home to him that at the time when he accepted them the trustee had been guilty of a breach of trust such as would preclude him from resorting to the trust estate for payment of his costs, and that the breach of trust of which the solicitors had notice was not necessarily such a one as would disentitle the trustee to be indemnified for his costs properly incurred out of the estate.

Notes on Exchanges and Legal Scrap Book.

PUNISHING THE JUDGES.—If we may believe the author of the "Mirror of Justices," who is said to have written in the reign of Edward I., there were almost as many judges as malefactors hanged in the time of Alfred. That active monarch ordained that all false judges, after forfeiting their possessions, "should be delivered over to false Lucifer, so low that they never return again; that their bodies should be banished, and punished at the king's pleasure and that for a mortal false judgment they should be hanged as other murderers." That this denunciation was not merely *brutum fulmen* appears from a list, given by the same author, of the judges executed by the king's order. In one year we are told that forty-four justices were hanged. "He hanged Cole, because he judged Ive to death when he was a madman. He hanged Athulf, because he caused Copping to be hanged before the age of one-and-twenty years. He hanged Dilling, because he caused Eldon to be hanged, who killed a man by misfortune. He hanged Horne, because he hanged Simin at days forbidden." A judge at this time could hardly escape with life or limb; for, not content with hanging, Alfred maimed his judges for not maiming their prisoners. Thus, we are told, he cut off the hand of Haulf, because he saved Armock's hand, who was attainted before him, for that he had feloniously wounded Richbold; and he judged Edulfe to be wounded, because the latter judged not Arnold to be wounded, who feloniously had wounded Aldens."—*The Green Bag.*

DIARY FOR MAY.

1. Wed.....St. Philip and St. James.
2. Thur.....Admission of graduates and matriculants. J. A. Boyd 4th Chan., 1881.
3. Fri.....Mr. Justice Henry, died 3rd May, 1888.
4. Sat. .....Last day for filing paper and fees for final examination.
5. Sun .....*Second Sunday after Easter.*
6. Mon .....Supreme Court of Canada sits. 1st Intermediate Exam. Lord Brougham died 1868, aet. 90.
9. Thur. ...2nd Intermediate Examination.
12. Sun .....*Third Sunday after Easter.*
14. Tue .....Court of Appeal sits. Gen. Sess. and Co. Ct. Sitt. for trial in York begin. Solicitors' Examination.
15. Wed.....Barristers' Examination.
19. Sun .....*Fourth Sunday after Easter.*
20. Mon .....Easter Term commences. High Court Justice Sittings begin.
21. Tue .....Confederation proclaimed 1867. Lord Lyndhurst born 1772.
24. Fri.....Queen Victoria born 1819.
26. Sun .....*Rogation Sunday.*
27. Mon .....Habeas Corpus Act passed 1679.
28. Tue .....Battle of Fort George 1813.
30. Thur. ...Ascension Day.

Reports.

ONTARIO.

HIGH COURT OF JUSTICE.

[Reported for the CANADA LAW JOURNAL.]

Re CENTRAL BANK OF CANADA.

Winding-up Act, R.S.C., c. 129—Impeaching bank charter and treasury certificate—Bank trafficking in shares, or reducing its capital—Shareholders by estoppel—Defences after winding-up order.

An Act incorporating a bank, and providing that the Act shall be in force until 1891, continues the legal vitality of the corporation until then, subject to its complying with the preliminary conditions as to its commencing banking business.

The certificate of the Treasury Board authorizing a bank to commence its business, is conclusive evidence that all the conditions of its charter have been complied with.

Persons who acquire shares in a bank, and attend meetings and receive dividends, and are recognized by the bank as shareholders, are estopped from impeaching the validity of the charter or treasury certificate, or that their shares never had a lawful existence, or were held under an unlawful trust, or were affected by other infirmities of title.

A person may become a shareholder without signing the stock book, or any written agreement to take shares; and the bank and a shareholder may waive the statutory condition requiring payment of ten per cent. within thirty days of the subscription for shares.

Directors subscribing for shares to enable the bank to go into operation, cannot relieve themselves from liability respecting such shares by declaring them to be "trust shares," and that no calls are to be payable on such shares; nor can the transferees of such shares, after a winding-up order, contend that by the directors so acting the bank was trafficking in its own shares, or that the shares were invalid, or that such transferees never became shareholders in the bank.

A cashier of a bank cannot use the bank's funds to purchase for the bank its own shares, as such a purchase, (1) if for the purpose of re-selling the shares, is prohibited by the Bank Act; or (2) if for the purpose of returning the money to the shareholders, would operate as a reduction of the bank's capital without the authority of law.

Where a transferror who is not at the time of transfer the owner of the specified number of shares, but who subsequently obtains and registers sufficient shares to make up the specified number, and the bank registers the transfer and pays, and the transferee receives, dividends on such specified number of shares, the bank and the transferee are estopped from contending that the specified number of shares did not pass to such transferee.

Semble: A bank having unissued shares may in such a case, recognize the transfer as conveying the shares actually held by the transferror, and may supplement out of its unissued shares sufficient to make up the specified number.

After a winding-up order there are only creditors and contributories before the Court, and no corporation; and shareholders cannot then raise defences which would be available against the corporation, as rescission of the contract respecting the shares is then impossible.

[TORONTO, June 29, 1888.

This was a proceeding before the Master-in-Ordinary under the Dominion Winding-up Act, R.S.C., c. 129, to settle a list of contributories. The bank had been declared insolvent by an order of Court, and three liquidators had been appointed to wind up its affairs. The material facts and the defences raised by the contributories are stated in the judgment.

MR. HODGINS, Q.C., MASTER-IN-ORDINARY: The evidence in this case has disclosed so many irregular, if not unlawful, transactions in the organization and management of this bank, as to have induced the shareholders to seek out and build up all possible defences against their liability for the corporate debts of the bank. Had the shareholders who now complain investigated the subscription for and transfer of the shares before acquiring them, they might have avoided the disasters in which they now find themselves involved. In taking the chances of gains on their purchase of shares they took also the risk of a total loss, and they are now learning the hard

lesson that as between the hardship of their present unfortunate position and the rights and equities of creditors, the Court can find no law to relieve them of the liability placed upon them by the Bank Act.

The bank in question was incorporated on the 23rd May, 1883 (46 Vict., c. 50); it commenced business about the end of February, 1884, and suspended payment on the 15th November, 1887—its paid up capital of $500,000 having been lost or wasted. Few banks, for the short period this Central Bank was in operation, can show so many disastrous, and, in some cases, scandalous financial transactions as those disclosed in the evidence before me.

I must denounce, in the strongest language allowable to judicial utterances, the wrongful practice adopted by this bank of making untrue returns of its shareholders to the Government. The evidence discloses that, although between 6,000 and 7,000 shares were subscribed for between the opening of the stock books and the suspension of the bank, each year's return to the Government cut them down to only 5,000. A vicious and unlawful practice of "dropping out" shares from these returns seems to have been invented, without its purpose being explained. Thus, in February, 1884, when it got its license from the Government, 5,010 shares were returned; between that date and the next return in January, 1885, 1,008 additional shares were subscribed for, making the total number 6,018 shares, but only 5,000 were returned. Between the 31st December, 1885, and 31st May, 1886, new holders to the extent of eighty-five shares came in, and an equal number of the shares previously returned to the Government were "dropped out." Between this latter date and the 5th November, 1886, new shares to the number of 346 were subscribed for, but, to keep the figures at 5,000, 360 shares previously returned and published in the Government blue books were "dropped out," and of these fourteen were redistributed. On many of the shares so "dropped out" the ten per cent. required by the Bank Act had been paid. This practice has apparently delayed the creditors of the bank in enforcing the liability of the shareholders so "dropped out"; but I have directed the liquidators to investigate the stock books and other contracts respecting shares, and to bring in a supplementary list of contributories. This, if not in the interest of the creditors, is in the interest of those shareholders who have lost their paid-up shares and are now called upon to pay their double liability, for after the creditors are paid off these shareholders have the right to call upon the non-paying shareholders, who are still liable, to adjust with them the accounts and equities of their common liability as partners and shareholders in this bank. Equally wrongful were the proceedings by which about $41,000 of the capital of the bank deposited in the Bank of Montreal, and which were included in its certificate to the Government, were "dropped out" of the accounts of the capital stock as entered in the books of this bank. The money deposited in the Bank of Montreal became and was the money and lawful property of the Central Bank, and no manipulation of the books or accounts, or alleged misappropriation by the directors, could lawfully deprive the Central Bank and its creditors of the money so received for the purpose of its organization.

In disposing of the various defences affecting the liability of the shareholders as contributories under these liquidation proceedings, I have allowed a latitude of defence and an admission of evidence which would not be allowable in ordinary cases. This exceptional course was adopted, not from any reasonable doubt as to my jurisdiction to hear the limited issues of fact, properly triable, but because this was the first case in which the double liability of shareholders was to be enforced, and because I felt I would be better able at the close of the evidence to define the limits of the inquiry and the extent of the jurisdiction I exercise in disposing of the various questions raised by the contributories. Another reason was my belief that the disclosures affecting the inception and financial management of this short-lived bank would be in the public interest, and therefore beneficial and cautionary to the banking and commercial interests of the community, as well as to the directors and other responsible officers of financial corporations.

As to the defence that the bank was never legally organized, or if organized, that its

charter, and therefore its corporate character, had been forfeited, there are several answers. The Act incorporating the bank (46 Vic., c. 50 D.) constitutes the parties named in the Act and such other persons as may become shareholders, and their assigns, a corporation by the name of "The Central Bank of Canada." The Act requires that before commencing business this corporation shall obtain from the Treasury Board a certificate that $500,000 of capital had been *bona fide* subscribed, and that $100,000 had been *bona fide* paid up. It also provides that if $200,000 be not paid up before obtaining such certificate, such sum shall be called in and paid up "within one year from the date of such certificate." Then follows a proviso that a failure to comply with these conditions shall render the Act null and void, and the charter shall be forfeited. Following this proviso comes the last section of the Act, which reads thus: "This Act shall remain in force until the 1st July, 1891." There seems, therefore, to be an apparent contradiction between the proviso and the last clause as to the life of the Act, and therefore as to the legal vitality of the corporation created by it. Under the ordinary canon of statutory construction the last clause must be read as qualifying and controlling the proviso to the extent, I think, of providing that while the corporation is to continue until July, 1891, its power of transacting the business of banking is to be contingent upon its complying with the conditions prescribed by the Act of Incorporation: *Re Holt*, 4 Q.B.D. 29; *Castrique* v. *Page*, 13 C.B. 461. This want of harmony appears to run through all the Acts incorporating banks.

Another defence is that the validity of the certificate of the Treasury Board, under which the Bank is authorized to commence business, is impeachable. Though the English law as to the effect of the certificate of the public officer under which a corporation there may commence business, is not in all respects similar to the Dominion law, it would appear that the purport of the certificate is the same. The Courts there have held that such certificate is not only *prima facie*, but conclusive, evidence that all previous requisites have been complied with. And they hold that even should the public officer miscount the shares, where there was not the statutory number, and grant the certificate, such certificate could not thereafter be impeached: *Bird's case*, 1 Sim. N.S. 147.

The cases on this point also show that, where by reason of such certificate a corporation is held out to the world as ready to undertake business, most disastrous consequences would follow to commercial undertaking if any person was allowed to go back and enter into an examination of the circumstances attending the original corporation: *Oakes* v. *Turquand*, L.R., 2 H.Lds. 325; *Peel's case*, L.R., 2 Ch, 684. For these reasons it is not competent for an objector to show that by reason of any prior defect, all the acts and contracts of the company since its supposed incorporation, were null and void: *Bird's case*, 1 Sim. N.S. 147.

Under the United States Banking Act the banks in that country are not allowed to commence the business of banking until they obtain a certificate from the comptroller—a provision very similar to that in our Banking Act already referred to. There is no direct decision in our Courts as to the conclusiveness of the certificate of the Treasury Board; but decisions of the Federal and State Courts of the United States show that the validity of the comptroller's certificate there cannot be questioned by any collateral proceeding, and that it is conclusive for all the purposes of the bank's organization: *Casey* v. *Galli*, 94 U.S.R. 673. And the Courts there have also held that one who contracts or deals with a corporation as existing in fact, is estopped from denying as against such corporation its regular organization, or contending that it has not been legally authorized to transact the business of its incorporation: *Chubb* v. *Upton*, 95 U.S.R. 665; *Close* v. *Greenwood Cemetery*, 107 U.S.R. 466. In the case of *Casey* v. *Galli*, 94 U.S.R. 673, cited above, the United States Supreme Court said: "Where a shareholder or a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence or legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must

take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent in its effects and consequences should be as if it were real; and the law properly so regards it."

In this country a similar rule applies to the letters patent incorporating a company—such letters patent being held to be conclusive evidence that all the preliminary statutory requisites to incorporation had been complied with: *Lake Superior Company* v. *Morrisen*, 22 C.P. 224.

A great deal of evidence has also been given with the object of establishing some infirmities of title to the shares held by the transferrors of those who are now before me as contributories. These infirmities of title could, and ought to have been, investigated by these parties at the time they acquired their shares, or within a reasonable time thereafter. In a large majority of cases they accepted the shares as valid and good; they paid money for them, which went into the capital of the bank, and they received from the bank and accepted share certificates and dividends in cash as the percentage of profit which their shares had realized by the financial operations of the bank. Some of them attended the meetings of shareholders; some granted proxies to directors, some transferred within the month prior to the suspension a portion or all of the shares so held by them in the bank.

After so committing themselves as shareholders, they now contend that their shares never had a lawful existence, that by non-payment of ten per cent. within thirty days after the original subscription, the shares were not lawfully subscribed; that shares subscribed for by the directors to make up the statutory amount were held under an unlawful trust for the bank, and therefore void; that the bank bought and trafficked in its own shares, and that the cashier, Allen, or other transferrors, had not shares to meet the amount or number stated in the transfer to them in the transfer book of the bank.

I had held in *Day's case* that, although the statutory provision requiring payment of ten per cent. within thirty days after subscription, was part of the contract to the shares, it was competent for the parties to waive it; and that where the money had been paid to and accepted by the bank, and stock certificates had issued recognizing the party as a shareholder and dividends on the shares had been paid to him, both parties were estopped from denying that he was a shareholder in the bank. That judgment has been appealed, but as yet stands unreversed.* I must, therefore, follow it in the other cases before me.

Another contention is that under a resolution of the Provisional Board, dated the 10th January, 1884, certain shares were acquired by the directors in trust for the bank, and that the bank has either been trafficking in its own shares contrary to the express provisions of the Bank Act, or that such shares were never subscribed for *bona fide*. The resolution is as follows: "That it being desirable to commence the organization of the bank without further delay, the directors agree to take up (in addition to their present holdings) the balance of the stock unsubscribed up to $500,000 in trust, to hold the same for such persons as may desire to subscribe for stock; and such subscriptions by directors in trust shall be cancelled or transferred *pro rata*, so as to reduce or cancel each holding in proportion, it being understood that no calls are to be payable on such trust holdings until such time as the stock is transferred to or taken by other parties."

The design of the directors was to take stock so as to bring the shares up to $500,000 to enable the bank to go into operation. Several of the directors did so subscribe and did pay certain moneys into the Bank of Montreal as payments on account of the $100,000 required by the Bank Act.

The "understanding" set out in the resolution as to "trust stock" its "cancellation," unless as prescribed in the Bank Act, and that "no calls are to be payable" may be eliminated out of the resolution as void. The moment each director signed the stock subscription book agreeing to take a certain number of shares, he undertook a personal liability to pay all calls upon such shares, from which he could only free himself under the conditions prescribed by the Bank Act.

* Affirmed 5th October, 1888.

Similar proceedings by directors have been attempted in other companies, the latest analogy being furnished in *Union Fire Insurance Company* v. *Shoolbred*, 4 Ont. R. 359. An earlier one is reported in *Port Whitby Ry. Co.* v. *Jones*, 31 U.C.R. 170, where it was held that although directors agreed with a party to take shares to an amount required to organize the company on condition that he should not be liable for calls thereon, such an agreement was in fraud of the Act and could not be availed of; and it was further held that as the party had attended meetings of the company, he could not dispute his being a shareholder, or that he was not liable in respect of the shares subscribed for. In 1840, several directors of a company in England, in order to make up the required number of shares for incorporation, subscribed for stock, and agreed among themselves to vest it in the secretary "in trust for the company;" and they resolved—as in this case—that no calls should be made on such shares. The transfer to the secretary was never executed. Two actions were instituted, one by a shareholder to compel the directors to make calls on themselves and pay up; the other by the directors, to be relieved of their liability, on the ground that they were only trustees for the company, and that the subscription was not *bona fide*. The Court held that the directors, as shareholders, were liable in respect of the deposit and all calls on such shares, and that they could not set up the trust, or claim that the subscription was fictitious and fraudulent for the purpose only of floating the company.

In giving judgment in the first case the Vice-Chancellor said: "The parties became subscribers for these shares; and admitting they did take the shares in trust for the company, they were the holders of these shares and were liable to all those operations that were to be performed by those who held shares. Even to this day there has been no transfer of these shares by the nine subscribers, the consequence of which is, let them state what they please with respect to an acknowledgment of the trust, and an intention to exonerate themselves from any liability as trustees under the provisions of the Act, they are clearly liable when calls are made upon the shareholders:" *Preston* v. *Grand Collier Dock Co.*, 2 R. & C. Cas. 358. And in the action by the directors to be relieved of the shares, he said: "There is an inference raised from the facts that the original subscription of these persons was bad, and that the original project cannot go on. Whereas it does appear to me that these persons who subscribed are now by law liable to pay the whole amount of their subscriptions, and that they are compelled by law to pay. And it would be no answer to an action to compel payment, to say they intended a fraud to be committed. It would rather make the matter worse:" *Mangles* v. *Grand Collier Dock Co.*, 2 R. & C. Cas. 366. Later cases negative the lawfulness of persons acquiring shares "in trust" for the company, and I must therefore hold that the shares so acquired by the directors were legal shares, and carried the liability to pay the calls thereon when lawfully made by the bank.

Another ground of defence is that the bank through Allen, its cashier, trafficked in shares; that he bought in from time to time with the bank's money certain shares which were held by him under the title of "A. A. Allen, cashier in trust," and that the account under that name in the deposit ledger was a bank account in respect of these shares.

To give effect to such a defence would be to fly in the face of the express prohibition contained in the 45th section of the Bank Act, which provides that "the bank shall not, either directly or indirectly, purchase or deal in any shares of the capital stock of the bank," a prohibition which has been held by our own Supreme Court to be "a law of public policy in the public interest, and any violation of it necessarily null and void": *Bank of Toronto* v. *Perkins*, 8 S.C.R. 640.

Such a buying in of shares by the bank would be practically a reduction of its capital stock without the authority of law, and therefore void. In *Trevor* v. *Whitworth*, 12 App. Cas. 409, the question was considered in the double aspect of a reduction of the capital and the buying in of the shares by the company for the purpose of selling again. Lord Herschell in giving judgment said that the stringent precautions to prevent the reduction of capital of a limited company would be idle if the company might purchase its own shares wholesale;

and that if it were otherwise the result would be that the shareholders would receive back the money subscribed, and there would thus pass into their pockets what before existed in the form of cash in the coffers of the company, or of buildings, machinery or stock available to meet the demands of the creditors. And he also held that the purchase of shares for the purpose of re-selling would be a trafficking or dealing in shares, and unlawful.

Whatever may have been Allen's design in the purchasing and selling of shares; the directors examined before me expressly repudiate giving him any authority to do so, except to sell their so-called "trust shares;" and therefore, in view of the penal and prohibitory clauses of the Bank Act on this point, I must hold that the purchase and sale of shares by Allen was on his own account, and that whatever shares he acquired he did so on his personal responsibility.

The defence most strongly urged was that, in any event, Allen in making several of the transfers of shares had not at the date of the transfer the number of shares specified in such transfer. This I find to be a fact on the occasion of some of the transfers. But I must also find as a fact that at the same time he was authorized as agent of the directors who subscribed for the trust shares to sell for them such trust shares, and although at the time the legal title to these shares had not vested in him, he acquired it by transfer shortly afterwards. The law respecting the conveyance of a title to real estate says that if at the time of conveyance the grantor has no title or only an interest, and afterwards acquires the estate in fee, the conveyance which before operated only by estoppel, shall then take effect out of the newly-acquired estate of such grantor: Co. Lit. 47 b. Whether such a rule is applicable to the transfer of shares in a company, may not be necessary to consider in view of the cases to which I shall refer.

But before referring to them I may say that I see nothing in the law to prevent a bank or corporation on receiving from a shareholder a transfer of more shares than he is the registered owner of, recognizing such transfer to the extent of the number of shares the transferor is lawfully entitled to, and then supplementing out of its own authorized but unissued shares a sufficient number to make up the amount required by the transferee. In the cases before me each transferee appeared to have signed in the proper book an acceptance of a specified number of shares, and it was optional in the bank, when there was a deficiency of shares in the transferor, to recognize the transfer. Where it did, and thereupon issued a share certificate for the specified number of shares,—such certificate would operate, I think, either by way of estoppel, or as an issue of so much of its own shares as would be necessary to complete the specified number required by the incoming shareholder.

But as the question has been settled by authority, it may not be necessary to consider it further.

In *Weikersheim's case*, L.R., 8 Ch., 831, one Lewis, a shareholder, transferred on the 23rd August, 1864, 1,400 shares in the Land Credit Co. to the appellants, but at that date he had no shares registered in his name. On the 5th September the transfers to Lewis were left at the office and registered as of the 30th August. It was contended that as Lewis had not the shares at the date of his transfer, the appellants were not liable, but Lord Justice JAMES held that as the appellants had been registered by the company as shareholders in respect of the 1,400 shares, the want of title in Lewis was not material; and that after such registration the company could not have disputed the right of the appellants as shareholders and members, nor could the appellants have disputed the fact that they were entered on the books of the company as shareholders having all the rights and liabilities of members in the company. Lord Justice MELLIS thought that the registration of the appellants as members of the company would make them "shareholders by way of estoppel;" that they did not really become shareholders until the date of the registration to Lewis (30th August), but that as they had re-transferred the shares to Lewis, it was totally immaterial whether they became shareholders at any one of the prior dates mentioned, because the extent of their liability depended upon the time when they made the re-transfer, and not on the time when they took the transfer of the 1,400 shares.

Other cases show that where the consent to become member of the company is shown, the invalidity of the transfer may be of no importance, the question to be considered

being, have the transferees agreed to accept the shares purporting to be transferred?

The same doctrine as to one becoming a "shareholder by way of estoppel" has been affirmed by the Supreme Court of the United States.

In a case in which share certificates had issued in blank, the learned judge of the Supreme Court said: "The only question was whether the appellant owned the stock. No one else claimed it. The certificates were issued and delivered to her. They were the muniment of her title. She had paid to the company all that was then payable, and subsequently received a dividend. Her name was placed on the stock list. These facts were conclusive against her. She was estopped from denying her ownership. She could not assert her title if there was a profit, and deny it if there was a loss. The certificates showed the par of the stock and the amount paid. Upon receiving them the law implied an agreement on her part to respond to the balance whenever called upon in any lawful way to do so. It would be a mockery of justice to permit such an objection to prevail:" *Sanger* v. *Upton*, 91 U.S.R. 63.

It is well known that the doctrine of estoppel is generally favored by the Courts, especially where it is essential to the quick and easy transaction of business. And so that a man should be able to put faith in the conduct and representations of his fellow, the Courts have inclined to hold such conduct and representations binding in cases where a mischief or injustice would be caused by treating their effect as revocable: 2 Smith, L.C. 460a.

Acting upon this doctrine, I must hold that where the bank has issued a share certificate, or otherwise recognized the incoming shareholder as entitled to a specified number of shares, where it has entered his name as a shareholder in the proper books of the bank, and where it has paid him as dividends the profits accruing on his shares, and where he has accepted such certificate and dividends, and otherwise acted as a shareholder, both the bank and the shareholder are estopped in law and must be held to the consequences of their acts.

After such a course of dealing rescission of the contract, or renunciation of the relative rights and liabilities of the shareholder and the bank, are impossible; and whatever invalidities there may have been in the original subscription or transfer, or defects in the title of the transferror—they are waived on both sides—the incoming shareholder becomes "a shareholder by way of estoppel."

During the argument I asked what was there to prevent a person desirous of purchasing shares from waiving the formality of signing the stock book, and on paying the full value of a specified number of shares, and having his name entered as a shareholder in the proper books, and obtaining a share certificate—the muniment of his title—from the company, and so becoming a shareholder? The reply given was that the law required a written subscription.

My question has, I find, been answered by our Court of Appeal in *Caston's case*, 12 App. R. 486. That case was under a statute which contained similar provisions as to subscription and payment to those prescribed by the Bank Act. The facts there showed that the appellant had signed powers of attorney, authorizing the manager of the company to subscribe for shares for him. The manager did not subscribe the stock book, but caused an account to be opened in the company's books as if he was a shareholder, and credited him with certain fees due him for services as a solicitor. In giving judgment, HAGARTY, C.J., said: "There are cases in which a person's status and liability as a shareholder can be established without an actual subscription or written agreement to take stock." BURTON, J.A.: "The applicant having been allotted and having accepted shares, is a shareholder." OSLER, J.A.: "I agree that it was not necessary that he should actually sign a subscription list. . . . In these circumstances it appears to me that each party is estopped as against the other from denying that Mr. Caston became a shareholder."

And the last named judge (OSLER, J.), in *Union Fire Ins. Co.* v. *O'Gara*, 4 Ont. R. 369, said: "A person may make himself liable as a shareholder in many other ways than by subscribing for shares and obtaining a formal allotment; and one who had caused his name to be entered on the company's books as a shareholder in respect of shares taken for the purpose of making up the statutory amount would, on principle, clearly be estopped from

afterwards saying he was not the holder of such shares."

It may be added that, although many defences are open to shareholders in actions between themselves and the bank, the rule is clearly established that such defences must be availed of within a reasonable time, and before any waiver of the defence by accepting dividends, or otherwise dealing with the shares.

But the right to such defences—even to that highest defence, fraud—is gone the moment the bank comes under the operation of the Winding-up Act, and its members are transformed from "shareholders" or owners of its share property to "contributories," or persons bound to contribute to the assets, for the benefit of the creditors. After an order to wind up a company there are only creditors and contributories and no company, and then rescission of the contract in respect of the shares is impossible: *Burgess' case*, 15 Ch. D. 509. The question then to be considered is not who is the person who is the owner of the shares, but who is liable in respect of the legal tenancy, at the time the tree was cut down: per Lord Westbury in *Barrett's case*, 4 De G.J. & S. 421.

I have now, I think, disposed of the various defences raised in the majority of the cases before me. A few others must be dealt with separately on the settlement of the list.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

ROBERTSON *v.* WIGLE (THE ST. MAGNUS).

[March 19.

Maritime Court—Collision—Damages—Party in fault—Answering signals.

The owners of the tug "B. H." sued the owners of the steam propellor "St. M." for damages occasioned by the tug being run down by the propellor in the River Detroit.

Held, reversing the judgment of the Maritime Court of Ontario, that as the evidence showed the master of the tug to have misunderstood the signals of the propellor, and to have directed his vessel on a wrong course when the two were in proximity, the owners of the propellor were not liable, and the petition in the Maritime Court should be dismissed.

Appeal allowed with costs.

MacKelcan, Q.C., and *Lash*, Q.C., for the appellants.

Christopher Robinson, Q.C., and *S. White*, for the respondents.

WARNER *v.* MURRAY.

[April.

Insolvent estate—Claim by wife of insolvent—Money given to husband—Loan or gift—Questions of fact—Finding of Court below.

M., having assigned his property to trustees for the benefit of his creditors, his wife preferred a claim against the estate for money lent to M. and used in his business. The assignee refused to acknowledge the claim, contending that it was not a loan, but a gift to M. It was not disputed that the wife had money of her own, and that M. had received it. The trial judge gave judgment against the assignee, holding that M. did not receive the money as a gift. This judgment was confirmed on appeal.

Held, affirming the judgment of the Court of Appeal, that as the whole case was one of fact, namely, whether the money was given to M. as a loan by, or gift from, his wife, who in the present state of the law is in the same position, considered as a creditor of her husband, as a stranger, and as this fact was found on the hearing in favor of the wife and confirmed by the Court of Appeal, this, the second Appellate Court, would not interfere with such finding.

Appeal dismissed with costs.

Moss, Q.C., for the appellant.

Gibbons, for the respondent.

VIRTUE *v.* HAYES, *in re* CLARKE.

[April 9.

Appeal—Final judgment—Jurisdiction—Discretion of Court or judge.

Judgment was recovered in the suit of *Virtue* v. *Hayes*, brought to realize mechanic's liens, and C., the owner of the land

on which the mechanic's work was done, applied by petition in the Chancery Division to have such judgment set aside as acted upon his title. On this petition an order was made allowing C. to come in and defend the action for lien on terms, which not being complied with, the petition was dismissed, and the judgment dismissing it was affirmed by the Divisional Court and the Court of Appeal. On appeal to the Supreme Court of Canada,

Held, that the judgment appealed from was not a final judgment within the meaning of sec. 24 (a) of the S. & E. C. Act, or if it was, it was a matter in the judicial discretion of the Court, from which by sec. 27 no appeal lies to this Court.

Appeal quashed without costs.

S. R. Clarke, appellant in person.

W. Cassels, Q.C., for the respondent.

GRAND TRUNK RAILWAY CO. *v.* MCMILLAN.

[March 18.

Railway company—Carriage of goods—Bill of lading—Carriage over several lines—Negligence—Exemption from liability for—R.S.C., c. 109, s. 104—Construction of—Joint tort feasors—Action against—Bar to—Discharge by one.

M. shipped certain goods by the Grand Trunk Railway from Toronto to Portage La Prairie, and the bill of lading contained the following condition:

"10. All goods addressed to the consignees at points beyond the places at which the company has stations, and respecting which no directions to the contrary shall have been received at those stations, will be forwarded to their destinations by public carriers or otherwise as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them, or they may, at the discretion of the company, be suffered to remain on the company's premises or be placed in shed or warehouse (if there be such convenience for receiving the same) pending communications with the consignees, at the risk of the owners as to damage thereto from any cause whatsoever. But the delivery of the goods by the company will be considered complete, and all responsibility of said company shall cease when such other carriers shall have received notice that said company is prepared to deliver to them the said goods for further conveyance, and it is expressly declared and agreed that the said Grand Trunk Railway Company shall not be responsible for any loss, mis-delivery, damage or detention that may happen to goods so sent by them, if such loss, mis-delivery, damage or detention occur after the said goods arrive at said stations or places on their line nearest to the points or places which they are consigned to, or beyond their said limits."

Held, on the authority of *Bristol & Exeter Railway Co.* v. *Collins* (7 H.L.C. 194), that this clause could not operate to restrict the liability of the Grand Trunk Railway to loss or damage occurring on their own line, but that the contract by the Grand Trunk Railway Co. must be held to be for the carriage of the goods over the whole route so far as it could be performed by railway, and the other companies over whose lines the goods were to be carried to be the mere agents of the Grand Trunk Railway Co. for the purpose of such carriage.

Sec. 104 of the Railway Act, R.S.C., c. 109, gives a right of action against a railway company for breach of certain regulations and for failure to convey and deliver goods, etc., and declares that from such action "the company shall not be relieved by any notice, condition or declaration if the damage arises from any negligence or omission of the company or of its servants."

Held, that the plain construction of the whole section is that this prohibition only affects railway companies in respect to their duties and obligations as common carriers, and the Grand Trunk Railway Company could, therefore, limit their liability, either as carriers or otherwise, in respect of goods to be carried after leaving their own line, the contract for such carriage being one they might have declined altogether. *Vogel* v. *The Grand Trunk Railway Company*, 11 Can. S.C.R. 612, distinguished.

The evidence showed that the loss and damage to the goods in this case occurred not in transit, but after their arrival at the station named as the place of delivery and while in possession of another company.

Held, reversing the judgment of the Court below (15 Ont. App. R. 14), FOURNIER and GWYNNE, JJ., dissenting, that the above clause put an end to the liabili the Grand Trunk Railway Company after such arrival, and the company having possession of them held them thenceforth as warehousemen and bailees for the consignees.

Held, also, with the like dissent, that the Grand Trunk Railway Company were relieved from liability by reason of the consignees failing to give notice of their claim for loss within thirty-six hours after the arrival of the goods, as provided in another condition of the bill of lading.

Quære: Under the present law, is a release to, or acceptance of satisfaction from, one of several joint tort feasors, a bar to an action against the others?

Appeal allowed.

McCarthy, Q.C., and *Nesbitt*, for the appellants.

Robinson, Q.C., and *Galt*, for the respondent.

MONETTE *v.* LEFEBVRE, *et al.*

Practice—Right to appeal—(P.Q.)—Amount in controversy—Supreme and Exchequer Courts Acts, s. 29, construction of—Jurisdiction.

In an action of damages for slander contained in certain resolutions adopted by defendants (respondents) as school commissioners of the parish of St. Constant, the plaintiff (appellant), claimed by his declaration $5000 damages, and prayed that the defendants be ordered to enter in the Minute Book of the School Commissioners the judgment in the cause, and that the same be read at the church door of St. Philippe two consecutive Sundays. The case was tried before a judge without a jury, and the plaintiff was awarded $200 damages. The defendants thereupon appealed to the Court of Queen's Bench (appeal side), and the plaintiff did not file any cross appeal, but contended that the judgment for $200 should be affirmed. The Court of Queen's Bench, setting aside the judgment of the Superior Court, held that a retraction made by the defendants, and a tender of $40 for damages and the costs of an action of $40, were sufficient, and dismissed the plaintiff's action for the surplus.

The plaintiff thereupon appealed to the Supreme Court of Canada, and it was

Held, that the case was not appealable, as the matter in controversy did not amount to the sum or value of $2,000.

Where the plaintiff has acquiesced in the judgment of the Court of first instance by not appealing from the same, to the Court of Appeal of the Provine, the measure of value for determining his right of appeal to the Supreme Court of Canada under sec. 29 of the Supreme and Exchequer Courts Act, is the amount awarded by the said judgment of the Court of first instance, and not the amount claimed by his declaration.

Allan v. *Pratt*, 13 App. Cas. 780, followed; *Joyce* v. *Hart*, 1 Can. S.C.R. 321, and *Levi* v. *Reed*, 6 Can. S.C.R. 482, overruled.

Appeal quashed without costs.

Lacosts, Q.C., and *Pagnuelo*, Q.C., for appellant.

Geoffrion, Q.C., and *Robidoux*, for respondents.

LABELLE, *et al*, *v.* BARBEAU.

Appeal—Judicial deposit by insurance company—Rival claims as to same—Value of matter in controversy—Jurisdiction—Supreme and Exchequer Courts Act, s. 29.

The Ætna Life Insurance Company deposited with the Prothonotary of the Superior Court, under the Judicial Deposit Act of Quebec, the sum of $3,000, being the amount of a life policy issued by the company to one E. L., which by its terms had become payable to those entitled to the same, but to one half of which sum rival claims were put in. The appellants, as collateral heirs of the deceased, by a petition claimed the whole of the $3,000, and the respondent (*mise-en-cause* petitioner), the widow of the deceased, by a counter petition claimed as *communs en biens* one half, and, in her answer to the appellants' petition, prayed that in so far as it claimed any greater sum than one half it should be dismissed. After issue joined the Superior Court awarded one half to the appellants, and the other half to the respondent. From this judgment the appellants appealed to the Court of Queen's Bench (appeal side),

and that Court confirmed the judgment of the Superior Court.

Thereupon the appellants appealed to the Supreme Court of Canada, and it was

Held, that as the sum or value of the matter in controversy between the parties in this case was the sum of $1,500, and fell short of the appealable amount, the case was not appealable: R.S.C., c. 135, s. 29.

FOURNIER, J., *dubitante.*

Appeal quashed with costs.

Trenholme, for motion to quash.

Laflamme, Q.C., contra.

SNOWBALL *v.* WILSON.

[March 18.

S., a judgment creditor of J.N., sr., applied to the Supreme Court of New Brunswick on affidavits, to have a judgment of J. N., jr., against said J. N., sr., his father, set aside as being obtained by collusion and fraud, and in order to cover up assets of the said J.N., sr. The facts alleged in the affidavits supporting the application were: that a cognovit was given and said judgment of J. N., jr., was signed on the same day; that no account was ever rendered of the debt; that no entries were ever made by said J. N., jr., against his father; that the account for which the cognovit was given was made up from calculation and not from books; that the father had offered to have the judgment discharged on payment of a much smaller sum, and that on an examination of the father for disclosure he would not swear that he owed his son the amount, and that he had had no settlement of accounts. The affidavits in answer stated how the debt had accrued, giving the details; that there was no collusion between the father and son; that the son had frequently asked his father for a settlement, but could not get it, and that he had never been a party to or authorized any settlement. The Court below held that the applicant had failed to show fraud, and refused to set aside the judgment.

Held, that the decision of the Court below should be affirmed.

Appeal dismissed.

G. F. Gregory, for appellant.

Hanington, Q.C., and *J. A. Vanwart*, for respondent.

MACFARLANE *v.* THE QUEEN.

[March 18.

Criminal law—Assault—On constable in discharge of duty—Indictment for—Service of summons under C. T. Act—Wife of defendant—Competent as witness on trial.

A constable in attempting to serve a summons on M. for violation of the Canada Temperance Act, was assaulted by M. and his wife. On indictment for such assault as an assault on a constable in discharge of his duty, under 32-33 V., c. 20, s. 39; R.S.C., c. 162, s. 34,

Held, affirming the judgment of the Court below, that such section applies to the case of a constable serving a summons for violation of the Canada Temperance Act.

Held, also, that on the trial of such an indictment neither the defendant nor his wife is a competent witness under sec. 216 of the Act relating to procedure in criminal cases, R.S.C., c. 174.

Appeal dismissed.

J. A. Vanwart, for the appellant.

R. J. Ritchie, Sol.-Gen. of New Brunswick, for the respondent.

MARITIME BANK *v.* TROOP.

[March 19.

Winding-up Act—R.S.C., c. 129, s. 57—Double liability—Set off.

Sec. 57 of the Winding-up Act, R.S.C., c. 129, provides that "the law of set-off as administered by the Courts, whether of law or equity, shall apply to all claims upon the estate of the company, and to all proceedings for the recovery of debts due, or accruing due, to the company at the commencement of the winding up, in the same manner and to the same extent, as if the business of the company was not being wound up under this Act."

Held, reversing the judgment of the Supreme Court of New Brunswick, that this section does not give a right to a contributory to set off an independent debt owed to him by a company against calls made in the course of winding up proceedings either for capital or double liability.

Appeal allowed with costs.

Barker, Q.C., for the appellants.

J. A. Vanwart, for the respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

Queen's Bench Division.

Divisional Court.] [March 7.

TRUAX *v.* DIXON.

Mechanics' Liens—Material men—Extent of lien—Cross claim by owner against contractor—Set-off—Payment—Registered claim of lien, requirements of—R.S.O. c. 126, ss. 9, 10 16, and schedule—Affidavit—Commissioner.

The last of the materials in respect of which the plaintiffs as sub-contractors claimed a lien under the Mechanics' Lien Act, upon the estate of the land-owner, were delivered on the 16th September, 1887, and the claim of lien was not registered, nor was notice in writing given until the 11th October, 1887, and this action to enforce the lien was not brought till the 29th October, 1887.

Held, that under ss. 9 and 10 of R.S.O. c. 126, the lien claimed did not attach so as to make the owner liable to a greater sum than the sum payable by the owner to the contractor.

Goddard v. *Coulson*, 10 A.R.I., followed.

The owner had an old account against the contractor for bread supplied, which account with interest he charged against the sums due to the contractor under the contract.

Held, upon the evidence, that the account and interest should be treated not as a matter of set-off, but as a payment of so much of the contract price.

S 16 of R.S.O. c. 126, requires that the claim of lien shall state the time or period within which the materials were furnished. The claim registered in this case did not state the year, but only the months and days of the months, in which the materials were furnished. It stated, however, that the materials were furnished on or before the 17th September, 1887, and in this and all respects it followed form I. in the schedule to the Act; and ss. 2 of s. 16 provides that the claim may be in one of the forms given in the schedule to the Act.

Held, that the statement that the materials were furnished on or before a named day was a sufficient statement of the time or period within which they were furnished, according to the true intent and meaning of s. 16.

Roberts v. *McDonald*, 15 O.R. 80, overruled.

The question of the authority of schedules to Acts of Parliament discussed.

The land upon which the lien was claimed was in the County of Wellington, but the affidavit of the plaintiffs verifying the claim of lien registered, was made in the County of Bruce, and before a commissioner for taking affidavits in that county.

Held, that the affidavit satisfied s. 16, ss. 2 of the Act.

H. P. O'Connor, for the plaintiffs.

W. H. Kingston, for defendant, George Dickson.

Chancery Division.

BOYD, C.] [Jan. 16.

RE MCMILLAN.

Agreement—Power of those for whose benefit it is made to enforce same—Release.

In consideration of a conveyance to him of a certain farm, H.M. agreed with his mother, M.J.M., that he would during her life provide her with a house on the farm, and with necessaries, and support his brothers and sisters thereon, until they reached sixteen years of age, so long as they remained at home on the said farm and assisted him so far as they were able in the management of it.

Held, that M.J.M. had no right or power to release H.M. from the obligations undertaken by him with reference to his brothers and sisters under the above agreement, and if the children did their part they could hold their brother to his promises, though the agreement was not in terms made with them as parties.

Hoyles, for petitioner.

ROBERTSON, J. [Feb. 14.

Re SPROULE, SHARP *v.* SPROULE.

Will—Construction—Devise "if my father does not alter his will—Legacies—Vesting.

A testator by his will provided that in case his father did not revoke his will and so deprive him (the testator) of certain lands therein devised to him, then he (the testator) devised to S. certain

lands, but in the event of his father altering his will and depriving him (the testator) of the lands therein devised to him, then he devised the said land otherwise.

He then bequeathed pecuniary legacies to certain of his children, adding in the case of those of them who were under eighteen, the words, "to be paid to them when they come of age," and concluding, "I do hereby authorise and direct my said executors to invest the moneys devised to my children in good legal securities, until they arrive of age, and the interest obtained from such investment to be paid to my wife to assist her in supporting and educating my family."

The father of the testator did not revoke or alter his will in the way referred to, but the testator pre-deceased him.

Held, that the words relating to the alteration of his will by the father of the testator must be construed as meaning that if the testator became the owner of the lands devised in his father's will, so that he could have a disposing power over them, then that they should go in the manner mentioned.

Held, also, that the pecuniary legacies were all of them vested; and that the legacy left to each child which did not attain twenty-one within the year after the testator's death, was to be invested until each child came of age, and the interest up to the several times when they should each attain twenty-one, should be applied in assisting the widow or mother to maintain and educate such child or children, and as each child attained twenty-one he or she would be entitled to be paid their respective legacies.

F. A. Anglin, for the executors.

J. Hoskin, Q.C., for the infant children of the testator.

N. F. Paterson, Q.C., for the adult defendants.

BOYD, C.] [February 28.

ANGLO-CANADIAN MUSIC PUBLISHERS' ASSOCIATION *v.* SUCKLING.

Copyright—British—Canadian—R.S.C. c. 62.

There is a very clear distinction to be observed in the Copyright Act, R.S.C. c. 62, between works which are of prior British copyright and those which are of prior Canadian copyright. If there is a prior British copyright and thereafter Canadian copyright is obtained by the production of the work, then by s. 6 that local copyright is subject to be invaded by the importation of lawful British reprints.

But if the Canadian copyright is first on the part of the author or his assigns, then under s. 4, the monopoly is secured from all outside importation.

The Imperial Parliament has sanctioned and reiterated colonial legislation whereby the possessor of a prior Canadian copyright is secured completely against all interference to the territorial extent of the Dominion, even as against English reproductions or copies made under a subsequent British copyright.

Bain, Q.C., for the plaintiff.

W. Cassels, Q.C., for the defendant.

STREET, J.] [March 18.

CAMERON *v.* GIBSON.

Mortgage — Conveyance — Merger — Chattel mortgage of growing crops.

A.C., owner of certain lands, mortgaged them to the Canada Permanent Loan and Savings Co., and afterwards executed two successive mortgages to one H. Afterwards, in 1887, A. C. sowed eight acres of fall wheat, and in January, 1888, made a chattel mortgage of this fall wheat to G., which chattel mortgage was properly registered. On April 4th, 1888, before the harvest, under pressure from H., A.C. conveyed to H. the lands for a consideration equal to what was due on the three mortgages and a small additional unsecured debt due from him to H. On April the 5th, 1888, H. leased the property to A.J.C. for a year.

When the fall wheat was ripe, A.J.C. cut and harvested it, but G. sent and seized it under his chattel mortgage, and A.J.C. now brought this action to recover the value of the wheat.

Held, that on his taking the conveyance from A.C., the rights of H., as mortgagee, were merged, for the evidence pointed strongly against an intention on his part that the mortgage debts should remain, and therefore G's. right as chattel mortgagee became prior in

point of time to the title of A.J.C., and the action must be dismissed. As mortgagee, H. would no doubt have had the right to take possession of the crops as part of his security.

Klein, for the plaintiff.

O'Connor and *O'Connor*, for the defendant.

Full Court] [March 18.

HORTON *v.* PROVINCIAL PROVIDENT INSTITUTION.

Insurance—Certificate of membership—Default—Forfeiture—Waiver.

Judgment of ROBERTSON, J., 16 O.R. 382, affirmed with costs.

Mowat, Q.C., and *Robertson*, for the defendants.

Meredith, Q.C., for the plaintiff.

BOYD, C.] [March 26

HOBBS HARDWARE CO *v.* KITCHEN.

Chattel mortgage—Advance of firm moneys—Mortgage taken to one partner.

A. and B. were partners as money lending brokers, and were in the habit of lending firm moneys and taking securities therefor in the name of the individual partners, as each was willing to accept the security of the person seeking to borrow. An advance of firm moneys was made to C. on a chattel mortgage made to B., who made the affidavit of *bona fides*, and A. was the subscribing witness thereto. In an interpleader issue between creditors of C., who claimed under executions, and B., who claimed under the mortgage, in which, while it was admitted there was no fraud or *mala fides* in the transaction, it was contended that both members of the firm should be specified as mortgagees. It was

Held, that there was nothing illegal or misleading to the public in such an arrangement, and that creditors should not be allowed to take advantage of it to the detriment of an honest lender, that as partners are joint owners in law of the assets of the firm, there is no *legal* objection to a loan by one member from the moneys of the firm and the taking of the mortgage to himself; while in equity the security is the property of the partnership, and the individual mortgagee would have to account for the moneys advanced, and judgment was given for the claimant for the mortgage.

Gibbons, Q.C., for the execution creditors.

Hoyles, for the mortgagee.

BOYD, C.] [April 1.

RE STURGIS.

Will—Attesting witness—Beneficiary.

Appeal from rulings of Master at Brantford.

After a person named as a beneficiary in a will had signed her name as an attesting witness, it was discovered that she was the same person as was named as the beneficiary. Two other witnesses then signed the will with the consent of the testator, but the name of the first attesting witness was not erased.

Held, that nevertheless evidence was admissible to show the above circumstances, and the right of the beneficiary to take under the will was not defeated.

W. H. Blake, for defendants (appellants).

E. T. English, for plaintiffs.

BOYD, C.] [April 1, 1889.

DOMINION BANK *v.* OLIVER.

Bank Act—Mortgage—Renewal notes—Warehouse receipt—Negotiation.

If a bank holding a mortgage as additional security for the payment of certain notes substitutes for these notes renewals from time to time, without, however, receiving actual payment, the whole series of notes and renewals form links in one and the same chain of liability, which is secured by the mortgage, although as a matter of bookkeeping, the bank may have treated the first notes and the subsequent substitutionary notes as paid by the application of the proceeds from time to time of the renewals.

The simple renewal of notes by a bank is not a "negotiation" within the meaning of s. 53, subs. 4, of the Bank Act, so as to validate a warehouse receipt taken as collateral security, no new advance being made, and no valuable consideration being given or surren-

dered contemporaneously by the bank, which might represent the inception of a new transaction or negotiation of securities.

Moss, Q. C., for defendants Oliver and Knowlton.

W. N. Miller, Q.C., for plaintiffs.

BOYD, C.] [April 1.

RE ZOOLOGICAL CO.

Comp. ies—Subscript on—Allotment.

Appeal from ruling of Master in Ordinary.

When one C. signed the subscription book of a company incorporated under R.S.O. 1887, c. 157, under the following agreement: "We the undersigned do acknowledge ourselves to be subscribers to the capital stock of the company for the number of shares and to the amount set opposite our names, and we do hereby covenant, promise and agree, each with the other of us, * * * to pay the amount of our said subscription and all calls thereon, when and as the same may be called up under the provisions of the Joint Stock Act or under any by-laws which may be passed,"

Held, following *re Queen City Company*, 10 O.R. 264, that this amounted to a complete and absolute engagement with the company, and with the other signatories which bound C., and the engagement was not conditional on the allotment of stock.

If the stock was not given to the signatories each could enforce the engagement specifically and needed to do nothing more to perfect the agreement.

A. C. Galt, for E. S. Cox.

W. Creelman, for liquidator.

Practice.

ROSE, J.] [April 2.

MARITIME BANK *v.* STEWART.

Bankruptcy and insolvency—English Bankruptcy Act, 1883—Proving claim under—Staying action in Ontario.

This action was begun in March, 1887, to recover $220,000 from the defendants. The defendants having become subject to proceedings in bankruptcy, the plaintiffs presented their claim and lodged it with the assignee in bankruptcy in England, in September, 1887. The judge in bankruptcy in England made an order enjoining the plaintiffs from proceeding with this action in the High Court of Justice for Ontario; and subsequently an order was made in this action by the Master in Chambers staying the proceedings forever.

Quære, whether there was power under the English Bankruptcy Act, 1883, to grant the injunction referred to? But,

Held, that there was power in this Court to make the order, either under s. 10 of the English Act, or by reason of the equity of the case and the power of the Court to administer that equity, and the order of the Master in Chambers staying proceedings was affirmed.

Ill v. Dominion of Canada Oil Refin ng Co., 37 U.C.R. 484; *Regina v. College of Physicians and Surgeons of Ontario*, 44 U.C.R 564; *Ellis v. McHenry*, L.R. 6 C.P. 250, specially referred to.

Gormully, for plaintiffs.

McCarthy, Q.C., for defendants.

MR. DALTON, Q.C.] [April 8.

WALLBRIDGE *v.* TRUST & LOAN CO.

Security for costs—Plaintiff, although suing for another, interested in result.

Where a plaintiff in an action is not an actor therein, but is a mere passive instrument in the hands of the real plaintiff by whom the action is brought, security for costs will be ordered; but where the plaintiff, although he partly brings the action for the benefit of another, who has agreed to contribute to the expense thereof, is also himself largely interested in the result, he is to be considered as the real acting plaintiff and cannot be compelled to give security for costs.

Delaney v. MacLellan, *ante* p. 191, distinguished.

Aylesworth, for plaintiff.

A. H. Marsh, for defendants.

BOYD, C.] [April 15.

In re DOLSEN.

Railways—Taking land for—Costs—Railway Act of Canada, 51 Vict., c. 29, ss. 136, 137—Infants interested in land—Sale and conveyance—Necessity for order.

Where land was conveyed to C.D. for life with remainder to her children, and C.D. during the infancy of her children agreed to sell and convey the land to a railway company for the purposes of its railway:

Held, that C.D., notwithstanding the provisions of s. 136 of the Railway Act of Canada, 51 V,. c. 29, had no right in law to sell; to get such a right an order of a judge, under s. 137, was required; and where the proceeding was entirely for the benefit of the railway company, and no factious opposition was raised by anyone, the company should pay the costs of the order as part of the price of the land.

J. Hoskin, Q.C., for infants.

Hoyles, for Ont. & Q.R.W. Co.

Appointments to Office.

DEPUTY ATTORNEY-GENERAL OF ONTARIO.

J. R. Cartwright, of Toronto, to be Deputy Attorney-General for Ontario, *vice* E. F. B. Johnston.

INSPECTOR OF REGISTRY OFFICES.

E. F. B. Johnston, of Toronto, to be Inspector of Registry Offices for the Province of Ontario, *vice* Hon. Sidney Smith, resigned.

OFFICIAL REFEREE.

Neil MacLean, of Toronto, to be an Official Referee under s.s. 2 of s. 124 of the Act Respecting the Supreme Court of Judicature.

REGISTRAR OF DEEDS.

Haldimand.

William Parker, of Jarvis, to be Registrar of Deeds for the County of Haldimand, *vice* A. G. Farrell, deceased.

LOCAL REGISTRAR, H. C. J., ETC.

Halton.

Walter A. Lawrence, of Hamilton, to be Local Registrar of the High Court, Registrar of the Surrogate Court and Clerk of the County Court of the County of Halton, *vice* Wm. L. Pearson, to take effect on 1st June next.

DEPUTY-REGISTRAR H. C. J., CHY. DIV.

Huron.

S. Malcolmson, of Goderich, to be Deputy-Registrar at Goderich of the Chancery Division of the High Court of Justice, *vice* H. McDermott, deceased.

POLICE MAGISTRATES.

Amherstburg.

Samuel McGee, of Amherstburg, to be Police Magistrate for the Town of Amherstburg, without salary.

Morrisburg.

Andrew A. Logan, of Morrisburg, to be Police Magistrate for the Village of Morrisburg, without salary.

DIVISION COURT CLERKS.

Haliburton.

S. Kettle, of Glamorgan, to be Clerk of the Third Division Court of the Provisional County of Haliburton.

Wellington.

Hugh Black, of Eramosa, to be Clerk of the Third Division Court of the County of Wellington.

Oxford.

James Munro, of Embro, to be Clerk of the Third Division Court of the County of Oxford.

BAILIFFS.

Frontenac.

George Greenwood, of Wolfe Island, to be Bailiff of the First Division Court of the County of Frontenac, *vice* W. J. McGrath, resigned.

Haliburton.

John Dovell, of Glamorgan, to be Bailiff of the Third Division Court of the Provisional County of Haliburton.

Welland.

Irvin Teal, of Bertie, to be Bailiff of the Third Division of the County of Welland, *vice* Geo. Graham, resigned.

Huron.

Philip Sipple, of Zurich, to be Bailiff of the

Tenth Division Court of the County of Huron, *vice* E. Bosenberry, resigned.

Peel.

John Clendening, of Streetsville, to be Bailiff of the Second Division Court of the County of Peel, *vice* Robert Irwin, resigned.

Prescott and Russell.

Francis Menard, of Clarence Creek, to be Bailiff of the Tenth Division Court of the United Counties of Prescott and Russell.

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

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

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

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

5. The Law Society Terms are as follows:—

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

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

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

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

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

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

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

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

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

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

14. Full term of five years, or, in the case of Graduates, of three years, under articles, must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after admission on the books of the society as student or articled clerk.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit only, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favorable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term. Candidates for Certificates of Fitness are not required to give such notice.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. A Teacher's Intermediate Certificate is not taken in lieu of Primary Examination.

24. All notices may be extended once, if request is received prior to day of examination.

25. Printed questions put to Candidates at previous examinations are not issued.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, for 1889 and 1890.

Students-at-Law.

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

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

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

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

Mathematics.

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

English.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

History and Geography.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy

and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek :—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.

1889—Lamartine, Christophe Colomb.
1890—Souvestre, Un Philosophe sous le toits.

or NATURAL PHILOSOPHY.

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

Articled Clerks.

In the years 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition ; Smith's Manual of Common Law ; Smith's Manual of Equity ; Anson on Contracts ; the Act respecting the Court of Chancery ; the Canadian Statutes relating to Bills of Exchange and Promissory Notes ; and Cap. 123 Revised Statutes of Ontario, 1887, and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition ; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, and Wills ; Snell's Equity ; Broom's Common Law ; Williams on Personal Property ; O'Sullivan's Manual of Government in Canada, 2nd edition ; the Ontario Judicature Act ; R.S.O. 1887, cap. 44 , the Consolidated Rules of Practice, 1888, the Revised Statutes of Ontario, 1887, chaps. 100, 110, 143.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

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

For Call.

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

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

Michaelmas Term, 1888.