Canada Law Journal.

VOL. XXXIX. FEBRUARY 15, 1903. NO. 4.

The following admirable sentences appear in a recent issue of a widely circulated and one of the best of our Canadian journals. This newspaper is the organ of the Government and doubtless echoes the sentiments of the leaders of the party in power. The writer says: "Whatever may be done with other offices, the Government ought never to appoint to any judgeship in any court a man whose knowledge is not competent, whose ability does not command respect, and whose moral character is not sun-clear. Knowledge, ability, character, these three, and, on the Bench, as everywhere else in life, the greatest of these is character." We admire these noble words, and commend them to those who now are or hereafter may be responsible in the premises; they are, however, incomplete without a quotation from the inspired volume, which we are glad to supply. It runs as follows: "Therefore to him that knoweth to do good and doeth it not, to him it is sin."

It will be refreshing to those who have the true interest of the Empire at heart, to read the following observations in a recent number of the *Law Times*. It has happened, even in this country in former days, that Governments were sufficiently strong and patriotic to chose the best available men for judical preferment. We regret that that has ceased, and appointments are made nowadays (notably on a recent occasion in the North-West Territories), not for professional eminence, but by reason of political influence. There must necessarily be retribution for this in the future. The country will insist in due time upon a different condition of things. We quote from our English contemporary:—

"The appointment by the Lord Chancellor of Mr. Inderwick, K.C., a strong political opponent, to the position of Lunacy Commissioner is a welcome recognition of the principles that promotions at the Bar should be based, not on political service, but on professional merit. Lord Lyndhurst was made Chief Baron of the Exchequer in 1831 upon the recommendation of his political rival, Lord Brougham, who then held the Great Seal.

Lord Campbell when Lord Chancellor, appointed Colin Blackburn to be a judge of the Court of Queen's Bench, although he was of opposite politics, and only known to the Chancellor by his professional reputation. And on the 3rd July 1865, the Attorney General (afterwards Lord Chancellor Selborne), stated in the House of Commons that Lord Chancellor Westbury had exercised his judical patronage without regard to the interests of party, and that he had selected a political opponent (Mr. Montague Smith, a Conservative member of the House of Commons) to fill the last vacancy on the Bench, and another Conservative gentleman to be Chief Registrar of the Court of Bankruptcy, because he considered them to be the most qualified persons for the said offices. In the appointment of County Court judges, he had also striven to select men for their merit and qualifications, without regard to personal or party considerations."

We notice a statement in one of the Toronto daily papers that the City Council adopted a suggestion (made, it is said, by the City Solicitor, but in reality by an alderman) to submit to Chief Justice Meredith a draft of a city charter which the Council proposes to apply for to the Provincial Legislature. We are sure no solicitor ever made any such suggestion, and are equally sure that the suggestion was without the knowledge or consent of the learned Chief Justice. The wish was probably father to the thought, as there is no better authority on municipal law; but of course he could give no counsel in the matter, for the manifest reason, even if none other, that in the natural order of things the time might come when he would be called upon to place a judicial construction on his own handiwork.

It might be well if the practice adopted by some County Judges of explaining to the assessors their duties under the Assessment Act were more general. We know that some do this but others do not. They are, of course, the best judges as to the necessity in their own counties, but a reminder might not be out of place at this time We notice that the County Judge of Lambton has called the attention of the assessors there to what he states to be a common belief that they need only assess up to say seventy-

five per cent. of the true value. He points out, however, that under the statute there is no such margin permitted, and that an assessment at an actual value greater or less than its true actual value by thirty per cent. is prima facie evidence that the assessment was unjust or fraudulent.

Our attention has been called to a question of etiquette in reference to the practice of judges being robed whilst holding Division Courts, and also as to whether the Bar should not, when appearing in this Court, be in proper Court costume. Members of the bar at Niagara Falls have taken the matter up by calling the attention of their County Judge to their desire, subject to his approval, that both Judge and Bar should appear in their robes in the Division Court there. We are not in a position to speak definitely as to how far the very proper practice of judges appearing in their robes, not only in County Courts, but in Division Courts also, prevails throughout the Provinces, but it certainly does so very generally, not only in Courts held in the county town, but in the country Courts also. The custom is certainly one that should be followed in all cases. As to those appearing before them, there would be an apparent incongruity if one party should be represented by a barrister in "blacks" (as the Scotch say) and the other in homespun ; and it must be remembered that Division Court litigation is largely conducted by agents and law students. The matter must necessarily be left to the joint action of the judges and the Bar in the various localities. We can only say thas it is most desirable that the business of the Courts should be conducted with all dignity and decorum, and that every effort should be made to impress the public mind that everything connected with the administration of justice is most important and demands the utmost respect.

Mr. Thomas Hodgins, K.C., Master-in-Ordinary of the Supreme Court of Judicature for Ontario, has been appointed local Judge in Admiralty of the Toronto District, in the room and stead of His Honour Joseph E. McDougall, deceased. We congratulate the learned and erudite Master on this mark of confidence of his judicial capacity. That he will, in these added duties, shew the same industry and learning that has distinguished

him in the discharge of his duties as Master, goes without saying. That position is in fact, though not in name, a judicial one. The principal duties in connection with it have been for some years the administration of company law, under the winding up clauses; a most important branch, and one to which Mr. Hodgins has devoted great care and research. As a legal writer he has done excellent work. On questions of constitutional law he has few equals, and Canada owes much to his contributions in that regard. Whatever subject he takes up he makes his own, and gives the public the benefit of his learning. Referring again to the recent vacancy, it is right to say that the late judge really undertook more work than one ordinary person could do. Being a man of untiring industry and large capacity he managed to do it, and did it well, but it shortened his life. It would be better, both in the interests of the public and of his successors, that the duties which fell upon him should be divided, and this seems to be the policy of those in authority.

THE SURROGATE COURT, COUNTY OF YORK.

Since the decease of the late able judge of the County Court of York, discussion has arisen as to the offices he held.

Under Dominion appointment, Judge McDougall was senior judge of the County and judge of the Maritime Court. As a provincial officer he was Surrogate of the county, sat as a Police commissioner, and had to do with the selection of jurors and the examination of lunatics, to which duties fees are attached. His income from the Dominion offices seems to have been $2600 as Judge, and $600 at least from the Maritime Court. From his provincial offices came an addition of $3500 or thereabouts, making the positions of more value than a High Court judgeship. Additional work and income were not refused, his services being sought as arbitrator.

It is peculiar that, while occupants of the Superior Court bench are never found acting as arbitrators for private individuals, judges of lesser dignity seem to be generally ready to take such extra employment. When the jurisdiction of the County Courts is increased, as has been more than once proposed, are all these duties still to be performed by the same officer? The growing

importance of the Surrogate Court of this County, including the City of Toronto, may be seen from the official figures.

The value of real estates passing in this County is not shewn in the Inspector's reports until 1901, when we find real and personal property figure up to $7,133,930, which marks this Court as very exceptional in importance. The value of estates yearly disposed of seem to be fully four times greater than in any other county. The report shews the issue of nearly 900 documents, such as probates, letters of administration and of guardianship, etc. No mention is made of the number of estate accounts audited and passed upon, an important part of judicial duty, especially as it seems fully understood that the taking of accounts, or even the taxation of the simplest bill, are no part of the duty of the amiable Registrar.

The income of the Court, which exceeds $11,000 for the year, after paying the Senior Judge his $3,000, the Registrar $2,250.00 above office expenses, and $660 to each Junior Judge, left $3,583 to go to the fee fund. It will be noted that all this came from the people of the county, the larger part from the city.

It has been strongly urged that there is ample work for one man to perform as Surrogate in this county, and that the plan of throwing this work on the County Court Judges is now out of date. For years past there has been dissatisfaction at the delays occasioned, especially in the auditing of accounts, and there is obviously much more important work that would be done in the office if it were filled as suggested—work which ought to be done by a Surrogate judge, but which has not been done hitherto, and which from want of time could not have been done. It is understood that several worthy members of the Bar feel sufficiently octopean to undertake all the duties and succeed to all the income of the late judge, but we doubt if this is in the public interest.

The appointment seems undoubtedly with the Ontario Government, and one in which city and county interests rather than individual interests should prevail.

JUDICIAL SALARIES.

The need for an increase in the salaries of the Judges, if the country is to have the services of those best qualified for the duties of the Bench, has frequently been dwelt upon in these columns. The subject is now attracting the special attention of the profession; and those of the public who are competent to form an opinion upon it fully concur in the views which have been expressed at the meetings of the Bar in various parts of the Province.

It is evident that more than ever promotion to the Bench is made the reward for political services, and that what should be the prizes of an honourable profession can more easily be gained by the adroit partizan than by the man who has made the study of law his great object in life. It is not, however, our object at present to dwell upon the evil conditions of things in that respect, but rather to suggest possible remedies, so far at least as the question of salary is concerned.

One great difficulty in the way of re-adjusting, upon an adequate basis, the salaries of the judges of the Province of Ontario arises from the demand which comes from the other Provinces, especially from Quebec, that any increase must apply to all the Provinces alike, no matter how much less the work, or less important the duties in those Provinces as compared with Ontario. There is at the present time a demand for an increase in the Provincial subsidies, especially with regard to the cost of the administration of justice. It seems, therefore, a fitting opportunity to deal with this question of salaries.

When the appointment of judges was left in the hands of the Dominion Government it was expected, on the principle that the higher the source of power the more pure would be its exercise, that the selection of men for the Bench would be free from local bias and local influence, and be more likely to be made in the interests of the public and the profession than if left to the Provinces. It may be that a less exalted motive had something to do with the matter, and those who framed the scheme of Confederation being practical politicians as well as far-seeing statesmen, were desirous of retaining so important an element of patronage, or perhaps it was thought essential to the more smooth working of parliamentary government. No doubt also the diffi-

culty which now exists was not apprehended when the arrangement was made.

But, whatever the motives of the framers of our constitution may have been, the results have not been satisfactory. The personel of the Bench has not been maintained at any higher level, either as regards the standing or ability of the judges, than before Confederation ; the exercise of patronage has gone more than ever in political channels, and there seems no prospect of the settlement of the question of remuneration. Under these circumstances would it not be better to go back to pre-confederation times, and let the government of each Province appoint the judges of their respective courts, giving them such remuneration as the work they have to do and the finances of the Province would justify. Public opinion would have at least as much influence in controlling appointments to the Bench as it has at present ; and the Attorney-General of Ontario, or of any Province, would probably be better able to advise the Lieutenant-Governor as to the members of the Provincial Bar best qualified for the position of judges than would the Minister of Justice to advise the Governor-General on the same subject, and the political pull would be no more potent in the one case than in the other.

Then again the courts of the Provinces being independent of each other, the statute law coming from independent legislatures the whole control of property and civil rights being with the Provincial government, the administration of justice, including the constitution, maintenance, and organization of Provincial courts, both civil and criminal, and the procedure therein—everything, in fact, bearing upon the administration of justice, except the enactment of criminal law, being administered by Provincial authority, it does seem anomalous that the officers who are to interpret and execute the law should be appointed by an authority which has nothing to say as to what those laws should be, or the machinery by which they are to be carried into effect. No such anomaly exists in any other department of government. Why then should it be continued in this, the most important of all, contrary alike to reason and precedent, especially when experience shews that it has not been attended with such satisfactory results as to justify so exceptional a case ?

The Supreme Court, being a Dominion and not a Provincial Court, is properly under Dominion control, and by the Dominion

government should its officers be appointed. To it of course the foregoing remarks do not apply, except so far as the protest raised against the appointments to this court as well as all others being made the reward of mere political service.

There may be other means by which the question of giving adequate salaries to Ontario judges without unfairly burdening the exchequer could be solved. For instance, additions might be made from Provincial funds; but the course above suggested may perhaps be the one best calculated to solve the difficulty, and most in accordance with the dictates of reason and constitutional usage.

IMPLIED COVENANT FOR QUIET ENJOYMENT.

Although we are bound to believe with Lord Coke that the common law of England is the perfection of reason, yet we occasionally come across cases in which, though the decisions of the Courts as to what is the common law upon some particular point may be a reasonable deduction from given premises, yet in the result it would appear that the law thus deduced is hard to reconcile either with reason or common sense.

After ten centuries of development it is disappointing when we find that there are still cases where the rights of suitors rest on the merest technicalities, and yet we ought not to be surprised that this is so, for a learned American judge has recently pointedly observed that our Courts are not kept open for the administration of abstract justice, but for the administration of the law, which is often an entirely different thing.

We are led to these observations by the consideration of the differences of opinion which have been recently manifested in the English Courts touching a very simple point arising on the relations of landlord and tenant, viz., the question under what circumstances an implied covenant for quiet enjoyment arises.

If the matter were to depend on what is fair and just between man and man it is obvious that the question would not admit of much difficulty; it would not depend on the particular words used in creating the tenancy, but on the simple fact that the tenancy has been created, and that, in the absence of any express stipulation, every man may be reasonably and justly presumed to engage that neither he, nor anyone claiming under him, shall do anything

to interfere with the enjoyment by the lessee of the premises demised.

This point, we may observe, was one of those depending on the view of the judge as to what should be the law. Its solution depended on no statutory enactment, but upon what the Courts in a given state of circumstances might determine to be the legal obligation and rights of the parties to a contract. Such a rule if it were to be laid down for the first time in the present day might be expected to be influenced to some extent by the consideration of the fact that all men are not lawyers and that the law is not made for lawyers as a class, but for the community as a whole, and that no reasonable man, not to speak of judges, could suppose for one instant that the average layman would discriminate very nicely as to the word he should use in making a lease; and to say that if he uses the word "demise" he is bound by an implied covenant for quiet enjoyment, but if he uses "let" or any other equivalent word he is not, would probably be regarded as absurd.

But it must be admitted that when such questions come to be determined by Courts of law at the present day "the authorities" have to be reckoned with, and it is here the difficulty arises in coming to a correct understanding of the authorities bearing on the point; thus we find some Courts adopting the view we have stated: see *Hancock* v. *Caffyn*, 8 Bing. 358; *Buad-Scott* v. *Daniell* (1902) 2 K.B. 351; while on the other hand another Court, and that a Court of Appeal, has twice expressed the view that the existence or non-existence of the implied covenant turns on the highly technical fact whether or not the word "demise" was used in creating the tenancy: *Baynes* v. *Lloyd* (1895) 2 Q.B. 610; *Jones* v. *Lavington*, 114 L.T. Jour. 149. These latter expressions of opinion, it is true, are merely obiter dicta; but the obiter dicta of an Appellate Court, when they conflict with the express decision of a Court of first instance, have the effect of creating considerable doubt and uncertainty as to what the law may ultimately be determined to be.

As we have already intimated, such a rule as the Court of Appeal seems to favour is more consistant with the age of special demurrers, but hardly seems suitable to our present ideas; but unfortunately in determining questions of law British judges are not permitted to indulge too freely in flights into the regions of abstract justice, but are very tightly bound by authorities, and if

perchance the authorities binding on the Court happen to have decided a case foolishly some hundred years ago the present generation of judges is bound to perpetuate the folly until some higher Court, or the Legislature, steps in and undoes it.

That is one of the penalties we pay for the principle that the law should be certain. In many matters it is really of no material consequence which way a rule is laid down, but when it is laid down it becomes of moment that it should be adhered to. On the other hand there are cases where rights are affected in which real injustice may be continually done by maintaining in force some piece of judicial folly which has acquired the force of "authority." In this Province we have an obliging Legislature ready annually to correct all real grievances of that kind which may arise, so that perhaps, as far as we are concerned, we have not much ground of complaint; with our fellow subjects in England the case is different and the ponderous judicial or legislative machine is slowly and with difficulty and at great cost moved. We had a striking instance of that in the case of *Fookes* v. *Beer*, 9 App. Cas. 605, when the House of Lords considered itself bound by a foolish judge-made law, which had ultimately to be corrected by legislation. See Ont. Jud. Act, s. 58 (8).

INCREASED PUNISHMENT OF CRIMINALS FOR PERJURY.

Since the introduction of the provision permitting prisoners to testify on their own behalf, we have frequently heard declarations from certain occupants of the Bench when pronouncing sentence on convicted prisoners, that their punishment should be increased by reason of their having perjured themselves.

Is it not unjust and contrary to the spirit of our criminal jurisprudence to thus punish men who have been neither charged, tried nor convicted of the specific offence of perjury for which they are thus summarily punished? Is it not also illogical to thus punish for perjury a prisoner who has been convicted of an entirely different offence, and permit the defeated litigant in civil proceedings to go free? Why should this unfair distinction be made just because a petit jury has seen fit to disregard the evidence of the prisoner?

It may also be asked, what about a prisoner who has so falsely testified and been acquitted? Or is it only when he has been

acquitted that he has spoken the truth? If a prisoner is to be thus summarily punished, should not a Judge, in order to be logical as well as just, similarly punish the witnesses for the prosecution where a verdict of acquittal has been secured, or at least should they not be committed to the custody of the sheriff, and a prosecution for perjury ordered against them? Why not also thus treat all witnesses who have testified on behalf of an unsuccessful party, and, therefore, presumably given false testimony?

It appears to me that the simple solution of these problems would be to treat all witnesses alike. Is it not conceivable that a jury on the prosecution for perjury alleged to have been committed by a prisoner in his own behalf in the course of a prosecution against him for a different offence, might acquit? Stranger things have happened in the course of the administration of criminal justice.

When framing this section of the code removing the proscription against the reception of the testimony of the accused, surely its author did not contemplate that the menace would be held over the prisoner's head, that if he failed to convince the jury of the truthfulness of his story his punishment would be increased. With this threat hanging over him, well might the most innocent accused hesitate to enter the witness box in the endeavor to unweave the tangled web with which a skillful detective has, perhaps, surrounded him. The cause that prompts this treatment of the accused is, doubtless, to be traced to the rule under which for long ages his testimony was rigidly excluded; and now, since the interdiction has been removed, the bias created by the rule takes the form of this increased and improper punishment.

The parliamentary enactment which rendered the testimony of the accused admissible is a standing confession that the rule excluding it was unjust, not only to the accused but also to the public; for, as observed by Judge Wallace in his able article on "Progress of Criminal Legislation in Canada," at p. 704 of your last volume, "Quite frequently a guilty prisoner goes upon the stand and is convicted mainly or partly as the result of his own evidence." That the rule excluding such evidence was illogical, granting the premise that "a man is presumed innocent until he is found guilty," which still remains a maxim of our criminal law, has always been manifest to the crudest reason. The exclusion was based on the assumption that the temptation to perjury

would be so strong that the evidence of the accused would be untrustworthy.

What inducement would a man who is innocent, as he is by the maxim referred to presumed to be, have to commit perjury? The same prejudice and practice existed within the recollection of men now living against the admission of the evidence of parties to civil proceeding, as well as against that of witnesses who might even in the slightest degree have been pecuniarly interested in the result.

More enlightened views have long prevailed in the case of proceedings in our civil courts, and the soundness of the argument of those who first agitated for the reform of the old system, "that so long as the safeguard of cross-examination exists it will be as easy to elicit the truth from an interested party as from any other witness," has been amply vindicated by the results. Those stirring denunciations from counsel of the evidence of the opposing litigant in civil proceedings, on the ground that it was the offspring of interested motives that were so common immediately after the innovation admitting such evidence was introduced, are seldom, or never heard nowadays, as the spectacle of an interested litigant in the box has long ceased to be regarded as anomalous. The same sentiments will, no doubt, gradually prevail in the case of criminal prosecutions after we have become more familiar with the spectacle of the accused giving evidence.

ELGIN MYERS.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

LANDLORD AND TENANT—LEASE—COVENANT FOR QUIET ENJOYMENT—ASSIGNMENT OF REVERSION—SUBSEQUENT PURCHASE OF ADJOINING PROPERTY BY ASSIGNEE OF LESSOR—BREACH OF COVENANT.

In *Davies* v. *Town Properties Corporation* (1902) 2 Ch. 635, a somewhat curious question arose. In 1897 a lease was granted to the plaintiff for fourteen years of certain offices. The lease contained a covenant on the part of the lessor and his assignes for quiet enjoyment by the lessee without any disturbance by the

lessor or any person claiming under him. The lessor assigned the reversion to the defendants, who afterwards also became the purchasers of the adjoining property upon which they erected a building which caused the chimneys in the plaintiff's offices to smoke, and the question was whether this was a breach of the covenant for quiet enjoyment. Byrne, J., who tried the action, decided that it was not, because the erection of the building on the adjoining premises was not done by them under any right acquired from the lessor, but in exercise of the rights under an independent title acquired subsequently to the date of the covenant.

LIMITATION OF PERSONALTY—"POSSIBILITY UPON A POSSIBILITY"—GIFT OF PERSONALTY TO UNBORN PERSON AND AFTER HIS DEATH TO HIS CHILDREN—PERSONAL ESTATE.

In *In re Bowles, Amedroz* v. *Bowles* (1902) 2 Ch. 650, Farwell, J. determines a neat point on the law of powers and holds that the rule that in the limitation of real estate there cannot validly be "a possibility upon a possibility," has no application in the case of personal estate. Therefore where property was settled by a marriage settlement to the husband and wife for life, and, upon the death of the survivor, for such one or more of the children of the marriage, or the issue of such children born in the lifetime of the husband and wife, as they or either of them should appoint, and in pursuance of such power an appointment was made in favour of the three children of the marriage for their lives and after their deaths for their children, the power and appointment thereunder were held to be valid, and not void for remoteness.

UNDER GROUND STREAM—CHANNEL DEFINED BUT NOT APPARENT.

In *Bradford Corporation* v. *Ferrand* (1902) 2 Ch. 655, Farwell, J., determined that where a pond or reservoir of water is fed by an underground stream in a defined channel, but which is not apparent without excavation, the owners of the pond or reservoir have no right of action against other persons who tap the water in such underground stream and thereby diminish the flow of water into the pond or reservoir.

TRUSTEES—POWER IN WILL TO RETAIN INVESTMENTS—SHARES IN COMPANY—EXCHANGE OF SHARES IN OLD COMPANY FOR SHARES IN NEW COMPANY.

In *Re Smith, Smith* v. *Lewis* (1902) 2 Ch. 667, a clause of a will was in question, which empowered trustees to retain any part

of the testator's estate "in its present form of investment." Part of his estate consisted of shares in a flourishing company. This company had been voluntarily wound up and a new company formed which took over all the assets of the old company, and the shareholders of the old company were allotted paid up shares in the new company for all shares held by them in the old company, and also in addition certain preference paid up shares in the new company. No alternative terms of accepting cash instead of shares were offered. The trustees accepted the shares in the new company, and the question submitted to Buckley, J., was whether they were, under the clause of the will above referred to, empowered to retain them, and it was held by the learned judge that notwithstanding the change which had taken place the new shares resulted from the old shares without any act on the part of the trustees and were therefore to be regarded as the same investment as that existing at the testator's death, and therefore within the clause of retainer.

GENERAL POWER OF APPOINTMENT—EXERCISE OF POWER BY WILL—COVENANT TO EXERCISE POWER IN PARTICULAR WAY—LIABILITY OF APPOINTED FUND TO DEBTS.

In re Lawley, Zaiser v. *Lawley* (1902) 2 Ch. 673, was a creditor's action for the administration of the estate of F. C. Lawley, in which a conflict arose between the general body of creditors and a mortgagee who claimed preferential rights on a fund appointed by Lawley's will. It appeared that Lawley was entitled to a testamentary power of appointment upon a fund of £10,000, and being so entitled borrowed £1000 from the mortgagee and as a part of the bargain for the loan agreed to execute the power by his will, and in pursuance of this agreement he by his will appointed the fund to the trustees of his will, and declared that the trustees of his will should stand possessed of the £10,000 upon trust to pay the mortgage in preference to all other payments. The general body of creditors claimed that by the exercise of the power by will the fund became assets for the payment of debts generally, and that the mortgagee was not entitled to priority, and it was so held by Joyce, J.

MORTGAGE—CLOG ON REDEMPTION—AGREEMENT FOR OPTION TO PURCHASE MORTGAGED PROPERTY SUBSEQUENT TO MORTGAGE.

Reeve v. *Lisle* (1902) A.C. 461, is an appeal from the judgment of the Court of Appeal in *Lisle* v. *Reeve* (1902) 1 Ch. 53 (noted vol. 38, p. 193,) on the question whether or not an agreement between mortgagor and mortgagee, made subsequent to the giving of the mortgage, whereby the mortgagee is given an option to purchase the mortgaged property, is invalid, as being a clog on the right of redemption. The House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Brampton and Lindley,) agreed with the Court of Appeal that it was not invalid, and dismissed the appeal.

PRACTICE—COUNSEL'S AUTHORITY—COMPROMISE OF ACTION—COUNSEL EXCEEDING HIS AUTHORITY—LIMITATION OF COUNSEL'S AUTHORITY UNKNOWN TO OPPOSITE PARTY—CLIENT'S RIGHT TO DISAVOW ACTION OF COUNSEL.

In *Neale* v. *Gordon Lennox* (1902) A.C. 465, the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Brampton, and Lindley) overruled the judgment of the Court of Appeal (1902) 1 K.B. 838 (noted vol. 38, p. 538, and see Ib. pp. 355, 394, 552). The case has been already discussed in these columns, and it may suffice to say that the case authoritatively determines that a client may disavow the action of his counsel where the latter exceeds his express authority, even though the limitation of the counsel's authority be not known to the opposite party in the litigation. In the present case counsel for plaintiff was expressly authorized to consent to a reference upon the terms of the opposite party withdrawing imputations against the plaintiff, whereas plaintiff's counsel consented to a reference without the imputations being withdrawn. The order of reference was set aside on the application of the plaintiff whose counsel had exceeded his authority.

INSURANCE PROPERTY OF AN ALIEN ENEMY—LOSS BEFORE BEGINNING OF WAR—INTENTION TO WAGE WAR—SEIZURE BY ENEMY'S GOVERNMENT OF PROPERTY OF ITS OWN SUBJECT—VALIDITY OF INSURANCE—PUBLIC POLICY.

In *Janson* v. *Driefontein* (1902) A.C. 484, the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Davey, Brampton, and Lindley,) have affirmed the judgment of the Court of Appeal, *Driefontein* v. *Janson* (1901) 2 K.B. 419 (noted ante vol. 37, p. 772). The matter in dispute was as to the validity of an insurance of gold by subjects of the late Transvaal Republic, war being at the

time the insurance was effected then imminent with Great Britain, and the property insured having been subsequently seized by the Transvaal Republic for the purposes of that government. The Court of Appeal held the insurance valid and not contrary to public policy, Williams, L.J., dissenting. The House of Lords have approved of the judgment of the majority of the Court of Appeal. The judgments are noteworthy for the observations they contain on the danger of considerations of public policy being allowed to influence or control the decision of cases. Lord Davey declares that "public policy is always an unsafe and treacherous ground for legal decision."

INSURANCE—POLICY—SHIP VALUED AT LESS THAN REAL VALUE—GENERAL AVERAGE—SALVAGE.

In *Steamship Balmoral Co.* v. *Martin* (1902) A.C. 511, the House of Lords (Lords Macnaghten, Shand, Brampton, Robertson, and Lindley) decide, that where during a voyage of a ship insured a general average loss occurs for salvage, and in the salvage action the actual value of the ship and not its value as estimated for the purpose of the policy of insurance, and for which it was insured, was the basis on which the ship's contribution to the average loss was adjusted; in an action on the policy of insurance on the ship the underwriters were liable only for that proportion of the general average losses which the policy value bore to the proved value of the ship; and as in this case the value stated in the policy was £33,000 and the proved value was £40,000, therefore the underwriters were only liable for 33-40th of the ship's contribution to the average losses.

PRACTICE—FOREIGN SOVEREIGN—TITLE TO SUE—PARTIES—ACTION ON CONTRACT ON BEHALF OF FOREIGN STATE.

Yzquierdo v. *Clyde bank Co.* (1902) A.C. 524, was an action for breach of a contract made on behalf of the King of Spain. The parties to the contract were described as "The Chief of the Spanish Royal Naval Commission" and "The Commissary of the Commission (naming them) both in the name and representation of His Excellency the Spanish Minister of Marine in Madrid hereinafter called the Spanish Government of the one part" and the respondents, a ship building firm in Scotland, of the other part. The contract was for the building of a war ship. The action was

brought by the present Spanish Minister of Marine, who was not the Minister of Marine when the contract was made. The Scotch Court of Session dismissed the action on the ground that the plaintiff had no right of action, and that the contract having been made on behalf of the Spanish sovereign he alone could sue on it. The House of Lords (Lord Halsbury, L.C., Lords Macnaghten, Brampton, Robertson, and Lindley), however, held that there is no rule in law, either English or Scotch, which requires that the monarch or titular head of a foreign State is the only person who can sue in Great Britain in respect of the public property or interest of that State, and that in the present case the action was properly brought, and though the word "successors" of the Minister of Marine was not mentioned, that was what was meant by the contract.

COMPANY—TRANSFER OF COMPANY'S MONEY BY MANAGING DIRECTOR TO HIS OWN OVERDRAWN ACCOUNT—BANKER AND CUSTOMER.

Bank of N.S. Wales v. *Goulbourn Valley Co.* (1902) A.C. 543, was an action by a joint stock company to recover from a bank a sum of money which was standing to the credit of the company in the books of the bank, but which had been improperly transferred by the managing director of the company to his own private account in the bank which at the time was overdrawn. The bank acted in good faith and without notice of any irregularity, and the Judicial Committee of the Privy Council (Lords Macnaghten, Davey, Robertson and Lindley, Sir Ford North and Sir Arthur Wilson,) held that it was not liable to refund the money, and overruled the judgment to the contrary of the Supreme Court of Victoria.

SUCCESSION DUTY—DEBT, LIABLE TO DUTY—INTENT TO EVADE DUTY.

Payne v. *The King* (1902) A.C. 552, deserves attention. The action was brought to recover succession duty in respect of property alleged to have been transferred by the deceased "with intent to evade payment of duty" within the meaning of a colonial Act making such property liable to duty notwithstanding the transfer, and secondly in respect of a debt secured by three mortgages on property in New South Wales. By the law of New South Wales these mortgages were specialty debts, but by the law of Victoria where the debtor and the testator resided they were simple con-

tract debts and the question whether duty was payable in Victoria depended on whether they were simple contract debts. The Judicial Committee of the Privy Council (Lords Macnaghten, Davey, Robertson and Lindley, Sir Lord North and Sir A. Wilson) held that as the transfer impeached was complete and bona fide though voluntary, the mere fact that it was made by the testator to avoid liability to duty was not sufficient to prove an intent to evade duty within the meaning of the Act which in the opinion of their Lordships strikes at colourable transactions only and that as regards the mortgage debts, they were to be regarded as simple contract debts, and assets in Victoria, and as such liable to duty.

PRACTICE—LEAVE TO APPEAL IN FORMA PAUPERIS.

Ponarima v. *Arnmogam* (1902) A.C. 561, was an application to the Judicial Committee for leave to appeal in forma pauperis from the Supreme Court of Ceylon. No provision was made by the Ceylon law for appeals in forma pauperis. It however appeared that as regarded the amount involved and the nature of the case it was proper to be appealed, leave was therefore granted as asked.

CANADIAN PATENT ACT—(R.S.C. c. 61) s. 8—55 & 56 VICT. c. 24, s. 1 (D.)—EXPIRY OF PATENT—"FOREIGN" PATENT.

Dominion Cotton Mills Co. v. *General Engineering Co.* (1902) A.C. 570, was an appeal from the Supreme Court of Canada and turned upon the construction of s. 8 of the Canadian Patent Act (R.S.C. c. 61) as amended by 55 & 56 Vict. c. 24, s. 1 (D.) in which the Judicial Committee (The Lord Chancellor and Lords Macnaghten, Davey, Robertson and Lindley,) overruled the judgment of the Supreme Court and restored that of Burbidge, J. By s. 8 as amended it is inter alia provided that "under any circumstances, if a foreign patent exists, the Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires." The short point was do the words "foreign patent" in this clause include a British patent? and Their Lordships hold that they do.

APPEAL—TESTAMENTARY CAPACITY—UNDUE INFLUENCE—FINDINGS OF FACTS.

Archambault v. *Archambault* (1902) A.C. 575, was an appeal from the King's Bench for Lower Canada. The action was to set

aside a will and gifts made inter vivos on the ground of testamentary incapacity and undue influence. The judge at the trial had found that the testator was of sound mind, and that there had been no undue influence, and dismissed the action. The full Court of King's Bench on appeal affirmed this judgment, and the Judicial Committee (Lords Davey and Robertson and Sir Arthur Wilson,) held that those findings could not be disturbed, unless it could be demonstrated that the evidence had not been adequately weighed and considered by the Courts below, which the Committee were unable to say was the case.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Exch. Court] [May 9, 1902.

DOMINION COAL CO. *v.* S.S. "LAKE ONTARIO."

Maritime law—Collision—Ship at anchor—Anchor light—Lookout—Weight of evidence—Credibility—Findings of trial judge—Negligence.

Judgment appealed from (7 Ex. C. 403) affirmed. Appeal dismissed with costs.

Mellish, for appellants. *Newcombe*, K.C., and *Drysdale*, K.C., for respondent.

Exch. Court] S.S. "PAWNEE" *v.* ROBERTS. [May 10, 13, 1902.

Maritime law—Collision—Undue speed—Ship in default—Rule 16—Navigation during fog.

Judgment appealed from (7 Ex. C.R. 390) varied, Girouard, J., dissenting. Appeal allowed in part without costs.

Coster, for appellant. *McLean*, K.C., for respondent.

B.C.] VAN NORMAN CO. *v.* MCNAUGHT. [Nov. 17, 1902.

Free-miner—Lapsed interest—Co-owners—Special certificate.

Where the interest of a free-miner in a mining location has lapsed on account of failure to renew his free-miner's certificate, and the interest has vested in his co-owners, under the provisions of the "Mineral Act" of

British Columbia, and the "Mineral Act Amendment Act, 1899," such interest cannot afterwards become reinvested in the original owner by the issue of a special free-miner's certificate, procured by such free-miner or any person claiming through him. Appeal dismissed with costs.

Peters, K.C., *and Lennie*, for appellants. *Taylor*, for respondent.

B. C.] HARTLEY *v.* MATSON. [Nov. 17, 1902.

Mines and minerals—Placer mining—Hydraulic concessions—Staking claims—Annulment of prior lease—Volunteer plaintiff—Right of action—Status of adverse claimants—Trespass.

In an action by free-miners who had "staked" placer mining claims within the limits of a concession granted for purposes of hydraulic mining, to set aside the hydraulic mining lease, on the ground that it had been illegally issued, and was null and of no effect,

Held, that where there was a hydraulic lease of mineral lands in existence, the mere fact of free-miners "staking" claims on the lands included within the leased limits, did not give them any right or interest in the lands, nor did they thereby acquire such status in respect thereto as could entitle them to obtain a judicial declaration in an action for the annullment of the lease. Appeal dismissed with costs.

Peters, K.C., for appellant. *Latchford*, K.C., and *McDougall*, for respondent.

B. C.] COLONIST PRINTING CO. *v.* DUNSMUIR. [Nov. 17, 1902.

Company—Election of directors—Agreement among promoters—Control of election—B. C. Companies Act, 1890.

A provision whereby it is sought to give to the holders of a minority of the shares in a joint stock company, incorporated under the British Columbia Companies Act, 1890, the right of electing the majority of the board of directors, from time to time, when directors are to be elected, is illegal and ultra vires of the corporation, being repugnant to the conditions imposed by the statute in the interests of the public. Judgment appealed from (9 B.C. Rep. 278) reversed. Appeal allowed with costs.

Robinson, K.C., and *Gregory*, for appellants. *Peters*, K.C., for respondents.

B. C.] [Nov. 17, 1902.

OPPENHEIMER *v.* BRACKMAN & KER MILLING CO.

Sale of goods—Condition as to acceptance—Post letter—Time limit—Term for delivery—Breach of contract—Damages—Counterclaim—Right of action.

The appellant, O., wrote a letter, dated 2nd October, 1899, offering to supply the company with thirty-seven car loads of hay at prices mentioned,

"subject to acceptance in five days, delivery within six months." On 5th Oct. the company wrote and mailed a letter in reply, as follows: "We would now inform you that we will accept your offer on timothy hay, as per your letter to us on the 2nd inst. Please ship as soon as possible the orders you have already in hand, and also get off the seven cars as early as possible, as our stock is very low. Try and ship us three or four cars so as to catch the next freight here from Northport. We will advise you further as to shipment of the thirty cars. Should we not be able to take it all in before your roads break up, we presume you will have no objection to allowing balance to remain over until the farmers can haul it in. Do the best you can to get some empty cars at once, as we must have three or four cars by next freight." This letter was registered, and by reason of the registration was not received by O. within the five days. Had it not been registered O. would have received it in the ordinary course of post within the five days. As a fact it was not received until the following day. On 12th Oct., O.'s agent wrote the company, acknowledging the letter, and saying that O. regretted to inform the company that the acceptance of the offer arrived too late, and he was, therefore, not able to furnish the hay.

On 6th Nov. the company wrote O. in reply, insisting on delivery of hay, as contracted for by the 15th of that month, and notifying him that in case of default, they would replace the order, charging him with any extra cost and expenses.

Prior to the expiration of the six months, mentioned in O.'s letter, the company, in defence to an action by him against them, counterclaimed for damages claimed on account of his alleged breach of contract for delivery of the thirty-seven car loads of hay.

Held, that as the six months limited for making delivery had not expired, the company had no right of action for damages, even had there been a contract, and that the filing of the counterclaim was premature. Appeal allowed with costs.

Aylesworth, K.C., and *Lennie*, for appellant. *Taylor*, K.C., for respondents.

B.C.] McKELVEY *v.* LE ROI MINING CO. [NOV. 17, 1902.

Practice—New points on appeal—Negligence—Findings of fact—Machinery in mine—Defective construction—Proximate cause of injury—Fault of fellow-workman—Defective ways, works and machinery—Disturbing verdict on appeal.

Questions of law appearing upon the record, but not raised in the Court below, may be relied upon for the first time on an appeal to the Supreme Court of Canada.

An elevator cage was used in defendants' mine for the transportation of workmen and materials through a shaft over eight hundred feet in depth.

It was lowered and hoisted by means of a cable which ran over a sheave-wheel at the top of the shaft, and to prevent accidents, guide-rails were placed along the elevator shaft, and the cage was fitted with automatic dogs or safety clutches, intended to engage upon these guide-rails and hold the cage in the event of the cable breaking. The guide-rails were continued only to a point about twenty feet below the sheave wheel. On one occasion the engineman, in charge of the elevator, carelessly allowed the cage to ascend higher than the guide-rails and strike the sheave wheel with such force that the cable broke and the safety clutches failing to act, the cage fell a distance of over eight hundred feet, smashed through a bulk-head at the eight hundred foot level and injured the plaintiff, who was engaged at the work for which he was employed by the defendants, about fifty feet lower down in the shaft. In an action to recover damages for the injury sustained, the jury found that the "proximate cause of the injury was occasioned by the non-continuance of the guide-rails which, in their opinion, caused the safety clutches to fail in their action, and thereby allowed the cage to fall."

Held, that the Court ought not, on appeal, to disturb the verdict entered for the plaintiff, as there was sufficient evidence to support the finding of fact by the jury. Appeal allowed with costs.

Aylesworth, K.C., and *MacNeill*, K.C., for appellant. *Daly*, K.C., for respondents.

Ont.] ATTORNEY GENERAL *v.* SCULLY. [Dec. 9, 1902.

Appeal—Special leave—Error in judgment—Concurrent jurisdiction—Procedure.

Special leave to appeal from a judgment of the Court of Appeal for Ontario, under sub-s. (*e*) of 60 & 61 Vict., c. 34, will not be granted on the ground merely that there is error in such judgment.

Such leave will not be granted when it is certain that a similar application to the Court of Appeal would be refused.

The Ontario Courts have held that a person acquitted on a criminal charge can only obtain a copy of the record on the fiat of the Attorney General. S. having been refused such fiat applied for a writ of mandamus which the Divisional Court granted, and its judgment was affirmed by the Court of Appeal.

Held, that the mandamus having been granted, the public interest did not require special leave to be given for an appeal from the judgment of the Court of Appeal though it might have had the writ been refused.

The question raised by the proposed appeal is, if not one of practice, a question of the control of Provincial Courts over their own records and officers with which the Supreme Court should not interfere. Motion refused with costs.

Cartwright, K.C., for the motion. *Arnoldi*, K.C., contra.

Province of Ontario.

HIGH COURT OF JUSTICE.

Boyd, C., Meredith, J.] HUNT *v.* PALMERSTON. [Dec. 5, 1902.

Public libraries—Aid by municipality—Grant for site—Validity of by-law—Assent of electors.

A mechanics' institute having been converted into a public library and a board of management organized under Part II of R.S.O. 1897, c. 232, a grant of a sum of money for the purchase of a site was made by by-law of the corporation of the town in which the library was situate without the assent of the electors to either the appointment of the library board or to the grant.

Held, that the power to grant aid to free libraries was absolutely in the hands of the local municipality under the general provision of the Municipal Act, and that the by-law was valid notwithstanding section 18 of R.S.O. 1897, c. 232, which may have its full and legitimate scope by being applied to the raising of ways and means by means of the requisitionary powers entrusted to the particular free libraries under sections 14 and 17 of the Act.

J. Montgomery, for the plaintiff. *Drew*, for the town of Palmerston. *Tennant*, for the Library Board.

Boyd, C.] RE ROCHON *v.* WELLINGTON. [Dec. 10, 1902.

Prohibition—Garnishment of married man's wages—Exemption—Evidence of marriage—Repute.

In an action in a Division Court where the judge held that evidence of repute was not sufficient to prove that a primary debtor was a married man and so entitled to the $25 exemption provided for by R.S.O. 1897, c. 60, ss. 180-181.

Held, that he did not decide upon a state of conflicting facts, but upon a theory that the best evidence must be given and that it was a wrong assumption in point of law and prohibition was granted. *Elston* v. *Rose*, (1868) L.R. 4 Q.B. 4, followed.

Middleton, for the motion. *Bayly*, contra.

Boyd, C.] RE NAYLOR. [Dec. 11, 1902.

Religious institutions—"Acquisition" of land after life estate—Seven years holding—When commencing.

The seven years during which a religious institution may hold land after its "acquisition" under section 19 of R.S.O. 1877, c. 216 (now section 24 of R.S.O. 1897, c. 307,) does not commence to run in the case of a devise of a reversion dependent upon a life estate until the expiry of the life estate.

W. E. Middleton, for the executors. *W. F. Kerr*, Cobourg, for the religious institution. No one for the heirs at law.

Trial of Actions. Street, J.] [Jan. 26.

BLACK *v.* IMPERIAL BOOK COMPANY.

Copyright—Foreign reprints—Notice to Commissioners of Customs.

Judgment noted p. 37 supra., recalled; and judgment now given holding that s. 152 of the Imperial Customs Law Consolidation Act, 1876, in the said note mentioned, is not in force in this Province, notwithstanding the expression of opinion of the commissioners in Part II of the Appendix to vol. 3 of the Revised Statutes of Ontario, 1897, to the effect that that section is in force; and that the plaintiffs had established their right to an injunction, perpetually restraining the defendants, the Imperial Book Company, Limited, from importing into Canada any copies of the 9th edition of the Encyclopedia Britannica, and for delivery up, and for an account.

Held, also, that the production of a certified copy of the entry in the book of registry at Stationers' Hall is all that is necessary to make out a prima facie proprietorship in the copyright of an Encyclopedia, under ss. 18-19 of the Imperial Copyright Act, 1842, and it is not necessary for such prima facie case to prove by direct evidence, other than the copy of the entry, the facts which by the said sections are made conditions precedent to the vesting of the copyright in one who is not the author.

Barwick, K.C., and *J. H. Moss*, for plaintiffs. *S. H. Blake*, K.C., and *Raney*, for company, defendants. *A. Mills*, for defendant Hales.

ELECTION CASES.

Maclennan, J. A.] [Jan. 13.

RE CENTRE BRUCE ELECTION PETITION.

STEWART *v.* CLARK.

Particulars—Time for delivery of, extended—Refusal of respondent to submit to a preliminary examination.

Motion to commit respondent for contempt of Court, or to compel him to attend for examination at his own expense, and to extend the time for delivery of the particulars in the petition herein.

A few days prior to the time for delivery of particulars, the solicitors for the respondent, and the solicitors for the petitioner, who was also the respondent in a cross petition, gave mutual undertakings for the production of their clients, at Toronto, for their preliminary examination for discovery under s. 17 of The Ontario Controverted Elections Act (R.S.O., c. 11). The respondent, Clark, after appearing before the examiner in pursuance of his solicitors' undertaking, refused to be sworn and examined, alleging a prior agreement, to which the petitioner was not a party, for dropping the petition. It was ordered that the respondent attend before the special examiner, at Toronto, at his own expense, for viva voce examination under oath, and that the time for delivery of the particulars be extended until forty-eight hours after the conclusion of the respondent's examination; the particulars in the cross petition to be delivered contemporaneously therewith. It was further ordered that service of the order and appointment upon his solicitors be sufficient service upon the respondent. Costs to the petitioner in any event over and above the amount of taxable costs between party and party restricted by the statute.

Drayton, and *Slaght*, for the petitioner; *Eric Armour*, for the respondent.

CRIMINAL CASES.

Meredith, C.J.C.P.] REX *v.* HERBERT. [Jan. 15.

Self-confessed murderer—Acquittal of accomplice—Withdrawal of plea of guilty—Dangerous precedent.

Gerald Sifton and Walter Herbert were accused of murdering Joseph H. Sifton, the father of the former. Herbert pleaded guilty and, at the subsequent trials of Sifton, at London, in 1901 and 1902, he gave evidence on behalf of the Crown. The first trial resulted in a disagreement of the jury, but on the second trial Sifton was acquitted.

At the London Winter Assizes, before MEREDITH, C.J.C.P., application was made Jan. 15, 1903, on behalf of Herbert for leave to change his plea of guilty to one of not guilty.

E. Meredith, K.C., and *T. G. Meredith*, for the prisoner.

Magee, K.C., for the Crown, stated that he had been instructed in the event of the plea being changed not to offer any evidence, and except to point out that a dangerous precedent might be established, he did not seriously oppose the application.

MEREDITH, C.J.:—The Court has power to permit the accused, at all events where sentence has not been pronounced, to withdraw his plea of guilty. There remains therefore only the question whether this is a proper case in which to exercise discretion.

I do not think there is any danger of this case forming a dangerous precedent, because I venture to believe, searching the records of this

country, or the Courts of the British Empire, that no case can be found in which the circumstances are such as existed in this case. If I grant the application, it will be competent for the Crown, indeed, that would be the ordinary course, to place the prisoner upon his trial, and the evidence which he gave upon the trials of Sifton could be used against him, and the jury might, upon that evidence, convict him. But Mr. Magee has intimated that the Crown, if the application be granted, will not take the course of further prosecuting this indictment; and the responsibility of taking that course is upon the Crown.

I am not at all questioning the propriety of that course, but it does seem to me almost a scandal that I should be called upon here solemnly to pronounce sentence of death on the plea of guilty of the accused, in a case in which the Crown says, if that plea were not there, they would permit the prisoner to go free. It is the most cogent circumstance that could be adduced in favour of my granting the application.

The circumstances are peculiar. The prisoner has not only confessed, but has twice under oath repeated the avowal of his guilt and the complicity of Gerald Sifton in the murder of Sifton. No doubt that is a very strong circumstance against the accused. But there is no theory that can be suggested by which Sifton could be innocent and the prisoner guilty. If it were possible that Herbert could be guilty and Sifton innocent, the case would present an altogether different aspect. The jury upon consideration of the whole case have pronounced Sifton not guilty. This being so, it seems to me that I should exercise my discretion in favour of permitting the accused to withdraw his plea.

It is not for me to suggest reasons why the accused should have pleaded guilty, if he was not guilty. One might think that in some cases a young man accused of a capital offence, might, especially if suggestion had come to him, have thought it best, though not guilty, to plead guilty expecting that the Crown, if he gave his testimony against his accomplices, would exercise its clemency in his favour. He did not suggest that this was so, but on looking at the circumstances the acquittal of Sifton was absolutely inconsistent with the guilt of the prisoner.

It would be entirely opposed to the whole policy of the English and Canadian law to permit the prisoner to be now sentenced to death upon his plea of guilty. It is more consistent with the traditions of the Court to be merciful to the accused. The responsibility for the course that was ultimately taken, whether it be to proceed with the trial or to offer no evidence, must rest upon those who were charged with the administration of criminal justice.

A tales jury having been empanelled and sworn, the Crown offered no evidence. They were thereupon instructed to acquit the prisoner, which having been done, Herbert was discharged.

Province of Nova Scotia.

SUPREME COURT.

Ritchie, J.] DEAL *v.* CROOK. [Nov. 1902.

Trespass to land—Riparian proprietor—Conveying timber and lumber on stream.

Plaintiff was owner of land bounded on one side by a stream, above tidewater, not navigable. Defendant was a lumberman, and, in order to assist his operations in driving logs down stream, erected a permanent dam, one end of which rested on plaintiff's land. To an action claiming damages, defendant pleaded, inter alia, that the entry complained of was a reasonable use of the land, and was authorised by R.S.N.S. (1900) c. 95, "Of the conveying of timber and lumber on rivers, and the removal of obstructions therefrom," and amending acts.

Held, 1. The erection of the dam was a trespass and could not be justified under R.S. c. 95, or under the acts of 1902 c. 33, no commissioner having been appointed for the stream in question, or for the river into which it ran.

2. Sec. 15 of c. 95, which gives the right to construct dams necessary to facilitate the floating of logs down streams during freshets, is subject to the provisions of s. 6, which require the assent of the owner of land entered upon to be obtained, and can only be constructed to apply to temporary erections, and not to permanent erections such as the one in question.

3. Sec. 17 of c. 95, as amended, only gives the right to enter for the purpose of driving or removing logs, and not for the purpose of making erections.

4. As plaintiff had failed to prove any substantial damage, there should be judgment in his favour for $5 damages and costs.

Russell, K.C., and *Power*, for plaintiff. *Notting*, for defendant.

Full Court] IN RE MCDONALD. [Jan. 17.

Will—Construction—Life estate—Power of disposition—Effect of.

Testator, by his will gave to his wife, C. M., the use, rents, and proceeds of all his remaining real estate, personal property, mortgages, notes, etc., for her own use during her lifetime. At the death of his wife he devised the house and contents to A. M., for her own use and benefit during her lifetime; and at the death of A. M., he devised to his nephews

and niece named, the said house and contents "as well as any money or securities which may remain after the death of my wife C. M."

Held, affirming the judgment of TOWNSHEND J., that the disposal of any property which might remain over at the death of C. M., shewed an intention to give to C. M. the disposition of the property during her lifetime. *In re Thompson's Estate*, 14 Ch. D. 263, and *Constable* v. *Bull*, 3 De. G. & Sm. 411, followed.

D. C. Fraser, K.C., in support of appeal. *H. McInnes*, K.C., for executors. *H. Mackenzie*, for Catherine McDonald.

Full Court.] GRAY *v.* HARRIS. [Jan. 17.

Distress—Lodger—Action by claiming damages—Practice and procedure.

In an action claiming damages for the alleged wrongful distress of a piano, the property of plaintiff, the statement of claim set out; (1) That plaintiff was a lodger; (2) That her property was seized and illegally removed, for which she claimed compensation under the provisions of R.S.N.S. c. 172, s. 15; (3) that the property seized and removed was only returned under order of the Judge of the County Court.

Held, per TOWNSHEND, J. That as the whole of s. 15 was necessarily made a part of the statement of claim, its provisions, read in connection with the other facts alleged, disclosed a good cause of action.

Held, per MEAGHER, J. That as the cause had been fully tried out and no hardship could result, the cause should be treated as if the pleadings were correct, although there were defects on both sides.

Held, per RITCHIE, J. That the statement of claim disclosed no cause of action, and the appeal should therefore be allowed and the action dismissed; although it appeared that the defendant had no defence to the cause of action proved at the trial, but not disclosed by the statement of claim.

Harrington, K.C., for appeal. *O'Connor*, and *Parsons*, contra.

Full Court] FRASER *v.* MCCURDY. [Jan. 17.

Contract—Action for goods sold—Burden of proof—Judgment of Trial Judge reversed—Costs.

In an action for the price of goods sold and delivered, judgment was given in favour of defendants on the trial, on the ground that the denial of the sale and delivery, threw the burden of proof upon the plaintiffs, and that they had failed to satisfy this burden, there being a conflict of evidence between plaintiff's traveller E., and the defendant M. It appearing from the evidence that the ground upon which the case was determined at the trial was wrong, the evidence of E. being corroborated in a number of particulars, and there being a preponderance in favour of plaintiffs,

Held, (RITCHIE, J. dissenting) that the appeal should be allowed, and judgment entered for plaintiffs for the amount of their claim, with costs of action and of the appeal.

H. McInnes, K.C., for appeal. *Wall*, and *Rowlings*, contra.

Full Court.] BROOKMAN *v.* CONWAY. [Jan. 19.

Trespass to land—Right to maintain actions for—Erection of fence to protect land—Effect of, as to possession.

The mere enclosure of the land of another by the adjoining proprietor by a fence put up with the consent of and by arrangement with the owner for the purpose of protecting the lands of both against cattle does not dispossess the owner nor prevent him from maintaining trespass against any one intruding therein or using his land for purposes other than that for which it was enclosed.

Rowlings, in support of appeal. *Harrington*, K.C., and *Fullerton*, contra.

Full Court.] ARMSTRONG *v.* BERTRAM. [Jan. 19.

Bill of sale—Banking Act—Right of bank under, to hold securities as against creditors—Compromise of action—Effect of possession taken under.

B., being indebted to the Commercial Bank of Windsor, gave to the bank a document purporting to be a warehouse receipt, and also a general transfer or bill of sale. The bank took possession of a portion of the goods covered by the documents and removed them and was proceeding with the removal of others of the goods when they were forbidden to do so by one of B.'s clerks. Two actions of replevin brought by the bank to recover possession of the balance of the goods were compromised by B. who agreed that the bank should take the goods and sell them and credit him with the amount received.

Held, that notwithstanding any irregularities under the Banking Act the title of the bank was complete under the compromise made between the bank and B., and that plaintiff who purchased a portion of the goods from the bank was entitled to recover against the defendant sheriff who levied on the goods under an execution against B.

Held, also, assuming it to be correct that the security on the goods held by the bank was void under the provisions of the Act not being for a present advance but for a past due debt, and that the bank was not entitled to hold such security against the creditors of B., that the bank was not obliged to rest its title on the document, and that its defects, if any, would not affect the subsequent transaction by which the bank became the actual purchaser of the goods and dealt with them as its property.

Fullerton, for appellant. *McInnes*, K.C., contra.

Full Court.] [Jan. 19.

SHEDIAC BOOT AND SHOE CO. *v.* BUCHANAN.

Bill of sale—Held bad as against creditors—Levy by sheriff under executors—Held an "action or proceeding" to impeach or set aside.

Under the provisions of R.S.N.S. (1900) c. 145, s. 4 (1). "Every transfer of property by an insolvent person (*a*) with intent to defeat, hinder, delay, or prejudice his creditors, or any one or more of them; or (*b*) to or for a creditor with intent to give such creditor an unjust preference over the other creditors of such insolvent person, or over any one or more of such creditors, shall as against the creditor or creditors injured, delayed, prejudiced or postponed, be utterly void. (2). If any such transfer to or for a creditor has the effect of giving such creditor a preference over the other creditors of such insolvent person, or over any one or more of them, such transfer shall (*a*) in and with respect to any action or proceeding which is brought, had or taken to impeach or set aside such transfer within sixty days after the giving of the same; be presumed to have been made with intent to give such creditor an unjust preference as aforesaid, and to be an unjust preference whether such transfer was made voluntarily or under pressure."

In an action by plaintiff company against the sheriff of the County of Cape Breton for the conversion of goods levied upon by defendant under executions issued on judgments recovered against R., plaintiff's title to the goods depended upon a bill of sale from R. The evidence shewed that R. was an insolvent person, and the effect of the giving of the bill of sale was to give plaintiffs a preference over the other creditors of R., and the levy made by defendant was made within sixty days from the giving of the bill of sale.

Held, that the levy was "an action or proceeding" had or taken to set aside the transfer within the meaning of the Act, and that under the provisions of sub-s. (2) the bill of sale must be presumed to have been made with intent to give an unjust preference and to be such preference whether made voluntarily or under pressure, and that as against the creditors represented by defendant it was utterly void.

O'Connor, and *F. Macdonald*, in support of appeal. *Harrington*, K.C., and *Fullerton*, contra.

Full Court.] FARQUHAR *v.* MCALPINE. [Jan. 19.

Pilotage Act—"Exempted ship."

Under the terms of the Pilotage Act, R.S.C. c. 8, s. 59, as amended by Act of 1900, c. 36, s. 14, the following ships, called "exempted ships," are exempted from the compulsory payment of pilotage dues. "(*c*) Ships employed in trading . . . between any one or more of the Provinces of Quebec, New Brunswick, Nova Scotia or Prince Edward Island, and any

other or others of them, or employed on voyages between . . . any port in any of the said provinces and any port in Newfoundland, etc."

Held, that a ship employed on a sealing voyage from Halifax to the Newfoundland seal fisheries and back, calling on her outward voyage at Louisburg for coal and at a port in Newfoundland for men and supplies, and again at Newfoundland on her return to dispose of her catch, was not an exempted ship within the terms of the Act.

Semble, that what was contemplated by the Act in providing for exemptions was lines of steamers, or even one steamer making regular periodical voyages, with termini as indicated in the Act either throughout the year or during a certain season of the year.

Rowlings, for appeal. *Mellish*, contra.

Full Court.] REX *v.* CHISHOLM. [Jan. 19.

Liquor License Act—Witness for prosecution—Entitled to fees—Conviction for non-attendance.

Defendant was summoned to appear as a witness an behalf of the prosecution at the trial of a prosecution under the Liquor License Act R.S.N.S. (1900), c. 100. Defendant did not appear, and afterwards a summons was issued requiring him to appear to answer to the charge of refusing or neglecting to attend as a witness. Defendant appeared and after hearing evidence in support of the charge the Justices convicted defendant and imposed a fine of $5 and costs.

Held, setting aside the conviction, with costs, that defendant could not be made liable for the penalty imposed by the Act, s. 161, sub-s. (2) in the absence of proof that the proper fees were tendered to him before he was required to give evidence.

Chisholm, and *Gregory*, in support of appeal. *Griffin*, contra.

Ritchie, J.] REX *v.* VENOT. [Jan. 27.

Criminal law—Theft—Juvenile offender—Discharge from imprisonment ordered—Defective commitment—Amendment of warrant.

Defendant was detained in St. Patrick's Home, a reformatory prison at Halifax, under a warrant of commitment from the stipendiary magistrate of Dartmouth, reciting a conviction of the prisoner before said stipendiary magistrate for the offence of fraudulently, and without colour of right, taking and converting to his own use one stove, of the value of $5, the property of one W., with intent to deprive said W. absolutely of the said stove. A return to an order, in the nature of a habeas corpus, made under c. 181 of R.S.N.S., "Of securing the liberty of the subject," shewed that the prisoner was detained under a warrant of commitment made Jan. 9th, 1903, by the stipendiary magistrate for the town of Dartmouth, and that

he came into the custody of the keeper of the Home under said warrant, on said last mentioned day, and was detained on said warrant until Jan. 22nd, 1903, when, being still in custody, the said stipendiary magistrate caused to be delivered to the keeper of the Home a certain other warrant of commitment, under which the prisoner has been detained ever since.

Held, ordering the discharge of the prisoner, that the return to the order was bad, because neither it nor the second commitment shewed that the Justice intended to amend the first warrant, or substitute the second one for it. *In re Elmy Sawyer*, 1 A. & E. 843, followed.

Power, and *Regan*, for prisoner. *Nem con.*

Province of Manitoba.

KING'S BENCH.

Bain, J.] MAW *v.* MASSEY-HARRIS CO. [Nov. 15, 1902.

Patent of invention—Infringement—Parties—Service out of jurisdiction.

Appeal from an order of the Referee setting aside the service out of the jurisdiction of the plaintiffs' amended statement of claim on the Verity Plow Co. and one Vansickle.

The action in the first place was brought against the Massey-Harris Co., which was duly served within the jurisdiction, claiming that defendant was selling certain ploughs in infringement of patents belonging to the plaintiffs and asking for damages and an injunction against further infringement. In its statement of defence the Massey-Harris Co. alleged that the ploughs in question were purchased from the Verity Plow Co. in Brantford, Ont., and that that Company was duly manufacturing and selling the ploughs under certain patents issued to Vansickle and assigned by him. Plaintiffs then amended their statement of claim by adding the Verity Plow Co. and Vansickle as defendants, and, besides asking for damages and an injunction against all the then defendants, alleged that the invention patented by Vansickle had been appropriated by him from the plaintiff Hancock, and asked that such patent should be declared null and void. The head office of the Plow Co. is in Brantford, Ont., where also Vansickle resides, and it was not alleged that either of these parties had been or was doing anything as to which an injunction could be asked against them in Manitoba; but it was on the ground that they were, under Rule 196 (g) of the King's Bench Act, proper and necessary parties to the action that plaintiffs relied in moving to set aside the Referee's Order.

Held, that the only relief plaintiffs could possibly claim against the added parties, upon the allegations in their amended statement of claim, would be a declaration that their patent was null and void, thus raising

two distinct and separate causes of action, one against the Massey-Harris Co., as originally stated, and the other against the added parties, and that the latter were neither necessary nor proper parties to the original action.

2. Under "The Patent Act," R.S.C., c. 61, as amended by 53 Vict., c. 13, this Court has no jurisdiction to impeach Vansickle's patent, but could only, on the application of a defendant sued for an infringement, declare it to be void as against him, leaving it prima facie valid as against everyone else. Appeal dismissed with costs.

Phippen, and *Minty*, for plaintiffs. *Aikens*, K.C., and *Robson*, for defendants.

Richards, J.] BLAKESTON *v.* WILSON. [Nov. 19, 1902.

Arbitration and award—Building contract—Making award a judgment—Arbitrators delegating their duty to third person.

Plaintiff's action was to recover a balance on a building contract, alleging completion. Defendant denied completion and counter-claimed against plaintiff on several grounds. After the record had been entered for trial the parties entered into an agreement to refer to two named arbitrators and a third one to be appointed by the latter "all matters whatsoever in dispute" between them. The arbitrators thus appointed made their award, finding the defendant indebted to the plaintiff under his contract in the sum of $362.35, but that defendant was entitled to retain $110.00 of this amount for thirty days "for the said James Blakeston to complete his contract in a workmanlike manner, subject to the judgment of a competent man, to be chosen by the said Blakeston and Wilson. Should Blakeston decline to complete the work, the $110 is forfeited to Wilson. Should Wilson decline to allow Blakeston to complete the building, Wilson shall pay the $110 at the expiration of thirty days from date of this judgment." Plaintiff moved, under Rules 754-764 of the King's Bench Act, to have the award made a judgment of the Court.

Held, dismissing the motion with costs, that the award was bad on the following grounds:—

1. It shewed on its face that the work under the plaintiff's contract had not been completed, so that the plaintiff was not entitled to recover anything at all in this action.

2. From evidence taken on the hearing of the motion it was clear that the arbitrators had not taken into consideration "all matters whatsoever in dispute," but had failed to deal with a number of such matters which had been brought to their attention. *Bowes* v. *Fernie*, 4 My. & Cr. 150; *Wilkinson* v. *Page*, 1 Hare 276; and Russell on Arbitration, 8th ed. p. 172, followed.

3. The arbitrators attempted to delegate to another person (unascertained) their authority to decide whether the $110, part of the amount awarded, should or should not be paid. See *Tandy* v. *Tandy*, 9 Dowl. 1044.

Andrews, for plaintiff. *Johnson*, for defendant.

Full Court.] WINTERS *v.* MCKINSTRY. [Dec. 20, 1902.

Mortgage—Power of sale—Service of notice—Fraudulent scheme of mortgagee to cut out equity of redemption—Sale by way of exchange—Notice to third party through solicitor—Costs in redemption action—Costs of appeal.

On appeal by the defendant Barker to the Full Court from the judgment of RICHARDS, J., noted vol. 38, p. 472, that judgment was varied by declaring that the defendant, Barker, was entitled to add to her claim under the mortgage in question, the costs of the sale proceedings that had been taken by McKinstry, not including those of any conveyances made after the sale. Form of decree in *Harvey* v. *Tebbutt*, 1 J. & W. 197, followed.

As the appellant had only succeeded on a comparatively unimportant point unvalued in her appeal, she was ordered to pay the costs of the appeal.

Anderson, for plaintiff. *Bradshaw*, for defendant Barker.

Full Court.] BRAUN *v.* BRAUN, RE VELIE. [Dec. 20, 1902.

Executors and administrators—Liability of, for goods supplied for business of testator carried on for benefit of estate under authority in will—Estoppel—Statute of Limitations.

Appeal from judgment of RICHARDS, J., affirming allowance by the Master of the claim of Velie as a creditor against the estate of John N. Braun, deceased, which was being administered by the Court in this action, which was commenced in May, 1892. The executor, Henry Braun, under authority of the deceased's will, had carried on the hotel business of deceased from July, 1890, to March, 1892, and in so doing had ordered goods from the claimant which had not been paid for. In May, 1893, Velie sued the executor in a County Court for the price of the goods in question, but the County Court judge dismissed the claim on the ground urged by the defendant that he was not personally liable, but that the claim should be against the estate. The executor claimed in the administration proceedings that the estate was insolvent, but in April, 1894, an order was made by consent for the transfer of all the assets to him personally upon his undertaking to pay or settle with all the creditors of the estate and paying $1,200 into the hands of trustees for the benefit of the children of the deceased and certain costs, and this order was carried out on both sides. The order contained provisions that the Master should forthwith adjudicate upon and settle all claims against the estate, that the executor should indemnify and save harmless the estate from all such claims, and that he should carry out and perform all the terms and provisions of the settlement. The claim was not brought into the Master's office in this action until 1901. The chief grounds of the appeal were that no charge was created upon the estate by the purchasing of the goods, but only a

personal liability of the executor, that the judgment in the County Court suit estopped the claimant from recovering against the executor personally, and that the claim was barred by the Statutes of Limitations.

Held, 1. A person supplying goods to an executor under such circumstances has no right against the estate, but he may sue the person who incurred the debt, and he also has a right to be subrogated to any right of indemnity which the executor has against the estate in respect of the liability so incurred: *In re Frith*, [1902] 1 Ch. 342; *Dowse* v. *Gorton*, [1891] A.C. at p. 199.

2. Per KILLAM, C.J., that the executor was estopped by the agreement of settlement that he had made and by the order of the Court confirming the same from setting up the defence of a deficiency of assets out of which to pay, and that under the circumstances Velie's claim should be treated as one against the estate upon which the Master was bound to adjudicate under the consent order.

3. Per DUBUC, J., that the executor was estopped by the course he had taken in the County Court suit from disputing the validity of the claim as against the estate.

4. There was no ground for claiming that the claim was barred by the Statutes of Limitations.

Elliott, for claimant. *Howell*, K.C., and *Hough*, K.C., for executor.

Full Court.] ROBERTS *v.* HARTLEY. [Dec. 20, 1902.

Fraudulent conveyance—Exemptions—Lien of registered judgment—Taking proceedings under, while debtor in occupation of land claimed as exemption.

Appeal from decision of DUBUC, J., noted vol. 38, p. 352, dismissing the plaintiff's action, which was for the setting aside of a conveyance of certain land from the defendant, Bridge Hartley, to his wife, Ruth Hartley, and for a sale of the property to realize the amount of the plaintiff's registered judgment against Bridge Hartley. The conveyance was made without consideration, and, as both parties swore, with the intention absolutely to transfer all interest in the property to the wife. It was made about the time when the writ was served in the action in which the judgment was obtained, and, unless the property were to be held to be exempt from seizure under the statute as being the actual residence and home of the debtor, there was no doubt that the conveyance should be declared void as against the plaintiff under the 13 Eliz., c. 5. Secs. 196-197 of R.S.M., c. 33, provide that the registration of a certificate of a judgment shall bind all interest or estate of the defendant in lands in the registration or land titles district the same as though the defendant had in writing under his hand and seal charged the same with the amount of the judgment; but, by 55 Vict., c. 7, s. 5, this enactment is made subject to the proviso that no proceedings shall be taken under any such judgment

against any lands exempted by R.S.M., c. 80, s. 12. The land in question was at the time of the conveyance, and continued to be the actual residence or home of the debtor.

Held, allowing the appeal with costs,

1. Following *Frost* v. *Driver*, 10 M.R. 319, that the registration of a certificate of judgment binds and charges the land of the judgment debtor, though it may be his actual residence or home, and enables the creditor to take proceedings to realize whenever the defendant ceases to be entitled to claim the property as his exemption.

2. Following *Brimstone* v. *Smith*, 1 M.R. 302, and *Massey-Harris Co.* v. *Warner*, decided by BAIN, J., not reported, that, when the debtor had absolutely conveyed all his interest in the land by a conveyance valid and binding on him, even when set aside by the court, as against creditors, the claim that the land was an exemption of the debtors could not be maintained.

3. The plaintiff was entitled to judgment setting aside the conveyance as fraudulent against him and ordering a sale of the land to realize the amount of his claim and costs. *Taylor* v. *Cummings*, 27 S.C.R. 592, distinguished. The lands that are to be exempt under R.S.M., c. 80, s. 12, are such only as belong to the judgment debtor himself or in which he has some interest, and that would be bound by the registration of a judgment against him at the time when the claim for exemption is made, and the words "any person," in the expression "the actual residence or home of any person," must be understood to mean only any judgment debtor.

4. The husband could not claim the exemption because the property did not belong to him when the claim for the exemption was set up, and the wife could not claim it because, as decided in *Young* v. *Short*, 3 M.R. 302, an exemption is a privilege incapable of being transferred and of which only the debtor can avail himself.

5. To the argument that, because the creditor claimed that the deed was void as against him, he could not say at the same time that the property was transferred away from the debtor, the answer of the court was that the transfer was effectual to divest the debtor of his property, but not to free it from liability to be subject to judgment and execution.

Wilson, for plaintiff. *Whitla*, for defendant.

Full Court.] ROYLE *v.* CANADIAN NORTHERN R.W. CO. [Dec. 20, 1902.

Railway—Highway crossing—Omission to ring bell or sound whistle—Contributory negligence.

Appeal from judgment of a County Court in favour of the plaintiff in an action for damages for injuries sustained by plaintiff's vehicle being struck by an engine of defendants, when driving over a railway track where a trail on private property crosses it. It appeared that the trail was in no sense a public highway, although the owner of the property had allowed

any person to use the trail who wished to, and some statute labour had been performed on it, but without the knowledge or authority of the Municipal Council. The engineer had not rung the bell or sounded the whistle on approaching the crossing, and the plaintiff had taken no precaution to ascertain whether a train was near before driving on the track. The railway line comes by a curve through a cutting on to the crossing, which had been constructed there by the railway company at the request of adjoining owners.

Held, 1. Under The Railway Act, 1888, c. 29, s. 256, taking the meaning of the word "highway" from sub-s. (g) of s. 2 of the Act, the railway servants were not bound to ring the bell or sound the whistle on approaching the crossing in question.

2. The plaintiff was guilty of such contributory negligence as to disentitle him to recover damages. *Cotton* v. *Wood*, 8 C.B.N.S. 568, and *Weir* v. *C.P.R.*, 16 A.R. 100, followed.

Elliott, for plaintiff. *Munson*, K.C., and *Hudson*, for defendants.

North-West Territories.

SUPREME COURT.

Richardson, J.

INDIAN HEAD WINE & LIQUOR CO. *v.* SKINNER.

Liquor license ordinance—Bill of exchange given for legal and illegal items—Recovery as to part—Rescision of contract.

On an overdue bill of exchange accepted by defendants, and also for goods sold and delivered. One Ellison and several other persons were carrying on a business at Indian Head, under the name and style as above. The license, however, to sell liquor, was granted to one Ellison and not to the plaintiffs as a firm. The bill of exchange was for goods sold, $411.34, of which $327 34 were intoxicants. The defendants, the plaintiffs and certain other creditors of the defendants, together with one Dundas, mutually agreed that the defendants should assign to Dundas certain property at a certain valuation, and the creditors should share pro rata. At the trial the following facts were proven, the acceptance by the defendants of the bill of exchange, also the sale and delivery of goods. The fraud of the defendants in falsely representing to the plaintiffs, that their total indebtedness was $6000, whereas, the fact was it was double that amount; and that after the plaintiffs had entered into the arrangement, and before they had received any benefit therefrom, they rescinded the agreement.

Secs. 13, 19 and 81 of the Liquor License Ordinance, provide that licenses may be issued to a co-partnership, and that every license for the sale of liquor shall be held to be a license to the person therein named, and for the premises therein mentioned, and shall remain valid so long as such person continues to be an occupant of such premises, and the true owner of the business; and no person shall sell any liquor without first having obtained a license.

Held, 1. Following *Browne* v. *Moore*, 32 S.C.R. 93, that where by law sales of liquor without license are prohibited, recovery for such sales cannot be enforced, and that therefore recovery on the bill of exchange in so far as the consideration is for sales of liquor, cannot be supported or enforced, but the prohibition will not extend beyond liquor sold, and the other sales included in the bill of exchange and the open account, not liquors are enforcable.

2. The contract between the plaintiffs and defendants, and several other creditors of defendants, and Dundas, was entered into by the plaintiffs by misrepresentation of a material fact. The plaintiffs having, on discovering this and before receiving any benefit, repudiated the same, the agreement must be rescinded. Judgment for plaintiffs for $5010.

L. C. Johnston, for plaintiffs. *H. G. W. Wilson*, for defendants.

COUNTY OF YORK LAW ASSOCIATION.

At the annual meeting of this Association held in their new rooms at the City Hall, Toronto, the Board of Trustees presented their annual report for the past year. There are now 303 members belonging to the Association. Special reference was made to the death of the Hon. R. M. Wells, K.C., one of the incorporators of the Association, and Mr. A. J. Boyd, who died while on active service in South Africa. The attention of the members was called to the urgent need for an increase in the salaries of the Judges. The subject of unlicensed conveyancers was also referred to and the report of the Legislation Committee to the effect that the licensing of conveyancers as a separate class would be unwise and likely to lead to further encroachments upon the profession. The reduction of fees for the examination for discovery was approved; as also some scheme whereby the Ontario and Dominion Statutes might be supplied free to the profession or at a reduced price. The library now contains 4,685 volumes, 183 being added in 1902. The following officers were elected for the ensuing year: President, J. B. Clarke, K.C.; Vice-President, Hamilton Cassels, K.C.; Curator, Angus MacMurchy; Secretary, Shirley Denison. Board of Trustees, D. E. Thomson, K.C., Wm. Davidson, Ernest Gunther, R. J. Maclennan, W. E. Middleton, D. W. Saunders, and C. S. MacInnes.

HAMILTON LAW ASSOCIATION.

The Annual Meeting of the Hamilton Law Association was held Jan- 13. The trustees' report shews a membership of 70, a library of 3875 volumes, of which 109 were added during the year, and a generally pros. perous condition of the affairs of the Association. Among the matters referred to were the deaths of Warren F. Burton, for twelve years Treasurer of the Association; T. A. Wardell, M.P.P., and Mr. S. H. Ghent, Deputy Registrar of the High Court and Clerk of the County Court of the County of Wentworth. The appointment of Mr. T. H. A. Begue to the latter office was also mentioned, as was the visit by the Minister of Justice, Hon. Chas. Fitz-Patrick, K.C.

The following officers were elected for 1903: President, Edward Martin, K.C.; Vice-President, F. MacKelcan, K.C.; Treasurer, J. A. Culham; Secretary, W. T. Evans; Trustees, Messrs. S. F. Lazier, K.C., Geo. Lynch-Staunton, K.C., Wm. Bell, P. D. Crerar, K.C., S. F. Washington, K.C.; Auditors, Chas. Lemon and W. A. Logie.

COUNTY OF HASTINGS LAW ASSOCIATION.

The County of Hastings Law Association held their annual meeting at Belleville on the 26th January, and elected the following officers: Honorary President, John Bell, K.C.; President, W. N. Ponton; Vice-President, W. S. Morden; Secretary. W. J. Diamond; Treasurer, J. F. Wills; Curator, W. C. Mikel. Books to the value of over $300 have been added to the library during the past year, and the number of members has increased. Resolutions in favour of increased salaries to the judges, the reduction of the large disbursements in stamps (especially in respect of interlocutory examinations and foreclosure actions), and also approving of a Bar Dinner to be held in the near future, and of periodical meetings to bring the members of the profession in this district more in touch with one another were passed. The subject of unlicensed conveyancing was also discussed, but further consideration left over until after legislation should be introduced. The County Council authorized new book cases to be furnished, larger accommodation being required for the increased library.

A good story is told of a certain Californian judge who delights in a little pleasantry to relieve the monotony of the Supreme Court session. It was during the hearing on appeal of a case in which a certain attorney appeared as a pleader, followed by an escort of office clerks bearing legal tomes. The judge looked up, and with a twinkle in his eye remarked: "How is this? Can't you read law enough in your office without bringing your books here?" "I'm not reading law," retorted the attorney. "I'm reading the decisions of the Supreme Court of California."

Flotsam and Jetsam.

The Shakespeare-Bacon controversy has always had a great attraction for lawyers, and several eminent judges have taken part in it. In this connection an amusing anecdote is related in Manson's "Builders of Our Law," of Baron Martin, who is said to have been a lawyer pure and simple. "Sergeant Robinson relates that on one circuit Baron Martin took Frank Talfourd round with him as his marshal. One evening after dinner, rousing himself from a short nap, the Baron found Frank reading Shakespeare. 'I find, Frank,' he said, 'you are always reading plays, and especially Shakespeare. I never found time to read him myself, but I suppose he is a big fellow.' 'Yes, Baron,' was the reply, 'he is generally acknowledged to be the greatest poet the world ever produced.' 'Well,' said the judge, 'I think I should like to read one of his works, just to see what it is like. Which do you recommend?' 'They are all admirable productions,' replied the marshal, 'but I have just been again reading "Measure for Measure," and I think that will, perhaps, please you as well as any.' 'All right,' said the Baron; 'lend it to me, and I will read it before I go to sleep.' The next morning he was of course asked how he liked the play. 'Well,' was the Baron's reply. 'I can't say I think much of it; it contains atrociously bad law, and I am of opinion that your friend Shakespeare is a very overated man.'"

UNITED STATES DECISIONS.

EXEMPTION.—A bicycle used by a painter, paperhanger and billposter to earn a livelihood is held in *Roberts* v. *Parker* (Ia.) 57 L.R.A. 764, to be within the provisions of a statute exempting from execution the team of a labourer who is the head of a family, and the waggon or other vehicle, by the use of which he earns his living, although the bicycle was not known when the statute was enacted.

FORGERY.—To add to a cancelled check the words: "In full of account to date" with intent to alter its effect as a receipt, is held, in *Gordon* v. *Com.* (Va.) 57 L.R.A. 744, to constitute forgery.

NEGLIGENCE—INFANT.—Negligence of an infant in performance of his contract to thresh grain which results in the destruction of the grain and the shed covering it by fire set by sparks from the engine is held, in *Lowery* v. *Cate* (Tenn.) 57 L.R.A. 673, not to render him liable for the loss. With this case is a note, reviewing the authorities on liability of an infant for torts.