

Divisional Court.]

[Sept. 7.]

ROBERTS V. HALL.

Adoption of child—Promise to make a will.

This was an appeal from the judgment of FERGUSON, J., noted *supra* p. 177, where the facts of the case are stated.

Held (reversing the judgment of FERGUSON, J.), (i) The question was not now whether the contract originally would have been enforceable by the court in specie; and inasmuch as the engagement had been faithfully performed by the father and the child on their part, any objection that there was in the agreement itself a want of mutuality could not be allowed to prevail at this stage. The agreement having so far been acted upon as to have altered the status of the plaintiff, and that by the act of the Halls, a new equity had arisen, and the defendants must be precluded from disputing with the plaintiff their liability to perform their part of the agreement. For where the plaintiff has fully performed his part, then if the court can enforce in specie the part which remains to be done by the defendant, it will do so, unless the agreement in question be illegal and contrary to public policy.

(ii) The agreement now in question is not illegal as against public policy, or otherwise. For although the general rule is indisputable that any agreement by which a father relinquishes the custody of his child, and renounces the rights and duties which as a parent the law casts upon him, is illegal and contrary to public policy, yet this only means that the court will not allow or assist a father to make an arrangement which will preclude him from acting according to his judgment and discretion in the most advantageous manner for the welfare of the child. Therefore, in those exceptional cases in which the control of the father may be injurious to the child, or where it is for the advantage of the child that the parental superintendence should not exist, or where the father agrees to *forisfamiliate* the child out of regard for his welfare, in view of benefits, pecuniary or otherwise, bestowed or expected, the "principal is inverted," and such a contract may be justified. And the facts shewed the present to be one of these exceptional cases. The benefit of the child is the foundation of both the rule and the exception. And although, in such cases, the

court requires to be satisfied that there are solid considerations for the infant to be taken into account, and not merely expectations, before coming between the parent and the child, yet in cases where the father is not seeking to regain the custody of the child, this is not a necessary element in determining whether such an arrangement is contrary to public policy.

(iii) *Held*, therefore, on the whole case, the plaintiff was entitled to a declaration that the property, real and personal, of which the deceased died possessed is impressed with a trust in her favour.

Dictum of Court of Appeal in *Alderson v. Mad-dison*, L. R. 7 Q. B. D. 181, dissented from.

(iv) *Held* further (affirming the judgment of FERGUSON, J., on this point), that the plaintiff had the right of suit in her own name.

W. Cassels for the plaintiff.

Robb for the defendant.

Osler, J.]

[Sept. 5.]

THE TOWNSHIP OF PEMBROKE V. CANADA
CENTRAL RAILWAY.

Railways—31 Vict. c. 68, sec. 10 D—Municipal law—Acquiescence by corporation—R. S. O. c. 174, sec. 277.

Suit by the corporation of the Township of Pembroke seeking for a *mandamus*, commanding the defendants to remove their railway from off a certain highway in the unincorporated village of Campbelltown, and for an injunction, on the ground that the defendants had constructed their railway along the said highway without the leave of the plaintiff, and contrary to the provisions of the Railway Act of 1868, 31 Vict. c. 68, sec. 10 D., to which Act the defendants were subject.

Held, on the evidence, that the corporation had sufficiently granted leave to the company to carry their railway along the highway, by a certain resolution passed by them in 1876, to the effect that, "The railway company be notified to fill up the deep ditch on both sides of the tract on the street, and have proper crossings put down at each cross street." The court held that this amounted to an admission that the defendants were lawfully in occupation of the street, coupled with a request to put it into better condition.