The Legal News.

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The judgment of the Court of Queen's Bench, Montreal, in the case of *Abbott & McGibbon* (7 L. N. 179) has been affirmed by the Privy Council, and the appeal dismissed. The question was, where a testator had power of apportionment of an estate between his children, and in the division one child was wholly excluded, whether there had been a valid distribution. The Court of Appeal in Montreal held that a division among four of the children to the exclusion of the fifth, was a valid exercise of the power vested in the testator. The Privy Council has dismissed the appeal from this decision.

University education as a preliminary to legal studies has been cried down recently in some quarters where the veneering of civilization is hardly skin deep, and where a University man would probably be very much out of his element. In an old forensic arena like London this is very far from being the case, and the record as far as regards the new legal appointments is surprisingly strong on the side of the old Universities, and particularly Cambridge. A contemporary states that both the law officers were 'wranglers,' Mr. Webster in 1865 and Mr. Gorst third wrangler in 1857. Five out of the ten new Queen's Counsel were at Cambridge, and of these Mr. Moulton was senior wrangler and Mr. Kennedy senior classic in the same year—that is 1868. Mr. Bayford and Mr. Channell were also wranglers, and Sir Arthur Watson is a Cambridge man. Oxford is represented by Mr. Elton, who was Vinerian scholar in 1862, and Mr. Samuel Taylor.

In a lecture delivered a short time ago in England the question was raised whether the Post Office could not supply official proof of the posting of letters where such proof might be desired. In English courts, it seems, very vague evidence is often accepted, and registration is not insisted upon. The suggestion is that forms should be issued at about three pence a dozen, to be filled up with particulars of the address of the sender of the letter, and simply examined, stamped and returned at the receiving office. A process so simple as this could be carried out at a very trifling cost to the department and might probably—as has already been proved with other small conveniences of a similar kind—be converted into a profitable source of revenue.

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*COURT OF QUEEN'S BENCH—MONTREAL.**

Master and servant — Responsibility of employer—Negligence of servant—Injury to fellow-servant—C.C. 1053, 1054.—An employer is liable for any want of care on his part by which his servant is injured; and, therefore, if he engages an unskilled or careless person to conduct his work, and owing to the want of skill or care of the person so employed, another workman is injured, the employer is responsible. But in order to hold the employer responsible, it must be clearly established that the negligence or want of skill of the fellow workman caused the accident by which the damage was occasioned. So, where two workmen were engaged in an operation not shown to be hazardous, and an explosion occurred which killed the superior workman and injured the plaintiff who was assisting the other, it was *held* that the workman injured had no right of compensation from the employer, in the absence of any evidence as to the cause of the accident, or that the employer was in fault by having hired a careless or unskillful workman. — *The St. Lawrence Sugar Refining Co.*, appellant, and *Campbell*, respondent.

Municipalités de villages — Municipalités locales—Code Municipal, art. 19, § 3, *et art.* 27—*Péage—Empierrement des chemins*—33 *Vic., c.* 32—36 *Vict., c.* 26, *s.* 34.—Jugé:—1o. Qu'aux termes du Code Municipal (34 Vict., c. 68, art. 19, § 3) les "municipalités locales" comprennent les municipalités de villages.

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*To appear in Montreal Law Reports, 1 Q. B.

2o. Que l'article 27 du même code ne fait qu'indiquer quelles municipalités rurales seront considérées comme municipalités locales sans égard aux municipalités de villages, qui tombent sous la règle générale établie par l'art. 19, § 3.

3o. Que par conséquent une compagnie dûment incorporée en vertu de l'acte 33 Vict., c. 32, avait le droit d'empierrer un chemin de front dans les limites d'une municipalité de village, d'y poser des barrières et d'y percevoir des péages.

4o. Qu'en vertu du dit acte une telle compagnie a le droit d'exiger un péage pour une fraction de mille parcourue, pourvu que sur toute la longueur du chemin parcouru le taux n'excède pas le montant par mille fixé par la cédule B du dit statut.—*La Compagnie du Chemin de Péage de la Pointe-Claire*, appelante, et *Leclerc*, intimé.

Privilege of the Crown—Deposit in Bank—C. C. P. 611.—*Held*:—1. (Following *Monk & Attorney-General*, 19 L. C. J. 71), that the privilege of the Crown for its claims over those of private competing creditors is to be governed by the civil law of the province of Quebec derived from France and not by the law of England.

3. That under C. C. P. 611, in the absence of any special privilege, the Crown has a preference over chirographic creditors for deposits due to it by a bank in liquidation.

3. The holders of notes of an insolvent bank, being accorded a special privilege by statute (43 Vict., c. 22, s. 12), take precedence of the Crown.—*The Queen*, appellant, and *The Exchange Bank of Canada*, respondent.

COUR DE CIRCUIT.

MONTREAL, 27 juin 1885.

Coram LORANGER, J.

LECOMTE v. COTRET.

Pigeons—Propriété par voie d'accession.

JUGÉ :1o. *Que les pigeons qui passent dans le colombier d'un voisin, sans fraude ni artifice de sa part, deviennent sa propriété par droit d'accession.*

2o. *Que d'après les dispositions de l'art.* 428 *du C. C., nous ne reconnaissons qu'une seule espèce de pigeons.*

Le demandeur alléguait par sa déclaration, qu'au mois de mars dernier, le défendeur avait attrapé, par fraude et artifice, un pigeon lui appartenant et qu'il retenait contre son gré.

Que ce pigeon était de l'espèce connue sous le nom de "pouter" et valait au moins $4. Et il concluait à ce que le défendeur fut condamné à lui payer cette somme.

Le défendeur, par sa contestation, a nié tous les faits et allégué spécialement :

Qu'il ignorait que le pigeon du demandeur fût passé dans son colombier, et que si tel était le cas, le dit pigeon était devenu sa propriété par droit d'accession, et que le demandeur n'avait pas le droit d'en réclamer le prix. Qu'il était spécialement faux qu'il eût employé aucun moyen frauduleux ni aucun artifice pour attirer ce pigeon. Et il concluait au renvoi de l'action.

A l'enquête le demandeur prouva que son pigeon était passé dans le colombier du défendeur et qu'il valait la somme d'au moins $4. Mais il ne fut prouvé aucune fraude ni aucun artifice de la part du défendeur, pour attirer le dit pigeon.

A l'appui de ses prétentions, le demandeur a cité les autorités suivantes :

1 Pothier, page 201.

9 Ibid, p. 156, No. 166.

2 Aubry et Rau, pp. 15 et 248.

2 Marcadé, p. 422.

De son côté, le défendeur a cité :

4 Pothier, Traité de la Propriété, No. 166.

6 Laurent, Droits Réels, Nos. 310 et 311.

4 Merlin, Répertoire, au mot colombier, p. 469, col. 2, 3e al.

10 Demolombe, Nos. 176 à 181.

Au No. 179, Demolombe s'exprime comme suit :—"Mais au contraire, lorsque l'émigration des pigeons d'un colombier, dans un autre colombier, a été volontaire ; lorsqu'elle n'a été provoquée par aucun artifice, nous pensons qu'il n'y a lieu à aucune action ni en revendication, ni en indemnité, *lors même que l'identité des déserteurs serait reconnaissable, comme s'ils étaient, par exemple, d'une autre espèce que les pigeons du colombier où ils ont été s'établir.*"

C. C. B. C., art. 428.

PER CURIAM. Il est évident d'après les termes de la loi et la preuve offerte, que le dé-

fendeur est devenu, par voie d'accession, propriétaire et possesseur incommutable du pigeon en question qui est passé dans son colombier, sans fraude ni artifice de sa part.

Comme l'art. 428 du Code, ne reconnaît qu'une seule espèce de pigeons, sans toutefois la définir ou la désigner autrement que par le mot "pigeons," je ne puis créer en faveur du demandeur une exception à laquelle la loi n'a pas pourvue ; et en présence d'un texte aussi formel que celui de l'art. 428, je ne puis maintenir l'action du demandeur et la renvoie avec dépens (1).

Action renvoyée.

St. Jean & Leblanc, procureurs du demandeu

Augé & Lafortune, procureurs du demandeur.

(J. G. D.)

JURISPRUDENCE FRANCAISE.

Interdiction—Conseil de famille—Composition—Enfants des demandeurs en interdiction.

Les enfants du demandeur en interdiction peuvent être régulièrement appelés à faire partie du conseil de famille, qui doit donner son avis sur l'état de la personne dont l'interdiction est demandée.

On ne saurait notamment demander leur exclusion de ce conseil par application de l'art. 442, § 4, C. Civ., la demande en interdiction elle-même ne pouvant être considérée comme créant entre l'auteur de cette demande et la personne qui y défend, un procès dans lequel l'état de cette dernière ou sa fortune seraient compromis, dans le sens de la disposition légale précitée.

(19 *mai* 1885. *Cass. Gaz. Pal.* 6 *juin* 1885).

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(1) Il ne faudrait pas même considérer, dit Demolombe, vol. 10, p. 142, 1er al., comme un artifice frauduleux le fait d'un propriétaire de pratiquer dans la clôture de son parc, des trappes mobiles afin de faciliter l'entré du gibier provenant des propriétés contiguës, lors même que ces trappes seraient disposées de manière que le gibier ne puisse plus sortir. Et il appuie cette opinion sur un arrêt de la cour de cassation du 22 juillet 1861, qui se lit comme suit :

"Attendu que la faute seule engage la responsabilité de son auteur et que nul n'est tenu de réparer le dommage causé par l'exercice légitime d'un droit ;

"Attendu que les trappes dont se plaignent les demandeurs sont établies sur la clôture du défendeur, et sur sa propriété ;

"Attendu que le gibier auquel elles donnent accès dans son bois, n'appartient encore à personne ; *qu'il y entre en toute liberté, sans qu'aucun moyen ait été employé pour l'attirer*. . . . . (Note du rapporteur).

Testament authentique—Dictée—Copie sur un modèle. Doit être déclaré nul par application de l'art. 872 du Code Civil le testament authentique que le notaire a purement et simplement copié sur un modèle de testament, antérieurement préparé, au lieu de l'écrire sous la dictée du testateur.

(*Cour d'Appel de Caen*, 17 *nov.* 1884. *Gaz. Pal.* 14-15 *juin* 1885).

TRIBUNAL D'ANGOULÊME (FRANCE).

Mai 1885.

Définition du mot clôture—Clôture légale d'un terrain.

Le sieur T. avait été arrêté pour délit de chasse, en temps prohibé, sur un terrain non clos. L'accusé plaidait que le terrain était clos.

Voici les remarques du tribunal sur ce qu'il faut entendre par "terrain clos" et le mot "clôture :"

"La loi n'a point défini le sens absolu qu'elle attachait au mot clôture. On peut dire d'une manière générale, qu'il y aura clôture, toutes les fois que certains objets manifesteront clairement l'intention de la part du propriétaire d'empêcher de passer sur son fonds et qu'ils constituent en même temps un obstacle réel et effectif au passage. Il suffit que la clôture oppose un obstacle sérieux et de nature à arrêter une personne d'une force, d'une agilité et d'une taille ordinaire n'ayant pas recours à des moyens de locomotion exceptionnels et inusités. Quand les conditions ci-dessus sont remplies, il y a lieu d'examiner si ce terrain est attenant à une maison habitée.

"Spécialement il y a clôture dans le sens de l'article 2 de la loi du 3 mai 1844, si le terrain attenant à une maison habitée confronte d'un côté à la voie ferrée, dont il est séparé par un treillage à la suite duquel est un talus élevé et à pente très rapide, d'un autre côté à une rivière non navigable ni flottable et entouré dans ses autres parties d'un fossé de deux mètres de largeur sur cinquante centimètres de profondeur, presque entièrement rempli d'eau."

Le tribunal prononca l'acquittement.

(Rapport de Mtre. Louis Albert au *Journal de Paris*).

(J. J. B.)

AN EARLY CRIMINAL TRIAL.

In the course of recent reading I came across an amusing and instructive account of a criminal trial occurring in England about six hundred years ago (say A. D. 1302), and but a few years, comparatively, after the enactment of Magna Charta. It not only illustrates the manners and customs of the time, but sheds light on the mode of making use of "benefit of clergy," of "trial by one's peers," of challenging jurymen, of refusing counsel to prisoners on trial for felony, and of judicial protection and countenance to an abashed prisoner, which are in some respects the glory, and in others the shame of English criminal law.

The account of the trial is in Latin, and I have ventured to give a free translation of it. The reporter of the case performs a peculiar function in making side remarks as he goes along, by way of criticism and suggestion. I shall follow his practice, and, in passing, throw in some modern explanations.

Curiously enough, though the account of the trial is perfectly authentic (being found in ancient English court papers), neither the name of the judge, nor of the prisoner, nor of the reporter is ascertainable. Nothing is known of the prisoner except that he is "Sir Hugh," and was a knight, presumably of "gentle blood." For convenience sake, the various actors will bear assumed names, taken from the same old papers, also illustrative of the times. The prisoner will appear as Sir Hugh Bad; the judge as "his honor, Judge Tynterel;" and the reporter as "Adam Worry." Sir Hugh had a serviceable friend, whose name was "Leyr," a personage useful in court matters even in our own day.

The case opens with a presentment by "*the twelve* of Y," (apparently acting as a grand jury), to the effect that Sir Hugh had committed the offence of rape, with the usual legal statements and descriptions of the offence. He was thereupon brought to the bar (*ad barram*) by two persons, perhaps his bail. Tynterel thereupon said to one of them, named Brian: "I understand that this man is your relative; you may stand by him and give him your countenance, but you must not advise him." Brian replied: "That is true, he is my relative; but, that I may not be suspected of having anything to do with the controversy, I will take my leave." And so this very prudent and circumspect relative departed. Then Tynterel said to the prisoner, "Sir Hugh, there is a presentment against you, that you have committed the crime of rape, etc.; how do you propose to defend yourself?" Then Sir Hugh: "Your honor, I ask for counsel. Give me counsel, that I may not be tripped up in the king's court for want of counsel." Then said Tynterel, "You ought to know that the king is a party in this case, and prosecutes you *ex officio*, and in such a case the law does not permit you to have counsel against the king—indeed, if the woman had been prosecuting you, you should have had counsel against her, but not against the king. Accordingly I now order, in behalf of the king, that all the pleaders who are here in order to be of your counsel, shall depart." Mr. Worry then interposes that all the counsel are removed.

Tynterel resumes: "Hugh, respond; the deed charged against you is possible, it is your own deed, and you can respond very well without counsel, whether you committed it or not. The law is common to all, and must be uniformly administered, and the law is, that when the king is a party *ex officio*, you shall not have counsel against him." He then proceeds to make this remarkable statement, which he must apparently have done in a manner not audible to the bystanders, while he was certainly heard by the inquisitive Mr. Worry. "If I, in opposition to the law, should give you counsel, and the 'country' (meaning the jury) should be with you, as, please God, they may, then the common talk would be that you had been set free by the favor of the justice. So I do not *dare* to award you counsel, and you ought not to ask it; so answer." Sir Hugh said no more about counsel.

This absurd and barbarous rule, denying a prisoner, charged with a felonious crime, the privilege of stating his case by counsel, rooted in the very outset in the system of trial by jury, continued unchanged in England, except in cases of high treason, down to the memory of men now living. There was a

preposterous idea prevailing that the judge should be, as it were, counsel for the prisoner. The rule applied to all; to the ignorant, the deaf, the young. Nothing, however, could shake the rule, until it met with the terrible and scathing invectives of Sydney Smith, in the *Edinburgh Review*, in 1826, where he maintained at length the proposition, set forth with *italics*, that a prisoner once accused of felony ought to have the same power of selecting counsel to speak for him as he has in cases of treason and misdemeanor, and as defendants have in all civil actions. This almost seems incredible.

Counsel were allowed for the first time by 6 and 7, William IV. c. 114 (1836-7).

It is very noticeable that the justice in the present case feared to allow counsel, because of the public opinion of the time. The people demanded an impartial administration of the laws against knights and nobles as well as common men. The judge did not *dare* to face the opinion. A sound public opinion was then as now a healthy check upon the administration of criminal justice.

Sir Hugh next takes up his defence, and instead of pleading not guilty, he pleads in opposition to the jurisdiction of the court. He played the following card. He said, "Your Honor, I am a clergyman, and I ought not to be called on to respond without my 'ordinary'" (meaning the bishop or ecclesiastical superior). Then said the judge, apparently astonished, "Are you truly a clergyman?" Whereupon Sir Hugh replied, "It is true; I have been a rector of the church of N." Then the bishop appeared in court, and said to the judge, "I demand him as a clergyman." Whereupon Sir Hugh cried, exultingly, "You hear what he says." But said the judge, "I say that you have lost the 'benefit of clergy,' because you are 'bigamous,' that is, you married a widow, and you must answer, whether when you married your wife she was a virgin or not, and you may as well tell the truth at once as to seek any evasion, for I shall immediately submit the matter to the country" (the jury). We may hope that Sir Hugh, being a knight, was a man of truthful disposition, but he was on trial for a vile crime, and, if convicted, subject to a terrible punishment, involving personal mutilation. So he put a bold face upon the matter, and said, without the quiver of a muscle, "My wife was a virgin when I espoused her." Then said Tynterel, "I must find out the truth of this matter, right away." So the reporter says he asked "*the twelve*," and they declared upon their oath that she was a widow when Sir Hugh married her. Mr. Worry thereupon remarks that it was a noteworthy thing that Tynterel did not administer a cumulative oath to the jury for this purpose. Then the court said, "You must respond not as a clergyman but as a layman, and you must submit yourself to these twelve 'honest men,' who are unwilling to lie for the king.

This is certainly a very graphic description of the way in which even a man of military rank would strive to pass himself off as a clergyman, in order that he might escape the dreadful severities of a criminal trial and punishment in the king's court. Had Sir Hugh been successful in his plea to the jurisdiction of the court, he would have been handed over to the bishop who claimed him. His trial before him would have been a farce. At most, if convicted, he would have been sentenced to be branded in the hand, and the sentence would very likely have been carried out with a *cold iron*. This it was to have "benefit of clergy," and this existed down to the time of the American revolution, when a new plan of punishment by imprisonment and transportation to a penal settlement took the place of the former barbarous methods (applicable to the laity), while unmeaning privileges were swept away, and the same rules of punishment were applied to all, without distinction of clergy and laity. When the case now in hand was tried, the distinction between the two classes was a real one; before it was abolished it was merely a line drawn between those who could read and those who could not. The case seems to show that a clergyman then could be married, except to a widow, but whether this was canon law or only Tynterel's law may be open to discussion.

Sir Hugh, baffled in his plea of being a clergyman, tries another plan. He objects to the jury, who are ready in court to try the

case. He makes two points: one is that he is *accused* by them, and that accordingly he will not consent to be *tried* by them. The meaning of this would seem to be that the *same men* are assuming to act both as a grand jury and a petty jury. Then, observing that they are men of inferior rank, perhaps yeomen or farmers, he says, "Your honor, I am a knight, and will not be judged except by my peers" (*pares*). To this Tynterel replies, "Since you are a knight, I direct that you be tried by your peers." So knights are summoned to try the case. Then Tynterel says further to Sir Hugh, "Do you desire to propose any challenges in respect to them?" Sir Hugh replies, "I do not agree to them; you may take whatever inquisition you desire *ex officio*, but I will not agree to them." To this Tynterel responds, "If you will consent to them, with the help of God they will act in your case; but if you will not, and refuse to follow the rules of the common law, you will suffer the regularly-ordained punishment, viz., one day you will be allowed to eat, and the next day to drink; but the day that you eat you shall not drink, and *vice versa*. When you eat you shall have barley bread without salt, and the day you drink, water," etc. Mr. Worry pauses at this point, and remarks that the judge said "many other things," showing why it would not be a good thing for him to adhere to his refusal, and why it would be better to consent. Sir Hugh took the hint, and said, "I will consent to be tried by my peers, but not by these twelve by whom I am accused. Be kind enough to have my challenges read." To this the judge said, "Gladly; let them be read, or if you can state any ground why the twelve should be removed, proceed orally." Then Sir Hugh: "I *desire counsel*, for I cannot read." Tynterel responds: "No! for this affects our lord, the king." To this, Sir Hugh: "Then you may take the challenges and read them." Tynterel: "No! for they must come from your mouth." Sir Hugh: "I cannot read." Tynterel then wakes up, and says, "How is this, Sir Hugh? It is but a few minutes ago that you were claiming the 'benefit of clergy,' and you were even rector of a church, and now you say you cannot read! Oh, fie!"

At this point the good reporter Worry interjects a remark to the effect that Sir Hugh stood silent, abashed and confused. Tynterel now tries to cheer him up, by saying: "Be not abashed; now, if ever, is the time to speak." Then the justice turns to Sir Hugh's friend, Leyr, saying, "Would you not like to read the challenges of Sir Hugh?" To which Leyr replies, "Yes, your Honor; if I only had the book which he holds in his hands." This was allowed. Then Leyr said, "Here are challenges against many of the jury. Do you wish that I should read them publicly?" Tynterel replies, "No! read them to the prisoner secretly, because they must be uttered by his mouth." And so it was done, and the challenges turning out to be true, all the disqualified jurymen were removed and others substituted. The jury being obtained, Tynterel said to them, "Sir Hugh is charged with the crime of rape. He pleads not guilty, and he is asked how he desires to be tried, and he says by the 'country' (*per bonam patriam*), so he places himself upon your decision for better or for worse. So we enjoin you to declare upon your oath whether Sir Hugh committed the offence with which he is charged or not." *The twelve* men say, "We declare that the woman was ravished by the 'men' of Sir Hugh." Then Tynterel: "Was Sir Hugh consenting to the crime?" *The twelve:* "No." Some other questions being asked and answered, which brought out the fact that there was no ravishment, the judge finally said, "Sir Hugh, because they (the twelve) acquit you, I acquit you."

This extraordinary trial is of the highest interest, as showing trial by jury in its earliest infancy. No authentic case dates back of this. There seems to be a mystery hanging about this form of trial, in the minds of the men of the time. The triers are "The twelve;" they are the "country," the "good country," "twelve honest men." They are but seldom called a jury. The case shows that the word "peers" in the great charter meant political equals, and that even a knight might demand a jury of knights. Further, there could be no trial of the facts unless the prisoner entered a plea of "not guilty." If he would not plead, he must be *made* to plead, by subjecting him to extreme

torture in regard to want of food and drink, and in other respects, which the reporter refrained from disclosing. This was the "*peine forte et dure*" of later days when a prisoner who would not plead, in addition to a daily supply of a few morsels of loathsome food and a few draughts of the vilest water, was to sustain constantly upon his person as great a weight of iron as he could bear, *and more*, and this until he died, unless he sooner answered. This continued to be law until 1828, when, if a prisoner refused to plead, the humane practice of entering the plea of "not guilty" was adopted. The case further shows that the judges were inclined to administer the law as humanely as its rules would allow, aud that a verdict of acquittal was deemed to be final. The system of challenging jurymen for unfitness, now so well established, was at that early day in existence, though with this singular qualification, that the challenges must come from the prisoner's own mouth, though they might be read to him to refresh his memory. There is in this trial a complete absence of formality. Question and answer pass between judge and prisoner, judge and jury, and judge and bystander in rapid succession. Subterfuges are speedily detected, and the kernel of the case soon reached. On the whole, the judges of the olden days set a good example to those of our time in regard for law, respect for an impartial public opinion, kindness to a prisoner on trial, grasp of questions involved, and due regard for the acts and verdicts of the mysterious "twelve" who then, as now, could in general be relied upon to bring a popular, and because popular, salutary element into the administration of criminal justice. Though the law was severe, and the punishments barbarous, nothing else could effectually quell the powerful ruffians who filled the neighborhood with terror, and dominated all things, except the king when in the field, or when meting out, through the medium of his judges, retributive justice in its most awe-inspiring forms.—THEODORE W. DWIGHT in the *Columbia Jurist*.

TRADE MARKS.

One of the most important changes made in the law relating to the registration of trade marks by the Patents, Designs and Trade Marks Act, 1883, (46 and 47 Vict. c. 57) was the extension of the definition of a trade mark so as to include "fancy words." Under the Trade Marks Registration Act, 1875) 38 & 39 Vict. c. 91), the definition of a registrable trade mark (Sec. 10) was purposely framed so as to include fancy words, except in the case of old marks, *i.e.*, marks used before the passing of the act, in which case only "any special and distinctive word or words," were allowed to be registered. An attempt was indeed made in *Ex parte Stephens*, 3 Ch. Div. 659, to bring a newly invented word within the description of "device," but without success, and down to the coming into operation of the act of 1883, fancy words continued to be excluded from registration, except where they had been used before the act of 1875. The definition section of the act of 1883, however (Sec. 64), not only allows "any special and distinctive word or words" to be registered as an old mark, but specifies among the essential particulars the possession of one of which qualifies for registration irrespective of previous user, any distinctive "fancy word or words not in common use."

What was wanted by the trader who procured the recognition of fancy words as trade marks was the assimilation of the symbols registrable as new trade marks to the symbols registrable as old ones, and the assimilation generally of the trade marks recognized in this country with those generally recognized abroad, especially in America. The words "fancy word or words," being included in the section, it does not seem to have occurred to those concerned, that the addition of the words "not in common use" by the Board of Trade, might have the effect of raising a difficulty, and even of taking away with one hand what was given by the other. It seems to have been assumed that "not in common use," was equivalent to "not in common use as applied to the goods in respect of which they are registered;" so that the effect would be to make the registrability of words depend, not upon their novelty *in se*, but upon the novelty of the mode of application.

The Board of Trade, however, in the very recent case of *Re Stapley and Smith's* Trade Mark "Alpine" attempted to set up a distinction between words newly inserted and existing words used in a new application, which has never hitherto been recognized either in English or American law, and which, if established in England, would set up a new *differentia* between the law of trade marks in force here, and that in force elsewhere, and might be productive of considerable difficulties in connection with the registration in England of the trade marks of foreign owners. In support of the contention of the Board of Trade, reliance was placed on the words "not in common use" as showing that a registrable fancy word must be newly coined, but Mr. Justice Chitty fortunately found himself able to take the view that an existing word might constitute a "fancy word not in common use" if applied to an article with which it had no natural or established connection.

Newly coined words are especially open to the objection that they may easily come to be descriptive of a special article, and so cease to be distinctive, as "linoleum" was held to be descriptive: *Linoleum Manufacturing Company* v. *Navin*, 38 L. T. Rep., N. S. 448; 7 Ch. Div. 834; whereas such appellations as "Eureka" shirts, "Sefton" cloth, "Crown Seixo" wine, or "Dogshead" beer, are not nearly so much exposed to the same risk. On all grounds Mr. Justice Chitty's decision is on the side of the balance of convenience: if the point were determined the other way, it would be necessary for traders to endeavor to get the act amended. Although the decision in the "Alpine" case is so recent, there has already been time for it to receive support from Mr. Justice Pearson's ruling in the case of *Slazinger* v. *Mallings* in which he held that the words "The Lawford," which had been registered as a fancy name for lawn-tennis raquettes, were properly registered and capable of protection. We ought not to omit to mention that in the "Alpine" case Mr. Justice Chitty very properly ridiculed a contention by the Board of Trade that a word not distinctive in itself could be made so by prefixing "The" to it, so that according to their argument, "Alpine" would be a bad trade mark, but "The Alpine" a good one. It seems difficult to conjecture who could have invented such a theory.—*Law Times* (London.)

GENERAL NOTES.

It is to be hoped that Prince Albert Victor before he has been long a member of an Inn of Court will be able to modify the rather gloomy view of the meaning of the words 'in Chancery' which he has gathered as an apt student of 'Bleak House.' Writing of a drive through the wilds of Australia, the royal midshipmen say: 'In many places we drive as through an open English park, only it is a park in Chancery, with the trees fallen and dead and the stumps protruding here and there, and pools uncared for, and the grass growing by their sides, dark and lank.' 'In Chancery' in its opprobrious sense is, like 'drunk as a lord' and other phrases, a survival historically imbedded in the language, used perhaps so marking progress, but happily recording a fact sometime past and gone.—*Law Journal* (London.)

A case which is of much interest was tried at Ottawa on Thursday last before Judge Lyon with a jury, in which Mr. M. Pennington, of Montreal, was the plaintiff, and Mr. Octave Noel, of Ottawa, defendant. Mr. Noel, who is in business, had over his store a sign on which was written M. M. Noel. A traveller of Mr. Pennington sold the defendant two bills of goods, and at each time he called defendant was in the store, seeming to have complete management of same, and really to be proprietor of the business. He gave the orders with the initials "M. M. Noel." Enquiries were made by the plaintiff, who naturally supposed that "M. M. Noel" was the party who transacted the business with his traveller, and nothing could be learned to the contrary; accordingly he addressed all invoices and letters to "M. M. Noel, Esq., as a man, and no intimation, it was alleged, was ever given by the defendant to the plaintiff that he was mistaken in so addressing the correspondence. The defendant withdrew from store keeping and went into contracting without the knowledge of the plaintiff, and when the bills became due said that he never was proprietor of the business, "M. M." being his wife's initials, that she alone had been owner, and to look to her for the money as he was not going to pay his wife's debts. She, of course, had nothing. Mr. Pennington then sued Octave Noel for the amo unt, believing that the business had belonged to him; that he had been guilty of sharp practice and deception, and that such sign over his door was misleading—"M. M." instead of "Mrs." or "Mary M. Noel." After the examination of several witnesses counsel for both parties reviewed the case at length. Mr. W. H. Barry, of Ottawa, the plaintiff's counsel, in his address to the jury, pointed out the danger of loss to which the mercantile community would be subjected if a man could with impunity go into business, get credit and act in such a manner as to make his creditors believe that it was his, and afterwards tell them to look to his wife for payment, as he was not responsible.

A verdict was returned in favor of the plaintiff for the full amount of claim with costs—*Ex.*