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We see it stated in one of our American exchanges that in a large number of the States biennial sessions have been adopted with advantage and entire satisfaction to the public, and a bill has recently been approved by the Assembly of the State of New York to the same effect, and will probably become law. The leading papers in that country approve of the change. We are told that the chief opposition comes from hotel managers, boarding-house keepers, professional lobbyists, etc. One paper remarks, "It is a long standing and grievous complaint that there is altogether too much law-making, unmaking and tinkering, and the evil has been steadily growing instead of diminishing. So frequent the changes in existing statutes, and so numerous the new ones enacted that it is difficult for judges and lawyers, to say nothing of the general public, to keep the run of the law. An adjournment of the Legislature is always hailed with a sense of relief by the people, and especially by the business community." This is largely true in Canada. It may not at present be within the sphere of practical politics to make any change here, but the profession at least would be glad to see it, and much money would be saved to the country.

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A daily journal in commenting on the decline of litigation in this province falls into some of the usual errors of laymen when discussing legal matters. The profession do not, as is alleged, object to or fight against simplicity in procedure. On the contrary, all reforms in this direction have come from and have been helped forward by lawyers and by the press that represents them. Further we would say that the decrease in legal business does not arise from any want of confidence in our judicial system, but from the dulness of the

times and the general stagnation of business, especially in reference to real estate and building operations. The lay mind is not able to grasp the fact that lawyers flourish most in good times; litigation is not the most profitable branch, and only forms a comparatively small part of a lawyer's business. Again, it is not true that commercial courts are in great favour with business men. The contrary is the fact. These courts are theoretically very good, but where they exist they are but little used, and are in practice considered unsatisfactory by those who expected great benefit from them. The writer of the article referred to is, however, quite right in saying that business has decreased, and the numbers of the profession increased, and the sooner this is recognized and young men turn their attention to some other pursuits, the better for all.

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## *THE EXCEPTIONS TO THE STATUTE OF FRAUDS.*

" . . . the lawless science of our law
That codeless myriad of precedent
That wilderness of single instances
Thro' which a few by wit or fortune led
May beat a pathway out to wealth and fame."

In reading over the many cases dealing with the Statute of Frauds the writer has been struck by the number of special instances which have from time to time been excepted from the operation of the sections of this great enactment requiring written evidence of certain transactions.

The sections particularly referred to are the first and second (as modified by R.S.O. 1897, c. 119, s. 7), by which some writing is necessary to the validity of certain leases; the fourth, which requires written evidence of all promises by executors to be personally responsible, all promises to answer for another's debt, etc., all agreements in consideration of marriage, all contracts for the sale of land, and all agreements not to be performed within a year; the seventh, by which parol declarations of trust of land are void; and the seventeenth, which requires written evidence of certain contracts for the sale of goods.

The exceptions, which have been created by many judges at different times, depend upon no apparent principle, but were laid down as the circumstances of the particular case seemed to require, and they have never, so far as the writer is aware, been gathered together. It may therefore serve some useful purpose to show the many cases in which the above important provisions have been held inapplicable to circumstances seemingly clearly within either their letter or their spirit.

We will treat these various sections separately. But it must first be observed generally that if the written evidence required by the statute has by any means been lost, parol secondary evidence may be given of its former existence and contents: *Nicol* v. *Bestwick*, 28 L.J. Ex. 4.

In considering sections one and two (as amended by R.S.O 1897, c. 119, s. 7) we find first that they do not extend to licenses, though giving an exclusive right to the premises for a long term of years, and though an annual payment be reserved: *Wood* v. *Lake*, Sayers 3, and Sugden V. & P. P. 123. Nor does section one include a lease for less than three years, with a right in the tenant to continue it by notice for three years more: *Hand* v. *Hall*, L.R. 2 Ex. D. 355. An agreement by a tenant to pay each year in addition to his rent a certain part of the cost of buildings to be put up by the landlord is not a new demise of the buildings, but merely a collateral promise: *Hoby* v. *Roebuck*, 17 R.R. 477. And though a lease in writing not under seal will be void by R.S.O. 1897, c. 119, s. 7, yet it will be construed as an enforcable agreement to grant and accept a lease: *Bond* v. *Rosling*, 1 B. & S. 371, *Parker* v. *Taswell*, 1 DeG. & J. 559.

Moreover, if the lessee enters he is governed by all the terms of the lease, just as if it had been formally executed; *Walsh* v. *Lonsdale*, 21 C.D. 14. Lastly R.S.O. 1897, c. 119, s. 7, does not apply to equitable interests, but such interests will pass by an unsealed writing: *Stamers* v. *Preston*. 9 Ir. C.L.R. 355.

Coming to section four we will deal first with the cases which have been excepted out of the statute on general

grounds, without special reference to any one of the classes of transactions particularly dealt with in the section. An agreement unenforcable by the statute may be proved by way of defence to an action: *Lavery* v. *Turley*, 30 L.J. Ex. 49, or to excuse a trespass: *Carrington* v. *Roots*, 2 M. & W. 248; *Wood* v. *Manley*, 11 A. & E. 34, or to show that a cause of action has been barred by accord and satisfaction; *Massey* v. *Johnson*, 1 Ex. 241; and if a defendant in his pleading admits the agreement, the statute no longer applies even as against his heir: *Attorney-General* v. *Day*, 1 Ves. Sr. 220. Secondly, the statute has no application to agreements which by fraud have not been reduced to writing: *Whitechurch* v. *Bevis*, 2 Bro. C.C. 565.

We will next deal separately with the different classes of transactions which fall within the fourth section, and firstly of promises to answer for the debt, default or miscarriage of another. Any verbal guarantee is so far good that money paid under it cannot be recovered: *Shaw* v. *Woodcock*, 7 B. & C. 73. In the exercise of their summary jurisdiction over their own officers the Superior Courts will enforce against a solicitor a parol guarantee given in a cause: *Re Greaves*, 1 Cr. & J. 374 n. Contracts of indemnity are not within the statute: *Re Hoyle*, [1893] 1 Ch. 84. *Guild* v. *Conrad* (1894), 2 Q.B. 885, which is a decision of considerable importance as the line of distinction between a guarantee and an indemnity was said by Lord Esher, M.R., to be a very nice question: *Sutton* v. *Grey* (1894), 1 Q.B. 287. The statute has no application to an agreement of novation as where two or more agree to be answerable for what was formerly the debt of one alone: *Ex p. Lane*, 1 DeG. 300.

It was formerly held that the statute did not apply to a guarantee given before the creation of the principal's liability: *Mowbray* v. *Cunningham*, cited in *Matson* v. *Wharam*, 2 T.R. 808. But this is not now the law. A debtor's promise to pay the debt to the assignee of the creditor is not within the statute, though a debt of the creditor to such assignee be thereby discharged, because it is a promise to pay the debtor's own debt: *Hodgson* v. *Anderson*, 3 B. & C. 842. Promises that

a certain thing shall be done by a third person as that he shall sign a guarantee are not within the statute: *Bushell* v. *Beanan*, 1 Bing. N.C. 103. Promises to answer for another's debt are not within the statute when that other is not also liable: *Birkmyr* v. *Darnell*, 1 Sm. L.C. 310: *Mountstephen* v. *Lakeman*, L.R. 7 Q.B. 196. The result is the same though the consideration was received by that other, as in the case of promises to answer for an infant's contracts (not being for necessaries): *Harris* v. *Huntbach*, 1 Burr. 373. The same is true where the the liability of that other, though previously existing, is discharged by the guarantee: *Goodman* v. *Chase*, 1 B. & Ald. 297.

Promises are not within the statute if there is any interest or liability in the guarantor or his property, except such as arises out of his promise: *Fitzgerald* v. *Dessler*, 7 C.B. N.S. 374, for instance where a lien or security is given up in consideration of the promise: *Walker* v. *Taylor*, 6 C. & P. 752, or where a right to distrain goods in which the promissor is interested is given up: *Williams* v. *Leper*, 3 Wils. 308. The statute does not apply where the immediate object of the guarantee is not the discharge of a third person's liability, though such discharge follows indirectly: *Castling* v. *Aubert*, 2 East. 325; for instance, the promise of a del credere agent, the immediate object being only to secure care on his part, is not within the statute, though he is personally liable if the purchasers make default: *Wickham* v. *Wickham*, 2 Kay & J. 478, nor are promises to pay another's debt in consideration of a transfer of the debt within the statute: *Anstey* v. *Marden*, 1 B. & P.N.R. 124.

Secondly, of agreements in consideration of marriage. Part performance of such agreements is sufficient to except them from the operation of the statute: *Taylor* v. *Beech*, 1 Ves. Sr. 296, and of course promises to marry are not in any sense within it: *Harrison* v. *Cage*, 1 L'd. Ray'd 386.

Thirdly, of contracts for the sale of land. Contracts collateral to a transfer of an interest in land are not within the statute: *Morgan* v. *Griffith*, L.R. 6 Ex. 70, or preliminary to such a transfer, as for instance a contract for the searching of a title: *Jeakes* v. *White*, 6 Ex. 873.

Shares in companies though owning and using land are not "land" within the statute: *Watson* v. *Spatley*, 10 Ex. 222; *Bradley* v. *Holdsworth*, 3 M. & W. 422; nor fixtures: *Hallen* v. *Runder*, 1 C. M. & R. 266; nor such products of land as come within the definition of fructus industriales: *Evans* v. *Roberts*, 8 D. & R. 611; nor fructus naturales unless still standing, and unless it is intended that they should obtain some benefit from so remaining: *Marshall* v. *Green*, L.R. 1 C.P.D. 35. An agreement for improvements by a landlord to be paid for by an increase of rent is not within the statute: *Hoby* v. *Roebuck*, 17 R.R. 477; *Donellan* v. *Read*, 3 B. & Ald. 899; nor an agreement to build upon land: *Wright* v. *Stavert*, 2 E. & E. 728. An equitable mortgage by deposit of title deeds is not within the Act: *Russel* v. *Russel*, 2 Bro. C.C. 269; and a lease within section 2 of the Act is not an agreement concerning land within section 4 and does not require writing, if the tenant enters, and the tenancy will be governed by all the parol terms: *Edge* v. *Stafford*, 1 C. & J. 391; *Bolton* v. *Tomlin*, 5 A. & E. 856. Sales before an officer of the court confirmed by order are not affected by the statute: *Attorney-General* v. *Day*, 1 Ves. Sr. 220. Any agreement concerning land will be taken out of the operation of the statute by part performance: *Butcher* v. *Stapely*, 1 Ver. 363.

Lastly, of agreements not to be performed within a year. An agreement is not within the statute unless it appears by its whole tenour that it is to be performed after the year: *Peter* v. *Campton*, 1 Sm. L.C. 9th ed. 308; nor if it is intended to be performed by one party within a year, for instance, a sale of goods not to be paid for within a year: *Donellan* v. *Read*, 3 B. & Ad. 906. A parol lease good under section two is not invalid under this section, because not to be performed within one year: *Bolton* v. *Tomlin*, 5 A. & E. 856. A hiring for one year and so from year to year as long as the parties please is not within the Act: *Beeston* v. *Collyer*, 12 Moo. 552. A contract to share the profits of an undertaking not to be completed within one year is not within the Act: *McKay* v. *Rutherford*, 6 Moo. P. C. 414.

We next turn to section seven, dealing with parol declara-

tions of trusts of land, and find as follows: Trusts for the Crown are not within the statute: *Addington* v. *Cann*, 2 Atk. 153. The statute cannot be used as a cloak for fraud, for instance, secret trusts for the grantor of property will be enforced against the grantee: *Haigh* v. *Kaye*, L.R. 7 Ch. App. 469; *Booth* v *Turle*, L.R. 16 Eq. 182; an apparently absolute conveyance may be shown by parol to be a mortgage: *Lincoln* v. *Wright*, 4 DeG. & J. 16; and where an agent has taken a contract or conveyance in his own name the agency may be shown by parol to vest the beneficial interest in the principal: *Archibald* v. *Goldstein*, 1 Man. L.R. 8; *Rochefoucault* v. *Boustead*, (1897) 1 Ch. 196; and secret trusts in wills have always been held to be without the statute: *Re Boyes*, 26 C.D. 531, *Russell* v. *Jackson*, 10 Ha. 204. Where a conveyance is made for an illegal purpose not fulfilled the grantee will be declared a trustee for the grantor: *Davies* v. *Otty*, 35 Beav. 208.

Coming last of all to the seventeenth section we find a very limited number of exceptions, due doubtless to the fact that the requirements of the statute as to evidence may be satisfied in several different ways. Investigation shows, however, that stocks and shares are not goods and merchandise within the statute: *Duncuft* v. *Albrecht*, 12 Sim. 189; *Watson* v. *Spatley*, 10 Ex. 222, nor are fixtures: *Lee* v. *Risdon*, 7 Taunt, 188; and an agreement to build a house is not within the section: *Cotterell* v. *Apsey*, 6 Taunt. 322.

In considering this formidable array of cases by which the field of this famous statute has been eaten into and curtailed, one is inclined to agree in the doubt expressed by Mr. Justice Kekewich, as to the benefit resulting from its passing, when he says in *James* v *Smith*, 63 L.T.N.S. 525, "It is not part of my duty to say whether on the whole the Statute of Frauds has been a beneficial or a mischievous statute. As to that there have been many opinions. Perhaps the only satisfactory answer to this doubt will be found in another quotation from the opinion of the judges upon which the judgment of the House of Lords in the case of *Warburton* v. *Loveland*, 6 Bligh, N.R. 29, was founded, as follows: "But the general rules of construction

which have been established from the earliest times require a large and liberal interpretation of any provision made for the suppression of fraud. In *Heydon's Case*, 3 Rep. 7, the Barons of the Exchequer resolved that the construction of the statute then under consideration before them must be made "by enquiring what was the mischief and defect against which the common law did not provide: what remedy the Parliament had appointed to cure the disease of the commonwealth, and what was the true reason of the remedy." And the observation which follows in the report is one which ought never to be lost sight of in any case, and is peculiarly applicable to the present, namely, "that the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief and pro privato commodo; and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

W. MARTIN GRIFFIN.

# ENGLISH CASES.

## *EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.*



**EXECUTOR**—DELAY IN TAKING OUT PROBATE—NEGLECT AND DEFAULT.

*In re Stevens, Cooke* v. *Stevens* (1898) 1 Ch. 162 the Court of Appeal (Lindley, M.R., and Chitty and Williams, L.JJ.) have affirmed the judgment of North, J. (1897) 1 Ch. 422 (noted ante vol. 33, p. 486), holding that where there is delay in collecting assets, owing to the delay of executors in applying for probate, whereby interest is lost to the estate, the executors are not liable to account for such loss on the footing of wilful neglect and default. The remedy of parties likely to suffer by delay in taking probate, is to cite the executor in the Surrogate Court.

**TRADE NAME**—INJUNCTION.

*Pinet* v. *Maison Louis Pinet* (1898) 1 Ch. 179, was an action brought by the plaintiffs to restrain the defendant companies from using the name of "Pinet" in connection with the sale or manufacture of boots and shoes not of the plaintiffs' manufacture. The facts were, that a person of the name of Dunch in 1892 took the name of "Pinet," and carried on business thereunder as a maker of boots and shoes, and subsequently sold this business to the defendant company, "Maison Pinet." The plaintiffs were well-known French boot and shoe makers, and the object of Dunch and the Maison Pinet Company in using the name "Pinet" was to obtain for their goods the benefit of the plaintiffs' reputation. Subsequently Maison Pinet went into liquidation, and a new company was organized styled "Maison Louis Pinet," also defendants. In this latter company a person alleged to be named Louis Pinet was a director, but as the judge found this was an assumed name. North, J., granted the injunction as prayed against both companies.

**COMPANY**—AGREEMENT TO ISSUE DEBENTURE—EQUITABLE SECURITY.

*Pegge* v. *Neath & District Tramways Co.* (1898) 1 Ch. 183, may be taken as illustrating that maxim of equity, whereby a thing is considered to be done, which ought to be done. The plaintiff had lent money to the defendant company in 1882 upon the security of a promissory note, bearing 5 per cent. interest, and the company then undertook that, whenever required so to do, they would issue debentures bearing interest at 4½ per cent., of a series which constituted a second charge on the company's assets. In 1894 an action was brought by holders of the first series of debentures to enforce their security, and the plaintiff in the present action was one of the plaintiffs in that action, and did not then claim to be a holder of a debenture of the second series. He continued to receive interest at five per cent. on his note, and had not applied for debentures in respect of the amount secured thereby. After judgment in the action by the holders of the first series of debentures, he for the first time claimed to have

debentures issued to him for the amount of the note. The whole of the second series of debentures had not been issued, and the amount remaining unissued was sufficient to answer the plaintiff's claim. The business of the company having been sold and the proceeds being in court for distribution, the plaintiff claimed to rank as the holder of a debenture of the second series for the amount of his note. This claim was disallowed by the Master, but North, J., on appeal held that there had been no waiver on the plaintiff's part of the right to call for the issue of debentures, and that he was entitled to rank on the proceeds as if the debenture had been actually issued to him.

**INTERNATIONAL LAW**—ACTION BY FOREIGN SOVEREIGN—JURISDICTION.

*South African Republic* v. *La Compagnie Franco Belge, etc.* (1898) 1 Ch. 190, was an action brought by a foreign state against the defendants to restrain them dealing with, and for the appointment of a new trustee of funds lodged in England in the name of a trustee for the plaintiffs and of a trustee for the defendants who held a concession from the plaintiffs for the construction of a railway in their territory. The defendants counter-claimed for damages in respect of alleged breaches of the terms of the concession, and the plaintiffs thereupon moved to strike out the counter-claim on the ground that the plaintiffs being a sovereign state could not be sued in England in respect of the subject matter of the counter-claim, and also on the ground that the counter-claim was unconnected with the plaintiffs' claim. North, J., considered the application was well founded on both grounds and struck out the counter-claim. A foreign state which sues as plaintiff in an English Court is liable to make discovery, and must also submit to the Court adjudicating on any cross claim against it, in mitigation of the relief which it claims in the action, but as regards any other cross claims, it does not by becoming a plaintiff give the Court any jurisdiction to entertain them, which it would not have if it were a defendant.

**SOLICITOR**—LIEN FOR COSTS—LIEN WAIVED BY TAKING SECURITY.

*In re Douglas* (1898) 1 Ch. 199, North, J., determined that where a client, on retaining a solicitor to negotiate a loan, signed a document by which she charged her interest in the property offered as security for the proposed loan, with the payment of the solicitor's costs, that that was such a taking of security for his costs by the solicitor as amounted to a waiver of his lien on his client's documents in his possession for such costs.

**CONTRIBUTORY MORTGAGE**—TRUSTEE—PRIORITY.

*Stokes* v. *Prance* (1898) 1 Ch. 212, was a case between contributory mortgagees to determine a question of priority. The plaintiffs were trustees of the will of Hester Stokes, and on the advice of their solicitors advanced £3,000 on the security of a mortgage for £6,000, the remainder of the mortgage being advanced by the solicitors, the mortgage was taken in the name of two trustees who made a declaration of trust as to £3,000 for the plaintiffs and as to the further sum of £3,000 "residue of the said sum of £6,000 and the residue of the interest to become due and payable" under the mortgage in trust for the solicitors. By another contemporaneous document the solicitors guaranteed the plaintiffs the sufficiency of the security and the repayment of the sum of £3,000 and interest. The solicitors afterwards assigned their interest in the security to other persons, and were afterwards adjudicated bankrupts. The security proving deficient, the plaintiffs claimed that they were entitled to be paid their claim in priority to that of the assignees of the solicitors. Stirling, J., was of opinion that the use of the word "residue" which was relied on as creating a priority in favour of the plaintiff's portion of the loan did not have that effect, and neither had the solicitors' guarantee of the loan in favour of the plaintiffs, nor yet the fact that the plaintiffs' making the loan in the way they did was a breach of trust brought about by the advice of the solicitors; these were liabilities personal to the solicitors for which the plaintiffs could prove against their estates in bankruptcy, but did not in the opinion of the learned Judge in any way affect the question of priority.

**WILL**—CONSTRUCTION—PERIOD OF ASCERTAINING CLASS—GIFT TO CLASS—REMOTENESS—PERPETUITY.

*In re Powell, Crossland* v. *Holliday* (1898) 1 Ch. 227, the construction of a will was in question; the testator directed his trustees to pay the income of his personal estate to the children of his sister in equal shares during their lives, and after their deaths to divide the share equally between their children. The testator's sister survived him, and the question was whether the gift in favour of her children's children was void for remoteness; and Kekewich, J., held that the gift to the children of the testator's sister was confined to children born at the date of the testator's death, and that the gift over to their children was consequently valid.

**TENANT FOR LIFE**—LEASEHOLD — REPAIRS — COVENANTS—RENT - REMAINDERMAN.

*In re Tomlinson, Tomlinson* v. *Andrew* (1898) 1 Ch. 232, deals with a question recently up for consideration in *Patterson* v. *Central Canada L. & S. Co.* before the Divisional Court (Boyd, C., and Robertson, J.), viz., the liability of a tenant for life for repairs. In this case the tenant for life was entitled to leaseholds under a bequest thereof contained in a will, which did not expressly fetter the bequest with any obligation on the part of the tenant for life to assume the covenants or obligations imposed by the lease under which the premises were held by the testator. The lease contained the usual covenants to repair, and pay rent, etc., and Kekewich, J., held that as between the tenant for life and the remainderman, the former was under no obligation by accepting the bequest, to perform any of the covenants in the lease, and that that obligation rested on the testator's estate.

**TRADE UNION**—MALICIOUSLY INDUCING EMPLOYER TO DISCHARGE SERVANT AND NOT TO EMPLOY HIM AGAIN—MALICE—DAMNUM ABSQUE INJURIA.

*Allen* v. *Flood* (1898) A.C. 1, may confidently be regarded as a very important decision, and judging from the evident care and deliberation it has received, it was obviously regarded as such by the House of Lords. The case was known in the Court below as *Flood* v. *Jackson*, and the decision of the Court

of Appeal (1895) 2 Q.B. 21, which is now reversed, was noted ante, vol. 31, p. 472. The point involved was whether the defendant, a delegate of a trades union, who had maliciously (as the jury found) procured the dismissal of the plaintiff from his employment under a threat that if he was not dismissed and refused further employment all his employers' other men would quit work, was liable to the plaintiff in damages for the injury thus sustained, no breach of contract between the plaintiff and his employers being involved in his dismissal. The Court of Appeal decided that the defendant was liable, but the House of Lords have now solemnly declared that such an action on the part of the defendant, even though maliciously done, involves no legal liability to the party injured. Before arriving at this conclusion they called for the assistance of several of the Judges of the High Court, the majority of whom were in favour of the view taken by the Court of Appeal; but, notwithstanding the majority of the Law Lords, decided the case the other way. In favour of the plaintiff were Kennedy, J., and the Court of Appeal (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) and Hawkins, Cave, North, Wills, Grantham and Lawrence, JJ., and Lords Halsbury, L.C., Ashbourne and Morris; and, in favour of the defendant, Mathew and Wright, JJ., and Lords Watson, Herschell, Macnaghten, Shand, Davey and James. Notwithstanding, therefore, that there was a majority of five judges in the plaintiff's favour, his action failed. The case may therefore be taken to establish the broad proposition that maliciously to induce a person to do a legal act whereby a third party may suffer damage involves no legal liability, and that it is, in short, a case of damnum absque injuria. As Lord Watson succinctly puts it, "the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due."

**WILL**—CONSTRUCTION—LEGACIES CHARGED ON LAND—SUBSEQUENT SPECIFIC DEVISE

*Bank of Ireland* v. *McCarthy* (1898) A. C. 181, was an appeal from the Irish Court of Appeal. The question at issue turns upon the construction of a will, whereby the testator made his legacies a general charge on his realty, in case his personal should prove insufficient, and then specifically devised all his lands. There was no residuary devise. The personal estate was deficient, and the devisees claimed that the lands specifically devised were free from the charge in favour of the legatees, on the ground that there is a presumption of law, that lands specifically devised are not intended to be subject to a general charge of legacies, unless it plainly appears that that was the testator's intention. The House of Lords (Lords Herschell, Macnaghten, Morris and Shand), affirmed the decision of the Court of Appeal, holding that in this case the intention of the testator was sufficiently manifest that the lands specifically devised should be subject to the charge, and therefore the presumption of law was rebutted.

**PATENT**—INFRINGEMENT—FOREIGN INFRINGEMENT SOLD ABROAD, AND DELIVERED IN ENGLAND—POST OFFICE.

*The Badische Anilin &c.* v. *The Basle Chemical Works* (1898) A.C. 200, is a case which in the Court of Appeal was known as *Badische Anilin* v. *Johnson* (1897) 2 Ch. 322, noted ante p. 18, and was an action by a plaintiff resident abroad to restrain the infringement of an English patent by a foreign manufacturer under the circumstances mentioned in our previous note, p. 18. The House of Lords (Lords Halsbury, L.C., Herschell, Macnaghten and Davey), have affirmed the judgment of the Court of Appeal, holding that as the contract of sale by the defendant was completed by the delivery to the post office in Switzerland, and as the post office there became the agent of the buyer and not of the seller, the latter had not made, used, exercised or vended the invention within the ambit of the patent.

**NEGLIGENCE**—DEFECTIVE RAILWAY WAGGON—MASTER AND SERVANT—INJURY TO SERVANT ARISING FROM DEFECTIVE WAGGON BELONGING TO THIRD PARTY.

*The Caledonian Ry. Co.* v. *Mulholland* (1898), A.C. 216, was an appeal from a Scotch court in an action of negligence. The facts were as follows: The Caledonian Ry. Co. had a contract with the gas commissioners at Glasgow to deliver coals at Dumfries station, and the Glasgow & S. W. Ry. had a contract with the gas commissioners to haul the coal from the Dumfries station to the gas works: for the convenience of transport, the coals were not unshipped at the Dumfries station, but remained in the Caledonian Ry. Co.'s waggons, and these waggons were then taken possession of by the Glasgow & S. W. Ry. Co., and hauled by horses under the control of their men to the gas works. One of the waggons of the Caledonian Ry. Co. had a defective break, and in consequence of this defect the plaintiff's husband, who was in the employment of the Glasgow & S. W. Ry., was killed. The action was brought against both railway companies, and upon a proceeding in the Scotch Court, somewhat in the nature of a demurrer, they were both held to be liable. The Caledonian Ry. Co. appealed to the House of Lords (Lords Halsbury, L.C., and Herschell, Macnaghten, Morris and Shand), and their appeal was unanimously allowed. The case seems to establish the proposition, that when a deceased person comes to his death by reason of a defect in a vehicle or other apparatus of another, who owed him no duty to have such vehicle or apparatus in an efficient condition, there is no liability on the part of such other person to the representatives of the deceased. *Heaven* v. *Pender*, 11 Q.B.D. 503, was relied on by the respondents, but was considered by Lord Herschell to rest on the ground that in that case the third party had in effect invited the person injured to use the defective staging.

**CRIMINAL LAW**—MARITAL COERCION—(CR CODE, SS. 12 13).

*Brown* v. *Attorney-General* (1898) A,C. 234, was an appeal from the Court of Appeal of New Zealand in a criminal case. The appellant, a married woman, had been tried for unlawfully using instruments with intent to procure an abortion. The New Zealand Criminal Code includes provisions similar to those in Cr. Code ss. 12, 13, and the jury at the trial without any evidence except the fact of marriage, had found that the prisoner had acted under the coercion of her husband, notwithstanding this finding the prisoner was convicted, and her conviction was affirmed by the Court of Appeal. The Judicial Committee of the Privy Council (The Lord Chancellor, and Lords Watson, Hobhouse and Davey and Sir R. Couch), affirmed the decision, being of opinion that the point sought to be raised by the appeals, viz., whether under the Code the fact that the offence was committed under the control or by command of the husband was a defence, was not open to the appellant on the facts, inasmuch as there was no evidence of any such control or command.

**TRADE NAME**—INJUNCTION—"FLAKED OATMEAL"—TERM OF ORDINARY DESCRIPTION—IDENTIFICATION OF NAME WITH GOODS BY USER.

*Parsons* v. *Gillespie* (1898), A.C. 239 was an action to restrain the use of the trade name of "Flaked Oatmeal," by the defendant in connection with goods not sold or manufactured by the plaintiffs. The plaintiffs relied on *Reddaway* v. *Banham* (1896) A. C. 199 (see ante vol. 32 p. 578), but the Judicial Committee, while approving of that case, nevertheless held that the plaintiffs were not entitled to succeed, because they had failed to prove that the name had become so identified with the goods manufactured by them, that its use by the defendants was calculated to have or did have the effect of enabling them to pass off their goods as those of the plaintiff, and the judgment of the Supreme Court of New South Wales dismissing the action, with damages resulting from the granting of an interim injunction, was affirmed.

**QUEEN'S COUNSEL**—R.S.O. 1877, c. 139,—VALIDITY OF—B.N.A. ACT, s. 92, SUB-SECS. 1, 4, 14.

In *Attorney-General of Canada* v. *Attorney-General of Ontario* (1898), A.C. 247, the Judicial Committee of the Privy Council (the Lord Chancellor and Lords Watson, Macnaghten, Morris. Davey, Sir Henry DeVilliers and Sir Henry Strong) have affirmed the validity of R.S.O. (1877) c. 139, enabling the Lieutenant-Governor of Ontario to appoint Queen's Counsel and to confer patents of precedence on members of the Ontario Bar. Lord Watson, who delivered the judgment, defines the position of a duly appointed Queen's Counsel as follows: "It is in the nature of an office under the Crown, although any duties which it entails are almost as unsubstantial as its emoluments, and it is also in the nature of an honour or dignity to this extent, that it is a mark and recognition by the Sovereign of the professional eminence of the counsel upon whom it is conferred. But it does not necessarily follow that, as in the case of a proper honour or dignity, the elevation of a member of the Bar to the rank of the Queen's Counsel cannot be delegated by the Crown, and can only be effected by the direct personal act of the Sovereign." In thus defining the principle on which the honour is conferred, Lord Watson, in view of the past practice of Her Majesty's advisers in Canada, must be presumed to be speaking from an ideal rather than an actual point of view, Having now, however, such an authoritative statement of the principles which ought to guide the selection of Queen's Counsel, we may, perhaps, hope that in the making of future appointments to this office in Canada there will be an honest effort to act up to them. The power of the Provincial Legislature to deal with the matter was held to be derived from the B.N.A. Act, s. 92. sub-secs. 1, 4, 14.

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A correspondent has obligingly drawn our attention to a slight inaccuracy in the note of *Paget* v. *Paget* (1898), 1 Ch. 47, ante p. 153. It is there stated that we have in Ontario no counterpart of the English Act enabling the Court to relieve a wife's property from restraint against anticipation. Our correspondent points out that in R.S.O. (1897) c. 163, s. 9, the section in question is enacted.

## Correspondence.

*To the Editor of the Canada Law Journal.*

DEAR SIR,—I observe that you have referred lately to a remarkably able work of Mr. Dicey's on the "Conflicts of Law," I do not think the work is sufficiently appreciated. It is without doubt the ablest work upon the subject of which it treats in the English language, and the day is probably not very far distant when it will be quoted in our courts on a similar footing as "Preston on Conveyancing."

While referring to this matter, will you also allow me space to refer to "Pollock & Maitland's History of English Law" and "Maitland's Domesday Book and Beyond"? I suppose the every-day lawyer would not take a great deal of interest in such works and yet no person can appreciate and understand the history of English law, its development and present status, without reading just such works as these, and certainly Pollock & Maitland's publication is one that should be read by every person whose aim is to be anything better than an office lawyer. I am not overlooking the fact that the lawyer who is busy in court day by day has but little spare time, and might, perhaps, doubt the utility of his wasting much of his valuable time upon works of this character, and yet, the curious person will, if he reads Pollock & Maitland, see that the case of *Queen* v. *Millis*, 10 Clark & Finelly 534, was improperly decided. The Court went astray because it misapprehended the legal effect of some old cases referred to by the respondent's counsel. See note 1, p. 370, vol. 2, Pollock & Maitland.

W. H. MCCLIVE.

St. Catharines.

# REPORTS AND NOTES OF CASES

## Dominion of Canada.

### SUPREME COURT.

Quebec.] RIOU *v.* RIOU. [Dec. 9, 1897.

*Deed—Construction of—Servitude—Roadway—User—Art. 549 C.C.*

In 1831 the owners of several contiguous farms purchased a roadway over adjacent lands to reach their cultivated fields beyond a steep mountain, which crossed their properties, and by a clause inserted in the deed to which they all were parties they respectively agreed "to furnish roads upon their respective lands to go and come by the above purchased road for the cultivation of their lands, and they would maintain these roads and make all necessary fences and gates at the common expense of themselves, their heirs and assigns." Prior to this deed and for some time afterwards the use of a road from the river front to a public highway at some distance farther back, had been tolerated by the plaintiff and his auteurs, across a portion of his farm which did not lie between the road so purchased over the spur of the mountain and the nearest point on the boundary of the defendant's land, but the latter claimed the right to continue to use the way. In an action (négatoire) to prohibit further use of the way.

*Held*, that there was no title in writing sufficient to establish a servitude across the plaintiff's land over the roadway so permitted by mere tolerance; that the effect of the agreement between the purchasers was merely to establish servitudes across their respective lands so far as might be necessary to give access to each of the owners to the road so purchased from the nearest practicable point of their respective lands across intervening properties of the others for the purpose of the cultivation of their lands beyond the mountain. Appeal dismissed with costs.

*Langelier*, Q.C., and *Choquette*, for appellant. *Pelletier*, Q.C., and *Riou* for respondent.

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Quebec.] DELORME *v.* CUSSON. [Dec. 9, 1897.

*Appeal—Jurisdiction—Title to land—Petitory action—Encroachment—Constructions under mistake of title—Good faith—Common error—Demolition of works—Right of accession—Indemnity—Res judicata—Arts. 412, 413, 429 et seq., 1047, 1241 C.C.*

An action to revendicate a strip of land upon which an encroachment was admitted to have taken place by the erection of a building extending beyond the boundary line, and for the demolition and removal of the walls and the eviction of the defendant, involves questions relating to a title to land, inde-

pendently of the controversy as to bare ownership, and is appealable to the Supreme Court of Canada under the provisions of the Supreme and Exchequer Courts Act.

Where, as the result of a mutual error respecting the division line, a proprietor has in good faith and with the knowledge and consent of the owner of the adjoining lots erected valuable buildings upon his own property, and it afterwards appears that his walls encroached slightly upon his neighbor's land he cannot be compelled to demolish the walls which extend beyond the true boundary or be evicted from the strip of land they occupy, but should be allowed to retain it upon payment of reasonable indemnity.

In such a case the judgment in an action en bornage previously rendered between the same parties, cannot be set up as res judicata against the defendant's claim to be allowed to retain the ground encroached upon by paying reasonable indemnity, as the objects and causes of the two actions were different.

An owner of land need not have the division lines between his property and contiguous lots of land established by regular bornage before commencing to build thereon when there is an existing line of separation which has been recognized as the boundary. Appeal allowed with costs. Judgment of Court of Queen's Bench (Q.R. 6 Q.B. 202) reversed, and judgment of Superior Court (Q.R. 10 S.C. 329) restored.

*Geoffrion*, Q.C., for appellant. *Fortin*, for respondent.

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Quebec.] POWELL *v.* WATTERS. [Dec. 9, 1897.

*Title to lands—Deed, form of—Signature by a cross—19 Vict. c. 15, s. 4 (Can.) Registry laws—Arts, 2134, 2137 C.C.—Litigious rights—Acquiescence by first purchaser in subsequent deed by his vendor—Evidence—Commencement of proof in writing—Finding of facts—Warrantor impeaching title—Arts. 1025, 1027, 1472, 1480, 1487, 1582, 1583 C.C.*

Where the registered owner of lands was present, but took no part in a deed subsequently executed by the representative of his vendor granting the same lands to a third person, the mere fact of his having been present raises no presumption of acquiescence or ratification thereof. The conveyance by an heir-at-law of real estate which had been already granted by his father during his lifetime is an absolute nullity, and cannot avail for any purposes whatever against the father's grantee who is in possession of the lands, and whose title is registered. Writings under private seal which have been signed by the parties, but are ineffective on account of defects in form, may nevertheless avail as a commencement of proof in writing to be supplemented by secondary evidence. The grantees of the warrantors of a title cannot be permitted to plead technical objections thereto in a suit with the person to whom the warranty was given. Where there is no litigation pending or dispute of title to lands raised except by a defendant who has usurped possession, and holds by force, he cannot when sued set up against the plaintiff a defence based upon a purchase of litigious rights. Appeal dismissed with costs. Judgment of Court of Review (Q.R. 12 S.C. 350) affirmed.

*Geoffrion*, Q.C., for appellant. *Lafleur* and *Aylen* for respondent.

Quebec.] LEFEUNTEUM *v.* BEAUDOIN. Dec. 9, 1897.

***Appeal—Reversal on questions of fact—Evidence—Affirmative testimony—Interested witnesses—Art. 1232 C.C.P—Title to land—Prescription by ten years—Limitation of actions—Equivocal possession—Mala fides—Sheriff's deed—Nullity.***

The Supreme Court of Canada may take questions of fact into consideration on appeal, and if it clearly appears that there has been error in the admission or appreciation of evidence by the courts below, their decisions may be reversed or varied. *North British and Mercantile Ins. Co.* v. *Tourville*, 25 S.C.R. 177, followed. In the estimation of the value of evidence in ordinary cases the testimony of a credible witness who swears positively to a fact should receive credit in preference to that of one who testifies to a negative. The evidence of witnesses who are near relatives or whose interests are closely identified with those of one of the parties, ought not to prevail over the testimony of strangers who are disinterested witnesses.

Evidence by common rumour is unsatisfactory and should not generally be admitted. Appeal allowed with costs.

*Belcourt* and *Beaubien*, for appellant. *Lajoie* and *Lussier*, for respondent.

## EXCHEQUER COURT.

AUER INCANDESCENT LIGHT *v.* DRESCHEL.

*Patent of invention—Canadian patent—Foreign patent—Expiration of.*

The expression "any foreign patent" occurring in the concluding clause of the 8th section of the Patent Act, viz.: "Under any circumstances if a foreign patent exist[illegible] Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires," must be limited to foreign patents in existence when the Canadian patent was granted.

[OTTAWA, Jan. 24. BURBIDGE, J.

The facts appear in the reasons for judgment.

*C. A. Duclos*, for plaintiff. *J. E. Martin*, for defendant.

BURBIDGE, J.—The question in this case is as to the meaning of the concluding clause of the eighth section of the Patent Act, as re-enacted in s. 1 of 55-56 Vict., c. 24. That clause, which was first enacted as part of s. 7 of the Patent Act, 1872, is as follows:

"And 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."

If the expression "foreign patent," where it last occurs in the clause has reference to a foreign patent existing at the time when the Canadian patent is granted, the plaintiff is entitled to judgment in this case. If on the contrary it means any foreign patent, and includes a foreign patent taken out after the date of the Canadian patent as well as one obtained prior to such date, the Canadian patent on which the plaintiff relies has expired, and the defendants

are entitled to judgment. In 1872 when the provision in question first found a place in the Canadian patent law, a similar provision existed in the patent laws both of England (15-16 Vict., c. 83, s. 25, repealed by 46-47 Vict., c. 57) and of the United States (Act of 1870, s. 25, R.S. s. 4887), but expressed in the statutes of both countries in terms that made it clear that the English patent in the one case, and the United States patent in the other, did not expire at the expiration of the foreign patent unless such foreign patent had been in existence when the English or United States patent respectively was taken out. If in the Canadian statute the expression "the foreign patent" or "such foreign patent" had been used instead of "any foreign patent," it would be clear, I think, that the Parliament of Canada had intended to adopt the rule on this subject then in force in England and in the United States.

By the English statute 15 & 16 Vict., c. 83, s. 25, it was provided that the English patent should be void immediately upon the expiration or determination of the foreign patent obtained prior to the English patent, or where there were more than one such foreign patent, then immediately upon the expiration or determination of the foreign patent that should first expire or be determined; and by the statute of the United States, the Consolidated Patent Act of 1870, s. 25 (see also R. S. s.4887) it was provided that the United States patent should expire at the same time with the foreign patent, or if there were more than one, at the same time with the one having the shortest term. In both cases the context makes it clear that the foreign patent by the expiration of which a domestic patent was to become void, must have been in existence prior to the granting of the domestic patent. And it may be that the expression "any foreign patent" used in s. 7 of the Patent Act, 1872, was meant to be subject to a like limitation; and I am inclined to think that it was. The earlier part of the section deals with the subject of foreign patents existing at the date of the Canadian patent, and it is not unreasonable to construe the words in the concluding clause as having reference to the same class of foreign patents. And then if it had been the intention of Parliament to adopt a rule on the subject different from that then in force in England and in the United States that intention would, I think, have been clearly expressed. I think the expression "any foreign patent" in the clause with which s. 7 of the Patent Act of 1872 concluded, and s. 8 of the Patent Act (R.S.C. c. 61, 55 & 56 Vict., c. 24, s. 1) concludes, should be limited to foreign patents in existence when the Canadian patent was granted.

There will be judgment for the plaintiff with costs, and the injunction granted herein will be continued.

# Province of Ontario.

## HIGH COURT OF JUSTICE.

Meredith, C.J., Rose, J., MacMahon, J.] [Feb. 7.

CHURCH WARDENS OF ST. MARGARET CHURCH *v.* STEPHENS.

*Church—Week-day services—Band at adjacent rink—Ordinary user of property by services—Non-natural user by band—Injunction.*

In an action by the church wardens and trustees of a church, wherein week-day services were held, to restrain the playing of a band in an adjoining skating rink, which had the effect of disturbing the services.

*Held*, that the use by the plaintiffs of the church in that way was an ordinary reasonable and lawful use of their property, and the inconvenience to them and the congregation was such as to materially interfere with the use and enjoyment of it, and that the defendant's use of their property was not a natural and ordinary one, but a non-natural and extraordinary, though apart from the question of nuisance not an unlawful one.

Per ROSE, J.—Even had the plaintiffs not complained to the former proprietors of the rink that would be no legal answer on the part of the defendants.

Judgment of Meredith, J., affirmed, though slightly varied.

*McCarthy*, Q.C., and *A. McLean Macdonell*, for the appeal. *Beck*, contra.

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Armour, C.J., Falconbridge, J., Street, J.] [Feb. 7.

ARMSTRONG *v.* HARRISON.

*Deed to trustees of temperance society—Construction—Estate taken—Intention—Locality of habitation—New trustee—Appointment—Injunction.*

A. by deed granted certain land to B. C. & D., trustees in trust for (three temperance societies) and their successors representatives of the aforesaid or the representatives of the societies of any temperance society by whatever name . . . . known or designated. Together with all . . . . the estate, right, title . . . . of him his heirs and assigns. . . . To have and to hold . . . unto the said parties . . . and their successors in trust for said societies. . . .

*Held*, that B. C. and D. took only a life estate for their joint lives and the life of the survivor of them leaving the reversion in fee in the grantor.

*Held*, also, looking at the situation of the premises and the uses for which they were intended and that the temperance societies originally named were all formed in a certain town that the trust was intended to be confined to temperance societies having the same local habitation.

*Held*, also, that the plaintiff R. having been appointed a trustee for such a society although no such appointment could extend or prolong the life estate granted was entitled to restrain the defendant, his co-trustee and the sole surviving trustee under the deed, from pulling down a building on the premises. Judgment of the County Court of Halton reversed.

*H. S. Osler*, for the appeal. *Bicknell*, contra.

Armour, C.J., Falconbridge, J., and Street, J.] [Feb. 10.

MINHINNICK *v.* JOLLY.

*Fixture—Negotiations for sale—Intention to sever from freehold—No actual severance—Subsequent purchaser of freehold, rights of.*

The mere expression by the owner of an intention to sever a fixture from the freehold and sell it to another even if communicated to one who becomes a subsequent purchaser of the freehold would not operate to convert a part of the freehold (the fixture) into a chattel or to alter its character in any way; and in the absence of any reservation in the conveyance everything attached to the freehold passes to the purchaser. Judgment of Meredith, J., reversed.

*Aylesworth*, Q.C., for the appeal. *N. W. Rowell*, contra.

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Divisional Court.] EWING *v.* CITY OF TORONTO. [Feb. 14.

*Municipal corporation—Sidewalk—Repairs—Accident—Negligence.*

In a sidewalk on one of the streets of the City of Toronto, there was a trap door leading to a cellar of abutting premises, about eight feet long, but divided in the centre into two parts, and opening therefrom, having three hinges on each half, fastened to the door by straps or flaps, which were half an inch above the level of the door, the movable part of the hinge extending an inch or an inch and one sixteenth above the level of the sidewalk, and being of the same length as the width of the flap, and about three-quarters of an inch in width. After nightfall, on a not dark night, the place also being lighted by an electric lamp on the opposite corner of the street, though the plaintiff's body, and the shadow from it to some extent obstructed the light, the plaintiff while walking on the sidewalk, struck his toe against one of the centre hinges, stumbled and fell, injuring himself. The plaintiff was well acquainted with the locality, having passed over the place at least once or twice a day for the previous three years.

*Held*, that there was no liability imposed on the city; for that the existence of the hinges, having regard to the purpose for which they were placed where they were, and the other circumstances of the case, did not constitute a breach of the defendant's statutory duty to keep in repair. *Ray* v. *Corporation of Petrolia* (1874) 2 C.P. 73, considered.

*John McGregor*, for plaintiff. *Lount*, Q.C., for third party defendant. *Fullerton*, Q.C., for corporation.

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C. P. Div.] REGINA *v.* GRAHAM. [Feb. 14.

*Conviction—Removal into High Court by certiorari—Application to take affidavit off files—Costs—Crim. Code, ss. 897, 898.*

The cost referred to in ss. 897, 898 of the Criminal Code are those dealt with by the General Sessions of the Peace, when a conviction or order is affirmed or quashed on appeal to it; but not the costs of an unsuccessful application to a Judge of the High Court to take an affidavit off the files, after a conviction has been moved by certiorari into the said court. After the remo-

val by certiorari of a conviction of the defendant into the High Court, the magistrate, who had made the conviction, moved to have an affidavit filed by the defendant, removed from the files of the court, which was refused with costs payable by the magistrate to the defendant; but subsequently under the belief that ss. 897, 898 of the Code applied, the defendant obtained an ex parte order, varying the previous order by making the costs payable to the clerk of the peace, and then to the defendant. An appeal to the Judge of the High Court sitting in Weekly Court, was dismissed; but an appeal therefrom, and also by leave, direct from the amended order, was allowed, and the order set aside. The Judge of the High Court sitting in Weekly Court has no power to entertain an appeal of this kind.

*DuVernet* and *Woods* for the police magistrate. *Murphy*, Q.C, contra.

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MacMahon, J.] DAVIS *v.* TAEGER. [March 4.

*Security for costs—Plaintiffs out of the jurisdiction—Judgment by default—Defendant allowed in to defend on terms.*

The plaintiffs, in an action to recover $4,500 upon a bond, resided out of the jurisdiction, and the writ of summons was so endorsed. The defendant appeared, but failed to deliver a statement of defence, and judgment for the plaintiffs was entered upon default, which the defendant moved to set aside, and an order was made allowing the defendant in to defend on terms of paying costs, paying $100 into Court to answer plaintiff's future costs, and providing further that the judgment and execution issued thereon should stand as security for the plaintiffs' claim. The defendant paid the costs and paid the $100 into Court, and then delivered a statement of defence, and issued and served a præcipe order upon the plaintiffs for security for costs, which the plaintiffs moved to set aside.

*Wyld*, for the motion, contended that the defendant, being allowed in on terms, was now the actor, and was not entitled to security, citing *Doer* v. *Rand*, 10 P.R. 165; *Exchange Bank* v. *Barnes*, 11 P.R. 11; *Thibaudeau* v. *Herbert*, 16 P.R. 420; *Walters* v. *Duggan*, 17P .R. 359.

*R. V. Sinclair*, for the defendant.

Præcipe order set aside with costs.

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Armour, C.J., Falconbridge, J., Street, J.] [March 7.

REGINA *v.* HOLMES.

*Criminal law—Criminal Code, s. 210—Neglect to support wife—Former marriage—Proof of death of first husband—Conviction.*

The defendant on the complaint of his wife was convicted under sub-sec. 2 of s. 210 of the Code of refusing to provide necessaries for her. The evidence showed that the parties were married in 1890, but that the complainant had been married to one W. in 1886, though she had never lived with him; that in 1888 she had received a letter stating he was dying in the United States, and that that was the last she heard of him, save that about a year after her marriage to H. she again heard that he was dead.

No further proof of the death of the first husband was given.

*Held*, that there was evidence to go to the jury of the death of the first husband, and that the defendant was properly convicted.

*J. R. Cartwright*, Q.C., for Crown. *J. M. Godfrey*, for defendant.

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Rose, J.] [March 7.

IN RE MCGILLIVRAY AND CHESTERVILLE PUBLIC SCHOOL.

*Public schools—Dissolution of Union school section—Power of arbitrators—59 Vict., c. 70, O., ss. 43, 44.*

Proceedings having been taken under the provisions of The Public Schools Act, 1896, 59 Vict., c. 70, O., for the dissolution of the Union school section hereinafter mentioned, arbitrators appointed by the county council under s. 44 of the Act, provided by their award that "Union school section No. 8 of Winchester Township, comprising the incorporated village of Chesterville and rural section No. 8 in said township, be dissolved, and that all the parcels of land included within the boundaries of rural section No. 8 be attached to and form the same for school purposes, and that all the parcels of land included within the boundaries of the village of Chesterville shall remain attached to and form the urban section of Chesterville village for such purposes.

*Held*, that though the language was in part insensible, the effect of it was to dissolve the union, recognizing the village as a corporation subject to the provisions of ss. 53 & 54 of the Act, and school section No. 8 as a non-union school section subject to the provisions of certain other sections; and that the award was valid as an exercise of power under sub-secs. 5 or 6 of s. 43.

*Aylesworth*, Q.C., for the motion to set aside the award. *B. C. Clute*, Q.C., and *Hilliard*, contra.

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Meredith, J.] ORFORD *v.* FLEMING. [March 21.

*Solicitor—Charging order—Rule 1129—"Property"—Judgment—Assignment—Notice—Taxation of costs—Sale of judgment.*

An application made under Rule 1129, by the solicitors who obtained on behalf of the plaintiff a judgment in the High Court for the recovery of money from the defendant, for an order charging their costs upon the judgment debt. Previous to the application the judgment had been assigned by the plaintiff to the mother of the defendant. Rule 1129 is new in Ontario, and is as follows:

"1. Where a solicitor has been employed to prosecute or defend any cause, matter or proceeding, it shall be lawful for the Court in which the cause, matter or proceeding has been heard or is pending, or for a judge thereof, to declare such a solicitor . . . to be entitled to a charge upon the property, of whatever nature, tenure or kind, recovered or preserved through the instrumentality of such solicitor; and upon such declaration being made, such solicitor . . . . shall have a charge upon and against and a right to payment out of the property so recovered or preserved, for the taxed costs, charges and expenses of or in reference to such a cause, matter or proceeding: and all conveyances and acts done to defeat, or which may operate to

defeat, such charge or right shall, unless made to a bona fide purchaser for value without notice, be absolutely void and of no effect as against such charge of right.

2. The court or judge may make such order for taxation of such costs, charges and expenses, and for the raising and payment of the same out of the said property as may seem just. . . ."

*Held*, following *Birchall* v. *Pugin*, L.R. 10 C.P. 397, that the judgment debt was "property" within the meaning of the Rule.

*Held*, also, upon the facts, that the assignment was not to a bona fide purchaser for value without express notice; but, even if there were no express notice, the assignee must, following *Cole* v. *Eley* (1894), 2 Q.B. 180, be taken to have notice of the solicitors' lien, for she was buying a judgment debt, and the implied notice she would have would be notice within the meaning of the Rule.

An order was made for the taxation of the costs of the action and of this application, declaring the applicants entitled to a charge upon the judgment for the amount which should be taxed, and directing that such amount should be raised and paid out of the judgment by a sale thereof.

*W. R. P. Parker*, for applicants. *Coatsworth*, contra.

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Meredith, J.] WINCH *v.* TRAVISS. [March 23.

*Arrest — Discharge — Failure to deliver statement of claim—Rule 1044—Extension of time—Rule 353—Terms.*

Under the present practice there is power, after the expiration of the time appointed by Rule 1044 for the delivery of the statement of claim, where a defendant is detained in custody under an order for arrest, to extend the time. The case is within Rule 353, and the wording of Rule 100 of the Rules of Trinity Term, 1896, has been altered from "shall have been given" to "is given" in Rule 1044.

Where the statement of claim was delivered two days after the month had expired, and the defendant moved for his discharge, an order was made validating it for all purposes, upon terms as to speedy trial and payment of costs.

*C. C. Robinson*, for the plaintiff. *C. Millar*, for the defendant.

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## ASSESSMENT CASES.

Dartnell, Co. J.] GRAND TRUNK RAILWAY CO. *v.* PORT PERRY.

*Assessment—Railways—Tank and platform—Sub-tenant.*

Appeal from the Court of Revision of the village of Port Perry.

*Held*, water tanks and platforms are part of the superstructure of a railway and are not assessable.

2. The assessment of a sub-tenant of a railway company should be deducted from the total assessment.

*E. Donald*, for appellants. *J. Arnold*, for respondent.

Dartnell, Co. J.] HARRIS *v.* TOWNSHIP OF WHITBY.

*Assessment—Parsonage.*

Appeal from the Court of Revision of the township of Whitby.

In 1885 two acres of land were conveyed to the Church Society in trust for a churchyard and burial ground for the use of the members of the Church of England. A church and subsequently a parsonage were erected thereon.

*Held*, that since 1890 the parsonage and a reasonable curtilage surrounding it were liable to taxation for municipal purposes.

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# Province of Nova Scotia.

## SUPREME COURT.

Graham, E.J.] NORTH SYDNEY MINING CO. *v.* GREENER.

*Equitable execution—Application for appointment of receiver by way of, under R.S.N.S. c. 104, s. 13, s.-s. 7—Mere convenience not sufficient ground—O. 40, Rules 34, 35.*

Application for a receiver by way of equitable execution to realize an amount due to the defendant as mortgagee (the mortgage being not yet due). Under R.S. N.S., c. 104, s. 13, s.-s. 7, enabling the court to appoint a receiver in all cases in which it shall appear to "be just or convenient" to do so. Under R.S. N.S. c. 104, Ord. 40, R. 34, 35, the sheriff may take mortgages in execution and either collect them in his own name, or assign them to the creditor in satisfaction of the execution.

*Held* (refusing the application), that the provision enabling the court to appoint a receiver did not alter the law which existed before it was passed as to the circumstances in which a receiver would be appointed, and that it would not do so merely because it would be a more convenient way of obtaining satisfaction of a judgment than the usual mode of execution. *Harris* v. *Beauchamp Brothers* (1894), 1 Q.B. 801. *Holmes* v. *Millage* (1893) 1 Q.B. 551. *Manchester Banking Co.* v. *Parkinson*, 22 Q.B.D. 173. Cases decided in respect to a similar provision in England followed. [See also *Pacific Investment Co.* v. *Swann*, ante p. 107.]

*W. A. Henry*, for plaintiff. *F. Mathers*, for defendant.

Full Court.] [Jan. 15.

MCLEOD *v.* THE INSURANCE CO. OF NORTH AMERICA.

*Marine insurance—Policy on hull and freight—Acceptance of abandonment—Admission of right to recover—Duty of company undertaking to repair—Owner prejudiced by—Right of owner to inspect work—"Boston clause"—Construction—Evidence—Matters peculiarly for jury—Authority of master and consignee superseded by arrival of special agent—Proofs of loss—Right of court to supply finding—Substantial wrong or miscarriage must be shown—O. 37, R. 6.*

The brigantine "Hattie Louise," owned by plaintiff and insured by the defendant companies under policies on the hull and freight, left Trinidad for Vineyard Haven with a cargo of molasses. Shortly after leaving port she encountered heavy weather, and put into the port of St. Thomas, W. I., in a leaky condition.

A survey was called which resulted in the cargo being ordered to be discharged and stored, and the vessel placed upon the slip for repairs, but before anything was done under the surveyors' report, J. B., an agent of the defendant companies, and W. H. B., the plaintiff's agent, arrived at St. Thomas by the same vessel, and several interviews took place with a view to determining what course should be pursued. This resulted in a disagreement, the plaintiff's agent insisting that the cargo should be trans-shipped, and the vessel taken to a northern port, after making temporary repairs, while the agent for the insurers insisted upon the vessel being permanently repaired at St. Thomas, and carrying her own cargo forward. Notice of abandonment was given on December 28th by letter addressed to the defendant companies In consequence of the failure on the part of the agents to come to an agreement, the plaintiff's agent withdrew from the project of repairing the vessel, and the work of effecting repairs was proceeded with by the defendant's agent. After the vessel was taken off the slip and the cargo reloaded, it was found that the vessel was still leaking badly, and was unseaworthy, and that it would be necessary to again discharge the cargo. At this time the disbursement account had run up to $4,014.48, and the vessel, which was valued in the first instance at $6,000, had not been re-metaled or re-classed. An attempt was made to raise money on bottomry, but failed on account of the leaky condition of the vessel, and as the consignees refused to allow the cargo to be discharged a second time, until the claims were paid, she was finally sold under process to recover the claims. The policies contained what is known as the "Boston clause," under which it is stipulated that "the acts of the assured or insurers in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of the abandonment." The jury found among other things that there was an acceptance of the abandonment.

*Held*, 1. The underwriters having intervened for the purpose of making permanent repairs the repairs must be thorough and made within a reasonable time; otherwise they must be held to have accepted the abandonment.

2. The clause in the policy was applicable rather to cases where the owner neglects or refuses to save the ship than to cases where he is going on with the project of saving her.

3. The owner was clearly prejudiced by the interference of the defendant's agent as the expenses of repairing at St. Thomas were excessive, and the vessel could not be re-metaled or re-classed there, whereas if she had been taken to a northern port as proposed by plaintiff's agent the repairs could have been better effected and at half the cost.

4. The case being one in which there was obscurity and evidence of a contradictory character was peculiarly one for the consideration of the jury and upon which they were especially competent to pass. And their findings were such as reasonable men might have found.

5. The authority of the master and consignees to bind the owner was superseded by the arrival of the plaintiff's agent at St. Thomas, and that if the consignees, after the agent's arrival, accepted the tender for repairs, express authority to do so must be shown.

6. Where repairs are made by the underwriter the owner has the same right to have someone superintend the work that the underwriter has where the repairs are made by the owner.

7. The Court will not set aside a verdict for misdirection unless there has been some substantial wrong or miscarriage (O. 37 R. 6).

8. Proofs of loss are not necessary when the loss need not amount to anything to entitle the plaintiff to recover.

9. Acceptance of the abandonment is an admission of the plaintiff's right to recover.

10. When the party with whom the contract is made is identified as the party insured there is not the same reason for requiring proof of interest as where the insurance is effected "for whom it may concern."

11. The finding of the jury that each company by its conduct, reasonably led plaintiff to believe that formal proofs of interest and loss and adjustment were not required, and the evidence showing that defendants' agent, who was present at St. Thomas, knew more about the loss than the owner did, was a reasonable finding.

12. On the authority of *Manufacturers Ins. Co.* v. *Pudsey*, that if the answer as to waiver was defective, because the authority of J. B., who purported to act as agent for defendants, was assumed, the Court could deal with the matter and supply a finding as to waiver.

13. There having been an agreement that the trial Judge should submit to the jury "such questions as he decided were proper to be left to the jury." It was held with respect to a question which it was contended the Judge should have submitted, that the question should have been formally offered, and a ruling had upon it, and a note made of the fact.

*R. E. Harris*, Q.C., and *R. C. Weldon*, Q.C., for appellant. *R. L. Borden*, Q.C., for respondent.

Full Court.] WEATHERBE *v.* WHITNEY. [Jan. 22.

*Contract for sale of coal mining areas—Plaintiff not entitled to recover alleged price but only damages occasioned by breach—Arrest of defendant – Order for set aside—Claim that equitable title passed—Affidavit held insufficient to support—Where perfected and completed sale is alleged it need not be alleged further that title passed.*

Plaintiff brought an action against defendant for the breach of a contract for the sale of a certain coal mining property, claiming among other things the specific performance of the alleged agreement, or, in the alternative, damages for the non-performance thereof. Subsequently to the bringing of the action plaintiff procured an order for the defendant's arrest on the ground that he was about to leave the Province, and that unless he was forthwith arrested the debt would be lost.

*Held*, (affirming on this point the judgment of Ritchie, J., setting aside the order) that the breach of an agreement for the sale of a mining right does not entitle the vendor to recover the purchase money, but only to damages occasioned by the breach.

It was contended on the part of plaintiff that the equitable title to the areas passed by the agreement, and that this was sufficient to entitle plaintiff to sue for the price of the areas.

*Held*, that even if this were true, as the only allegation in plaintiff's affidavit was that defendant signed by his agent, and not that he himself signed a note or memorandum of the agreement, this not being an equitable action for specific performance but a common law action to recover a certain sum of money, the alleged price of the areas, that plaintiff could not succeed on that ground in upholding his proceedings.

*Held*, further, on the authority of *Hargreaves* v. *Hayes*, 5 E. & B. 272, (reversing on this point the decision appealed from) that it was not necessary for plaintiff, in his affidavit, in addition to alleging a perfected and completed sale of the coal mining areas to defendant, to allege that the title passed.

*W. B. A. Ritchie*, Q.C., for appellant. *W. B. Ross*, Q.C., for respondent.

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Full Court.] FULTON *v.* THE KINGSTON VEHICLE CO. [Jan. 22.

*Assignment and confession of judgment—Induced by threat of criminal prosecution—Held not ground for setting aside in absence of agreement express or implied to abandon proceedings—Where debtor or delinquent is himself seeking to avoid contract—Held distinguishable—Threat to do that which may lawfully be done—Held not to be duress.*

Plaintiffs sought to set aside a deed of assignment made by A. R. F. to the defendant F. in which the defendant company were preferred creditors, and also a judgment confessed to the defendant company at the same time, on the grounds that A. R. F. was induced to make the assignment and confess the judgment, (1.) under threat of criminal prosecution; (2.) by an agreement on the part of defendants to stifle such criminal prosecution if their demand was complied with. A large number of questions were submitted to

the jury, all of which were answered in plaintiff's favour, with the exception of the 8th, which was as follows: "Whether there was any understanding between the defendant company or its directors and A. R. F., either express or implied, to abandon the criminal prosecution if the assignment and warrant to confess judgment were executed," to which the jury answered "No."

*Held*, that in the absence of such understanding or agreement the mere fact that threats of a criminal prosecution were employed to induce A. R. F. to give security for a debt admittedly due, and compliance on his part in fear of arrest for the alleged offence, were not enough to invalidate the security given under such circumstances.

*Semble*, that the case where the debtor or delinquent is himself seeking to avoid his contract is distinguishable from the case where the security is given by a third party in fear of or to save from criminal prosecution a near relative.

*Semble*, that where the threat is only to do that which may lawfully be done, as a threat of a lawful imprisonment, there is no duress.

*H. A. Lovett*, for appellants. *R. L. Borden*, Q.C., and *H. McKenzie*, for respondents.

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Townshend, J.] PITFIELD *v.* GUEST. [March 11.

*Fraudulent assignment—Particulars of fraud.*

This was an action of replevin against the Sheriff of Yarmouth. The defendant pleaded, inter alia, that the deed of assignment under which the plaintiff claimed (*a*) was made "for the purpose and with the intent to defraud, hinder and delay the creditors of the grantor, etc." and (*b*) that the deed "is void under 13 Eliz. c. 5, as hindering and delaying creditors." The plaintiff moved under Order 19, Rule 7, for further and better particulars of the fraud pleaded as aforesaid, citing *The Rory*, 7 P.D. 121, and *Wallingford* v. *Mutual Society*, 5 App. Cas. 701.

*Held*, that the particulars sought must be refused with costs. The plea of purpose and intent has a well settled meaning and indicates all that can reasonably be asked. It is not such a general allegation of fraud as is mentioned in the cases cited by the applicant. It is as definite as is necessary. The defence of the statute 13 Eliz. is specifically set up, and what that defence means and the evidence required under it are too well known to take anyone by surprise.

*J. A. Chisholm*, for the motion. *Ernest Gregory*, contra.

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# Province of Manitoba.

## QUEEN'S BENCH.

Full Court.] CARRUTHERS *v.* HAMILTON PROVIDENT. [March 5.

*Mortgagor and mortgagee—Negligence in exercising power of sale.*

Appeal from decision of Bain, J., noted ante p. 51, dismissed with costs, but verdict reduced by $200.

*C. H. Campbell*, Q.C., for plaintiff. *J. S. Ewart*, Q.C., and *A. D. Cameron* for defendant.

Full Court.] CRAYSTON *v.* MASSEY-HARRIS CO. [March 5.

*County Courts—Jurisdiction—Extent of—Equitable relief.*

County Court appeal. The plaintiff sued to recover back money paid by him to the defendant company under stress of a seizure of his crop by the bailiff, and for damages for trespass to goods. It was shown at the trial that the plaintiff had given the company by mistake a chattel mortgage for an amount larger than he really owed them, and that at the time the bailiff made his demand the plaintiff really owed the company nothing; that the plaintiff gave a bond for the forthcoming of the goods to induce the bailiff to withdraw and subsequently sold enough of the grain and paid the amount demanded. Plaintiff had a verdict for the amount overpaid and $10 for the trespass.

*Held*, that County Courts in Manitoba have no jurisdiction to rectify written instruments for fraud or mistake or to entertain an action for the recovery of money paid under the strict terms of such an instrument. S. 60 of the County Courts' Act only gives jurisdiction in personal actions, and the limitations as to amounts show that purely money demands are contemplated. If equitable claims are to be entertained at all they must be equitable debts or demands of cognate character to legal ones coming under the terms used. The plaintiff was liable at common law for the full amount of the mortgage he had signed and sealed. A recital in it estopped him and he could have had no defence to an action on the covenant for the full amount, and the license to seize the grain would have been an effectual defence to any action of trespass. Money paid under such a contract could not have been recovered back at law; and the County Court, having to right no rescind or rectify the chattel mortgage or to declare it satisfied, could not exercise an equitable jurisdiction to adjudge re-payment of the money: *Foster* v. *Reeves* (1892), 1 Q.B. 255. The provision in section 70 of "The County Courts' Act," that the judge "may make such orders, judgments or decrees thereupon as appear to him just and agreeable to equity and good conscience," does not authorize him to give the relief that the plaintiff would be entitled to in a court possessing general equitable jurisdiction. It and section 71 come under the heading "Practice and Procedure," and only apply to orders and decrees in actions within the jurisdiction of the court as defined by section 60, and deal only with the practice and procedure in such actions, and with the manner in which the judges are to dispose of such actions at the trial: *Ahrens* v. *McGilligat*, 23 U.C.C.P. 171. The jurisdiction of the County Court being confined to personal actions which constitute one of the three divisions into which civil actions maintainable in the old common law courts were divided, and it being a rule of construction that when technical words are used in reference to a technical subject, they will prima facie be understood to be used in the sense they have acquired in that subject, it is open to question if the legislature intended to give jurisdiction to entertain any causes of action but such as might have been sued for as personal actions in the courts of common law; and at all events the words do not include a claim to reform or cancel a deed for fraud or mistake. Appeal allowed with costs, and non-suit entered in the County Court.

*Howell*, Q.C., for plaintiff. *Culver*, Q.C., for defendant.

Dubuc, J.] RITZ *v.* SCHMIDT. [March 11.

*Practice—Service of process—Leave to defend—Setting aside judgment.*

Motion by the defendant Frose to set aside the judgment recovered by plaintiffs against the defendants by default for possession of a farm and a writ of hab. fac. poss. and the proceedings and delivery of possession thereunder. The plaintiffs bought the land in question at a sale held by order of the Court in a suit commenced by one Russell to realize the amount of a judgment against the defendant Schmidt, and had obtained an order to the Court vesting the title in them ; but, as defendants had refused to give up possession, this action was necessary. Defendants made affidavits that they had never been served with any statement of claim and had no knowledge of the proceedings in this action. They also denied service of any papers or notices in the former suit in which the vesting order had been made, and claimed that the same had never in any manner been brought to their knowledge and that they had a good defence to the action on the merits ; that the land in question was the homestead of the defendant Schmidt before he conveyed it to the defendant Frose ; and that the land was exempt from sale under legal process. The affidavit of service on the defendants stated that true copies of the statement of claim had been personally served on the defendants by delivering the same to, and leaving the same with, the defendants respectively at their houses and that they refused to accept the same and the bailiff left the copies at the houses on the land described in the affidavits.

*Held*, on the authority of *Thompson* v. *Pheney*, 1 Dowl. 441, that personal service requires that the process should be shown to have come to the notice of the person to be served, or that he has been informed of the nature of the process, when it will be sufficient to throw it down before him and leave it there ; and, as such was not shown to have been done in this case, the service was not effectual, more especially as the defendants were Mennonites, and did not understand English ; and that defendants should be allowed to put in their defence to the action within fifteen days.

The evidence disclosed on the affidavits as to the merits of the defence raised not being satisfactory or convincing.

*Held*, following *O'Sullivan* v. *Murphy*, 78 L.T. 213, that none of the proceedings should be set aside in the meantime, and plaintiffs should be allowed to remain in possession of the property. Costs of the application reserved until after the trial of the action.

*Phippen*, for plaintiffs. *Wilson*, for defendants.

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HUTCHINGS *v.* ADAMS.

*Principal and agent—Assignment for creditors—Sale of goods.*

Appeal from a County Court. One Pifer, who had been carrying on a business as a general trader in Oak Lake, being in embarrassed circumstances, made a transfer of his stock in trade and other property to the defendant in trust for certain creditors, and a written agreement was entered into between Pifer and the defendant which provided among other things that the former

should remain in charge of said business and carry it on for and on behalf of the defendant in accordance with instructions received. It did not appear that any specific instructions as to the purchase of new goods were given, but it seemed to have been contemplated by the defendant that some new goods would have to be ordered from time to time to enable Pifer to clear out the old stock. Pifer then remained in charge and in his own name purchased from the plaintiff goods such as would reasonably be required in the business, and the Judge of the County Court found that the goods had been ordered for the said business.

*Held*, following *Armstrong* v. *Stokes*, L.R. 7 Q.B. 598, and *Watteau* v. *Fenwick* (1893), 1 Q.B. 349; that defendant had constituted Pifer as his general agent for taking charge of and carrying on the said business, and was liable to the plaintiff for the price of the goods furnished by him. *Hechler* v. *Forsyth*, 22 S.C.R. 489, distinguished. Judgment in the County Court affirmed and appeal dismissed with costs.

*Nugent*, for plaintiff. *A. D. Cameron* and *Clark*, for defendant.

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ALLAN *v.* M. & N. W. R. CO.

*Practice—Receiver—Ex parte application—Trustee and cestui que trust.*

This was a motion made by two holders of bonds issued by the defendant company, and secured by a mortgage made to Grey and Heron, the plaintiffs in the second suit, as trustees for leave to bring an action to administer the trusts of the mortgage deed, for a declaration that the power of sale and other powers contained in that deed are valid, and for a declaration of the true construction of the mortgage as to certain matters. The mortgage covered a portion of the line of the defendant's railway, known as the first division: but as part of it is beyond the province it had been decided that the court had no jurisdiction to order a sale. Receivers of the profits, tolls and revenues of the railway had been appointed in the respective suits, but they were not in possession of any part of the company's property, and had nothing to do with the management of the railway. The trustees Grey and Heron had formerly applied to the court, and got leave to take certain proceedings which they had taken, but without any practical result to the bond holders, beyond the appointment of separate receiver for the first division. It was deemed necessary to make the present application because the railway would have to be made a party to the action to be brought, and receivers had been appointed in the above actions.

*Held*, that leave should be granted as asked, and that the applicants were not precluded from bringing an action for the administration of the trusts on account of anything done by the trustees; also that no notice of the application need be given, as the receivers were not in any sense in possession of any part of the company's property.

*Howell*, Q.C., for applicants.

# Province of British Columbia.

## SUPREME COURT.

Davie, C.J., Walkem, J., Irving J.] [Feb.

Re QUAI SHING, AN INFANT.

*Custody of infant—Rights of adoptive parent—Welfare of child.*

Quai Shing, a Chinese girl of about 14 years of age, was taken from her country folk against her will and placed in the Refuge Home at Victoria, B.C. An application for habeas corpus by her former Chinese custodian was refused by Drake, J. The applicant appealed and the appeal was heard before Davie, C.J , Walkem, J. and Irving, J.

*Held*, following *R.* v. *Nash*, 10 Q.B.D. 454, and *Ah Guay's Case*, 2 B.C. 343, that neither the applicant, who is neither parent nor guardian, but has adopted the child at a tender age at request of a relative in whose care she had been committed, nor the respondent, the matron of the Refuge Home, are entitled in law to the custody and possession of the child. In all such questions the benefit or welfare of the child is of primary importance. Both parties being in the eye of the law strangers, the Court will act on its opinion as to what is best for the child.

Per DAVIE, C.J., dissenting, that while an adoptive parent has no status as against parent or guardian, yet as against strangers interfering the adoptive parent is a person having the lawful care or charge of the child of his adoption, so as to make it illegal to take the child out of his custody, unless on account of moral turpitude or the like.

Appeal dismissed.

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Walkem, J.] CONNELL *v.* MADDEN. [Feb.

*Mineral claim—Initial post.*

A prospector staked a claim on the international boundary, some of the stakes being in British Columbia, and some, including the initial post, on American soil.

*Held*, that a post thus planted in a foreign country could not be a boundary post within the meaning of any of the Mineral Acts, and the location is invalid.

Walkem, J.] [Feb.

ESQUIMALT & NANAIMO RAILWAY CO. *v.* NEW VANCOUVER COAL CO.

*Inspection of mine.*

Plaintiffs claim to be the owners under Dominion and local legislation, and under a Crown grant, of all the coal beneath Nanaimo harbour. There is no dispute as to the place under the harbour where defendants are taking out coal. Plaintiffs having commenced proceedings for purpose of asserting its title to the coal lands in question.

*Held*, following *Bennett* v. *Whitehouse*, 29 L.J., c. 326, that the plaintiffs are entitled to order asked for, as they are entitled to know the extent and manner of the work being done on giving undertaking as to damages, and that information gained will be used only for purposes of the action. Plaintiffs to pay expenses of inspection.

# Book Reviews.

*The Judicial Trustees' Act*, 1896, with notes of practice cases in Scotland on the Judicial Factors' Act, with the rules issued under the Act of 1896, and appendix giving the Trustees' Acts in England and an epitome of Colonial Acts, by GERALD JOHN WHEELER, M.A., LL.B., of Lincoln's Inn. London, Butterworth & Co., 7 Fleet St., Law Publishers, 1898.

This book is, of course, peculiarly useful in England, but the cases cited will help to illustrate the law as it stands in this country. These cases, by the way, are largely Scotch decisions, on the Judicial Factors' Act, which gives the peculiarity of an English book illustrated by Scotch cases. The reference to public trustees in the colonies is interesting and gives a bird's eye view of the progress of legislation on the subject in various parts of the Empire.

*A Summary of the Principles of the Law*, by CLAUDE C. M. PLUMITRE, Middle Temple, barrister-at-law, etc. Second edition. London: Butterworth & Co., 7 Fleet street, Law Publishers, 1897.

In this very useful little work of 270 pages, the author summarizes by means of rules and sub-rules those principles of the law which are applicable to the formation of a simple contract, and to the rights and obligations attaching thereto, illustrating the application of these rules by examples taken from leading cases. As the author correctly states, any attempt to summarize so extensive a branch of law, is full of difficulties, but certainly the author has done his work remarkably well, giving a very valuable introduction to more advanced reading, such as the works of Pollock, Anson and Addison give in more extended form. This is a book which might well be added to the curriculum of the Law School, being cheap as well as good. Price, 7s. 6d.

*The Law relating to unconscionable Bargains with Money Lenders*, by HUGH H. L. BELLOT, M.A., B.C.L., and R. JAMES WILLIS, Barrister-at-Law. London: Stevens & Haynes, Law Publishers, Temple Bar; 1897; 130 pp.

Books on special subjects are the order of the day. We have got pretty well to the end of usury laws, but this book has its use even now. The first part is devoted to a sketch of the origin and history of usury, and a discussion on usury at common law, prior to the statutes regulating usurious transactions. The more practical part of the book begins with chap. 3, which treats of the equitable doctrine giving relief in case of heirs and expectants, dealing with their expectancies as enunciated by the leading case of *Earl Chesterfield* v. *Janssen*. An appendix gives the various leading cases decided since the case above referred to. Questions do not often in this country arise in connection with the subject treated of in this book, but this collection of the authorities will make it useful, and save time when the occasion requires.

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*Principles of the Law of Consent*, with special reference to criminal law, including the doctrines of Mistake, Duress and Waiver; by HUKM CHAND, M.A., author of "Res Judicata." Bombay Education Society's Press. 1897.

A writer who, in these days of specialized dissertations upon concrete subjects, gives us a treatise upon one of those elementary concepts which constitute the framework around which the entire structure of the law has been built, is performing an extremely meritorious and useful task. The most recent essay in this direction emanates from the far east, and is written by a native of India, a quarter of the globe from which we have not hitherto learned to look for much enlightenment in matters of this sort. The topic chosen involves the investigation of some of the most difficult and unsettled problems of jurisprudence, and to the solution of these the learned author has contributed most valuable aid. In carrying out his scheme he has, with remarkable industry, drawn not only upon that great storehouse of legal lore, the English and American reports, but also upon the disquisitions of the civilians of Continental Europe. It would require more space than we have at our disposal to furnish our readers with any more definite idea than this of the contents of Mr. Chand's volume. Nor are we disposed, in a case where there is so much that is deserving of praise, to essay the ungracious task of criticizing the author's style, which is often rather obscure and inartificial. We shall merely say that, in our own opinion, this work merits the favourable attention of the profession as a very cleverly arranged collection of information which it would be extremly difficult to procure without its assistance.

## COUNTY OF YORK LAW ASSOCIATION.

At the annual meeting of the County of York Law Association, held in its library on January 31st, 1898, the following report was submitted:

There are at present 333 members of the association, and 294 members have paid their fees for the year 1897. During the year sixteen practitioners became members. One member died, and forty-seven members severed their connection with the association by removal from the county, or resignation, or by being posted under the rules for non-payment of fees. There are now 3,424 volumes in the library, 203 having been added during the year, made up as follows: Reports and Statutes, 71 volumes; Texts and Digests, 60 volumes; bound periodicals, 42 volumes; miscellaneous, 30 volumes. The most important addition during the year comprised Cartwright's Constitutional Cases. The value of the books in the library is now estimated as follows: Reports and Statutes, $7,705.08; text books, $2,833.26; periodicals, $1,462.57—total, $12,000.91. Insurance to the extent of $10,000 has been effected upon the library and property of the association. Following a custom of our past presidents, a portrait of Mr. Shepley, Q.C., president for the year 1896, has been presented to the association by Mr Ritchie, Q.C., the retiring president.

The work of consolidating the Rules of Practice was completed during the past year. The changes suggested by the commissioners appointed to consolidate these Rules was submitted to the Committee upon Legislation, appointed at the last annual meeting. That committee gave a great deal of time and consideration to the memorandum, and made an elaborate report to the commissioners. This was followed by an interchange of views between the committee and commission, and the adoption of a large part of the suggestions made by the committee. The members of the association and the profession at large are much indebted to the members of the Legislation Committee for the time and attention which they so willingly and without remuneration gave to the consideration of the serious changes involved in the consolidation. The attention of the association is again called to the approaching completion of the court house in Toronto. Without doubt the present accommodation afforded the library will not be available any length of time. The trustees understand that provision is not being made for the immediate accommodation in the new building, which will be available for a library and reading rooms. The board trust that their successors will take up the question with a view to seeing that the provisions of the statute which require accommodation to be furnished in the court house for the association, are fully and fairly complied with. The trustees record the death during the year of the following member: Mr. W. G. Murdoch.

After this report was submitted and adopted the following officers were appointed for the ensuing year:—President, Wm. Mortimer Clark, Q.C.; Vice-President, J. H. Macdonald, Q.C.; Treasurer, Walter Barwick; Curator, Angus MacMurchy; Secretary, Shirley Denison. Trustees:—J. B. Clark, Q.C., R. J. Maclennan, W. E. Middleton, D. W. Saunders, D. Fasken, C. D. Scott. Auditors:—H. M. Mowat, Goodwin Gibson. Committee on Legislation:—John Hoskin, Q.C., LL.D., E. D. Armour, Q.C., D. E. Thomson, Q.C., T. Langton, Q.C., D. W. Saunders, Douglas Armour, W. H. Blake, W. E. Middleton, E. T. English, C. A. Masten.

LITTELL LIVING AGE, Boston.—No one who is interested in the best contemporary French literature can afford to miss the series of sketches and stories by Paul Bourget, which will begin in *The Living Age* for April 2. These sketches have been but recently published in France, and this is their first appearance in English dress. They are translated for *The Living Age* by William Marchant. They are extremely clever and characteristic.

## THE HOME OF THE BRIEFLESS BARRISTER.

My friend, have you heard of the town of Nogood,
On the banks of the river Slow,
Where blossoms the Waitawhile flower fair,
Where the Sometimeorother scents the air,
And the soft Goeasys grow?

It lies in the valley of Whatstheuse,
In the Province of Leterslide;
And Thattiredfeeling is native there,
It's the home of the reckless Idon'teare,
Where the Giveitups abide.

It stands at the bottom of Lazy hill,
And is easy to reach, I declare;
You've only to fold up your hands and glide
Down tne slope of Weakwill's toboggan slide
To be landed quickly there.

The town is as old as the human race,
And it grows with the flight of years,
It is wrapped in the fog of idlers' dreams,
Its streets are paved with discarded schemes,
And sprinkled with useless tears.