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RAILWAY INSURANCE AS A DEFENCE TO DAMAGE ACTIONS.

Although provident society insurance has for many years been a feat. e of our great railway systems, it is only in comparatively recent years that railway companies have set up the contractual relationship of their employees with their provident insurance branch or association as a defence to actions for damages by injured employees or their representatives.

A fund is supplied by the company, and this is supplemented by a small monthly payment retained out of the workman's wages. The object of the association is to provide relief to members while suffering through illness or bodily injury, and in the event of death to provide a sum of money for the benefit of the family or relatives of deceased members varying from $250 to $2,000, according to the class insured in and assessments levied. An assessment is also made in the event of the death or total disablement of a member, every surviving member paying an amount proportionate to the amount of his insurance, and this is paid to the person totally disabled or to the person named by the deceased member, or if no person is named, it is paid to his widow, or failing a widow, to his executors or administrators. Temporary employees are insured against disablement or death resulting from injuries received while actually at work in the service of the company, and in the event of death $250 is paid to the widow, children or legal representative, as the case may be. Membership in the association is obligatory on all the employees, and the rules and by-laws provide that no member or his representatives shall have any claim against the company for compensation on account of injury or death from accident. For temporary employees the further provision is made that no employee insured against accident only, who elects suit against the company for damages resulting from injuries, shall have any claim against the association, and the acceptance in whole or in

part by any employee or his legal representative, of any compensation from the association on account of any such death or injury shall thereby release and forever discharge the company from any further claim for damages or compensation on account thereof. In paying a claim the provident society or association insists on obtaining a receipt and release to the railway company which the unsuspecting beneficiary usually signs, and this very often with the approval of his or her solicitor. On an action for damages being brought under Lord Campbell's Act, The Workmen's Compensation for Injuries Act, or at common law, the rules and by-laws of the association and the release, although formerly unheard of as a defence, in recent years have been elaborately set up as a complete bar to recovery.

In 1904 the Dominion Government probably recognizing this as an unrighteous defence, though taken advantage of by the Crown in *The Queen* v. *Grenier*, 30 S.C.R. 42, passed an Act, 4 Edw. VII. c. 31, to amend the Railway Act of 1903 and designed to abolish this defence. The Act reads:—

"1. Notwithstanding anything in any Act heretofore passed by Parliament, no railway company within the jurisdiction or legislative power or control of Parliament shall be relieved from liability for damages for personal injury to any workman, employee or servant of such company, nor shall any action or suit by such workman, employee or servant, or, in the event of his death, by his personal representatives, against the company, be barred or defeated by reason of any notice, condition or declaration made or issued by the company, or made or issued by any insurance or provident society or association of railway employees formed, or purporting to be formed, under such Act; or by reason of any rules or by-laws of the company or rules or by-laws of the society or association; or by reason of the privity of interest or relation established between the company and the society or association, or the contribution or payment of moneys of the company to the funds of the society or association; or by reason of any benefit, compensation or indemnity which the workman, employee or servant, or his personal representatives, may become entitled to or obtain from such society or association or by membership therein; or by reason of any express or im-

plied acknowledgment, acquittance or release obtained by the company or the society or association prior to the happening of the wrong or injury complained of, or the damage accruing, to the purport or effect of relieving or releasing the company from liability for damages for personal injuries aforesaid.

"2. Upon the passing of this Act the Governor-in-Council shall submit to the Supreme Court of Canada for its determination the question of the competency of this Parliament to enact the provisions hereinbefore set forth; and in the event of the said Court determining that the said provisions are within the powers of this Parliament, and the time for appeal having elapsed—or in cases of appeal being taken and prosecuted, then in the event of it being determined by the Judicial Committee of the Privy Council that the said provisions are within the powers of Parliament as aforesaid—the Governor-in-Council shall thereupon name a day, by proclamation, for the coming into force of this Act, and this Act shall take effect and come into force upon the day so named accordingly."

In accordance with the provisions of s. 2 at the opening of the present sittings of the Supreme Court, the question of the competency of the Parliament of the Dominion to enact the provisions of s. 1 of this Act was considered on a reference to that Court by the Governor-General in Council. Those opposed to the amendment justified the right of a railway company to contract itself out of responsibility by reason of the rules and regulations above referred to, and also justified the right of an employee to contract himself out of compensation, and they further contended that under the B.N.A. Act to the Provinces only belongs the right to legislate in matters affecting property and civil rights, and that the Dominion Parliament has no right to encroach.

It is interesting to note here that the Grand Trunk Ry. Co. now usually pleads as a defence to actions for injuries that the G.T.R. Insurance and Provident Society, being a society authorized by the statutes of the Dominion of Canada, and their rules and by-laws being passed pursuant to such statutes, there was no power in the Legislature of the Province of Ontario (referring to s. 10 of R.S.O. 1897, c. 160) to authorize any Court or Judge

to take away the defence which such statutes, by-laws and rules give to them, and that any legislation to the contrary would be beyond the powers of the Province as affecting the company. But contra, the defence was unsuccessfully urged by the Canada Southern Ry. Co. that having been brought under the operation of the Dominion Railway Act the Workmen's Compensation for Injuries Act did not apply to them: *Canada Southern Ry. Co.* v. *Jackson,* 17 S.C.R. 316.

In view of the above amendment to the Railway Act, and the fact that it may be some time before the competency of the Dominion Parliament to enact it is finally decided, an appeal to the Privy Council being probable, it may not be amiss to discuss the present state of the law in Ontario, assuming that R.S.O. c. 160, s. 10, is intra vires. Moreover, the amending Act may be held to be ultra vires, in which event it is to be hoped that the local Legislatures will follow in the footsteps of the Dominion and pass the necessary legislation for the protection and relief of the employees, their wives and children.

In so far as Quebec is concerned, it may be considered settled law that the payment of the insurance benefit is an effectual bar to recovery of damages: *The Queen* v. *Grenier,* 30 S.C.R. 42, and *Miller* v. *Grand Trunk Ry. Co.*, 34 S.C.R. 45. But are these cases precedents in Ontario? They have in effect been held to be so—Falconbridge, C.J., in *Holden* v. *Grand Trunk Ry. Co.* (tried at Hamilton in 1902), and *Harris* v. *Grand Trunk Ry. Co.* (not reported). In both these cases the widow received the insurance moneys from the Grand Trunk Railway and Provident Society, and signed the formal receipts releasing the company. In the *Holden case*, Falconbridge, C.J., also found against the plaintiff on the ground of contributory negligence. An appeal was taken to the Court of Appeal for Ontario, but unfortunately the insurance and release branch of the case was not passed on by the Court, the appeal being dismissed on the grounds of contributory negligence.

There would appear to be large room for argument as to the correctness of these decisions. Where the insurance is paid and release given the railway company is not directly dealt with, consequently there is no privity of contract. Where the insur-

ance is not recovered, and consequently no release given, one is a step farther removed from the danger. Further, is it not contrary to public policy to allow such an inequitable so-called contract to stand: *Roach* v. *Grand Trunk Ry. Co.*, Q.R. 4 S.C. 392; and should not the provisions of R.S.O. 1897, c. 160, s. 10, prevail?

On examination the Quebec cases above cited do not appear to be analogous. The judgments seem to turn or hinge on the construction and application of art. 1056 of the Civil Code, which provides that "in all cases where a person injured by the commission of an offence or quasi offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi offence or his representatives all damage occasioned by such death." A few quotations from the judgments of the Court in these cases will, I think, support this contention: "This Court has already held that the law of Quebec, from which we must take our rule of decision in this case, does not recognize the defence of common employment which prevails in English law." . . . "Further, that such a renunciation would be a sufficient answer to an action under Lord Campbell's Act is conclusively settled by authority: *Griffiths* v. *Earl of Dudley*, 9 Q.B.D. 357. That the action given by art. 1056 Civil Code is merely an embodiment in the Civil Code of the action which had previously been given by a statute of Canada re-enacting Lord Campbell's Act is too plain to require any demonstration, and nothing in the judgment of the Judicial Committee in *Robinson* v. *Canadian Pacific Ry. Co.* (1892) A.C. 481, controverts this proposition": Strong, C.J., *The Queen* v. *Grenier*, p. 51. "Has the deceased ever received *indemnity* or *satisfaction* for the injury in question in the sense to be given to those words in art. 1056 C.C.? If so, by the ratio decidendi and the opinion delivered by their Lordships of the Privy Council in *Robinson* v. *Canadian Pacific Ry. Co.* (1892) A.C. 481, the respondent's action fails. It is no doubt singular that anyone can receive indemnity or satisfaction so as to bar an action which belongs to another. But that is the state of the

law. Here, were I unfettered by authority, I would be inclined to doubt if the deceased can be said to have received any indemnity or satisfaction; but I am bound by the authority of *The Queen* v. *Grenier* to hold that he has. The word 'renunciation' used by the learned Chief Justice who delivered the judgment of the Court in that case means nothing else, it is clear, than release in consideration of the indemnity or satisfaction that an employee under such circumstances agrees to have received in lieu of any further claim against the company in the case of his meeting any injury in the course of his employment. It was argued then, as it was at bar in this case, that an employee cannot stipulate in advance with his employer so as to defeat, in case of his death, the action of his wife and children: and that such a stipulation was not the indemnity or satisfaction required by art. 1056. But that contention did not prevail. We were of opinion that the words 'without having received indemnity or satisfaction' of the article of the Code would be meaningless if the construction contended for by the plaintiff in that case, as it is by the plaintiff here, prevailed, that an indemnity or satisfaction which would have barred an action by the deceased, had he survived, does not also bar the action by the consort and children. That cannot be. That would be reading out of the article the words 'without having received indemnity or satisfaction.'" . . . "However small the indemnity accepted by the deceased may have been, in whatever form or shape he may have accepted it, at what time he has accepted it, makes no difference." . . . "And in the *Grenier case* we were bound, I need hardly say, by that decision, and held in strict accordance with it, that there having been indemnity or satisfaction by the deceased in that case, the survivors' action did not lie, though it did lie in the *Robinson Case*, because the deceased there had not in his lifetime received indemnity or satisfaction": Taschereau, C.J., in the *Grand Trunk Ry. Co.* v. *Miller*, pp. 58 and 59.

Article 1056 of the Quebec Civil Code has no counterpart in Ontario. On the other hand, we have the saving effect of s. 10 of the Workmen's Compensation Act, which has no place in the Civil Code. It is true that the Supreme Court refers to and follows some English decisions, notably *Griffiths* v. *Earl of Dudley*,

9 Q.B.D. 357. But the English Act also contains no saving clause like s. 10 of the Ontario Act. Under the latter Act it is left to the trial Judge to decide whether, under the circumstances, the agreement impeached comes within the intended prohibition, and the fact that this provision is made shews that the Legislature anticipated the making of improvident agreements and intended to make provision against them. Mr. Holmested, at p. 93 of his work on the Ontario Workmen's Compensation Act, says: "There is no corresponding section in the English Act. But for this section, there was no bar whatever to a workman contracting himself out of the Act," and he cites the *Griffiths case* as an authority for his statement. Ruegg, in his Employers Liability Act, 4th ed., pp. 56-9, says: "Whenever, as an answer to an action under the Employers Liability Act, a contract waiving the operation of the Act is set up, it must be carefully looked at to ascertain not only whether it was assented to by the workman, but whether it was founded upon a valuable consideration."

On the particular facts of the *Dudley case* as reported, the question as to whether there was really any contract at all to waive the benefits of the Act appears to some extent to have been lost sight of in the larger question of the legality of such a contract. See also Elliott on Railways, s. 1384. And the oft quoted words of Lord Halsbury in *Quinn* v. *Leatham* may here bear repetition: "Every judgment must be read as applicable to the particular facts proved or assumed to be proved," and "a case is only an authority for what it actually decides."

HAMILTON. JOHN G. FARMER.

INFANT CRIMINALS.

The recent ghastly tragedy—the alleged murder of an infant by a girl of thirteen years—has given the City of Toronto an unenviable notoriety. The peculiar circumstances of the case and the tender age of the self-confessed offender lends it an interest from a legal point of view. It will not, therefore, be inappropriate to refer to the law affecting the punishment of juvenile criminals.

Section 9 of the Criminal Code 1892 provides that "no person shall be convicted of an offence by reason of any act or omission of such person when under the age of seven years." Section 10 provides that "no person shall be convicted of an offence by reason of an act of omission of such person when of the age of seven, but under the age of fourteen years unless he was competent to know the nature and consequence of his conduct and to appreciate that it was wrong."

The Code thus makes it clear that a child under the age of seven is to be deemed absolutely incapable of committing a crime and no evidence can rebut this presumption. The case is different as to a child between seven and fourteen, as while in such case there is a presumption that such child was doli incapax still this presumption may be rebutted, and for this purpose evidence may, it appears, be given of a mischievous discretion for capacity to commit crime which it is said by text writers "is not so much measured by years and days as by the strength of the delinquent's understanding and judgment." See Archbold's Criminal Pleading and Evidence, 22nd ed. p. 21; Roscoe's Criminal Evidence, 12th ed. p. 856.

In Russell on Crimes, 6th ed. vol. 1, p. 115, it is said that "the evidence of malice, however, which is to supply age should be strong and clear beyond all doubt and contradiction; but if it appear to the Court and jury that the offender was doli capax and could discern between good and evil, he may be convicted and suffer death. Thus it is said that an infant of eight years old may be guilty of murder and shall be hanged for it, and where an infant between eight and nine years old was indicted and found guilty of burning two barns, and it appeared upon

examination that he had malice, revenge, craft and cunning he had judgment to be hanged and was executed accordingly:" *Dean's case*, cited in 1 Hale 25 note (*u*). An infant of the age of nine years having killed an infant of the like age, confessed the felony and upon examination it was found that he hid the blood and the body. The judges held that he ought to be hanged, but they respited the execution, however, that he might have a pardon: 1 Hale 27. Another infant of the age of ten years who had killed his companion and had hid himself was, however, actually hanged, upon the ground that it appeared by his hiding that he could discern between good and evil, and malitia supplet ætatem: 1 Hale 26, and a girl of thirteen years of age was burnt for killing her mistress: *Alice de Waldborough's case*, 1 Hale 26.

Whenever a child between seven and fourteen is charged with committing a felony the proper course is to leave the case to the jury to say whether at the time of committing the offence, such child had guilty knowledge that he was doing wrong: *R.* v. *Owen*, 4 C. & P. 236, per Littledale, J.; *R.* v. *Smith*, 1 Cox 260, per Erle, J. See also the case of William York, a boy of ten years, who was convicted at Bury Summer Assizes, 1784, and received sentence of death. This case is given at length in Foster's Crown Law, p. 70

It is high time that some effort were made by those in authority to cope with the rapid increase of crime by children. The way that boys and girls are allowed to roam the streets of our cities, notably the City of Toronto, at all hours of the night, cannot but be productive of evil and an education in crime. If mayors and aldermen were to devote more time to such matters, and less to those which the founders of our municipal system never intended should come within its purview; and if School Boards and School Inspectors gave more attention to moral training and the true education of children, rather than to the cramming of them with a smattering of utterly useless knowledge it would be much better for the public welfare.

ONTARIO ELECTION ACT.

Assuming that the Election Court (Boyd, C. and Teetzel, J.), correctly interpreted s. 165 of R.S.O. 1897, c. 9, an amendment is desirable to the Ontario Election Act. The Court found it proved that one Coyne provided free railway transportation for voters from Michipicoten to Wawa and return. It appeared that he also provided free transportation to voters by means of the historic steamer Minnie M. The Court, however, did not consider that any penalty could be imposed for this, holding that "the statute contemplates transportation by land, and not on water. 'Railway, cab, cart, waggon, sleigh, carriage, or other conveyance' are the words used, and on the principle of noscitur a sociis the last larger word 'conveyance' cannot be so enlarged as to take in a steam vessel propelled on the water." The section referred to being penal and there being a reasonable doubt whether the word "conveyance" should have the larger interpretation contended for by the prosecution and so cover conveyance by water, the Court probably came to the right conclusion. The adverse criticisms in the daily press are however natural enough, though not sustainable at law. It certainly does seem somewhat strange that conveyance by water was not mentioned in the section, as there are many places in this country of great lakes and rivers where such transportation would be not only more convenient than transportation by land, but in some cases and at certain times of the year almost a necessity.

TREASURE TROVE.

As says the *Law Notes* in a recent issue this subject has been of fascinating interest since the days when Captain Kidd sailed, and has been kept alive from time to time by the tales of wonderful discoveries and by the fact of the finding of lost or hidden treasures. Blackstone, as our readers are aware, discusses the subject at some length; but there have been many cases decided since he wrote his commentaries. Taking up the subject as it

is found in the reports of more modern times the writer in the above journal deals with it, with especial reference to the American authorities, as follows:—

"We may say then that lost property includes things of value found upon the surface of the earth, while treasure trove is property found hid in the earth or some other place of concealment. It is not 'material whether it be of ancient time hidden in the ground, or in the roof, or walls, or other part of a castle, house, building, ruins, or otherwise.' (3 Inst. 132). The elements constituting lost property are a thing of value, an unintentional loss or actual abandonment, and an unknown owner; those constituting treasure trove are a particular thing of value, a hiding or secreting, and an unknown owner. In using the adjective 'particular' in the latter clause, we speak advisedly. For not every chattel or thing of value belonging to a person unknown and hidden away in the ground or elsewhere is treasure trove. We see that Blackstone limits treasure trove to 'money or coin, gold, silver, plate or bullion.' In *Livermore* v. *White*, 74 Me. 452, it is said that treasure trove is 'where any money is found hid in the earth, but not lying upon the ground, and no man knows to whom it belongs. Nothing is treasure trove but gold or silver." Gold rings and ornaments have been held to be treasure trove (*Queen* v. *Thomas*, 33 L.J. N.S. 22; *Atty.-Gen.* v. *British Museum*, [1903] 2 Ch. 598), as have silver cups, a chalice, pyxes, and a paten (*Atty.-Gen.* v. *Moore*, L.R. 1 Ch. D. 676.) In *Huthmacher* v. *Harris*, 38 Pa. St. 499, it is said: 'Treasure trove, though commonly defined as gold or silver hidden in the ground, may, in our commercial day, be taken to include the paper representatives of gold and silver, especially when they are found hidden with both of these precious metals.' In *Elwes* v. *Brigg Gas Co.*, 33 Ch. D., at p. 567, Chitty, J., says that Roman coins, not of gold or of silver, apparently forming the small change of the treasure of a Roman legion, do not fall 'within the royal prerogative of treasure trove.' This seems to be the extent to which the authorities have gone in defining what is embraced by the term treasure trove. And that brings us to another class of cases which have reference to things embedded in the soil and their owners un-

known, but not coming within the ancient definition of treasure trove, as gold or silver. Thus, a prehistoric boat embedded in the soil six feet below the surface (*Elwes* v. *Brigg Gas Co.*, 33 Ch. D. 562), an aerolite which has fallen to the earth (*Goddard* v. *Winchell*, 86 Iowa 71), ancient dishes buried in the ground (7 *Law Notes*, p. 160), and gold-bearing quartz rock found embedded in the soil, evidently once contained in a cloth bag (*Ferguson* v. *Ray*, 44 Oregon 557), have been directly or indirectly held not to be treasure trove, on account of the character of the articles so found, though in other respects, such as the place of finding, they might well be so classified. And it is evident that for such articles a different rule of ownership is necessary than that obtaining in the case either of lost property or of treasure trove.

The right of the finder of lost property to retain the same as against all persons save the true owner has been recognized since the early case of *Armory* v. *Delamirie*, 1 Strange 504. 'In that case a chimney sweeper's boy found a jewel, and carried it to a goldsmith to ascertain what it was. The goldsmith refused to return it, and it was held that the boy might maintain trover on the ground that by the finding he had acquired such a property in the jewel as would entitle him to keep it against all persons but the rightful owner. This case has been uniformly followed in England and America, and the law on this point is well settled.' (*Sovern* v. *Yoran*, 16 Oregon 269; 19 Am. and Eng. Encyc. of Law (2nd ed.) 579; *Danielson* v. *Roberts*, 44 Oregon 108). It seems that in Oregon a statute exists by virtue of which lost property must be divided between the finder and the country (*Sovern* v. *Yoran*, 16 Oregon 269), and similar statutes doubtless exist in some other jurisdictions, but the general rule is as above stated. The right of the finder of treasure trove is less well defined, in this country, at any rate. The common-law rule was, as stated by Blackstone, that treasure trove belonged to the king as the successor of the unknown owner. Whether this rule obtains in America is extremely doubtful. (See 2 Kent Com. *357). There are numerous American authorities which refer to the common law rule,

but in no one of them was the question of the ownership of treasure trove squarely at issue. Thus, in *Livermore* v. *White*, 74 Me. 456, the owner of a tannery had sold it and accidentally omitted to remove a few hides from the vats. These were found many years afterward by a labourer, and it was held that the case was not one of treasure trove, the hides not being either gold or silver, and the original owner being known. In *McLaughlin* v. *Waite*, 5 Wend. (N.Y.) 404 a lottery ticket was found, and the Court held that the principles appertaining to lost chattels did not apply, as the lottery ticket was of no greater validity than a mere chose in action, or evidence of the right of the real owner. In *Huthmacher* v. *Harris*, 38 Pa. St. 491, a person purchased, at an administrator's sale, a 'drill machine,' which was found to contain money and other valuables secreted therein by the decedent. The Court said: 'But the common law, which we administer, gave it always to the owner if he could be found, and if he could not be, then to the king, as wrecks, strays, and other goods are given "whereof no person can claim property." 3 Inst. 132. Huthmacher, therefore, held the unsold valuables for the personal representative of the deceased owner.' In *Sovern* v. *Yoran*, 1 Oregon 269, some packages of money were found under the floor of a barn. The property had been purchased at an administrator's sale, and the purchaser took steps in accordance with the law of the State of Oregon in reference to lost property to ascertain the true owner of the money by advertising the same. No owner having appeared within one year, as prescribed by the statute, the purchaser delivered one-half of the money to the county treasurer and the other half to the finders of the property. The administrator who had sold the property subsequently brought suit against the purchaser to recover the value of the property found. The Court held that the money was in the nature of treasure trove, but did not decide as to the ownership thereof, merely holding that the purchaser, having acted in good faith in reference to the matter, was not guilty of conversion. In *Warren* v. *Ulrich*, 130 Pa. St. 413, a roll of money was found concealed in a cesspool, and the administrator of a former owner of the premises brought an action to recover the same. It was held that the evidence was

sufficient to shew ownership in the decedent. The Court did not discuss the subject of treasure trove nor make any distinction between treasure trove and lost property, merely saying: 'The finder of money has title to it against all the world except the true owner.' In *Danielson* v. *Roberts*, 44 Oregon 114, the plaintiffs found some gold coin in a chicken house situated on premises occupied by the defendants. The defendants proved no ownership, and is was held that the plaintiffs were entitled to the money. This was clearly a case of treasure trove, and the Court cites the old common-law doctrine as to the ownership of both lost property and treasure trove. But the following significant statement was made: 'In this country the law relating to treasure trove has generally been merged into the law of the finder of lost property, and it is said that the question as to whether the English law of treasure trove obtains in any state has never been decided in America: 2 Kent *357; 26 Am. & Eng. Encyc. of Law (1st ed.) 538. But at the present stage of the controversy it is immaterial whether the money discovered by plaintiffs was technically lost property or treasure trove, or, if treasure trove, whether it belongs to the State or to the finder, or should be disposed of as lost property if no owner is discovered. In either event the plaintiffs are entitled to the possession of the money as against the defendants, unless the latter can shew a better title.' None of these cases can be regarded as absolute authority upon the question of the ownership of treasure trove, and, unless we accept the dictum of the Oregon Court in the case last cited, we must decide either that the question is an open one in this country, or else that the common-law rule obtains, and that treasure trove belongs to the sovereign State. In Louisiana, it may be noted, the code provides for an equal division of hidden treasures discovered between the finder and the owner of the land. (Civ. Code La., s. 3423.) As to the third class of discovered treasures, namely, property embedded in the soil, the authorities are uniform to the effect that such property belongs to the owner of the soil. It was so held in the cases of the prehistoric boat, the aerolite, the ancient dishes, and the gold-bearing quartz rock mentioned above. To the same effect is the case of *Reg.* v. *Rowe*, Bell's Crown Cas. 93, where a quantity of iron found in the bed

of a canal was held to belong to the company operating the canal in the absence of proof as to the true owner. In *Ferguson* v. *Ray*, the Court cites the case of *Waterworks* v. *Sharman*, 65 L.J. (N.S.) 460, in support of the proposition that the possession of the article found is in the owner of the locus in quo. If this case turned merely on the right of possession as between the owner of the land and a labourer who found valuables therein, it is undoubtedly sound in deciding that the owner was entitled to possession. But if it attempted to determine the ultimate ownership of the articles in question, it is difficult to reconcile the decision with the common-law rules as to treasure trove, for the articles found were gold rings, and were hidden beneath the surface of the earth, and it does not appear that the original owner was known, all of which elements combined make a clear case of treasure trove. In France, it seems, an aerolite has been held to be the property of the finder. (See 20 Alb. L.J. 229). To recapitulate: Lost property, which includes property unintentionally lost or intentionally abandoned by the owner and found above ground, belongs to the finder if the owner is not known; treasure trove, which includes gold and silver in some form or other hidden underneath the ground or in some part of a building by an unknown owner, belongs, by the common-law rule, to the sovereign, and possibly, in the country, to the finder; property embedded in the soil, and not of such a character as to constitute treasure trove, belongs to the owner of the land."

The litigation concerning Stonehenge and the rights of the public in connection therewith bring to remembrance the Giant Causeway case tried in Ireland in 1897. It will be remembered that a company was formed which acquired a lease of the place and then closed it, charging a fee to the public for admission. The people of the neighbourhood and their friends claimed the right to the use of the Causeway as a place of public resort; but the case was found against them. The Courts held that a public right of way could only arise by statute or by dedication, and that there was not sufficient evidence of dedication. The "ancient custom" that was relied upon was held to be unreasonable and uncertain, and therefore unenforceable.

REVIEW OF CURRENT ENGLISH CASES.

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VENDOR AND PURCHASER—TITLE—POWER TO INVEST IN THE PURCHASE OF REAL ESTATE—POWER TO VARY "SECURITIES"—IMPLIED POWER TO RE-SELL LAND PURCHASED AS INVESTMENT.

In re Gent Eason (1905) 1 Ct. 386 was an application under the Vendors and Purchasers Act to determine a simple question. The vendors were trustees of a will, whereby they were empowered to invest trust moneys in real estate; they were also empowered from time to time in their discretion to vary the "securities" in which the trust funds were invested. The land in question had been purchased as an investment for part of the trust funds, and the point was whether under the power to vary the "securities" the vendors had any implied power to re-sell the land in question. Farwell, J., held that the word "securities" was used as a synonyon for "investments" and that the trustees had an implied power to re-sell the land in question following *In re Rayner* (1904) 1 Ch. 177.

VENDOR AND PURCHASER—POSSESSORY TITLE—LAND SUBJECT TO RESTRICTIVE COVENANTS—NOTICE—REAL PROPERTY LIMITATION ACT 1833 (3 & 4 W. 4, c. 27) s. 34—(R.S.O. c. 133, s. 15).

In re Nisbet & Potts (1905) 1 Ch. 391 is a very important decision under the Real Property Limitation Act (see R.S.O. c. 133, s. 15). The question arose under the Vendors and Purchasers Act. The vendors claimed to have become entitled to the land in question as successors in title of a person who had acquired a title thereto by possession. The vendors objected that title could not be made because by deed made in 1867 and another in 1872 the land was subject to certain restrictive covenants forbidding the erection of any shops on the land, or any buildings whatever within 30 feet of the road. The vendors when they acquired title had accepted a title commencing in 1878, and claimed to have purchased without notice of the covenants. Had they called for a forty years' title, as they were entitled to, they would, probably, have acquired notice of the covenants. Farwell, J., held that a restrictive covenant is like an easement and is not necessarily barred by an adverse possession which only extinguishes the title of the rightful owner, but not the equitable

claims of other persons against the land of which the adverse possessor or those claiming under him had notice, or might have had, had they made reasonable inquiry. He therefore held that the vendors could not make a good title.

LANDLORD AND TENANT—TENANT FOR LIFE, AND REMAINDERMAN —TRADE FIXTURES—INTENTION TO IMPROVE INHERITANCE.

Re Hulse, Beattie v. *Hulse* (1905) 1 Ch. 406 was an application by the personal representative of a deceased tenant for life to determine the right to certain trade fixtures. The deceased tenant for life had leased the settled estates consisting of a steam mill and machinery for 21 years. The lessee covenanted that at the end of the term he would sell to the lessor all the machinery other than demised machinery, then on the premises. The tenant brought additional machinery into, and affixed it to, the mill and at the end of the term the tenant for life paid for it. The tenant for life having died, his personal representative claimed to be entitled to remove the machinery. Buckley, J., held that in the absence of any evidence that the tenant for life intended to make a present of the machinery to the remainderman, that it did not become part of the freehold and might be removed by him or his representative.

COMPANY—WINDING-UP—ACTION AGAINST COMPANY BEFORE LIQUIDATION—LIQUIDATOR DEFENDING ACTION AGAINST COMPANY —COSTS.

In re Wenborn & Co. (1905) 1 Ch. 413. Prior to proceedings for winding-up, an action had been instituted against a company for damages for breach of contract. Pending the action, proceedings were begun for winding-up the company, on the liquidator being asked whether he would admit the plaintiff's claim in the action, he refused so to do, and the action was accordingly proceeded with, the liquidator defending on behalf of the company, and the plaintiff recovered judgment for damages and costs. The plaintiff now claimed that the costs of the action should be ordered to be paid in full out of the assets of the company. The liquidator contended that they must be proved as a claim in the winding-up proceedings. Buckley, J., while conceding that the cases on the point are not easily reconcilable, yet was of the opinion that where an action against a company is defended by the liquidator for the benefit of other creditors, they must bear the costs and consequently that the costs in question ought to be paid in full out of the assets.

COMPANY—RE-CONSTRUCTION UNDER POWER IN MEMORANDUM—SALE OF ASSETS FOR "SHARES" IN NEW COMPANY—PARTLY PAID SHARES.

Mason v. *Motor Traction Co.* (1905) 1 Ch. 419. By the articles of association a limited company were empowered to sell its assets for shares in any other company. The question was whether this meant fully paid up shares or whether it would authorize a sale for partly paid up shares. Buckley, J., decided that in the absence of anything in the memorandum to qualify the meaning of the word "shares," it would include partly paid up shares.

WILL—CONSTRUCTION—GIFT OF REMAINDER FOLLOWED BY GIFT OF RESIDUE—LAPSED LEGACY.

In re Isaac, Harrison v. *Isaac* (1905) 1 Ch. 427 the effect of a double residuary gift was in question. The testator appointed one H. his executor and then gave pecuniary legacies to sixteen persons and then directed that "the remainder" of his property should be divided among certain named persons in specified shares. The will concluded as follows, "and I appoint my executor my residuary legatee." Certain of the pecuniary legacies lapsed by reason of the legatees predeceasing the testator, and the question raised for decision was who was entitled to the lapsed legacies. Counsel for the executor relied on a passage in Theobald, 5th ed., p. 659. "So if a testator gives the remainder of his property to A. and makes B. his residuary legatee, B. will take any lapsed legacies," but Buckley, J., came to the conclusion that this cannot be regarded as a general rule, on the contrary, where, as here, there are two residuary gifts, the ordinary rule is that the second only takes effect in the event of the failure of the first, therefore, the lapsed legacies in the first place fell into "the remainder."

ATTACHMENT OF DEBTS—GARNISHEE ORDER ABSOLUTE—MISTAKE—SETTING ASIDE ORDER ON APPLICATION OF PERSON PREJUDICED.

In *Marshall* v. *James* (1905) Ch. 432 the defendant, having obtained an order for payment of costs against the plaintiff, applied for and obtained an order attaching debts alleged to be due by two firms to the plaintiff. No opposition was offered by the garnishees, and an order to pay over was made against them both; whereupon one Witham, a parties of the plaintiff moved to set aside the order and for repayment of any moneys paid thereunder to the parnishees, or to the applicant on behalf of Marshall & Co., on the ground that the debts in ques-

tion were due to the firm of Marshall & Co. and not to Marshall individually, relying on *Moore* v. *Peachey*, 66 L.T. 198. Nothing had been paid under one of the orders and that was accordingly discharged. Under the other, the amount attached had been paid, and on the parties agreeing to the attaching creditor refunding one-half the amount so paid, that order was also discharged.

REDEMPTION ACTION—SALE OF PARTS OF MORTGAGED PROPERTY BY MORTGAGEE—LIABILITY OF MORTGAGEE TO ACCOUNT FOR PROCEEDS OF SALE WITH RESTS—RESTS.

Ainsworth v. *Wilding* (1905) 1 Ch. 435 was a redemption action, in which it appeared that the mortgagee had from time to time sold parts of the mortgaged property and the mortgagor claimed that in taking the account there should be a "rest" at the time of every sale, and the total receipts from all sources should then be set off against the amount then due for principal, interest and costs. On the other hand the mortgagee contended he was not compelled to accept payment in driblets. Joyce, J., negatived the plaintiff's contention and held that the mortgagee was not liable to recount with rests at the time of each sale.

PATENT—COMBINATION—INFRINGEMENT—REPAIR OF PATENTED ARTICLE.

Sidar Rubber Co. v. *Wallington* (1905) 1 Ch. 451 was an action to restrain the infringement of a patent. The plaintiffs' patent was a rim for holding a solid rubber tyre without pinching and without wire or bands for securing. The defendant had made and fitted a new tyre to one of the plaintiffs' rims to replace a worn out one. Eady, J., held that this was not an infringement and was nothing more than what might fairly be deemed a repair, that there was no patent for the tyre and the combination of tyre and rim was not a patentable combination.

LANDLORD AND TENANT—COVENANT NOT TO ASSIGN OR SUBLET WITHOUT LEAVE—LICENSE TO SUBLET NOT TO BE UNREASONABLY WITHHELD.

In re Spark, Berger v. *Jenkinson* (1905) 1 Ch. 456. The owner of a building having only one entrance let a part of it to a tenant who gave a covenant not to assign or underlet without the consent of the landlord, which was not to be unreasonably withheld. The tenant being desirous of underletting part of the premises applied to the landlord for his consent, which he refused to give unless he were first informed of the purpose for which the

under lessee proposed to use the premises, and unless the proposed sub-tenant entered into a similar covenant with him not to assign or sublet. These conditions Eady, J., held were not unreasonable.

PARTNERSHIP — DISSOLUTION OF PARTNERSHIP — STOCK-BROKING BUSINESS—GOODWILL—ASSET OF PARTNERSHIP—SALE.

In *Hill* v. *Fearis* (1905) 1 Ch. 466 a firm of stock brokers had been dissolved by the death of one of the partners. The survivor continued to carry on the business and used the firm name. He accounted for his deceased partner's capital, but declined to pay anything in respect of the goodwill. Warrington, J., decided that the goodwill was an asset of the partnership, which should be sold and the proceeds divided.

Encounters between judges and counsel have, it must be confessed, become unpleasantly numerous in recent years. Without attempting to ascertain the exact origin of the angry scene that took place the other day between Mr. Justice Ridley and Mr. Danckwerts, K.C., we may observe that a learned judge who describes a leading counsel as "ridiculous," shews but little regard for the dignity of his office, and that an advocate who enters into a wordy warfare with the judge who submits him to such treatment, does not adopt the best mode of resenting it. The better way was shewn by Mr. Benjamin, who when a law lord exclaimed "monstrous" at an argument he was addressing to the House of Lords, quietly tied up his papers, bowed to the noble lords, and left the House. The silent protest at once produced a letter of apology. Counsel have, of course, at all times to consider the interests of their clients, and the recommencement of a trial, made necessary by the withdrawal of an affronted advocate, may involve considerable expense. The interests of the bar, however, have also to be considered. If collisions between judges and counsel are to occur—and it is significant that it is usually the same judges who figure in them—the dignity of the administration of justice—in other words, the interests of the public—would certainly be better served if Mr. Benjamin's example were more generally followed.—*Law Journal.*

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court] WEDDELL *v.* RITCHIE. [May 9.

Railway company—Bondholders—Right to vote at annual meeting—Scope of rights as to future meetings—Number of votes—Construction of statutes.

By an enactment of the Provincial Legislature applicable to the bonds of a certain railway company it was provided that—"In the event at any time of the interest upon the bonds remaining unpaid and owing then at the next ensuing general, annual meeting of the said company all holders of bonds shall have and possess the same rights and privileges and qualifications for directors and for voting as are attached to shareholders."

Held, that on a fair reading of this the right to vote of the bondholders might be exercised at any time when interest was in arrear, and was not restricted to the one general annual meeting next after the interest fell into arrear. It might be exercised at other meetings if the arrears continued.

Held, also, Osler, J. A. and McLaren, J. A. dissenting, that inasmuch as by the enactment in question "all holders of bonds shall have and possess the same rights, and privileges and qualifications for directors and for voting as are attached to shareholders,"—the result was to give each holder of a bond one vote for every portion equivalent to the amount of one share namely, $100. Thus the holder of a bond for $1,000 would have an equal voting power with the holder of 10 shares.

Per Osler, J. A. Each bondholder had as many votes as he had bonds and no more, although the bond might be for $100, $150, $350, or any other sum the company and purchaser might agree upon. But there was no reason why the boldholder should not require the company to issue separate bonds for $100 up to the amount he had agreed to buy.

Per Maclaren, J. A. A bondholder would have more than one vote if he had more than one bond, but no more votes than there were bonds held by him.

Aylesworth, K.C., and *J. H. Moss*, for the defendants (appellants.) *G. T. Blackstock*, for the plaintiffs.

From Britton, J.] [May 9.

JONES v. GRAND TRUNK RY. CO.

Railways—Second class—Accommodation—Smoking car.

A railway passenger holding a second class ticket is entitled to reasonable accommodation of the kind usually furnished to passengers of that class and cannot be compelled to travel in a smoking car.

Judgment of BRITTON, J., affirmed, OSLER, and GARROW, JJ.A., dissenting as to the conclusions of fact.

Riddell, K.C., for appellants. *A. G. Chisholm*, for respondent.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P., Teetzel, J., Clute, J.] [March 31.

HENDERSON v. STATE LIFE INSURANCE CO.

Life insurance—Application for—Withdrawal before acceptance—Contract—Recovery of premium.

The plaintiff signed an application to the defendant company for an insurance on his life and paid the first year's premium. In the premium receipt was printed in italics, "The insurance will be in force from the date of approval of the application by the Medical Director," and in the application was a statement of the payment of the premium "to make the insurance . . . binding from the date of approval by the company's Medical Director," and that the contract did not take effect until accepted by the head office.

Held, that what took place was a mere offer of a risk on the plaintiff's life, and that he was entitled to withdraw it before the acceptance by the Medical Director and to recover the premium paid.

Judgment of the County Court of Wentworth affirmed.

W. H. Hunter, for appeal. *G. H. Levy*, contra.

Meredith, C.J.C.P., Teetzel, J., Clute, J.] [April 17.

EARLE v. BURLAND.

Costs—Appeal to Privy Council—Costs incurred in Canada—Ascertainment.

On an appeal from an order granted to defendants upon a petition pursuant to the suggestion in the judgment herein, reported (1904) 8 O.L.R. 174, 176, and 40 C.L.J. 700.

Held, that Rule 1255 (818a) gives effect to R.S.O. 1897, c. 48, s. 7 and Rule 818, and does not carry the procedure beyond what is therein provided for, and that by applying it, or even without it, the defendants were entitled under the Act and Rule 818 to have the costs ascertained "as if the decision had been given in the Court below," and the appeal was dismissed with costs.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

D. L. McCarthy, for appeal. *Middleton*, contra.

Master in Chambers] CLARK *v.* LEE. [April 19.

Solicitor and client—Maintenance—Conducting case gratuitously.

Where a solicitor brought an action on his bill of costs in connection with certain litigation carried on by him on the defendant's behalf, and the defendant in his statement of defence alleged that the solicitor took up the case on the condition that he was to get his costs out of the defendant, and that if the litigation failed all the defendant would have to pay would be the costs of the other side.

Held, that the agreement alleged was not champertous, nor did it come within the prohibition against maintenance.

A solicitor may conduct the case out of charity or from friendship toward his client.

C. A. Moss, for plaintiff. *Cooke*, for defendant.

Street, J.] HIME *v.* LOVEGROVE. [May 6.

Vendor and purchaser—Covenant—Building restriction—House —Stable.

The owner of two adjoining parcels of land sold and conveyed one to the purchaser thereof, the deed containing a covenant by the purchaser for himself, his heirs, executors, administrators and assigns not to "erect or build more than one house upon the property hereby conveyed:" with special provisions as to the cost and materials of "any house so erected," and as to the distance of its walls from the boundaries of the parcel conveyed. The vendor subsequently conveyed his parcel to the testator of the plaintiffs, having first erected a stable upon it. The parcel first sold by him became vested by various mesne conveyances in the defendants who built a stable upon part of it, sufficient space

being left within the prescribed boundaries for the erection of a house of the nature and value provided for in the covenant:—

Held, that the burden and benefit of the covenant passed with the respective parcels; that the covenant operated only as a restriction against the building of more than one house upon the property in question; that it was not wide enough to prevent the building of a stable as appurtenant to a house; that this bei[illegible] so there was no reason why the stable should not be built first and the house afterwards; and that, apart from the construction of the covenant, the original vendor having himself built a stable on his property the right to complain of the building of a stable on the adjoining property was gone.

A. Cassels, for plaintiffs. *Bicknell*, K.C., for defendants.

Master in Chambers.] [May 9.

GOODISON THRESHER CO. *v.* WOOD.

Sale of goods—Conditional sale—Venue—Agreement as to place of trial—3 Edw. VII. c. 13, s. 1.

An action was brought in a County Court on a conditional sale agreement containing a provision that no action should be tried except in the proper Court having its sittings where the head office of the vendors was situated. The provisions of s. 1, of 3 Edw. VII. c. 13, had not, however, been complied with:—

Held, that this section was not limited to actions in the Division Court: that not having been compiled with the provision as to the place of trial was not binding; and that a preponderance of conveyance being shewn, the venue could be changed.

George Wilkie, for defendant. *C. A. Moss*, for plaintiffs.

Divisional Court.] GREEN *v.* STEVENSON. [May 13.

Specific performance—Statute of Frauds—Memorandum in writing—Receipt—Omitted terms—Registry Act—Notice—Solicitor.

The owner of a house orally agreed to sell it for $400, payable $50 in cash and $350 by the assumption of a mortgage, the purchaser to pay the taxes for the current year and interest on the mortgage from a date some months prior to the making of the agreement. The purchaser paid $10 at the time and received from the vendor the following receipt: "Received from Mr. E. G. the

sum of $10 on house and lot number (describing it) sold by Mr. J. S. for $350 by paying $50 to Mr. S. allowing one-half for lawyers' fees also paying water rates. Balance $40 on house":—

Held, that it might properly be inferred from this receipt that E. G. was the purchaser and that the price was $400 and that had the matter rested there the receipt would have been a sufficient memorandum; but that the omission of the admitted terms as to taxes and interest was fatal to its sufficiency.

Judgment of TEETZEL, J., reversed.

Notice to a solicitor acting for a would-be purchaser of a prior agreement for sale is notice to the client, who cannot upon an agreement for sale being entered into with him claim the benefit of the Registry Act.

DuVernet, and *W. L. Ross*, for appellant. *Mabee*, K.C., for for respondent.

Divisional Court.] [May 15.

IN RE LUMBERS AND HOWARD.

Overholding tenant—Alterations in lease—Summary adjudication.

In proceedings under the Overholding Tenants' Act the County Court judge has power to determine summarily such a question as the validity of alterations appearing in the copy of the lease in question produced by the tenant, although there is a direct conflict of testimony as to the time when and the person by whom the alterations were made. He is not bound to refuse to make a summary order and thus to force the landlord to bring an action.

Order of MACMAHON, J., affirmed.

W. H. Blake, K.C., for appellant. *Watson*, K.C., for respondent.

Province of Nova Scotia.

ELECTION CASES.

Weatherbe, C.J.] [May 12.

SHELBURNE AND QUEENS ELECTION.

Dominion Election Act, 1891, c. 20, s. 8—Service of petition—Service out of Canada—Double service—Actions in rem and in personam contrasted.

A petition was presented against the return of Hon. W. S. Fielding, Minister of Finance, on Dec. 12, 1904, who at the time

was in Europe. An order was obtained from one of the judges of the Supreme Court extending the time of service from Dec. 16, 1904, to February 8, 1905. The respondent was served personally with the notice and petition in England. He subsequently returned to Canada and was again served at Ottawa on February 28, 1905. Section 8 of the Dominion Controverted Elections Act, 1891, provides that notice of the presentation of the petition, accompanied with a copy thereof, shall, within ten days after its presentation or within the prescribed time or within such longer time a judge under special circumstances of difficulty in effecting service may allow, be served on the respondent at any place within Canada. If service cannot be effected on the respondent personally within the time, then service may be effected "upon such other person or in such other manner as the Court or a judge, on the application of the petitioner, directs."

Held: 1. The statute provides no means by which the respondent may be subjected to personal service out of Canada.

2. If personal service cannot be effected in Canada, service must be made upon such other person or in such other manner as the Court or a judge may direct.

3. The second service of a petition or as it has been called "double service," is a nullity. The service on the respondent personally in Ottawa was therefore invalid.

4. Rules as to service of election process must be construed strictly: *Montmagny Case*, 15 S.C.R. 1.

5. Actions and proceedings in rem and in personam contrasted.

Petition dismissed with costs.

W. B. A. Ritchie, K.C., and *Lovett*, K.C., for petitioner. *Mellish*, K.C., and *G. F. Pearson*, for respondent

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HALIFAX ELECTION CASE.

Weatherbe, C.J.] HETHERINGTON *v.* ROCHE. [May 19.

Preliminary objection—Petitioner—Disqualification of, by corrupt practices—Preliminary trial as to petitioner's qualification—Meaning of "right to vote."

The respondent was elected member for Halifax at the last Dominion election. A petition against his return was presented by the petitioner, who was the secretary of the Halifax County Conservative Club. A preliminary objection to the petition was taken by the respondent on the ground that the petitioner was

disqualified as such, in that he had been, as was alleged, guilty of corrupt practices at the same election. The election Act provides that the petitioner must either be a candidate, or one who has "a right to vote" at the election which the petition relates.

Held, 1. A person guilty of corrupt acts has no "right to vote" within the meaning of the Act, and is disqualified as a petitioner.

2. There may be an enquiry and evidence taken on the hearing of preliminary objections to a petition so as to ascertain whether or not the petitioner has been guilty of corrupt acts, for the purpose of shewing that he had no "right to vote" at the election and was therefore disqualified as a petitioner.

3. The phrase "right to vote" must be taken to mean an uncontestable and untainted right subject to be questioned before the petition is proceeded with, and does not mean merely that he was properly on the voter's list.

The following are some of the cases referred to on the argument and in the judgment: *West Montreal case* and *L'Assomption case*, 19 L.C. Jur.; *Honiton case*, 3 Jud. 163 (1782); *Re Parsons* and *Thomas*, 36 U.C.R. 38; *Beauharnois case*, 31 S.C.R. 447; *North Victoria case*, Hod. El. C. 584; *Simcoe case*, ib. 617; *South Renfrew case*, ib. 556; *South Huron case*, 29 U.C.R. 301; *Dufferin case*, 4 O.A.R. 442.

W. B. A. Ritchie, K.C., and *Lovett*, K.C., for petitioner. *Mellish*, K.C., and *G. F. Pearson*, for respondent.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] GAULT BROS. CO. *v.* MORRELL. [Feb. 17

Injunction—Assignment for benefit of creditors—Prejudice of creditor—Varying injunction order—Title of cause in order.

Where an ex parte injunction order restrained a trader, who had obtained goods from the plaintiffs under an agreement that the property therein was to remain in them, with liberty to them to take possession, from, inter alia, making an assignment for the general benefit of his creditors, it was ordered to be varied in that respect.

It is not a ground for setting aside the service of an ex parte

injunction order that the order is not entitled in the cause, where the defendant has not been misled.

Earle, K.C., and *Baxter*, for defendants. *Teed*, K.C., for plaintiffs.

Barker, J.] WOOD *v.* LEBLANC. [Feb. 21.

Interlocutory injunction—Undertaking as to damages—Order for assessment.

Claims for small damages by some defendants ordered to be included in an order for assessment of damages by other defendants under an undertaking given on obtaining an interlocutory injunction, where they arose from the restraint of acts the injunction was obtained to prevent from being done.

Pugsley, Attorney-General, and *Friel*, for defendants. *Teed*, K.C., for plaintiff.

Barker, J.] PETERS *v.* AGRICULTURAL SOCIETY. [March 9.

Agreement—Consideration—Public exhibition—Competition for medal.

Three proprietors of blends of teas exhibiting their teas at a public exhibition held by the defendant society allowed their teas to be judged by a committee appointed by the society in competition for a gold medal offered by the society. During the exhibition each of the competitors served the public gratuitously with samples of made tea, and tea was served by them to the committee in the same way that it was served to the public. The committee having awarded the medal to the plaintiff:—

Held, that there was consideration for the offer entitling the plaintiff to the medal.

Currey, K.C., and *W. A. Ewing*, for plaintiff. *G. W. Allen*, K.C., and *R. W. McLellan*, for defendants.

Barker ,J.] PATTERSON *v.* PATTERSON. [March 21.

Partition—Previous sale of land—Title of vendor confirmed—Cost of vendee—Evidence—Ancient documents.

Where a suit for partition of lands sold previously to the commencement of the suit established the exclusive title of the vendor and the suit was not caused by any fault of his, the vendee made a party to the suit was held not to be entitled to deduct his costs from the purchase money.

Where a document of date 1831 purporting to have been executed by father and son, was produced from the custody of a grandson of the former, and as having been kept with title papers in a box formerly in the custody of the grandson's brother, and now in the grandson's custody, and where a document, of date 1840, purporting to be a will, was produced from the custody of a nephew of a person purporting to have signed it as a witness, and as having been kept by him with other papers in a chest now in the nephew's custody, both documents were held admissible in evidence without proof of execution.

L. P. D. Tilley, for plaintiff. *Currey*, K.C., and *E. T. Knowles*, for defendant executors. *Skinner*, K.C., for O'Neill Lumber Co. *S. A. M. Skinner*, for defendant Elizabeth Patterson.

Barker, J.] DUGUAY *v.* LANTEIGNE. [March 21.

Deed—Maintenance bond—Declaration of lien.

Where land was conveyed in consideration of a bond by the vendee to maintain the vendor and wife for life, but the consideration was not expressed in the deed, a decree was made charging the land with a lien for the performance of the agreement in the bond.

Currey, K.C., and *Byrne*, for defendant. *Teed*, K.C., for plaintiff.

Province of Manitoba.

KING'S BENCH.

Full Court.] MANEER *v.* SANFORD. [March 4.

Principal and agent—Misrepresentation of authority of agent —Liability for—Measure of damages.

Appeal from judgment of PERDUE, J., noted vol. 40, p. 162, dismissed with costs.

As to the measure of damages, the cases of *Robinson* v. *Harman*, 1 Ex. 850; *Engel* v. *Fitch*, L.R. 4 Q.B. 659; and *Richardson* v. *Williamson*, L.R. 6 Q.B. 276, were cited as authorities.

Anderson, and *Hudson*, for plaintiff. *Aikins*, K.C., for Riley.

Full Court.] GIBBINS v. METCALFE. [March 4.

Conspiracy—Combination in restraint of trade—Agreement to boycott plaintiff in his business.

Judgment of KILLAM, C.J., noted vol. 39, p. 674, affirmed with costs.

The present Chief Justice, in delivering the judgment of the Court, stated the result of the authorities to be that a combination such as the defendants had entered into, although resulting in damage to some person or persons, is actionable only in cases where its object is unlawful, or, if lawful, such object is attained by unlawful means, and followed *Allen* v. *Flood* (1898) A.C. 1 and the *Mogul Case* (1892) A.C. 25.

Andrews, for plaintiff. *Howell,* K.C., and *Phippen,* for defendants.

Dubuc, C.J.] MCILVRIDE v. MILLS. [April 5.

Sale of land—Statute of Frauds—Memorandum of agreement—Signature of party charged, or his agent—Tender of conveyance.

Action to recover balance of purchase money of land sold by plaintiff to defendant. The main ground of defence relied on was under the Statute of Frauds. After a personal inspection of the property, for which plaintiff asked $16 per acre, defendant consulted one Henderson as to the value of it, and, on his advice, authorized and requested him to offer $15 per acre, and, if plaintiff accepted, to draw on defendant for the cash deposit required. Henderson informed defendant that there was a mortgage in the property which would have to be assumed, and defendant agreed to do so, and to buy the property on the terms to be agreed on between plaintiff and Henderson, if it could be got for $15 per acre.

After receipt of a letter from defendant asking if he had seen the plaintiff "about that land," and urging haste, Henderson saw the plaintiff, obtained from him a formal agreement in writing, prepared by a solicitor under Henderson's instruction, for the sale of the farm to defendant at $15 per acre, containing all necessary particulars, paid $100 as a deposit on the purchase money, and informed defendant of the result by telegraph at once, and also by letter, both referring to "McIlvride's farm." The agreement of sale was signed by plaintiff, but not by defendant, or his agent Henderson.

On receipt of the telegram defendant wrote Henderson approving of the purchase and desiring to know how soon he could

get possession of the farm, adding, "You can tell McIlvride I will move into his house as soon as possible." About the same time he sent Henderson the $100 the latter had paid for him.

About nine days afterwards defendant wrote to Henderson that he had decided not to carry out the purchase, stating, among other reasons, that he had ascertained that the land was not as good as the plaintiff had represented, and that he would forfeit the $100 already paid.

Held, 1. An agent need not be authorized in writing to purchase land in order to bind his principal, and it is sufficient if the agent, authorized only by parol, has signed an agreement in writing so as to satisfy the statute: Sugden, 145, Dart, 210.

2. The written agreement, the two letters from defendant to his agent, the telegram and letter from Henderson to defendant, and Henderson's cheque for $100 payable to plaintiff, together constituted a sufficient memorandum in writing of the transaction to satisfy the Statute of Frauds, and the writing of defendant's name near the beginning of the agreement by instructions of Henderson, was, under the circumstances, a sufficient signature by the defendant's agent within the meaning of the statute: *McMillan* v. *Bentley,* 16 Gr. 387; *Evans* v. *Hoare* (1892) 1 Q.B. 593, and *Schneider* v. *Norris,* 2 M. & S. 286, followed.

Defendant also alleged as a defence that the plaintiff had been guilty of fraudulent misrepresentation of the quality of a portion of the farm which he, defendant, had not personally examined, but the learned judge found against that contention.

Held, also, that as defendant had formally refused to carry out the purchase, it was not necessary for the plaintiff to tender a conveyance of the land to defendant before commencing his action.

Caldwell, K.C., for plaintiff. *Kilgour,* for defendant.

Dubuc, C.J.] WILSON *v.* GRAHAM. [April 18.

Real Property Limitation Act—Action on covenant in agreement of sale of land to convey same by good deed—Parol evidence to contradict writing.

By an agreement made in April, 1893, the plaintiff agreed to purchase and the defendant agreed to sell a certain parcel of land which was subject to a mortgage for $1,000, besides arrears of interest and taxes, the consideration stated being the amount due on the mortgage. Plaintiff afterwards ascertained that there were registered judgments binding the land to the further extent

of about $2,000, and as these incumbrances amounted to a good deal more than the value of the land, he paid nothing on the mortgage; and the mortgagee soon afterwards sold and conveyed the property to a third party, under the power of sale contained in the mortgage. Plaintiff claimed that the real bargain was that he was to deliver six horses valued at $700 to the defendant in addition to assuming the mortgage, and that he had actually delivered the horses. He brought this action after the lapse of more than ten years on the defendant's covenant in the agreement of sale, that in consideration of the aforesaid covenants of the plaintiff, and on payment of the said sum of money (viz., the $1,000 mortgage) with interest as aforesaid, in manner aforesaid, the defendant would convey and assure the land to the plaintiff by a good and sufficient deed in fee simple, and his claim was for damages for the alleged breach of that covenant.

His counsel contended that he was not seeking "to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land," within the meaning of section 24 of the "The Real Property Limitation Act," R.S.M. 1902, c. 100, and so was not barred by the lapse of ten years, but might bring such an action within twenty years, relying on *In re Powers*, 30 Ch. D. 297.

Held, that, if the plaintiff had paid the $1,000 referred to in defendant's covenant and had brought his action to recover that amount on the covenant, section 24 of the statute would certainly bar it, and that he could not be in a better position now because he had not paid the money and that his claim was barred by the statute. *Sutton* v. *Sutton*, 22 Ch. D. 511, and *Fearnside* v. *Flint*, 22 Ch. D. 579, followed. *Allan* v. *McTavish*, 2 A.R. 278, and other Ontario cases in which a different construction is given to a similar statute not followed, as this Court is bound by the decisions of the English Courts: *McLenaghen* v. *Hetherington*, 8 M. R. 357.

Wilson and *F. D. Davis*, for plaintiff. *Haggart*, K.C., for defendant.

Perdue, J.] MACARTHUR *v.* HASTINGS. [April 19.

Breach of trust—Constructive notice—Knowledge of solicitor acting for both parties—Purchase for value without notice—Notice by tenancy—Redemption—Negligence.

The plaintiff, Duncan MacArthur, being indebted to a number of persons, including his infant son, the plaintiff, John R. MacArthur, by an instrument absolute in form, assigned to the defen-

dant Hastings a tax sale certificate covering a parcel of land in the City of Winnipeg in 1st November, 1894, and at the same time obtained from Hastings a letter which after acknowledging the receipt of the certificate, proceeded as follows: "And I hereby acknowledge the transfer of said tax sale certificate to me under this date and that I hold the said land mentioned therein and also said t. x sale certificate in trust for one John R. MacArthur of the City of Winnipeg." Hastings was at the time a member of a law firm which was and for some time had been acting as solicitors for Duncan MacArthur, and the object of the trust was that Hastings should procure a tax deed of the land for the benefit of John R. MacArthur as a security.

On 13th February, 1895, a tax deed was issued by the City of Winnipeg to Hastings as assignee of the tax sale certificate, Duncan MacArthur paying to the city $178 as the balance of the purchase money payable for the land.

The title remained in Hastings until March, 1897, when he conveyed the land to his co-defendant Mrs. Stenning as part security for an indebtedness to her. Mrs. Stenning afterwards procured a certificate of title for the land under "The Real Property Act," and in April, 1899, an agreement was entered into between her and Hastings whereby the latter purported to release all his claim to the land and to grant to her his interest therein in consideration of the sum of $460, which sum was to be credited on his indebtedness to her, Hastings being released to that extent, but remaining liable for the balance of her claim which he had subsequently settled in full. During all this time Mrs. Stenning had no knowledge of any claim on the part of the plaintiffs and believed the land to be vacant, although there really was a building on it occupied by a tenant who paid rent to a real estate agent, who accounted for it to MacArthur.

MacArthur, being thus in receipt of the rents, had no knowledge of Mrs. Stenning's claim until he heard that some one else had paid taxes on the land which, at the time of the commencement of the action, was valued at $2,000.

The statement of claim asked to have the deed and certificate of title in Mrs. Stenning's name set aside, or that she be declared a trustee of the land for John R. MacArthur. Defendants at the trial offered oral evidence to shew that the land was held by Hastings upon trusts other than that set out in the written declaration of trust, but the trial judge refused to allow such evidence to contradict the writing.

Held, 1 Notice of the plaintiff's claim was not to be attributed to Mrs. Stenning on account of her solicitor's knowledge of the facts, because where the circumstances of the case shew that

the solicitor, in the very transaction, intended a fraud which would require the suppression of the knowledge of the material fact from the person with whom he was dealing, notice of such fact is not to be imputed to such person: *Rolland* v. *Hart*, L.R. 6 Ch. 678; *Cave* v. *Cave*, 15 Ch. D. 639, and *Thompson* v. *Cartwright*; 33 Beav. 178.

2. There was nothing on the face of the documents constituting Mrs. Stenning's claim of title to put a solicitor upon inquiry or to require him to probe more deeply into the transaction.

3. Following *Hunt* v. *Luck* (1902) Ch. 428, that the occupation of the land by a tenant affected Mrs. Stenning with constructive notice only of that tenant's rights, and not with notice of his lessor's title or rights.

4. Mrs. Stenning was entitled to be treated as a purchaser for value without notice, and, having the legal estate, her claims should prevail over the prior equity of the plaintiffs, but only to the extent of the amount ($460) by which she had reduced her claim against Hastings, as there was no new or further consideration for the release to her by Hastings of the equity of redemption contained in the agreement of April, 1899.

5. That the action of MacArthur in assigning the tax sale certificate, and not afterwards inquiring what the trustee was doing with the property, could not be considered as negligence disentitling the plaintiff to relief: *Shropshire, etc., Co.* v. *The Queen*, L.R. 7 H.L. 507.

6. John R. MacArthur was entitled to redeem the land upon payment to Mrs. Stenning of the $460 with interest, together with any money paid by her for taxes and interest thereon, and her costs of suit.

7. The defendant Hastings should be ordered to pay John R. MacArthur the amount so found due to Mrs. Stenning and the plaintiffs' costs of the action.

Reference to the Master.

Bradshaw and *Affleck*, for plaintiffs. *Wilson*, for Mrs. Stenning. *Potts*, for Hastings.

Perdue, J.] [April 19.

IN RE KUNDSEN AND THE TOWN OF ST. BONIFACE.

Municipality—By-law of council to close street and sell land—Street shewn on registered plan but not taken over or improved by municipality—By-law passed for improper object—Approval of Leiutenant-Governor-in-Council—Effect of promulgation.

Application to quash by-law No. 257 of the town of St. Boniface closing "a certain street or blind alley" shewn on a regis-

tered plan of part of lot 89 of the parish of St. Boniface as opening out on Marion Street, being 66 feet wide and extending northwards a length of 165 feet to its closed end. The by-law also provided for the sale of separate portions of the street at named prices to the respective owners of the adjoining lots. The applicant was the owner of a lot fronting on Marion Street, bounded on the west by the street in question and extending back the full length of the street. He had a house on the lot facing on Marion Street and another on the rear end of the lot fronting on the street in question, which was the only means of access to it.

The town had never done any work or expended any public money for improvements on the street in question or assumed possession of it in any way.

The reason urged on behalf of the corporation for the closing of the street was that it was of no public benefit and was a source of useless expense, but the trial judge found that the true reason for the action of the council was disclosed in the report of a committee adopted by the council which stated that the street in question had not been extended northerly by the neighbouring owners, although Marion (the original owner of parish lot 89) had a verbal arrangement with them to that effect, that it would be equitable to close the street and return the land to Marion or pay him the price which could be obtained by a sale, also by the passage of another by-law three months afterwards providing for the opening of a lane 20 feet wide to the rear of the tier of lots fronting on Marion Street, and a lane of the same width running through the centre of the "blind street" in question, and to acquire the necessary land by expropriation.

Held, the purpose of the council in passing the by-law objected to was to aid Marion in retaking the land covered by it on obtaining the proceeds of a sale of it, and the passing of the by-law was therefore an abuse of the powers conferred on the council by the Municipal Act, and it should be quashed for that reason. *Re Morton and Township of St. Thomas*, 6 A.R. at p. 325, followed.

Marion, having registered the plan shewing the street in question and having sold to Kundsen a lot lying alongside this street, was bound by the plan, and could not, without the consent of Kundsen and others who bought on the strength of the existence of the street, close it up and retake the land, and what he could not do himself the council had no right to do for him.

Held, 1. Under s. 667 and sub-s. (*d*) of s. 693 of the Municipal Act, the power of a council to sell roads stopped up by them is restricted to original road allowances and to public roads which have been duly dedicated as such and over which the

council has established its jurisdiction, and is not conferred in the case of a street simply shewn on a private plan of sub-division and which the council has not improved or assumed any liability to repair.

2. The approval by the Lieutenant-Governor-in-Council, pursuant to sub-s. (*c*) of s. 694 of the Municipal Act, has not the effect of making valid a by-law which is unauthorized by the Act.

3. The promulgation of a by-law under the provisions of ss. 425 and 426 of the Act cannot have the effect of validating a by-law which the council has not power to pass. Such promulgation simply cures defects in the substance or form of the by-law and in the steps leading up to the passing of it, and cannot prevent on application to quash a by-law not within the proper competence of the council. By-law quashed with costs.

Bradshaw, for applicant. *Bernier,* for the town.

Richards, J.] McKENZIE *v.* KAYLER. [April 28.

Nuisance—Injunction—Injury to landlord's reversion—Damages in lieu of injunction.

The owner of a terrace of six dwelling houses, occupied by tenants, brought this action to restrain the defendants from carrying on their business of livery and feed stable keepers in an adjoining building in such a manner as to cause a nuisance to the plaintiff's tenants and to injure the terrace itself.

The plaintiff failed at the hearing to prove any injury to his reversion caused by the defendants; but he was then allowed to add two of his tenants as co-plaintiffs, when further evidence was given and the case further argued. The added plaintiffs clearly established that the smell and noises from the stable disturbed the comfort and sleep of the occupants of the houses in which they resided, and caused them special annoyance and prevented their reasonable enjoyment of their residences. The livery stable in question was erected after the plaintiff's terrace had been fully occupied and in spite of strong objections from the plaintiff and distinct notice that an action would be brought for an injunction if they persisted.

The immediate neighbourhood of the stable was mainly a residential district, although it was proved that prices of land there had advanced beyond what it was worth for residential purposes, in anticipation that, with the growth of the city, it would soon be required for business purposes. The tenancies of the added plaintiffs were from month to month only.

Held, notwithstanding, that the defendants should be restrained from so conducting their business on the premises in question as to occasion a nuisance to the added plaintiffs, or either of them, or the families or lodgers of either of them, during the occupation of their, or either of their, present holdings.

Jones v. *Chapple,* L.R. 20 Eq. 539, followed.

Although the nature of the occupancy of a locality may be a large factor in deciding whether the carrying on of a certain trade there would or would not create a nuisance, yet, in so deciding, no consideration need be given to the probability that a change in the nature of such occupancy will occur in the near future.

Held, also, that it was not a proper case for the awarding of damages instead of an injunction, as it could not be known how long the tenants might remain, and, besides, injuries of the kind in question cannot be fully compensated by damages, and it would be impossible to estimate such damages accurately in every case.

No costs to either party prior to the further hearing, but the defendants to pay the costs of that hearing and subsequent costs.

A. J. Andrews and *Knott,* for plaintiffs. *Campbell,* K.C., and *Wilson,* for defendants.

Dubuc, C.J.] IN RE R. B. FISHER. [April 20.

Summary conviction—Municipal by-law—Statement of offence.

This was an application by way of motion for a writ of certiorari to quash the conviction of the defendant, that he "did refuse to close a pool room occupied by him in the Village of Carman, after the hour of half-past eight, contrary to the by-law of the village in that behalf." The by-law provided that all pool rooms or billiard rooms in the village should be closed from the hour of half-past eight o'clock in the afternoon of every Saturday until seven o'clock in the forenoon of the following Monday, and should remain closed on every other day from ten o'clock in the evening until six o'clock on the following day.

Held, that the conviction was bad and should be quashed on the following grounds:—

1. It did not state that the pool room had been kept open after half-past eight *in the afternoon.*

2. It did not state that it was on a Saturday or Sunday the offence was committed; and, if it was not Saturday or Sunday, the pool room might have been lawfully kept open until ten o'clock in the evening.

3. The conviction said nothing as to when the offence had been committed and, for all that it stated, it might have been before the by-law came into operation, or more than six months before.

Butcher, for defendant. *Brooks*, for Village of Carman.

Province of British Columbia.

SUPREME COURT.

Full Court.] PECK *v.* SUN LIFE ASSURANCE CO. [April 15.

Lis pendens—Contract for sale of land—Registration of—Interest of vendor pending payment—Subsequent registration of lis pendens—Payment by instalments—Notice—Land Registry Act, ss. 23, 24, 37, 85-88.

Appeal from judgment of IRVING, J., ordering the cancellation of a lis pendens. In 1894 a husband conveyed certain lands to his wife and from her by agreement in October, 1896 (registered in March, 1897), plaintiff contracted to purchase one parcel of the land: the agreement provided that the purchase money should be paid by instalments which were paid until November, 1898, when the wife conveyed to the plaintiff and took his note in payment of the balance. In August, 1897, defendant company commenced an action against the wife to set aside the conveyance to her from her husband as a fraud on his creditors and registered a lis pendens on 24th September, 1897, and by the final judgment in that action the wife was directed to do all acts necessary to make the lands comprised in the impeached conveyance available to satisfy the claims on her husband's estate. Plaintiff on applying to register his title first learned of the action and the lis pendens. Plaintiff sued to have the registration of the lis pendens cancelled:—

Held, 1. That the estate acquired by the conveyance to plaintiff from the wife remained subject to the rights of the company as they should be determined by the result of its action against the wife.

2. The plaintiff in order to get a title should not be compelled to pay again that portion of the purchase money which he has paid since the registration of the lis pendens.

3. Notice of the company's adverse claim was not imputed to plaintiff by reason of the registration of the lis pendens.

4. Sections 85-88 of the Land Registry Act providing for the cancellation of a lis pendens are not available in practice where, as in this case, the nature and extent of the interest affected by the lis pendens are not ascertained.

5. The plaintiff was entitled to a declaration of right only and the Court declared that he was within his rights in making the payments before notice of the adverse claim; that the lis pendens did not affect the interest acquired by the plaintiff under his contract and that the defendant company has a charge on the lands for the amount of purchase money unpaid.

So long as there remains anything to be done to work out the judgment in an action the action is pending.

Upon a contract for the sale of land the purchase price of which is payable by instalments the vendor retains an interest in the land proportional to the amount of purchase money unpaid which interest is capable of being affected by lis pendens

Semble, generally a cause of action imperfect at the issue of the writ is not perfected, either at law or in equity, by subsequent events.

Judgment of IRVING, J., varied.

Bloomfield, for appellants. *Reid*, for respondents.

Full Court.] [April 28.

CENTRE STAR MINING CO. *v.* ROSSLAND-KOOTENAY MINING CO.

Practice—Appeal to Privy Council—Leave—Amount in controversy—Privy Council Rules, 1887.

Motion for leave to appeal to the Privy Council. The parties were owners of adjoining mines and by the judgment of the Full Court the defendants were restrained from permitting water to flow through certain artificial openings into plaintiffs' mine and defendants were also ordered to pay plaintiffs $10 damages. It appeared from affidavits used in support of the motion that the defendants would be put to an expense of over £300 in obeying the injunction.

Held, that in determining the question of the value of the amount involved, upon which the right to appeal to the Privy Council depends according to the terms of the Privy Council Rules of 1887, the Court will look at the judgment as it affects the parties; and as it appeared on affidavit that defendants in obeying an injunction would be put to an expense of over £300, they were granted leave to appeal.

C. R. Hamilton, K.C., for the motion. *Sir Charles Hibbert Tupper*, K.C., contra.

UNITED STATES DECISIONS.

AGENT—COMMISSION:—A real estate broker is held, in *Cadigan* v. *Crabtree* (Mass.) 66 L.R.A. 982, not to be entitled to a commission, where, after having produced a customer willing to negotiate for the lease which he was employed to effect, the principal in good faith decides not to lease, terminates the negotiation, and discharges the broker, although the principal subsequently again decides to lease and makes a contract with the customer produced by the broker.

INSANITY:—The burden of proving insanity as a defense to a criminal prosecution is held, in *State* v. *Quigley* (R.I.), 67 L.R.A. 322, to be upon the accused: and it is held not to be sufficient merely to raise a reasonable doubt as to sanity, but that the evidence upon that point must preponderate in his favour, or be sufficient to satisfy the jury of that fact.

CRIMINAL LAW:—An officer who kills a person whom he is attempting to arrest for misdemeanour, by striking him on the head with a billy, is held, in *State* v. *Phillips* (Iowa), 67 L.R.A. 292, not to be guilty of murder if he uses no more force than is necessary in case of an ordinary person, although it proves fatal in the particular case because of the thinness of the prisoner's skull, of which the officer has no knowledge. The other cases on homicide by official action, or by officers of justice, are collated in an extensive note to this case.

TELEGRAPH LAW:—A telegraph company receiving a message for transmission is held, in *Swan* v. *Western U. Teleg. Co.* (C.C.A. 7th C.), 67 L.R.A. 153, to be bound to notify the sender in case the line is obstructed so that the message cannot be sent within a reasonable time, so as to give him an opportunity to avail himself of other modes of conveying the desired information to the sendee. A note to this case discusses the question of duty of telegraph company to notify sender of message if it cannot be promptly transmitted or delivered.

To entitle the sendee to sue for failure promptly to transmit and deliver a telegram, it is held, in *Frazier* v. *Western U. Teleg. Co.* (Or.), 67 L.R.A. 319, that the telegraph company must know, or be chargeable with notice, that the message is for his benefit.