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The effort to promote uniformity of legislation among the various states of the Union still continues, thirty-two of them maintaining commissioners for that purpose. Negotiations are being carried on for the uniformity of laws in reference to negotiable instruments, and more recently an attempt is being made to perfect the details of a bill to provide for uniformity of procedure in divorce cases. A writer in one of our exchanges therefore thinks that uniform legislation may not, after all, be merely an impossible dream. The Canadian Bar Association will prove its usefulness if in any way it promotes uniformity of laws in the Dominion, and having already taken ground in that direction will, we trust, continue the good work. A letter on this subject appears in another place.

Our English contemporary, the *Law Times*, refers to complaints of the profession as to some judicial methods of shortening cases, such as the judge telling the defendant's counsel at the close of a plaintiff's case that he has no case, or asking the jury whether they think there is any libel or any fraud, and generally expressing his own opinion about the case more or less definitely, so as to render a further contest unavailing. The writer correctly says, "Speed is not justice. There is no royal road to the end of the law suit. Facts are for the jury and not for the judge, who should reserve comment as much as possible until called upon to sum up." And again, in referring to an observation of Mr. Justice Phillimore the same journal speaks thus: "This is fast becoming an age of extra judicial utterances from the Bench, which is a habit to be most strongly deprecated."

We record the following judicial appointments recently made. Mr. Justice McColl, puisne judge of the Supreme Court of British Columbia, has been promoted to the position of chief justice of that province, and Mr. Archer Martin, of the city of Victoria, takes the place thus vacated. We note that the Government has not gone outside the province in these appointments. We have already had occasion to refer to this matter, see ante p. 254. The following appointments have been made to the County Court bench; in New Brunswick, Mr. William Wilson takes the place of Judge Steadman, and in Ontario Mr. Patrick McCurry becomes Judge of the Parry Sound district, and Mr. Thomas W. Chapple now occupies the same position in the provisional judicial district of Rainy River. The county of Victoria and the county of Ontario have taken to themselves junior judges in the persons of Mr. John E. Harding, Q.C., of the city of Stratford, and Mr. D. J. McIntyre, Q.C., of the town of Lindsay, respectively. Mr. John F. Monck, of the city of Hamilton, becomes junior judge of the county of Wentworth. Mr. C. A. Dugas, Sessions judge of Montreal, has been made judge of the Yukon judicial district.

On July 1st there went into force in the United States a uniform bankruptcy law, a copy of which has just been published by the Washington Law Book Co. Much confusion had resulted in the various states from the fact that each state controlled its own territory in respect of insolvency legislation until a federal law should be passed, such as the one above mentioned. The state laws differed greatly, and in some cases placed creditors resident in other states or jurisdictions at a serious disadvantage. The plan of the English Bankruptcy Act appears to have been largely followed in the compilation of the new statute. Exemptions from executions will, however, remain subject to the state laws, and are to be allowed to bankrupts as prescribed by the laws in force at the time of filing petition, in the state wherein they have had their domicile for the six months or the greater portion thereof

immediately preceding the filing of the petition. Any person, but not a corporation, may take the benefit of the Act as a voluntary bankrupt, but involuntary or enforced bankruptcy is not to apply to a wage-earner, or a person engaged chiefly in farming, or the tillage of the soil. Mercantile corporations are made subject to involuntary bankruptcy only in case they owe debts of $1,000 or over.

MASTER AND SERVANT.

RIGHT TO TERMINATE A HIRING, THE DURATION OF WHICH IS NOT EXPRESSLY PROVIDED FOR BY THE PARTIES.

I. General Principles.

1. **Introductory**—The elaborate judgment of the Ontario Court of Appeal in the recent case of *Harnwell* v. *Parry Sound Lumber Co.* (*a*), has drawn attention once more to the incidents of contracts of hiring, the duration of which has not been expressly provided for by the parties, and, as the correctness of that decision has been seriously doubted by many members of the profession, a complete and detailed review of the authorities can scarcely fail to be of interest to our readers.

A discussion of such contracts divides itself naturally into two branches. In one of these the question to be investigated is: How long did the parties, at the time they entered into the agreement, intend that it should be binding? The other deals with the extent of their rights in respect to the severance of their connection before the end of the contemplated period. Since the duration of the hiring, in so far as it is inferred merely from what occurred at its inception, becomes, for practical purposes, a wholly immaterial circumstance, if it is once established that the contract is subject to rescission by the act of the employer or the employed, the

(*a*) (1897) 24 Ont. App. 110. See sec. 16, *post*.

issue to be decided in actual litigation is usually whether this is one of the incidents of the service. For this reason the boundary line between the two branches of the inquiry is apt to be lost sight of in actual trials. The exigencies of a logical analysis, however, demand that proper account shall be taken of the fact that there really is such a boundary line, and in the following article, therefore, the cases will be arranged with due reference to its existence.

2. Theory upon which the Duration of a General Hiring is determined—As in all other cases where the construction of a contract involves the necessity of ascertaining the intention of the parties in respect to some essential matter for which they have made no express provision, the duration of a hiring which is indefinite as to time is, as a question merely of practical procedure, susceptible of determination either as a question of law, or as dependent on a rebuttable presumption, or as an entirely open issue to be settled by the jury or other triers of facts, in view of all the testimony introduced.

The theory that the duration is properly one to be settled as a matter of law emerges in some of the cases, and has even been deemed sufficiently important to deserve a formal refutation (sec. 5, *post*); but, according to the great weight of authority, both in England and the United States, the proper starting point in an inquiry of this description is a presumption of fact. Manifestly, however, the line which separates the domain of the theory that the question is to some extent controlled by a presumption of fact, and the domain of the theory that it is to be determined from all the circumstances, is difficult to fix with precision, except in those not very numerous cases in which no testimony is offered which can, by any possibility, overcome the prima facie inference that the service was intended to continue for a certain period (*a*). When any such testimony has been introduced, the correctness of that inference obviously becomes a disputable point, and the duration of the engagement must then be decided

(*a*) See for example *Buckingham* v. *Surrey Canal Co.* (1882), 46 L.T.N.S. 885 [sec. 4, *post*].

simply by the weight of evidence. That is to say, the investigation, although it may set out with a presumption of fact, will be pursued, after a certain stage, which, in practice, is usually reached, upon a footing which is virtually the same as that upon which it would have stood if no presumption had been indulged. It is doubtless a result of this inevitable convergence of the lines of inquiry indicated by these two possible aspects of the cases under review, that some judges have expressed themselves in language suggesting a doctrine which would eliminate entirely the factor of a presumption, and that some of the actual rulings of the courts have even been supposed to embody this doctrine (*a*). That this doctrine, if any such can really be extracted from the actual decisions, is contrary to the overwhelming weight of authority will, we think, be readily conceded after a perusal of the following sections.

3. Indefinite Hiring, presumptively for a Year—The general rule applied by nearly, if not quite all the English judges (*b*), may be enunciated in its simplest form as follows: It is a rebuttable presumption of fact that a general hiring without mention of time is obligatory for at least one year, and therefore subject to all the incidents of an entire contract of that duration, irrespective of the question whether those incidents enure to the benefit or prejudice of the parties. (*c*)

(*a*) See sec. 16, *post*.

(*b*) It is asserted in Wood's Law of Master and Servant (sec. 96) that in the United States an indefinite hiring is *primâ facie* a hiring at will; but this statement of the rule, although it has been adopted as correct, at least one court of high standing in that country (see *McCullough, etc., I. Co.* v. *Carpenter* (1887) 67 Md. 557), is, to say the least, too sweeping. The English doctrine is accepted without reservation in New York and in Massachusetts; *Adams* v. *Fitzpatrick* (1891) 125 N.Y. 124; *Tatterson* v. *Suffolk Mfg. Co.* (1870), 106 Mass. 57. Perhaps, however, it may be said, as to most of the States, that, for obvious social and economic reasons, a hiring for a shorter period than a year will be more readily inferred in that country than in England: *Bascom* v. *Shillito* (1882), 37 Ohio St. 431. It would, therefore, be undesirable, in an article designed for Canadian readers, to rely upon the American authorities, and they will not be referred to except in cases in which this tendency is not an operative element in the moulding of the decision of the court, and they will serve to corroborate some English ruling.

(*c*) Attempts have been made, but, as we venture to think, without much success, to explain the origin of this presumption. Judge Story suggests (Contr. 1290) that it was established in order to give the master and the servant the benefit of all seasons. According to Mr. Macdonnell (Master & Servant, p. 167), "a more probable explanation of it is that it arose in consequence of the statutory enactment

"If a man retain a servant generally, without expressing any time, the law shall construe it to be for one year, for that retainer is according to law." (*a*)

"Wherever the relation of master and servant is to continue an indefinite time, and cannot be put an end to at the election of either party without notice, there the hiring must be understood to be a hiring for a year." (*b*)

"There can be no doubt that a general hiring is a hiring for a year." (*c*)

"If a master hire a servant without mention of time, that is a general hiring for a year" (*d*)

"The general rule is that if a master hire a servant without mentioning the time, that is a general hiring, and in point of law a hiring for a year." (*e*).

"As a general rule, where the hiring is a yearly hiring it cannot be put an end to by either party before the end of the year." (*f*)

It was assumed by all the judges summoned by the House of Lords to give opinions in *Elderton* v. *Emmens*, (*g*) and presumably conceded by the House of Lords itself, that the effect of a resolution entered in the minute-book of a company, by which a person was to receive, as the company's solicitor, a salary of $100, in lieu of his rendering an annual bill of costs, as he had previously been doing, was to bind the company to retain him in its employment for at least a year, the sole point of controversy being whether it was also bound to give him business to transact during that time.

(5 Eliz. c. 4, sec. 3 and 7, and other statutes), that hirings should be by the year." The objection to the first theory is that "the benefit of all the seasons" could hardly be of any special importance except in the employment of laborers doing outdoor work, and that the common law must, from a very early period, have found it necessary to formulate some doctrine as to other kinds of service. The second theory would require us to assume that the courts, by a species of judicial legislation, extended the rule prescribed by statute for one particular class of employees, viz., those engaged in manual labour, to other employees who did not come within the purview of the statute. The present writer, while willing to admit that this view may possibly be correct, ventures to think that a much simpler and more reasonable hypothesis is that the statutory provision was itself merely a recognition of a well understood custom, having its origin in economic and social conditions. This explanation has at least the advantage of referring the rule to a source from which a large part of the so-called unwritten law has been derived, and obviates all necessity for the rather violent supposition that the legislature at the particular period which gave birth to the statute, added an entirely novel incident to the contract of service.

(*a*) Coke Litt., 42, 6: The same doctrine is laid down in Fitzherbert's Nat. Brev. p. 168, H.; Comyns Dig., Tit. Justices of Peace, B. 58.

(*b*) *Rex* v. *Hampreston* (1793), 5 T.R. 205. To the same general effect, see *Rex* v. *Great Yarmouth* (1816) 5 M. & S. 114.

(*c*) *Beeston* v. *Collyer* (1827) 4 Bing. 309, per Gaselee J.

(*d*) *Beeston* v. *Collyer* (1827), 4 Bing. 309, per Best, C. J.

(*e*) *Fawcett* v. *Cash* (1834), 3 N. & M. 177; 5 B. & Ad. 904, per Denman, C.J.

(*f*) *Buckingham* v. *Surrey, etc., Canal Co.* (1882), 46 L.T.N.S. 885, per Grove, J.

(*g*) (1853) 4 H. of L. 624. Crompton, J. "concurred entirely with the judgment of the Exchequer Chamber, as to the company being bound to continue the relation of employers and employed, at least for a year," and said that "supposing the case one of employment and service, the words of the contract appeared to him as strong in favour of the engagement lasting through the year, as the words in *Fawcett* v. *Cash*." Platt, B., said: "This agreement appears to me to have established the relation of employer and employed for the period of a year, at a salary of £100." Coleridge, J., said: "It seems to me that this was clearly an agreement for a year certain."

To the same effect see the following text books: Addison Contr. (9th ed.) p. 844; Smith's Mercantile Law (10th ed.) p. 521; Chitty Contr. (12th ed.) p. 640; Story Contr., sec. 962 (c).

4. Same Subject Continued: Illustrative Decisions -- Concrete illustrations of the general principle stated in the foregoing section are furnished by the subjoined decisions as to contracts affecting various employees. The effect of the cases is so stated as to show precisely the extent of the power assumed by the courts in drawing inferences from the testimony.

Where the only evidence is that a person was hired to work as the foreman of silk manufacturers, and to have wages at the rate of $80 a year, there is nothing to repel the ordinary presumption that he was hired for an entire year. (*a*)

An agreement to serve as a steward from a certain date for a specified salary per annum creates an engagement for a year. (*b*)

Where the evidence is merely that the plaintiff entered the defendants' employ at a certain salary, the only two possible suppositions as to the nature of the hiring are that it is a hiring by the year, or a general hiring without any particular agreement as to time (*c*).

In *Davis* v. *Marshall* (*d*) Pollock, C.B., said with regard to a man hired to manage a shop and keep accounts: "This position and employment, coupled with the hiring at £30 a year, are sufficient to establish a yearly contract." (For a full statement of this case see sec. 9, *post*).

Evidence that the plaintiff entered the service of the defendant, an army agent, as a clerk upon a yearly salary, which had at one time been paid quarterly, but was paid monthly during the last six years of the service will warrant a jury in finding that the hiring was a yearly one, and terminable only at the end of a current year. (*e*).

A hiring of an engineer under a resolution of a company, at a specified annual salary is primâ facie a hiring for a year certain. (*f*)

(*a*) *Turner* v. *Robinson* (1833), 5 B. & Ad. 789: 2 N. & M. 829.

(*b*) *Forgan* v. *Parke* (1861), 12 I. R. C. L. 495 [verdict for plaintiff in accordance with this rule held to have been rightly directed].

(*c*) *Broxham* v. *Wagstaffe* (1841), 5 Jur. 843, per Parke, B.

(*d*) (1861), 4 L. T. N. S. 276.

(*e*) *Beeston* v. *Collyer* (1827), 4 Bing. 309. To the same effect see *Huttmann* v. *Boulnois* (1826), 2 C. & P. 510, per Abbott, C.J., negativing the contention that this doctrine only applied to domestics and servants in husbandry. In *Foxall* v. *International, etc., Co.* (1867), 16 L.T.N.S. 637 (nisi prius case), it was not questioned by either side that the hiring of a clerk whose salary was fixed at so much "per annum" by a resolution entered on the company's minute book, was a yearly hiring. (See post as to termination by notice.) The doctrine that the hiring of a clerk is presumptively yearly was also recognized in *Parker* v. *Ibbetson* (1858), 4 C.B. N.S. 346.

(*f*) *Buckingham* v. *Surrey, etc., Canal Co.* (1882), 46 L. T. N. S. 885. Grove, J., said: "It seems to me, therefore, that the judge was bound to direct the jury that in the absence of any such evidence, the hiring was a hiring for a year. There is nothing to show that the plaintiff accepted the engagement upon any other terms than those expressed in the resolution. The plaintiff established a primâ facie case of a yearly hiring, and therefore in the absence of any evidence of custom to rebut that primâ facie case I think the verdict ought to stand."

Unless something to the contrary is said at the time of the hiring, the engagement of a person employed to supply a particular department of a newspaper,—as for instance the leading article, or reports of the parliamentary debates,—is understood to be for a year. (*a*)

The proposition that, if unexplained, a general hiring of a surgeon's assistant, is to be taken as a hiring for a year has been recognized, *arguendo*, as correct. (*b*)

The rule based upon the presumption is carried to its strict logical consequences in favor of the master, as is very strikingly indicated by the ruling in *Turner* v. *Robinson* (*c*), where a servant who was dismissed for good cause during a current year was held not to be entitled to recover compensation for his actual services, on the ground that the contract was an entire one.

The length to which a Court of Equity will go in enforcing this class of contracts is shown by *Stiff* v. *Cassell*, (*d*) where it was held that a prima facie case was made out for enforcing by injunction a stipulation of an author to write only for publications of a specified class within the period covered by an indefinite hiring, which the Court held to be one for a year.

The effect of the doctrine, from the pleader's standpoint, is strongly emphasized in such rulings as these:

Where the servant enters an employment under a general hiring, and continues to discharge the same duties for several years, the contract is properly declared upon as one for a whole year in the first instance, and afterwards as long as the plaintiff and defendant shall respectively please until the expiration of the current year from the date at which the service originally began (*e*).

A general hiring of a servant as a labourer in husbandry is, in law, a

(*a*) *Holcroft* v. *Barber* (1843), 1 C. & K., 4. There Wightman, J., submitted to the jury the question whether this rule was applicable in the case of a monthly paper, to be sent to India as a sort of speculation, but the defendant had a verdict on the ground that the plaintiff was not hired as an editor, and the question was not answered. In *Baxter* v. *Nurse* (1844), 6 M. & G. 935, (see sec. 5 *post*), Coltman, J., remarked that the question whether, in the case of an editor of a literary publication, a general hiring was to be considered as necessarily an engagement for a year, had never been decided.

(*b*) *Bayley* v. *Rimmell* (1836), 1 M. & W. 506, per Parke, B.

(*c*) (1883), 5 B. & Ad. 789, 2 N. & M. 829.

(*d*) (1856), 2 Jur. N. S. 348.

(*e*) *Beeston* v. *Collyer* (1827), 4 Bing. 309.

hiring from year to year, and will not support a count in a declaration which is based on the theory that it is one determinable at any time on reasonable notice. (*a*)

Under the old rules of pleading it was held that, if the servant was dismissed without cause during the currency of the year embraced by the contract, he could not recover in the common counts, but must either wait till the end of the year, or declare specially (*b*).

See also the cases in III. *post*, as to the termination of the service by notice.

5. Presumption that general hiring is yearly, not a presumption of law—That the presumption of a yearly hiring which is indulged when there is no mention of time is really regarded as a mere presumption of fact and not one of law, is sufficiently indicated by the circumstance that even the most unqualified statements of the rule occur as parts of opinion reviewing the findings of juries or other triers of facts. (*c*) Some of the decisions cited above show that the court is warranted in taking the case from the jury, or in directing a verdict, upon the theory that there is no evidence to rebut the presumption,—though even in very clear cases trial judges have declined to take either of these courses (*d*). But more direct expressions of judicial opinion as to the true nature of the presumption are not wanting. Thus in one case we find Lord Denman remarking:

(*a*) *Lilley* v. *Elwin* (1849), 11 Q.B. 742. Compare the remark of Gaselee, J., to the effect that the understanding that a contract for domestic service may be dissolved before the end of the year merely by giving notice, (see sec. 11, (*c*.) *post*) does not seem to prevail in regard to servants in husbandry. *Beeston* v. *Collyer* (1827), 4 Bing. 309. The same doctrine is assumed without any argument in many of the settlement cases cited in this article. See for example: *Rex* v. *Birdbrook* (1791) 4 T.R. 245; *Rex* v. *Lyth* (1793) 5 T.R. 327: *Rex* v. *St. Mary* (1815) 4 M. & S. 315.

(*b*) *Broxham* v. *Wagstaffe* (1841), 5 Jur. 843.

(*c*) The numerous affirmations of the general rule which we find in the settlement cases refer, it should be remembered, to the findings of justices of the peace, whose functions in this regard were identical with those of a jury. It has been expressly ruled that whether there was a hiring for a year is in most cases a question of fact for the justices to determine: *Rex* v. *Bottesford*, 4 B. & C. 84.

(*d*) In *Foxall* v. *International, etc., Co.* (1867), 16 L.T.N.S. 637, we find the following remarks in the charge of Byles, J.: "I am very strongly of opinion that a hiring simply for a year, as in the present case (of a clerk) cannot be determined by a three months' notice, and my only doubt is whether I should not direct the jury that, if they believe the evidence given, there was an absolute hiring for a year. It is perhaps safer to leave the question to the jury."

"In some instances the nature of the contract is, in fact, so well understood that it is often put as matter of law. Still it is always a matter of fact." (*a*)

But the case in which this distinction is brought out in the clearest relief is *Baxter* v. *Nurse* (*b*), the great importance of which justifies an extended statement of its incidents and effect.

The plaintiff declared in a special contract to employ him as editor of a certain periodical, for a year, at a salary of £3 3s., to be raised progressively when the work should reach a certain circulation, and assigned as a breach his dismissal before the expiration of the year. At the trial the terms on which the plaintiff was engaged were not proved; but it was shown that, after the commencement of the publication, the defendant had paid him three guineas a week. The defendant abandoned the enterprise after the third number of the review had been issued, but the publication was continued by another person. The plaintiff called several witnesses to prove that, in the absence of any stipulation to the contrary, a general engagement as an editor of such a work is understood to be an engagement by the year; but, upon cross-examination, they admitted that they spoke with reference to established works, and not to new speculations. Tindal, C.J., left it to the jury to say whether there had been a contract for the period of a year, observing that the rule spoken of by the plaintiff's witnesses might be useful and proper in the generality of cases, but that it might not be so applicable in the case of a newly started work where it might be uncertain whether it would be continued for the period of a year. The verdict being for the defendant, a new trial was moved for, on the ground that the trial judge had refused the request of the plaintiff to charge the jury that an indefinite hiring was, as a general rule of law, a yearly hiring.

Creswell, J., said: "Then, that ground failing, the rule of law was referred to in the second instance, namely, that a general hiring,—or to use more correct terms, a hiring for an indefinite period,—is to be taken as a yearly hiring. But what is the evidence of the hiring in this case? There is nothing to show that it was an indefinite hiring. The progressive increase of salary would apply as well to the second as to the first year."

Tindal, J., said: "Upon the first ground on which the present motion was made, namely, that the jury ought to have been directed, as upon a general rule of law, that the hiring in this case must be taken to have been by the year, it appears to me that the principle on which contracts of this nature,

(*a*) *Williams* v. *Byrne* (1837), 7 A. & E. 177 (p. 182). The American rule is the same. In *Tatterson* v *Suffolk Mfg. Co.* (1870), 106 Mass. 56, the principle was recognized that the duration of a general hiring was "an inference of fact to be drawn only by the jury." In a New York case it has been held that a finding by a referee that the parties intended a yearly hiring by a continuance of the service after the expiration of the original term will, for the purpose of upholding the judgment, be regarded as a finding of fact, although it is form classified as a finding of law: *Adams* v. *Fitzpatrick* (1891), 125 N.Y. 124.

(*b*) (1844) 6 M. & G. 935.

which have been entered into without any definite arrangement as to time, are held to be contracts for a year, is by no means an inflexible rule, (*a*) but that it is a presumption to be raised from contracts of the same kind; and that the judge at a trial is not authorized to lay down any general rule upon the subject. There are cases in which undoubtedly a rule of law is laid down to the jury. Thus, in the case of a deed, the instruction being under seal, imports the existence of a valid consideration. So, a promissory note or a bill of exchange also imports a consideration. These are rules of law; and upon these points the judge does not ask the opinion of the jury. So twenty years' adverse possession (without reference to the late statute) will import a right of possession. That also is a rule of law, upon which the opinion of the jury would not be asked."

Creswell, J., remarked that in some of the earlier cases upon the questions of settlement, Lord Kenyon directed the justices at sessions in stating a case themselves to draw the conclusion of a hiring, but said that he "must have meant a conclusion of fact, not of law—as to whether or not there had been a yearly hiring."

A passage to the same effect from the opinion of Erskine J. will be found quoted in sec. 8, *post*.

The same conception is evidently implied by the language used in the cases already cited and those to be noticed below, especially those (cited in sec. 11, *post*) which recognize the principle that the presumption of an annual hiring is rebuttable by evidence of a custom permitting the engagement to be put an end to by notice.

6. General hiring not within Statute of Frauds—Since the contract to serve for a year under a general hiring is implied from the circumstances and not expressed, a writing is not necessary to authenticate it. (*b*)

II. PARTICULAR CIRCUMSTANCES RELIED UPON TO REBUT OR CORROBORATE PRESUMPTION AS TO A GENERAL HIRING.

7. Inference where the evidence is merely that services were rendered—It has been laid down, as a general principle, that, where there is not a hiring in express words, but the nature of the service implies a precedent hiring, the court will go

(*a*) This expression was repeated by Pollock, C.B., in *Fairman* v. *Oakford* (1860), 5 H. & N. 635 (see the passage quoted in sec. 9, *post*).

(*b*) *Beeston* v. *Collyer* (1827), 4 Bing. 309. Compare the American rulings to the effect that the yearly hiring which is inferred from a continuance of service after the conclusion of the first year is not within the statute: *Lines* v. *Superintendents* (1885), 58 Mich. 503; *Tatterson* v. *Suffolk Mfg. Co.* (1870), 106 Mass. 57.

far to presume one. (*a*) Thus service for a year by a servant in husbandry has been held to afford very strong presumptive evidence of a hiring for a year. (*b*)

But the inference of a yearly hiring cannot properly be drawn from a mere rendition of services, unless it appears that the person who rendered them did so in the capacity of a servant. Thus the relation of master and servant under such a hiring cannot be inferred merely from evidence which shows that one person, when a young boy, had lived with another upon charity, and run errands, etc., (*c*), nor from evidence that a person who, after having lived with his uncle on charity, hired himself out to another person as a yearly servant, and then accepted an invitation from his uncle to come "and live with him as before." (*d*)

8. Defeasibility of contract at the will of the parties, effect of— A contract which, by its express terms, permits either party to terminate the engagement at any time cannot be construed as one which is binding for a year. (*e*) But the presumption that a general hiring is for a year is not repelled by the mere fact that the servant left in the middle of the year (*f*); nor by the fact that the master has reserved a right to discharge the servant by giving notice (*g*), or a right to dismiss him "if he should have a sale" of the property on which the work is to be done (*h*), nor by the fact

(*a*) *Trinity* v. *St. Peters* (1764) 1 W. Bl. 443.

(*b*) *Rex* v. *Lyth* (1793), 5 T. R. 327.

(*c*) *Rex* v. *Weyhill* (1760), 1 W. Bl. 205.

(*d*) *Rex* v. *Stokesley* (1796) 6 T. R. 757.

(*e*) *Rex* v. *Great Bowden* (1827) 7 B. & C. 249: There is merely a service at will where a boy is employed to work "for meat, drink and clothes as long as he has a mind to stop:" *Rex* v. *Christ's Parish* (1824) 3 B. & C. 459. In a settlement case it has been held that the presumption that an indefinite hiring is for the year is not repelled by the fact that the master and servant thought they could separate within the year: *Rex.* v. *Stockbridge* (1773) Burr. S.C. 759. Compare *Rex.* v. *Seaton* (1784) Cald. 440, and *Rex.* v. *Newton Toney* (1788) 2 T. R. 453. But this doctrine seems to have been formulated with special reference to the English Poor Law. It is apprehended that, where the question is merely as to the rights of the parties *inter se*, their mutual understanding that the contract might be rescinded during the year would preclude the inference of a yearly hiring.

(*f*) *Rex.* v. *Worfield* (1793) 5 T. R. 506.

(*g*) *Rex* v. *Sandhurst* (1827) 7 B. & C. 557, *Rex* v. *Birdbrooke* (1791), 4 T. R. 245; *Rex* v. *Hampreston* (1793) 5 T.R. 205.

(*h*) *Rex* v. *Farleigh Wallop* (1830) 1 B. & Ad. 340.

that the contract is subject to a condition subsequent, which may possibly terminate the service before the end of the year, as where the continuance of the engagement is dependent upon the servant's being found to have sufficient physical strength for the work. (*a*)

As to the cases in which the presumption of a yearly hiring exists, but its effect is, for practical purposes, overcome by evidence of a custom which gives the parties a right to sever their relations by giving notice. (See sec. 11, *post*).

9. Inferences from stipulations as to manner in which the Compensation is to be Paid—(*a*) *Provisions for payment by the piece, effect of*—There seems to be no dispute as to the doctrine that a general hiring to do piece work is not a yearly hiring. (*b*) Thus a contract to serve from Michaelmas to Michaelmas and to make a certain number of bricks is not a contract for a year certain, but only to serve until a particular job is done. (*c*)

On the other hand, since the mere fact that the amount of wages due is computed with reference to the quantity of work actually done is immaterial where the question is merely whether the hiring is or is not for a specific period, (*d*) a general hiring will be regarded as a yearly hiring irrespective of the question whether the servant is paid by the year or according to the actual results produced by his services (*e*).

There is no evidence of a hiring for a year where it appears that payments were made to the plaintiff as assistant to a surgeon, but not according to any yearly amount, nor at any definite periods, that the parties separated at the middle of the year, and that the plaintiff was not required to return and complete the service. (*f*)

(*b*) *Stipulations as to an annual rate of compensation, effect of.*—As is plainly apparent the authorities cited in subd. I., *ante*, it cannot be contended that the mention of a lump

(*a*) *Rex* v. *Northwold* (1823) 2 D. & R. 792.
(*b*) *Trimby* v. *St. Peters* (1764), 1 W. Bl. 443.
(*c*) *Rex* v. *Woodhurst* (1818), 1 B. & Ald. 325.
(*d*) See *Gregson* v. *Watson* (1876), 34 L.T.N.S. 143; *Warburton* v. *Heyworth* (1880), L. R. 6 Q. B. 1.
(*e*) *Inter King's Norton and Campden* (1850), 2 Strange 1139.
(*f*) *Bayley* v. *Rimmell* (1836), 1 M. & W. 506.

sum as the compensation to be received for the year's services could have any effect except to corroborate the usual inference as to the duration of a general hiring. In one case, however, it was argued that a different principle was applicable where the evidence was that the servant was to be paid "at the rate of £80 a year." But the Court refused to accept this theory, and said that the ordinary presumption must still prevail. (*a*)

(*c*) *Stipulations as to payment at intervals shorter than a year.*—Provisions for the payment of the compensation at shorter intervals than a year, either specify both the annual rate and the rate for the fraction of a year, or else the latter rate only.

As regards provisions of the first description, they are certainly not inconsistent with the hypothesis of a yearly hiring. Thus it has been said that, "if there be anything in the contract to show that the hiring was intended to be for a year, there a reservation of weekly wages will not control the hiring." (*b*) Hence the mere fact that an author is to furnish so much matter for a magazine every week at a certain rate does not make his engagement a weekly one. (*c*) So where there is no change in the nature of the employment, the mere fact that the salary, after having been for some time paid quarterly, is paid monthly, is not in itself evidence that the hiring has ceased to be a yearly one. Such an alteration is not unlikely to be made merely for the convenience of the servant, and has no bearing upon the essential character of the hiring. (*d*)

In *Davis* v. *Marshall* (*e*) the plaintiff was hired to manage a shop and keep accounts at a certain annual salary, payable monthly, the Court declined to accept the contention that a verdict in his favour based on the theory that the hiring was

(*a*) *Turner* v. *Robinson* (1833), 2 N. & M 829.

(*b*) *Rex.* v. *Newton Toney* (1788) 2 T. R. 453, per Buller, J.

(*c*) *Stiff* v. *Cassell* (1856) 2 Jur. N. S. 348.

(*d*) *Beeston* v. *Collyer* (1827), 4 Bing. 309; 12 Moore, 552. See further, as cases recognizing the principle that the period at which the wages are to be paid is immaterial, where the hiring is otherwise presumptively for a year: *Rex.* v. *Seaton* (1784) Cald. 440; *Levy* v. *Electrical Wonder Co.* (1893) 9 Times L R. 495; *Fawcett* v. *Cash* (1834) 3 N. & M. 177; 5 B. & Ad 904, per Patterson, J., (p. 179), during argument of counsel; *Tatterson* v. *Suffolk Mfg. Co.* (1870) 106 Mass. 57.

(*e*) (1861) 4 L.T.N.S. 216.

for the year should be set aside on the ground that the monthly payments required the inference that the hiring was by the month, and could therefore be terminated at a month's notice. Pollock, C.B., said:

"No doubt the general rule is that notice need not be more extensive than the period of hiring; the question whether or not a hiring at so much a year, with monthly payments, is a yearly contract, depends a good deal on the nature of the employment, and the other circumstances of the case. Short periodical payments are absolutely necessary to persons in the position of life of the plaintiff, and the mere fact of his receiving his wages monthly is not inconsistent with a yearly hiring. He was hired at £30 a year, to be paid monthly, because, I take it, it was a convenient and necessary course to adopt."

Martin, B., said more briefly:

"A contract for a year, with monthly payments, is still a yearly contract, unless the yearly hiring be rebutted by evidence to the contrary."

The rule as to provisions of the second description is equally well settled.

"If the payment of weekly wages be the only circumstance from which the duration of the contract is to be collected, it must be taken to be only a weekly hiring." (*a*)

"If nothing be said as to the term of service but that the servant shall have weekly pay, it must prima facie be understood that the parties intended a weekly hiring and service." (*b*)

"An indefinite hiring has been held to be for a year; but if any other facts appear, such as payment by the week, the presumption of a yearly hiring may be rebutted." (*c*)

(*a*) *Rex* v. *Newton Toney* (1788), 2 T. R. 453, per Buller, J.

(*b*) *Rex* v. *Pucklechurch* (1804), 5 East. 382; *Rex* v. *St. Andrew* (1828), 8 B. & C. 679, per Bayley, J.

(*c*) *Baxter* v. *Nurse* (1844) 6 M. & G. 935, per Creswell, J. (p. 941). The ordinary inference from such a provision is not rebutted by the fact that the hiring was to be for "winter and summer": "*Rex* v. *Dedham* (1769) Burr. S.C. 653; nor by a provision that, during the harvest, the wages are to be raised to a higher sum per week: *Rex* v. *Dodderhill* (1814) 3 M. & S. 243. In *Rex* v. *Lambeth* (1815) 4 M. & S. 315, counsel argued that where the hiring was at weekly wages and a lump sum "for the harvest," it was a weekly hiring, as the words "for the harvest" imported a consolidated period longer than a week, but the court said that it was a weekly hiring, with a special provision in case the service should last through the harvest. A hiring at so much a week for as long a time as the master and servant can agree is a weekly hiring, being a hiring for as long as they can agree from week to week: *Rex* v. *Mitcham* (1810) 12 East 351. A hiring "at two guineas a week for the first year" is a hiring by the week and not by the year: *Robertson* v. *Jenner* (1867) 15 L. T. N. S. 514, per Bramwell, B. A. entered the service of Messrs. Roe under a written memorandum, as follows: "April 13th, 1871. I agree to accept the situation as foreman of the works of Messrs. Roe, flock and shoddy manufacturers, and to do all that lays in my power to serve them faithfully, and promote the welfare of the firm, on my receiving a salary of 2*l.* per week and house to live in, from the 19th of April, 1871:"—*Held*, a weekly hiring from the 19th of April, 1871; and that evidence of a conversation at the time of signing the contract showing that a hiring for a year was intended, was not admissible for the purpose of bringing the agreement under the Statute of Frauds: *Evans* v. *Roe* (1872) L.R. 7 C.P. 138.

The inference of a weekly hiring may sometimes be strengthened by proof of something said or done by the employer at the time he was negotiating with the servant, indicating that he preferred not to enter into a more permanent contract, as where he asked the person who was about to enter his service what wages he expected per week, and upon the latter's replying £20 a year, the employer refused to give him that, but offered a certain weekly sum. (*a*)

Conversely the inference that would otherwise be drawn from the payment of the compensation weekly may be rebutted by some other provision of the contract, going to show that the parties contemplated a longer duration than a week. Thus in one case Coleridge, C.J., considered that the appointment of a manager of a company at so much per week was an annual one, for the special reason that a portion of his salary was to be a percentage of the profits, as ascertained by the auditor. (*b*)

The inference of a weekly hiring would seem to be less cogent where no evidence is given as to what transpired between the parties before the service began, and it is merely shown that some services were performed, and that for a certain period the servant was paid his wages every week. Such evidence is regarded as equally consistent with the theory of a weekly or of a yearly hiring, and presents an open question for the jury. Thus in *Baxter* v. *Nurse*, (*c*) already noticed: (see sec. 5, *ante*.)

Erskine, J., said: "Assuming that the general rule of presumption, arising from an indefinite hiring, might apply to such a case as the present, and that, if a general hiring had been proved, the jury ought to have been told that it should be taken to be a yearly hiring, still it is enough to say that a general hiring was not proved in this case. The facts in evidence clearly do not amount to such proof. It appears that the plaintiff was paid three guineas a week, with a prospect of increase of salary, and there is the fact of some

(*a*) *Rex* v. *Warminster* (1826), 6 B. & C. 77; 9 D. & R. 70.

(*b*) *Levy* v. *Electrical Wonder Co.* (1893), 9 Times L. Rep. 495.

(*c*) (1844) 6 M. & G. 935. In *Rettinger* v. *McDougall* (1860) 9 U. C. C. P. 485, the court refused to disturb the verdict of a jury who found that, where the employer of a foreman of a printing office was shown to have settled the wages weekly, the hiring was by the week, but intimated that a finding that it was yearly would also have been justified by the evidence.

service having been performed, but there is nothing to show what passed between the time of the engagement. The terms of the hiring were therefore a question for the jury, and, I think, the circumstances of its being a new periodical, of which the plaintiff was to have the management, was worthy of attention in considering the probability of a yearly engagement having been entered into without reference to such a publication, whatever might be the usage in the case of an old-established work. It seems to me, therefore, that the whole question was properly left to the jury."

The fact that a general hiring at so much for a specified part of the year is determinable by a notice of the same period is, of course, not inconsistent with the hypothesis of a weekly hiring. (*a*) But where a contract, indefinite as to duration, provides that it may be terminated by a notice of some period longer than that with reference to which the payments of compensation are estimated, the presumption of a weekly hiring which might otherwise be drawn from the mention of the shorter periods is rebutted, and the contract regarded as binding for a year. (*b*) Such a contract is one of which no certain portion of time can be predicated for its duration, and is consequently a general "hiring." (*c*)

This inference, however, from the fact that the period for notice is longer than that with reference to which the payments of compensation are computed, seems not to be an absolutely necessary one. Such at least is the apparent effect of the refusal of the Court to set aside a finding by a trial judge that the hiring of a factory hand, under an agreement which contemplated that, according to the custom of the establishment, he should receive on a certain day wages depending on the amount of work done during the previous week, was a hiring by the week, although it also appeared that the servant could not leave without a fortnight's notice. (*d*)

(*a*) *Rex* v. *Banbury* (1802), 2 East 423, distinguishing *Rex* v. *Hampreston*, cited in the next note.

(*b*) *Rex* v. *St. Andrews* (1828), 8 B. & C. 679, [weekly payments—provision for month's notice]; *Rex* v. *Hampreston* (1793), 5 T.R. 205 [same provisions]; compare *Reg.* v. *Pilkington* (1844), 5 Q.B. 662 [weekly wages—service terminable by fortnight's notice].

(*c*) *Rex* v. *Great Yarmouth* (1816), 5 M. & S. 114.

(*d*) *Gregson* v. *Watson* (1876), 34 L.T.N.S. 143. The Court remarked that "the time required for notice does not necessarily fix the period of service."

9. Inferences from special incidents of the business in which the servant is employed—In one class of cases under this head the essential factor is that the parties presumably intended to refer the duration of the engagement, not to the divisions of the calendar, but to some event which would recur at irregular intervals as long as the employment lasted.

In *Creen* v. *Wright* (*a*) a master mariner accepted the command of a ship under a written agreement running as follows: "I hereby accept the command of the ship City Camp, on the following terms: salary to be at and after the rate of 18*l.* sterling per annum. Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners have the option of paying or not paying his expenses traveling home. Wages to begin when captain joins the ship." While in England, he was dismissed without notice, and in an action for wrongful discharge, the lower court directed a verdict for the defendant on the ground that, as the contract was specific, and there was no evidence of a custom, as in the case of clerks and servants, the plaintiff was not entitled to any notice. In the Common Pleas Division the questions discussed were these: (1) What was the primâ facie duration of an indefinite hiring of a shipmaster? (2) Was the engagement under general common law principles terminable by notice? (3) What were the plaintiff's rights as to notice under the actual provisions of the contract? In its decision of the first of these questions, (the others will be referred to below; see sec. 10) the court apparently intends to adopt the view of one of the counsel who had argued that the case of a master of a ship was an exceptional one, as it would be extremely inconvenient if the service were to determine in the middle of a voyage, and therefore it could not be intended to be a service for a year: Coleridge, C. J., said: "The relation of the master of a ship to his employer, the ship owner, is not one in which, in the case of an indefinite hiring, the law has made, and there was no evidence of any custom making the hiring for a year, or for any other definite time, nor the notice by which the service is to be determined certain." The following dictum of Pollock, C.B., in *Fairman* v. *Oakford* (*b*), was quoted as embodying a correct principle: "There is no inflexible rule that a general hiring is a hiring for a year. Each particular case must depend on its own circumstances. From much experience of juries I have come to the conclusion that usually the indefinite hiring of a clerk is not a hiring for a year, but rather one determinable by three months' notice."

In yet another class of cases the circumstance which tends to rebut the presumption of a yearly hiring is that the enterprise for which the servant is engaged is so essentially lacking in the elements of stability and permanence, that the

(*a*) (1876) 1 C.P.D. 591.
(*b*) (1860) 5 H. & N. 635; 29 L.J. Ex. 429.

servant must be supposed to have contracted with reference to the possibility of losing the position before the end of a year. Thus there is no presumption that an editor employed to conduct a new periodical, started as a mere speculation, is hired for a whole year. Thus in *Baxter* v. *Nurse* (*a*), we find Coltman, J., making the following remarks:

"There is also another circumstance which contends to throw doubt upon the supposition that there was a yearly hiring, namely, that the defendant said, if the work were not conducted to his satisfaction, he should give it up. In such a state of things it is not very probable that he should hire persons to be concerned in the management of the publication for a whole year. There is, therefore, in my opinion, no presumption of a yearly hiring, and I do not see that the jury have come to an unreasonable conclusion on the subject."

This would also appear to be the rationale of the decision of the Ontario Court of Appeal in *Bain* v. *Anderson* (*b*), so far as it embodies any general principle, the judgment of the lower Court being reversed on the ground that the evidence failed to show any definite hiring in the case of one who, after the business of his employer had been sold, was retained by the purchaser in his former position of superintendent while the business was being reorganized. But the precise grounds of the decision are not stated in the report.

The presumption that the hiring was for a year certain may also be rebutted, where the duties to be discharged are such that the employé is fit for his position only so long as his political opinions continue to be the same as those of his employer. It was ruled by Lord Coleridge in the nisi prius case of *Lowe* v. *Walter*, (*c*) that a contract employing a foreign correspondent was a mere engagement at a yearly salary unless custom could be imported into it. The learned Chief Justice pointed out that, under any other theory of the relation, an editor might be placed in the anomalous predicament of being obliged to permit his newspaper to be made a medium for the publication of views of which he disapproved.

(*a*) (1844), 6 M. & G. 935.
(*b*) (1896), 27 Ont. Rep. 369.
(*c*) (1892), Times L.R. 358.

The force of this consideration is undeniable, but it seems to be extremely doubtful whether a peremptory direction was warrantable. The authorities cited in this and the preceding sections point very strongly to the conclusion that the trial judge, under such circumstances, should go no further than to declare that the peculiar nature of the work to be done was a fact tending to rebut the presumption of a yearly hiring, and that the duration of the hiring accordingly became a question to be decided by the jury upon the whole evidence. There seems to be no precedent for taking the decision out of the hands of the jury in cases of the type discussed in this article, except where the court directs a verdict for the plaintiff on the ground that there is no evidence tending to rebut the ordinary presumption that a general hiring is for a year. (*a*)

In a nisi prius case Wightman, J., ruled that, on a contract to pay a traveller by commission, no implication arises of a yearly hiring. (*b*) The principle to which the ruling is referable is not stated in the report, but it would seem to belong to the same category as those just cited.

III. Termination of the Hiring by Notice.

10 Reasonable Notice must always be given—All the cases bearing upon the second main branch of our inquiry, lay it down, or assume as an undoubted general principle that, whether the general hiring is for a year certain or subject to rescission during a current year, the party who desires to terminate the engagement is bound to give the other reasonable notice of his intention, to the end that the interests of each may suffer as little as may be by the severance of the connection. This principle, among others, we find emphatically affirmed in *Beeston* v. *Collyer* (*c*) (for the facts see section 4, *ante*), where Best, C.J., said in the course of his opinion;

(*a*) See, for example, *Buckingham* v. *Surrey, &c., Canal Co.* (1882), 46 L.T.N.S. 885, as stated in section 4, *ante*.

(*b*) *Nayler* v. *Yearsley* (1860) 2 F. & F. 41.

(*c*) (1827), 4 Bing. 309. To the same effect see *Williams* v. *Byrne* (1837), 7 Ad. & E. 177; 2 N. & P. 139. (Per Patteson, J.). *Bain* v. *Anderson* (1896), 27 Ont. Rep. 369. may be also cited as an example of that class of cases in which a judge is able to say that, whether the evidence establishes a yearly hiring or not, the plaintiff is entitled to recover damages on the ground that adequate notice was not given.

"It is not necessary for us now to decide, whether six months, three months, or any notice, be requisite to put an end to such a contract, because under the circumstances of the present case, after the parties had consented to remain in the relation of employer and servant from 1811 to 1826, we must imply an engagement to serve by the year, unless reasons are given for putting an end to the contract. The defendant put an end to this engagement, without assigning any reason, and the jury, therefore, were warranted in the finding they have come to."

Whether the notice in the case of a contract construed to be one for a year certain should be longer or shorter than the notice in the case of one terminable within the year, is a question which seems never to have been discussed. The courts have contented themselves with laying it down that what is a reasonable notice is necessarily a matter for the jury to settle upon the whole evidence, subject to the direction and control of the Court. Some illustrative cases bearing on this point are cited in the subjoined note. (*a*)

A very eminent judge has laid it down that "the general rule is that notice need not be more extensive than the period of payment." (*b*) But it is evident from the context of the opinion in which this dictum is found that he simply meant that a jury would be justified in finding that such a period was reasonable. (*c*)

Where a specific contract of hiring, which appears upon the whole evidence not to be one for a year, makes special provision for termination of the engagement in one particular event, the inference is that the general rule which requires a reasonable notice is to govern the rights of the parties if the contract is rescinded under any other circum-

(*a*) In *Levy* v. *Electrical Wonder Co.* (1893), 9 Times L.R. 495, Lord Coleridge ruled that a notice of one week was not sufficient in the case of a manager of a company, and left it to the jury to say what was a reasonable notice. In *Hiscox* v. *Batchelor* (1867), 15 L.T.N.S. 543, the jury found that an advertising and canvassing agent was entitled to a month's notice. In *Byrne* v. *Schott* (1883), Cab. & E. 17, a manager of several shops belonging to the defendant, was found by a jury entitled to a month's notice. In *Vibert* v. *Eastern Tel. Co.* (1883), 1 Cab. & E. 17, where the terms of the hiring were indefinite, and the plaintiff's salary was paid at first monthly and afterwards weekly at a certain annual rate, a stationery clerk in a telegraph office was found by the jury to be entitled to one months' notice upon being discharged in the middle of a current year.

(*b*) *Davis* v. *Marshall* (1861), 4 L.T.N.S. 216, per Pollock, C.B.

(*c*) *Robertson* v. *Jenner* (1867), 15 L.T.N.S. 514, at nisi prius, the fact that the hiring was by the week, was held to justify the inference that a week's notice was sufficient. (Per Bramwell, B.).

stances than those provided for. Thus with respect to the second and third of the three points decided in *Creen* v. *Wright* (*a*), the incidents of which have already been stated (sec. 9 *ante*), the Court said:

"As to the notice, we think the sound construction of the contract before us is that, except, in the single case provided for by its terms, there must be a reasonable notice before it can be put an end to by either party. The rule of construction must be the same for both parties to the contract. If the ship owner may dismiss the master without notice on the very eve of a voyage, the master may leave the ship without notice at the same point of time. But the great inconvenience and heavy loss which might be, and indeed in most cases would be inflicted on the ship-owner, without any remedy, by such a construction of the contract, if acted on by the master, leads us to believe that such is not and could not be the meaning of the contract, nor the intention of the parties to it. The loss and inconvenience to the master following upon the construction contended for, though not positively so great, may be relatively very great indeed; and this consideration points to the same conclusion." The maxim, Expressio unius est exclusio alterius, was also applied to the construction of the contract, and shown to corroborate the inference thus drawn.

As regards the implied duration of the relations of the parties to a contract of general hiring and the right to terminate those relations, the action for use and occupation bears, up to a certain point, a rather close analogy to an action upon a contract of general hiring. But that it is only an analogy appears very clearly from the following passage of Chief Justice Best's opinion in *Beeston* v. *Collyer*. (*b*)

"The principles upon which the action for use and occupation proceed are the same as those which formed the ground of my direction to the jury upon the present occasion. The contract is for a year at first, and if the parties do not disagree, it goes on from one year to another. It is true that one of the incidents of a tenancy of this kind is, that it can only be terminated by a half year's notice concluding with that day on which the tenancy commenced. We do not say that such terms are to be engrafted on contracts for the hiring of servants."

11. General Hiring, primâ facie terminable only at the end of the current year—The main principle which makes a general hiring presumptively a yearly, clearly involves the corollary that in the absence of some positive evidence showing that the right to terminate the engagement at some other time was under-

(*a*) (1876) 1 C.P.D.
(*b*) (1827) 4 Bing., 309.

stood by the parties to be an incident of the contract. the notice must, if given at all, be given so as to mature at the close of the current year.

Thus the effect of a clause requiring three months' notice on each side to determine a contract which, from its other provisions, appears to be for a year certain, is that the three months' notice must be given so as to mature at the end of the year. (*a*)

So a plea based on the theory that a notice is reasonable which determines the service before the end of a current year is no answer to a declaration which alleges the contract to be for one year from a certain date, and so on from year to year, to the end of each year commenced while the plaintiff should be so employed, reckoning each year to commence at the day named. (*b*)

(*a*) *Forgan* v. *Burke* (1861), 12 Ir. C.L. 495.

(*b*) In *Williams* v. *Byrne* (1837), 7 A. & E., 177. This case was evidently not present to the mind of Lord Coleridge when, in *Lowe* v. *Walter* (1892) 8 Times L.R. 358, he remarked (p. 359), that, as to the contention that the notice must expire at the end of the current year, no doubt that right existed, and there were very good reasons for it, as to yearly tenants of land; but that he was not aware that the same law existed as to servants. (See also p. 361). The Irish case last cited was called to his attention by counsel, but declared, without any reasons being assigned, not to be in point.

Other cases bearing upon the rule laid down in the text are the following:

Davis v. *Marshall* (1861), 9 W.R. 520; 4 L.T.N.S. 216, where a verdict was allowed to stand by which a clerk was permitted to recover, on the ground that he had been dismissed without notice, an amount exceeding the wages for the residue of the year.

Foxall v. *International, etc., Co.* (1867), 16 L.T.N.S. 637. Byles, J., in the course of his charge to the jury said: "Take the case of a clerk, a clerk in some very responsible position, who is employed at a salary of, say, £2,000 a year, is he to be dismissed, without any custom or agreement, at a quarter's notice? I do not decide it as a question of law; but I express an opinion of fact that the clerk could not be dismissed at such a notice; he would be entitled to his salary up to the end of the year."

Buckingham v. Surrey, etc., Canal Co. (1882) 46 L. T. N. S. 885. There the plaintiff was appointed consulting engineer to the defendant company under a resolution to the following effect: "Resolved that Mr. J. B. be appointed engineer to the company at a salary of £500 per annum." The Court held that, as no evidence was offered on behalf of the defendant of any custom to determine such a contract by notice, the trial judge was bound to direct the jury that the hiring was for a year certain. A motion for a new trial was therefore denied.

The more general principle that a hiring for a specific period is terminable only at the end of that period, is assumed to be the true one by Holroyd, J., in *Rex* v. *Great Yarmouth* (1816), 5 M. & S. 114 (p. 119), where the hiring was a monthly one.

12. Under what circumstances the inference that the notice must expire at the end of the current year is rebutted—(*a*) *Generally*—As already remarked (sec. 2, *ante*), the scope of an inquiry into the duration of a general hiring is not the same as the scope of an inquiry into the rights of the parties to terminate the relation. It is obvious, however, that the same evidence which goes to show that such a hiring was not for a year tends to establish the conclusion that the notice by which it is terminated need not mature at the end of the current year. In other words, once it is shown that the contract is only binding for some fraction of a year, the duty of the parties in regard to notice is defined by considering what shall be deemed reasonable notice, or what notice they are entitled to by virtue of a custom in the business. It will be unnecessary, therefore, in the present connection, to discuss at any length the cases in which the right to terminate by notice a hiring indefinite as to time is deduced from considerations identical with those which are deemed to rebut the presumption that the hiring was yearly.

Where a clerk hired at an annual salary accepts, on quitting the service, a month's salary in lieu of notice, and subsequently takes service again under the same employer on terms which such employer testifies to have been the same except as to salary, the jury is warranted in finding that the hiring is determinable at a month's notice. (*a*)

(*b*) *Custom as a circumstance tending to rebut the inference.*—That the existence of a custom with reference to which the employer and employed may be presumed to have contracted will furnish a sufficient ground for a reading into a contract of general hiring an implied stipulation that either party may terminate it by notice is obvious upon general principles. (*b*)

(*a*) *Fairman* v. *Oakford* (1860), 5 H. & N. 635.

(*b*) See generally the opinion of Grove, J., in *Buckingham* v. *Surrey, etc., Canal Co.* (1882) 46 L.T. N.S. 885. When, however, the hiring is expressly for a term "certain" a custom of the trade for a master or a servant to determine it at any time without notice is inadmissible to control the contract, etc: *Peters* v. *Stavely* (1866), 15 L.T. N.S. 275.

One eminent judge has gone to the length of declaring that the absence of evidence of a right under custom to terminate a hiring by notice maturing at some other time than the end of the year is, without more, sufficient to require the conclusion that the hiring was for a year certain. (*a*) But this is clearly putting the case too strongly, for the presumption of a yearly hiring is, as we have seen above, rebuttable by other evidence besides that of a custom. Such a doctrine can be true, to the extent here declared, only in regard to employments to which, for some reason, the presumption of a yearly hiring does not apply. An example of such a case is furnished by *Holcroft* v. *Barber* (*b*) where Wightman, J., in an action for wrongful dismissal brought by one who alleged himself to be the editor of a newspaper, ruled that he might introduce testimony going to show that there was a custom for editors to be engaged for a year, unless there was an express stipulation to the contrary. But the jury found for the defendant on the ground that the plaintiff was not an editor. See, however, as to this case, sec. 4, *ante*.

Evidence of custom will not avail to disturb the general presumption that the hiring is for a year certain, unless it relates to "a general custom, of some reasonable antiquity, uniform, and sufficiently notorious and well understood that people would make their contracts on the supposition that it exists." (*c*)

The effect of a custom that a general hiring of a clerk in a given city, although it is a yearly hiring, may be terminated by a month's notice, is not overcome by a provision in the contract that the employers will make the clerk a donation at the end of the year, if he has done sufficient business to justify them in doing so. Such a provision clearly has no bearing upon the extent of the master's right to dismiss the servant. (*d*)

(*a*) Rule so laid down by Littledale, J., in *Fawcett* v. *Cash* (1834), 5 B. & Ad. 904.
(*b*) (1843), 1 C. & K. 4.
(*c*) *Foxall* v. *International, etc., Co.* (1867), 16 L.T.N.S. 637, per Byles, J.
(*d*) *Parker* v. *Ibbetson* (1858), 4 C.B.N.S. 346.

The result of connecting the general principle as to the effect of a custom with the rule of pleading that the proof of a contract subject to a certain qualification does not support a count which does not state such a qualification is that an indefinite hiring which by the custom of the business, is terminable by a three months' notice, cannot be declared upon as a contract to continue the servant in the employment for an entire year. (*a*)

Whether the existence of a custom fixing the period of notice has been established is a question for the jury (*b*), subject, of course, to the power of the court to declare the testimony offered to be insufficient to support the conclusion that there is such a custom. (*c*) Hence where the question is whether the editor of a new periodical can be dismissed before the end of the current year, and the evidence of the plaintiff's witnesses goes only to the extent of showing that usage had made such a hiring annual in the case of established periodicals, it is properly left to the jury to say whether such a usage is applicable to a periodical like that for the management of which the editor was hired. In *Baxter* v. *Nurse*, (*d*) Cresswell J., in commenting on a contention of the plaintiff that by usage, a contract for the employment of an editor was a contract for a year, said:

"It cannot be contended that this was not a question for the jury. And it was certainly a fair observation by counsel, that all the instances that were proved had reference to the old and established works. In cases where a general rule with regard to questions of hiring has been established, it has been in conformity with some established usage to be gathered from evidence. That it is not a fixed rule, is clearly shown from the course taken at trials where the question as to the nature of a hiring arises—where evidence is always given by persons in the particular trade, or under circumstances similar to

(*a*) *Metzner* v. *Bolton* (1854), 9 Exch. 518. [The trial judge had ruled that the power to determine the contract, as it came by way of defeasance need not be noticed by the plaintiff]. See the remarks of Martin B. on this case in *Wheeler* v. *Bavidge* (1854), 9 Exch. 668.

(*b*) *Foxall* v. *International, etc., Co* (1867), 16 L. T. N. S 637. *Parker* v. *Ibbetson* (1858) 4 C.B.N.S. 346; *Lowe* v. *Walter* (1892) 8 Times L.R. 358.

(*c*) In *Naylor* v. *Yearsley* (1860) 2 F. & F. 41, the plaintiff called a witne to prove that it was customary to employ agents to canvas for advertisements, to be paid by a percentage on the advertisements received whenever they were actually inserted, and that it was considered that they were entitled to a month's notice; but Wightman, J., held such evidence not sufficient.

(*d*) (1844) 6 M. & G. 934.

those of the parties in the case; and then the jury are told that, unless there is something to distinguish the case before them from the usage that has been proved, the parties must be considered as dealing with reference to such usage. But the finding by the jury in such a case, in conformity with such general usage, cannot be considered as a rule of law."

But, as a custom, when proved, becomes part and parcel of a contract, and the question whether the terms of a written agreement may admit or must necessarily exclude a custom is one of law for the court, a jury exceeds its powers in finding that a custom which allows dismissal at six months' notice is excluded by a special provision in such an agreement which is not inconsistent with the application of that custom. (*a*)

—(*c*) *Custom in the case of domestic servants.*—The general principle as to the effect of a custom in qualifying the primâ facie meaning of a contract of general hiring is most frequently illustrated in the cases which apply the familiar rule that menial or domestic servants are subject to discharge at a month's notice, or upon payment of a month's wages.

"In the case of domestic servants the rule is well established that the contract may be determined by a month's notice or a month's wages." (*b*)

"The contract between the master and a domestic servant is a contract to serve for a year, the service to be determined by a month's warning, or by payment of a month's wages; subject to the implied condition that the servant will obey all lawful orders of the master." (*c*)

The presumption of the existence of a custom enabling the employer to terminate the service by a month's notice, does not arise except in the case of servants of this class. (*d*)

(*a*) *Parker* v. *Ibbetson* (1858), 4 C.B. N.S. 346.

(*b*) *Fawcett* v. *Cash* (1834) 5 B. & Ad. 904; 3 N. & M. 177, per Littledale, J.

(*c*) *Turner* v. *Mason* (1845) 14 M. & W. 112, per Parke, B. To the same effect see the following cases: *Foxall* v. *International, etc., Co.* (1867) 16 L.T.N.S. 637; *Smith* v. *Kingsford* (1836) 3 Scott, 279; *Fewings* v. *Tisdall* (1847), 1 Exch. 295; *Archard* v. *Horner* (1828) 3 C. & P. 349. If a month's wages are paid the servant is entitled only to the money due for a calendar month, not to board wages: *Gordon* v. *Potter* (1859), 1 F. & F. 644.

(*d*) *Broxham* v. *Wagstaffe* (1741), 5 Jur. 845, per Parke, B. In *Williams* v. *Byrne* (1837), 7 A. & E. 177, Littledale, J., doubted whether, even in the case of a menial servant, it could, as matter of law, be implied that there was a power to determine the service at any time on a month's notice. In *Beeston* v. *Collyer* (1827), 4 Bing. 309, the judges were much influenced by the consideration that the position of the plaintiff was such as to exempt it from the operation of the rule applicable to domestic servants: "Persons in the position of the plaintiff (a clerk to an army agent) must be supposed to possess superior acquirements, and are entitled to more respect than to be turned off without any reason being assigned." (Park, J.) "It would indeed be extraordinary if a party in his station of life could be turned off at a moment's notice, like a cook or scullion." (Best, C.J.).

In many of the decisions, therefore, the real question at issue has been whether the plaintiff belonged to the category of menial servants or not. The following have been held to be menial or domestic servants: A man hired to keep a garden in order, to work in the stables, and make himself generally useful (*a*); a head gardener (*b*); a huntsman hired at a salary of £100 a year and perquisites. (*c*)

Conversly the usage as to the termination of the hiring by a month's notice or a month's wages has been deemed not to be applicable to a governess (*d*), nor to the housekeeper of a large hotel of the modern type, her position being essentially different from that held by a housekeeper in a private family. (*e*)

13. Termination by Notice under Specific Contracts—An obvious exception to the rule that a general hiring can be terminated only at the end of a current year presents itself where the parties have expressly provided for its termination by notice. (*f*)

14. Inference as to duration when the employment under a General Hiring continues for more than one year—In cases in which the servant has retained for more than one year the employment upon which he entered under a general hiring, it becomes an important question how far the relations of the parties are subject to the incidents implied in the original hiring. Without undertaking to discuss this question in all its bearings, (*g*)

(*a*) *Johnson* v. *Blenkinsopp* (1840), 5 Jur. 870.

(*b*) *Nowlan* v. *Ablett* (1835), 2 Cr. M. & R. 54; 5 Tyr. 709.

(*c*) *Nicoll* v. *Greaves* (1864), 17 C. B. N. S. 27; 33 L.J.N.S.C.P. 259; 10 L. T. N.S. 531.

(*d*) *Todd* v. *Kerrich* (1852), 8 Exch. 151; 17 Jur. 119; 22 L.J. Ex. 1

(*e*) *Lawler* v. *Linden* (1876), 10 Ir. Rep. C. L. 188. In the opinion of a jury to whom Parke, B., left the question, a gentleman is not justified in giving only a month's notice to a farm bailiff: *South* v. *Drummond*, reported in the London *Times*, March 28, 1849. See Smith on Master and Servant, p. 95.

(*f*) See the remarks of Grove, J., in *Buckingham* v. *Surrey, &c., Canal Co.* (1882), 46 L.T.N.S. 885. A contract by which the employer hires a foreman of smelting works, "to remain with me for at least three years at my option," has been held to be a yearly hiring, giving the employer to determine the engagement at the end of the first, second or or third year: *Down* v. *Pinto* (1854), 9 Exch. 327.

(*g*) In *Mansfield* v. *Scott*, 1 Cl. & Fin. 319, the general doctrine was applied that, when a contract of service for one year certain, is continued during subsequent years with the assent of the employer, it is presumed to be renewed in all its parts,—in this case as to a subsidiary promise by which the servant was to receive a present at the end of the year. In a settlement case where the question was whether a pauper who had been paid wages during the first year of his service

it is sufficient to say that the great weight of authority is to the effect that the presumption of an annual engagement attaches, with other incidents, to the contract during each successive year that the parties continue their relations without making any new arrangements.

"If a master hire a servant without mention of time, that is a general hiring for a year, and if the parties go on four, five or six years, a jury would be warranted in presuming a contract for a year in the first instance, and so on for each succeeding year, as long as it should please the parties." (*a*)

In *Williams* v. *Byrne* (*b*) the declaration alleged the contract to be for one year from a certain date, and so on from year to the end of each year commenced, while the plaintiff should be so employed, reckoning each year to commence at the day named. (*c*) Littledale, J., said: "It appears not to be disputed that the parties were, at any rate, bound to the end of the first year. I think their position was the same in all the subsequent years. Therefore, when any year had commenced, the service was to run on to the end. And this was to continue as long as the parties pleased, that is, till one of them determined the engagement by reasonable notice expiring at the end of the current year." Patterson, J., said: "It is an employment for a year, and so on from year to year, the year beginning on a day named. The words 'while the plaintiff should be so employed,' are satisfied by a power to put an end to the employment in the way warranted by the contract; that is if it be put an end to adversely and not by agreement, by a notice expiring with the current year. How long such notice must be, we need not determine."

The usual presumption is not repelled by the fact that the contract of general hiring was entered into immediately after

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under his father, was living with the latter as a child or a servant during the succeeding year, it was held that the near family relationship of the parties excluded presumption that the incidents of the connection continued to be the same a first year: *Rex* v. *Sow* (1817), 1 B. & Ad. 178. The following American cases also are explicit to the point that where a person is hired in the first place for a year certain, or for part of a year, and the service is continued with the tacit consent of the master, the incidents of the implied contract which thus results are the same as those to which the express contract was subject: *Grover, etc., Co.* v. *Bulkley* (1868), 48 Ill. 189; *New Hampshire, etc., Co.*, v. *Richardson* (1830), 5 N. H. 294; *Vail* v. *Jersey, etc., Co.*, (1860), 32 Barb. 564; *Wallace* v. *Devlin* (1885), 36 Hun, 275; *Huntingdon* v. *Claffin* (1868), 38 N. Y. 182; *Sines* v. *Superintendents* (1885), 58 Mich. 503; *Wallace* v. *Floyd* (1857), 29 Pa. St. 184.

(*a*) *Beeston* v. *Collyer* (1827), 4 Bing. 309, per Best, C.J.

(*b*) (1837), 7 A. & E. 177.

(*c*) To the same effect see *Forgan* v. *Burke* (1861), 12 Ir. C. L. 495: *Adams* v. *Fitzpatrick* (1891), 125 N.Y. 124: *Tatterson* v. *Suffolk Mfg. Co.* (1870), 106 Mass. 57. In Fawcett v. Cash (1834), B. & Ad. 904, Taunton, J., seems to have had some doubt as to the relations of the parties during years subsequent to the first, as he remarked that it was unnecessary to consider what the effect would have been if the dismissal had taken place after the first year. But this rather nebulous and entirely negative expression of disapproval is of small importance when set against the explicit rulings cited above.

the termination of services under a special engagement for a lump sum for a period of less than a year. (*a*) But from the hiring of a shepherd a few days after a previous term had come to an end, and the payment of his wages up to the end of that term, a general hiring cannot be inferred by connecting the new period with the earlier one. (*b*)

15. Inferences where the servant leaves and re-enters an employment.—A principle resembling that discussed in the last section has been in one case applied to the prejudice of the servant, a jury being held justified in finding that the susceptibility of being terminated by a month's notice was an incident of a general hiring, where the plaintiff on leaving the same employment some time before had accepted that period of notice as sufficient. (*c*)

16. Harnwell v. Parry Sound Lumber Co., discussed—We are now in a position to examine the decision in *Harnwell* v. *Parry Sound L. Co.* (*d*) The facts of the case were as follows: The plaintiff entered into defendant's service as assistant book-keeper, under a written agreement, for a year certain, at a specified annual salary. After the close of the year he continued to fill the same position, and was paid at the same rate, but no express contract was made either as to time or compensation. When about half of the second year had elapsed, he received three months' notice of dismissal, the reason assigned for the discharge being that his services would not be required during the approaching winter. He brought an action for wrongful dismissal, and claimed damages assessed upon the theory that, after he had once entered upon the second year of the service, the contract was binding upon the employer up to the end of that year. No

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(*a*) *Rex* v. *Macclesfield* (1789) 3 T. R., *Rex* v. *Long Whatton* (1793), 5 T. R. 447; *Rex* v. *Hales* (1793) 5 T. R. 668.

(*b*) *Rex* v. *Ardington* (1834) 1 Ad. & E 260. The court said it did not see how the master could have done better to avoid a yearly hiring, and that this was apparently the intention of the parties.

(*c*) *Fairman* v. *Oakford* (1860) 5 H. & N. 635.

(*d*) (1897) 24 Ont. App. 110. The other Ontario cases bearing on the effect of a hiring indefinite as to time, have already been cited in the earlier sections of this article.

evidence, so far as appears from the report, was given as to custom either in favour of the plaintiff or of the defendant, nor was any attempt made to show that the conditions under which the business was carried on might require such an employee to take into account the possibility that his services might not be required during the winter. Meredith, C.J., who tried the case without a jury, gave judgment for the plaintiff on the ground that, as he had originally been hired for a year certain, and had continued, after the expiration of the year, to perform the same duties at the same rate of salary, it might reasonably be inferred that there was a second engagement of the same duration as the first.

The Court of Appeal took a different view of the evidence, intending, as it would seem, to rest its conclusion on two distinct grounds, which, however, are scarcely differentiated with as much precision as might be desired. The first of these is that the employer's tacit acceptance of the plaintiff's services after the beginning of the second year did not, of itself, justify the inference that the renewed hiring was, like the original one, binding for an entire year. The second is that the conclusion of the trial judge could not be sustained without the aid of a presumption that a general hiring is for a year certain, and that the weight of authority is against the indulgence of any such presumption.

So far as regards the former of these grounds the rationale of the decision will be apparent from the following passage of the opinion:

"The parties go on after the expiration of their express contract, one to serve in the same employment, the other to accept the service and to pay therefor at the same rate quarterly as before. How can a contract to serve for another year absolutely be implied from this? Or can the fact that the previous hiring was expressly for one year certain help us to infer an implied contract for a similar period? These, I think, are the only relevant facts, for can there be said to be anything in the nature of the plaintiff's employment which makes it proper to infer a contract for a year absolutely? We may say that it was of such a character as to make it unreasonable that he should be dismissed without notice, but can we say more? There is no evidence of the existence of any usage in reference to such or similar engagements. . . . I am unable to bring myself to the conclusion that any of the relevant facts proved, or all of them together, justify the finding that there was a hiring for a second year absolutely."

In order to appreciate fully the length to which this conclusion goes, we have only to remember that it sets aside a finding of an ultimate fact which a trial judge, in the discharge of the same functions as a jury, considered to be a warrantable inference from the probative facts before him. It amounts, therefore, to an assertion that if the case had been tried before a jury, these probative facts would have been insufficient to sustain a verdict for the plaintiff. It is necessary, from the outset, to insist strongly upon the aspect of the decision, because much of the reasoning of the court suggests that it has failed to grasp completely the full significance and effect of the principle established by all the authorities, viz., that the functions of a reviewing tribunal are, in this class of cases, strictly limited to ascertaining whether the testimony is adequate to support the conclusion of the person or persons whose province it is to pass upon the facts. For example, in the extract just quoted the word "absolutely" is clearly out of place. The real question to be decided was simply whether a judge, sitting as a trier of the facts, was justified in finding as one of those facts, that the engagement was binding for the whole of the second year.

Regarding this as the real issue, it is difficult to see how the ruling of the Court of Appeal as to the effect of the continuance of the service after the first year can be sustained in face of the precedents cited in sec. 13, *ante*. Under the doctrine applied in those cases the evidence as stated in the judgment itself not only "helps us to infer" that the extension of the employment was impliedly for another entire year, but points almost irresistibly to that conclusion. The attempt to get rid of the authority of *Beeston* v. *Collyer* does not strike one as being altogether successful. Its circumstances, we are told, are "peculiar," but it is not explained in what essential particular the evidence differs from that in *Harnwell* v. *Parry Sound Lumber Co.* Setting aside wholly immaterial variations of facts, the latter case is on all fours with the former, except in one respect, viz., that in the English case the annual duration of the original hiring was a matter of implication, while

in that at bar the original hiring was for a year by express stipulation. But this, if a distinction at all, is a distinction which evidently makes against rather than for the view of the Court.

This special reason for doubting the correctness of the judgment is of course quite disconnected from the doctrine as to the implied duration of a general hiring. The second hiring is or is not deemed to be for a year certain, because it is a renewal of another, of which one of the incidents was that it was or was not binding for that term, and this as well as other incidents, are presumed to attach to the extended period, unless the parties make other arrangements, and not because the new hiring is indefinite as to time. We cannot help thinking that the Court might have reached a different conclusion if their attention had been more closely concentrated upon the significance of the authorities in relation to this particular aspect of the case before them.

The other position taken by the Court as to the non-existence of a presumption that a hiring for an indefinite period is one for a year certain is, we think, not less untenable than that just discussed. That this view is opposed to many of the cases is fully conceded in the judgment, the theory upon which it is defended being that the law has been modified by the more recent authorities. (*a*)

Considering the deep traces which the rule supposed to have been abandoned has left upon this branch of our law, and that it has, by implication at all events, been sanctioned by the House of Lords, (*b*) this hypothesis requires the most ample demonstration before it can be accepted. Such demonstration, it is submitted with all respect, is not obtainable.

That the views of the court on this point are erroneous is

(*a*) See p. 116 of the opinion. It is remarked that, as a general rule, wherever the question of the duration of a general hiring was expressly raised in the older cases, it was said to be "for the jury to determine upon the whole of the circumstances of the case, though they were to be told that the presumption [i.e. of a yearly hiring], existed and ought to govern in the absence of anything to repel or control it."

(*b*) *Elderton* v. *Emmens* (1853) 4 H. of L. 624, (referred to in sec. 3, *ante*). This case, strange to say, was not noticed either by counsel or court, but gives the ordinary rule the very strongest kind of support by taking its correctness for granted.

strongly suggested by the fact that there is no decision in the books disapproving in express terms of the rule alleged to be obsolete. A change in the law which is so essentially radical would scarcely, as we may reasonably suppose, have been made without some specific judicial repeal of the principles so long and so often applied. Not to insist too strongly upon this negative argument, however, we assert with confidence that the English cases may be searched in vain for any real indication that there has ever been any repeal of those principles by indirection. The utmost that can be said of the more recent cases is that certain individual judges have used language which, when detached from the facts which occasioned it, may be construed in a sense favourable to the contention of the Court of Appeal.

One of these isolated remarks is the dictum of Pollock, C.B., in *Fairman* v. *Oakford* (see the words quoted in sec. 9 *ante*). This passage, however, clearly cannot bear the meaning ascribed to it by the Court of Appeal. The first sentence is to be interpreted with due reference to the fact that the learned Chief Baron was negativing the obviously untenable doctrine of plaintiff's counsel that the presumption of a yearly hiring must prevail "in the absence of an express stipulation to the contrary." The second sentence is simply a declaration of his approval of the finding of the jury upon the question of reasonable notice in a case where the master's right to determine the hiring within a current year had already been settled upon the evidence submitted.

The words of the Chief Baron are in some sense an echo of some used in *Baxter* v. *Nurse*, another of the cases supposed by the Court of Appeal to sustain its theory. But that this decision cannot be thus vouched in aid of its doctrine will be at once apparent by referring to the statement of the facts and the extracts from the opinions in sec. 5 and 9, *ante*. It is simply a reassertion of the doctrine that the rule as regards the prima facie duration of a general hiring does not rest upon any fixed principle of law, but simply gives effect to a presumption of fact which, like other such presumptions, is rebuttable by evidence.

We confess ourselves to be quite unable to see any ground for supposing that the Common Pleas Division, when it quoted in *Creen* v. *Wright* the dictum of Chief Baron Pollock referred to previously, credited its author with the intention of burying an older doctrine, without condescending to explain when and how its demise occurred. On referring to the place where we have discussed that case, sec. 8, (c) *ante*, it will be seen that the court by which it was quoted was reviewing the ruling of a judge who had directed a verdict for the defendant for the narrow reason that, as the contract was specific, and no provision was made for notice, nor any custom proved, the plaintiff could be discharged at any time the employer pleased. Under such circumstances it was only natural that the court, in sending back the case for a new trial on the ground of misdirection, should take occasion to point out that the peculiar nature of the employment was a circumstance tending to rebut the general presumption that a hiring indefinite as to time is one for a year, and that its duration was, therefore, a matter to be settled upon the whole evidence. That there was no intention on the part of the court to treat this presumption as obsolete is conclusively shown by the fact that Lord Coleridge, who wrote the opinion, enunciated, during the argument of counsel, the ordinary rule regarding that presumption, and cited, without any hint of disapproval, a familiar authority on the subject. (*a*)

As to *Lowe* v. *Wright*, considering that this was a nisi prius case, that it came before a judge whose reputation as a jurist is not of the highest, and that both he and the counsel, as will be seen from the report, exhibit a very plentiful

(*a*) *Rex* v. *Hampreston* (1791), 5 T. R. 205. It is worthy of notice that in the report of *Fairman* v. *Oakford*, in 29 L. J. Exch. 459, the language ascribed to Pollock, C.B. is as follows: "The contention of the plaintiff's counsel was that he was entitled to a whole year's salary, or at all events to more than a month's salary. My own experience is that juries in London generally find that clerks are entitled to three months' notice, that is, they find that the hiring was in each particular case to be put an end to by three months' notice." This version is probably the more authentic of the two, as the special allusion to London can scarcely be an invention of the reporter, and, since it indicates that the learned judge was probably referring merely to trials in one particular city, where, as it happened, the rights of the parties were governed by a custom which allowed dismissal at a reasonable notice, the significance of the passage as an expression of general principles, is reduced to a minimum.

ignorance of many earlier authorities which are most pertinent to the issue, the Court of Appeal has, we venture to think, treated the rulings made during the trial with far too much respect. Whether this be so, or not, however, Lord Coleridge certainly did not intend in this case, any more than in *Creen* v. *Wright*, to treat the ordinary doctrine as obsolete, for, during the proceedings he remarked that he would tell the jury that, "as the plaintiff was engaged for a year, primâ facie, the presumption was that it was a yearly contract." The direction he finally gave was, it is true, different from this, and we have already hazarded an opinion that it was inconsistent with a proper conception of the true dividing line between the functions of the Court and jury (sec. 9, *ante*). But there is no explicit retractation of the earlier remark, which must, therefore, be regarded as embodying his abstract views on the subject.

It would seem, therefore, that even the cases cited by the Court of Appeal itself for the support of its judgment do not, upon any reasonable construction, support its theory as to a modification of the law. But the most conclusive refutation of that theory is that the very latest decision on the subject by an English court of review shows quite clearly that the presumption which it is sought to consign to the limbo of discarded doctrines is still a living force in the law of the mother country. The hypothesis that there has been a modification of that law is deprived of its last prop when, so late as 1882, we find that the course taken by a trial judge in directing a verdict for the plaintiff on the ground that there was no evidence to rebut the presumption that the hiring, being general, was for a year certain, was approved by two such distinguished jurists as Justices Grove and Matthews. (*a*) The weight of this decision from our present standpoint is greatly increased by the fact that the familiar principle established by the older authorities, which are supposed by the Court of Appeal to have been discredited, is laid down without the smallest suggestion or hint that other cases such as *Creen* v. *Wright*, had introduced a different rule.

(*a*) *Buckingham* v. *Surrey, etc., Canal Co.*, 46 L.T.N.S. 885.

It is scarcely necessary to insist at any length upon the very unsatisfactory condition in which the law of Ontario is left by a judgment which, if our view of the true effect of the English cases is correct, constitutes a wholly new departure in a matter which is of immediate practical importance to a very numerous section of the community. We cannot refrain from expressing a hope, therefore, that the whole question may before long be reopened under such circumstances that the Supreme Court will have an opportunity of stating its views upon the subject.

C. B. LABATT.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

TRUSTEE—BREACH OF TRUST—MORTGAGE OF TRUST ESTATE WITH TRUSTEE'S OWN PROPERTY—APPORTIONMENT.

Rochefoucauld v. *Boustead* (1898) 1 Ch. 550 is a somewhat curious case arising on the taking of the accounts directed by the judgment of the Court of Appeal, 1897, 1 Ch. 196 (noted ante. vol. 33, p. 384). It may be remembered that by that decision the defendant was declared to be trustee for the plaintiff of certain estates in Ceylon, which the defendant had purchased in his own name, and claimed to be entitled to for his own benefit, and an account was directed. In the course of taking the accounts it appeared that the estates in question had been mortgaged along with certain property of the defendant in Cumberland to secure £35,000 borrowed from Coutts & Co., but that Coutts & Co. had never resorted to the Ceylon estates for payment. £15,000 of the sum of £35,000 had been previously advanced, and the balance, £20,000, was advanced when the Ceylon estates were mortgaged. The official referee, to whom the taking of the account was referred, held that the defendant was chargeable with £20,000.

Kekewich, J., on appeal considered that although the defendant's mortgaging the Ceylon estates was a breach of trust, yet was of opinion that as the plaintiff had suffered no loss, and the defendant had obtained no benefit thereby, he was not chargeable with any part of the £35,000. The Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.), on the other hand, thought that the proper method of taking the account was to apportion the £20,000 on the Ceylon and Cumberland estates, according to their respective values, and on that basis they held that the defendant was chargeable with three-fourths of the £20,000, and the appeal from Kekewich, J., was allowed.

MORTMAIN—WILL—DISCRETION OF TRUSTEES—"GIFT TO SUCH CHARITABLE INSTITUTIONS AND OBJECTS AS MY TRUSTEES MAY DETERMINE"—IMPURE PERSONALTY—CHARITABLE USES ACT, 1735 (9 GEO. 2, C. 36.) SS. 1, 3, 4.

In re Piercy, Whitwham v. *Piercy* (1898) 1 Ch. 565, involves a question under the Mortmain Act (9 Geo. 2, c. 36), similar to that discussed in *Anderson* v. *Dougall*, 13 Gr. 164. A testator by his will had devised and bequeathed real and personal property for sale and conversion, and out of the proceeds directed his trustees to apply one-tenth of the fund to "such charitable institutions and objects as my trustees may determine." The question was whether the gift was good as regarded the impure personalty, and proceeds of sale of realty. The Court of Appeal (Lindley. M.R., and Rigby and Williams, L.JJ.), agreed with North, J., that the gift extended to the impure personalty and proceeds of realty, and conferred upon the trustees a power of selection, which could be validly exercised in favour of any object or institution exempted from the operation of the Act, (9 Geo. 2, c. 36); but that no exercise of the power of selection of an unexempted charitable institution or object would operate as a valid gift of the impure personalty and proceeds of sale of real estate. Williams, L.J., says: "It seems to me that in *Lewis* v. *Allenby*, L.R. 10 Eq. 668, it is tolerably clear that Stuart, V.C., meant to decide that a gift would not be outside the provision contained in the 1st and 3rd section of 9 Geo. 2, c. 36, unless in a case where it included the gifts avoided by

those sections; you might include gifts within those sections, unless there were words excluding that which might be included," but it is thought better to forbear to quote any further at present, for fear of the consequences to the reader of these notes.

ACCOUNT—CONTRACT—PRICE PAYABLE IN FOREIGN CURRENCY—PERIOD OF CONVERSION INTO ENGLISH MONEY—RATE OF EXCHANGE.

Manners v. *Pearson* (1898) 1 Ch. 581, this was an action for an account. The action was brought on a contract made in 1891, whereby the defendants agreed to pay one Morrison, deceased, and of whom the plaintiff was legal personal representative, one cent in Mexican currency per cubic metre of excavation works being done in Mexico, as and when the same should be received by the defendants from the Mexican authorities. Morrison died in 1894, but the plaintiff was not appointed his administrator till May, 1896, and in the meantime there was no personal representative of his estate. The action was brought to recover sums which had become due and payable to Morrison's estate, under the contract, after his death. The defendants on 13th November, 1897, delivered an account showing a balance due to Morrison's estate of $19,366 in Mexican currency on 31st Aug., 1896, which they offered to pay in Mexican currency or its equivalent in value in English money on the 13th Nov., 1897. The plaintiff, however, claimed that the account ought to be taken on the basis of charging the defendants with the sums payable monthly, turned into English money at the respective dates on which they became payable, or at all events that the balance appearing due on 31st Aug., 1896, should on that date be turned into English money; the defendant on the other hand claimed that the ultimate balance only ought to be turned into English money. The majority of the Court of Appeal (Lindley, M.R., and Rigby, L.J.) agreed with Kekewich, J., that the conversion into English money ought not to be made until the balance due was ascertained by the delivery of the account on 13th November, 1897. Williams, L.J., however, dissented and was of opinion that the conver-

sion ought to be made into English currency as of the dates when the moneys became payable, but as the plaintiff was willing that the value in English money on 31st Aug., 1896, should be taken as the basis, he assented to that date as the proper one for conversion of the amount then admitted to be due. The point was of some importance to the plaintiff, inasmuch as the value of the Mexican dollar had depreciated 7⅛d. between Aug. 31, 1896, and Nov., 1897.

INSPECTION—RIGHT TO TAKE COPIES.

In *Boord* v. *African Consolidated Land Co.* (1898) 1 Ch. 596, the question was, whether a shareholder of a joint stock company, who had a statutory right to inspect the register of shareholders was also entitled by virtue of that right, to make copies of the entries in such register. North, J., held that he was, and that a right of inspection carries with it a right to take a copy, unless such right is expressly or impliedly negatived by the statute giving the right of inspection.

STATUTE—CONSTRUCTION—EJUSDEM GENERIS.

In re Stockport Schools (1898) 1 Ch. 610, is an illustration of the application of the ejusdem generis rule to the construction of a statute. By the Charitable Trusts Act, 1853, s. 62 excludes from the exemption contained in that section "any cathedral, chapter, or other schools," and it was held by Stirling, J., that the general words "or other schools" were to be restricted to other schools of the same character as those specifically mentioned.

TRUSTEE—APPROPRIATION OF ASSETS.

In re Nickels, Nickels v. *Nickels* (1898) 1 Ch. 630, Stirling, J., was called on to determine whether a valid appropriation of assets had been made by a trustee to answer the share of one of his cestuis que trustent. By his will a testator gave the proceeds of his residuary estate upon trust as to the income of an undivided one-sixth thereof, to go to each of his five sons and his daughter for their lives, and after their death to pay the capital of each share to their respective children, and he empowered the trustee to pay over a portion of the capital of

the settled shares to any of his six children absolutely, notwithstanding the previous trusts. In 1881 the trustee paid to each of the five sons one half of his share, and to the daughter one sixth of her share absolute, and he also set aside for the daughter and her children a sufficient sum of stock at its then value to make up, with the sum advanced, one-half of the daughter's share, and the income of this stock was paid to the daughter till her death in 1896. Stirling, J., held that this was a valid appropriation of the stock to the daughter's share, and that the distribution to her children ought to proceed on that footing.

MARRIED WOMAN—SEPARATE ESTATE—MORTGAGEE—CONVEYANCE.

In re Brooke & Fremlin (1898) 1 Ch. 647, was a matter under the Vendor's and Purchaser's Act, in which the point presented for adjudication was whether a married woman, who under the Married Woman's Property Act, 1882, (see R.S.O. c. 163, s. 3, Ib. c. 165, s. 3) was entitled as mortgagee, could make a valid conveyance of the mortgaged estate without the concurrence of her husband, or acknowledgment of the deed under the Fines and Recoveries Act, and he held that she could.

FORFEITURE—LANDLORD AND TENANT—BREACH OF COVENANT—NOTICE OF BREACH OF COVENANT BY TENANT, SUFFICIENCY OF—RE-ENTRY—CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44 & 45 VICT. C. 41) S. 14—(R.S.O. C. 170, S. 13).

In re Serle, Gregory v. *Serle* (1898) 1 Ch. 652, shows that where a landlord gives notice of breach of covenant by tenant, with a view to enforcing a right of re-entry, the notice under the Act (see R.S.O. c. 170, s. 13) must be specific as to all of the breaches complained of, and that a notice to the tenant that he "has not kept the said premises well and sufficiently repaired, and the party and other walls thereof," is nugatory, and the fact that other breaches of covenant which are complained of are sufficiently specified, will not make the notice sufficient. In arriving at this decision Kekewich, J., follows *Fletcher* v. *Nokes*, (1897) 1 Ch. 271, noted ante, vol. 33, p. 388.

CHARGE ON LAND—LOCKE KING'S ACT (17 & 18 VICT. C. 113)—(R.S.O. C. 128, S. 37)—MORTGAGE BY DECEASED PARTNER TO SECURE PARTNERSHIP DEBT—DEVISE OF REAL ESTATE.

In re Ritson, Ritson v. *Ritson* (1898) 1 Ch. 667, the question was whether the devisee of land of a deceased partner, mortgaged by him for payment of a partnership debt, was subject to the provisions of Locke King's Act (17 & 18 Vict., c. 113) from which R.S.O. c. 128, s. 37, is derived, the assets of the partnership being sufficient for the payment of all the debts of the partnership. Romer, J., held that he was not, and that he was entitled to have the land devised, exonerated from payment of the mortgage debt out of the partnership assets, notwithstanding the statute.

MASTER AND SERVANT—AGREEMENT TO DEVOTE WHOLE TIME—NEGATIVE STIPULATION—BREACH OF CONTRACT—SPECIFIC PERFORMANCE.

Ehrman v. *Bartholomew* (1898) 1 Ch. 671, shows that there is a limit to the right to enforce specifically a negative stipulation in a contract for service. In this case the defendant had agreed to serve the plaintiffs as a traveller for the term of ten years from 10th Aug., 1897, and to devote his whole time to the business of the plaintiffs, and not directly or indirectly engage in the service of any other person during that time. The defendant having left the plaintiff's employment, and entered the service of another firm carrying on the same kind of business as the plaintiffs, an action was brought for an injunction to restrain him from acting as traveller for any other firm. Romer, J., held that the stipulation sought to be enforced was an unreasonable restraint of trade, and could not be specifically enforced. The learned judge distinguishes the case from *Lumley* v. *Wagner*, 5 DeG. & S. 485; 1 D.M. & G. 604, on the ground that in that case the negative stipulation only applied to a certain special service, viz., singing in public, whereas in this case, the stipulation extended to every kind of business.

TRADE NAME—FORMER CONCURRENT USER OF, BY TWO FIRMS—DISCONTINUANCE AND RESUMPTION OF USE OF TRADE NAME.

Daniel v. *Whitehouse* (1898) 1 Ch. 685, was an action to restrain the use by defendant of a trade name applied to certain articles of the plaintiff's manufacture. The peculiarity of the case arises from the fact that the name in question, "Brazilian silver," had formerly been in use by the plaintiffs and defendants concurrently. It appeared that the plaintiffs had continuously used the name as applied to goods manufactured by them since 1886, and had established a large trade in goods so styled; and that from 1885 to 1887 the defendant had also used the name as applied to goods made by him, but that from 1887 to 1894 only a few sales had been made by the defendant under that name, and that in 1894 they had ceased altogether. It also appeared that the goods called "Brazilian silver" were now known to the trade and the public as the plaintiff's make. Barnes, J., under the circumstances, considered the case came within "the Yorkshire Relish" case: *Powell* v. *Birmingham Vinegar Brewery Co.* (1894), 3 Ch. 449, noted ante, vol. 31, p. 117, and granted the injunction as prayed, viz., restraining the defendant from using the name "Brazilian silver" in connection with, or descriptive of his goods without so distinguishing them from the plaintiff's goods, so that nobody might mistake the one from the other.

A doctor sued a labourer in the County Court for Cambridgeshire, England, for professional services rendered in pursuance of an engagement to attend the labourer's wife during her confinement. Before the child was born the wife engaged another medical man. The County Court judge was of the opinion that the doctor who was originally engaged had no legal claim to compensation, inasmuch as he was not called upon actually to attend the mother when she was confined. This view has provoked much adverse criticism in British medical circles; and it is not easy to defend the doctrine of the decision on any ground of good morals. To engage a doctor and thus impose upon him restrictions that may affect his movements for many days, and then employ another physician when there has been no fault or suggestion of fault in respect to the conduct of the first one, is a course of proceeding which certainly ought to render the employer chargeable with a fair and reasonable value of the first doctor's services in holding himself ready to respond to the summons, come when it might, which should call him to the bedside of the patient.—*Ex.*

Correspondence.

UNIFORMITY OF PROVINCIAL LAWS.

To the Editor of the Canada Law Journal:

DEAR SIR,—In a recent number of your valuable journal I observe a paper read by B. Russell, Q.C., of Halifax, Nova Scotia, under the title of "Provisions of the British North America Act for Uniformity of Provincial Laws," and in connection with the matters therein treated of, my attention has been particularly called to the subject in a very important particular, and one, I think, of very great hardship to suitors. Some years ago an action was brought in the High Court here by the plaintiff to recover from the defendant the sum of ten thousand dollars in connection with the promotion and building of the Parry Sound Colonization Railway. The plaintiff recovered judgment for the amount, and an appeal was at once made to the Divisional Court, which court unanimously sustained the finding of the trial judge. From this decision an appeal was made to the Court of Appeal, and that court without dissent again agreed with the Divisional Court. An appeal to the Supreme Court of Canada met with the same result. In all these appeals the only security required was for the Supreme Court costs which were paid. Now comes the hardship: The defendant resides in Montreal, is a contractor, and engaged in an extensive railway contract in Truro, Nova Scotia, where he has engaged temporary residence. On enquiry there as to the means of enforcing his judgment, plaintiff is advised that the defendant in the action is entitled under the laws of that Province to put the plaintiff to all the loss of time, trouble and expense over again, as defendant can again set up all or any of the defences he had to the original cause of action. It would appear that this provision is ultra vires, as it virtually overrides the Supreme Court Act, but why should the plaintiff be put to the expense of contesting that matter in the courts?

From the various steps taken by the defendant it is evident that his purpose is to delay or defeat plaintiff's claim. Being a wealthy man himself he is determined to worry the plaintiff out of his claim sustained by the courts. I write you now in reference to this matter, as the question of uniformity of Provincial laws is under the consideration of the Bar Association of Canada, and so that public attention may be called to the necessity of an early and effective remedy of this and similar grievances.

Parry Sound. SUBSCRIBER.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Exchequer.] GOODWIN *v.* THE QUEEN. [March 8.

Contract—Construction of—Public works—Arbitration—Progress estimate—Engineer's certificate—Approval by head of department—Final estimate Condition precedent—Obiter dicta.

Clauses 8 and 25 of the appellant's contract for the construction of certain public works were as follows:

"8. That the engineer shall be the sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute with regard to work or material, or as to the meaning or intention of this contract, and the plans, specifications and drawings shall be final, and no works or extra or additional works or changes shall be deemed to have been executed, nor shall the contractor be entitled to payment for the same, unless the same shall have been executed, to the satisfaction of the engineer, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractor to be paid therefor;" but before the contract was signed by the parties the words "as to the meaning or intention of this contract, and the plans, specifications and drawings," were struck out.

"25. Cash payments to about ninety per cent. of the value of the work done, approximately made up from returns of progress measurements, and computed at the prices agreed upon or determined under the provisions of the contract, will be made to the contractor monthly on the written certificate of the engineer that the work for, or on account of, which the certificate is granted has been duly executed to his satisfaction, and stating the value of such work computed as above mentioned, and upon approval of such certificate by the minister for the time being, and the said certificate and such approval thereof shall be a condition precedent to the right of the contractor to be paid the said ninet. per cent. or any part thereof."

A difference of opinion arose between the contractor and the engineers as to the quantity of earth in certain embankments which should be paid for at an increased rate as "water tight" embankment under the provisions of the contract and specifications relating to the works, and the claim of the contractor was rejected by the engineer, who afterwards, however, after the matter had been referred to the Minister of Justice by the Minister of Railways and Canals, and an opinion favourable to the contention of the contractor given by the Minister of Justice, made a certificate upon a progressive estimate for the amount thus in dispute in the usual form, but added after his signature the following words: "Certified as regards item 5 (the item in dispute) in accordance with letter of Deputy Minister of Justice, dated 15th Jan., 1896." The estimate thus certified was forwarded for payment, but the Auditor-General refused to issue a cheque therefor.

Held, that under the circumstances of the case the certificate sufficiently complied with the requirements of the twenty-fifth section of the contract; that the decision by the engineer rejecting the contractor's claim was not a final decision under the eighth clause of the contract adjudicating upon a dispute under said eighth section, and did not preclude him from subsequently granting a valid certificate to entitle the contractor to receive payment of his claim, and that the certificate given in this case whereby the engineer adopted the construction placed upon the contract in the legal opinion given by the Minister of Justice, was properly granted within the meaning of the twenty-fifth clause of the contract.

Murray v. *The Queen*, 26 S.C.R. 203, discussed and distinguished.

Appeal allowed with costs.

Osler, Q.C., and *Ferguson*, Q.C., for the appellant. *Ritchie*, Q.C., and *Chrysler*, Q.C. for the respondent.

Nova Scotia.] MULCAHY *v.* ARCHIBALD. [June 14.

Debtor and creditor—Transfer of property—Delaying or defeating creditors—13 Eliz. c. 5.

A transfer of property to a creditor for valuable consideration, even with intent to prevent its being seized under execution at the suit of another creditor, and to delay the latter in his remedies, or defeat them altogether, is not void under 13 Eliz. c. 5, if the transfer is made to secure an existing debt, and the transferee does not, either directly or indirectly, make himself an instrument for the purpose of subsequently benefiting the transferor. Appeal allowed with costs.

Harris, Q.C., for appellants. *McInnis*, for respondent.

N.-W. Territories.] HEIMINCK *v.* EDMONTON. [June 14.

Municipal corporation—Highways—Old trails in Rupert's land—Substituted roadway—Necessary way—R.S.C. c. 50, s. 108—Reservation in crown grant—Dedication—User—Estoppel—Assessment of lands claimed to be a highway—Evidence.

The user of old travelled roads or trails over the waste lands of the crown in the North-west Territories of Canada, prior to the Dominion Government survey thereof, does not give rise to a presumption that the lands over which they passed were dedicated as public highways. The land over which an old travelled trail had formerly passed, leading to the Hudson Bay Trading Post at Edmonton, N.W.T., had been enclosed by the owner, divided into town lots and assessed and taxed as private property by the municipality, and a new street substituted therefor, as shown upon registered plans of sub-division, and laid out upon the ground, had been adopted as a boundary in the descriptions of lands abutting thereon, in the grants thereof by letters patent from the crown.

Held, reversing the decision of the Supreme Court of the North-west Territories, that under the circumstances there could be no presumption of

dedication of the lands over which the old trail passed as a public highway, either by the crown or by the private owner, notwithstanding long user of the same by settlers in that district prior to the Dominion Government survey of the Edmonton settlement. Appeal allowed with costs.

McCaul, Q.C., for appellant. *Beck*, Q.C., for respondent.

COURT OF APPEAL.

Practice.] RE MACAULAY, A SOLICITOR. [Sept. 20.

Solicitor—Costs—Taxation—Discretion of local officer—Increased counsel fees.

The decision of a Divisional Court, 17 P. R. 461, affirmed on appeal.

W. J. Clark, for appellant. *C. R. W. Biggar*, Q.C., for the solicitor.

Province of Ontario.

HIGH COURT OF JUSTICE.

Rose, J.] RENNIE *v.* FRAME. [May 6, 1896.

Limitation of actions—Exclusive possession of land—Receipt of profits—Pasture for cattle.

While the defendant was in possession of land as caretaker or tenant at will, the owner put his cattle thereon to be fed and cared for by the defendant.

Held, that the produce of the land which the cattle ate was "profits" which the owner, by means of his cattle, took to himself for his own use and benefit, and as long as the cattle were upon the land the defendant was not in exclusive possession, and the Statute of Limitations did not begin to run in his favour.

Aylesworth, Q.C., and *William Millar*, for plaintiffs. *E. P. Clement*, for defendant.

Divisional Court.] BEAULIEU *v.* COCHRANE. [July 2, 1898.

Trade union—Libel—Malice—Privilege—Evidence.

On appeal by defendant from that portion of the judgment of the trial judge reported ante page 161, directing judgment to be entered for the plaintiff in respect of the libel in the 10th paragraph of the statement of claim, for $300 and costs, heard before Ferguson, Robertson and Meredith, J.J.,

Held, that there was no evidence of malice shown, and in the absence of such evidence that the communication was privileged. Appeal allowed, and the action dismissed with costs. Judgment of MacMahon, J., reversed.

L. G. McCarthy, for the appeal. *A. H. Lefroy*, contra.

Rose, J.] REGINA *v.* THE T. EATON CO., LIMITED. [Aug. 1.

Criminal law—Charge against a corporation—Prohibition—Crim. Code, s. 448—Preliminary enquiry—Indictment.

Sec. 448 of the Criminal Code provides that certain acts constitute an "indictable offence."

Held, the only way in which an offender can be prosecuted for violation of this section is by indictment. A prohibition was therefore awarded against a police magistrate who was holding a preliminary investigation.

Semble, the only way in which a corporation can be prosecuted is by indictment.

Starcy v. *Chilworth Gunpowder Manufacturing Company* (1889), 17 Cox C. C. 55, referred to.

Maclaren, Q.C., for the corporation. *Cavell*, for the informant.

Meredith, J.] MCINTYRE *v.* SILCOX. [Aug. 2.

Insurance for benefit of children—Death of some—Alteration of apportionment by will—Gift to others and to grandchildren—Validity of, as against creditors—Cancellation and re-issue of policies.

A parent insured his life for the benefit of six of his children in equal shares, three of whom died without issue in his lifetime. He then made his will altering the shares of the three survivors, gave a portion to another child, and portions to four grandchildren, caused the policies to be cancelled and new ones issued, payable to "his executors in trust," and died in 1894.

Held, that the apportionments of gifts to the four children were valid, but those to the grandchildren while valid as legacies were not valid as against the rights of creditors.

Held, also, that the application of the provisions in 60 Vict., c. 36, s. 159 (O.), "to any contract of insurance heretofore issued and declaration heretofore made," could not apply to any concluded transaction, but should be limited to those existing at the time of the death of the insured.

Held, also, that the issue of the new policies did not affect the rights of the parties as the executors would take in trust for those who were beneficially entitled.

Videan v. *Westover* (1897), 29 O.R. 1, distinguished.

W. A. Wilson, for the plaintiff. *T. W. Crothers*, for the executors. *J. A. Robinson*, for defendant, L. Clark. *D. B. S. Crothers*, for other adult defendants. *J. S. Robertson*, for the infant defendants.

Meredith, J.] IN RE POWERS AND TOWNSHIP OF CHATHAM. [August 2.

Municipal Corporations—By-law—Repeal—Public Schools Act, R.S.O. c. 292, s.s. 38, 39—Alteration of school sections—Township Council—County Council—Appeal.

A by-law of a township council repealing a former by-law, passed under the provisions of s. 38 of the Public Schools Act, R.S.O. c. 292, whereby a new rural school section was created from parts of three existing sections, was quashed.

Held, that the repeal was not within the power of the council; that the original by-law could be set aside or altered, or its effect prevented or changed, only by means of an appeal to the county council under s. 39, that the township council's power, once regularly exercised, was exhausted, to revive again only at the expiration of five years.

Aylesworth, Q.C., and *A. B. Carscallen*, for applicant. *J. S. Fraser*, for township.

Falconbridge, J., Street, J.] ROPER *v.* HOPKINS. [Sept. 6.

Covenant—Restraint of trade—Breach—Assignment of interest pendente lite.

Upon the plaintiffs becoming the holders of certain shares in an incorporated company carrying on a dairy business, they made an agreement with the defendant, who had formerly been the owner of these shares, by which he was employed as manager of the business, and given a right to re-purchase the shares, and by which he covenanted, among other things, that, if the agreement should be terminated, he would not "become connected in any way in any similar business carried on by any person or persons, corporation or corporations," in the same place. The agreement was terminated about six months later, and about a year after its termination the defendant's son began to carry on a similar business in the same place. The defendant without having any pecuniary interest in this business, and not being employed or paid by his son, but apparently moved solely by a desire to help his son's business, introduced his son to customers of the above mentioned company, and solicited orders for his son from them.

Held that, in order to establish a breach of the covenant above quoted, a legal contract of some sort between the defendant and his son must be shown, and, failing such a contract, it could not be said that the defendant was "connected in any way," with his son's business within the meaning of the contract.

Pending this action, which was brought to restrain the defendant from committing breaches of his agreement, the plaintiffs sold their shares in the company and ceased to have any interest in its affairs, but verbally agreed with the vendees to continue the action, and accordingly brought it to trial.

Held, that from the time the plaintiffs sold their shares they ceased to have any right to relief under the covenant.

Semble, that the benefit of the covenant would be assignable along with the shares.

Judgment of the County Court of York reversed.

Lobb, for plaintiffs. *J. M. Clark*, for defendant.

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

REAL ESTATE LOAN CO. *v.* GUARDHOUSE.

Division Courts—Jurisdiction—Cause of action—Principal and interest due on mortgage—Splitting of—Assignee of covenant.

In an action brought in a Division Court by the assignee of a covenant of a mesne owner of property subject to a mortgage for one of several gales of overdue interest; the principal also being overdue. On a motion for prohibition,

Held, while under s.-s. 2 of s. 79 of R.S.O. c. 60, a plaintiff might sue separately for the principal and interest due, he must sue for the whole and not portions of either.

Held, also, that the claim of the primary creditors against the primary debtor being as assignee of a covenant their claim was not for interest due on a mortgage, and that the section did not apply. Judgment of Robertson, J., reversed.

Stonehouse, for the appeal. *Mickle*, contra.

Armour, C. J., Falconbridge, J., Street, J.] [Sept. 12.

CREIGHTON *v.* SWEETLAND.

Security for costs—Sheriff—Public duty—R.S.O. c. 89, s. 1.

A sheriff executing a writ of fi. fa. is not an officer or person fulfilling a public duty within the meaning of R.S.O. c. 89, s. 1, and is not, therefore, entitled to security for costs of an action brought against him for negligence in not making a seizure under the writ.

McWhirter v. *Corbett*, 4 C. P. 208, followed.

Biggs, Q.C., for the plaintiff. *H. M. Mowat*, for the defendant.

Leave to appeal refused by the Court of Appeal, Sept. 19.

ELECTION CASES.

OTTAWA PROVINCIAL ELECTION.

RANDAL *v.* POWELL.

Time for presenting petition—Service of notice of presentation of petition—Con. Elect. Act, ss. 9, 15, 135.

Held, 1. The return required to be made to the Clerk of the Crown in Chancery by the returning officer is made when received by such clerk, and not when placed in the express office or in the post office for the purpose of transmission.

2. The omission to serve a separate notice of the presentation of a petition is not fatal to the proceedings, when a copy of the petition itself has been duly served, with the endorsement "This petition is filed," etc.

[May 9, 1898. OSLER, J.A.

This was an application to set aside the petition. Two objections were made to the proceedings:

1. That the petition was presented too late because not presented as it is said within 21 days "after the return has been made to the Clerk of the Crown in Chancery of the member to whose election the petition relates," as required by s. 9 of the Controverted Elections Act, none of the conditions arising which permit of a presentation at a later date.

2. That no notice of the presentation of the petition was served with the copy of the petition as required by s. 15 of the Act.

W. Nesbitt, for the motion. *Watson*, Q.C., contra.

OSLER, J.A.: In support of the first objection it was contended that the return to the Clerk of the Crown in Chancery is "made" within

the meaning of s. 9, when the returning officer has actually placed it in the express office or in the post office for the purpose of transmitting it to the clerk (s. 135). The inconvenience of such a construction is manifest, as no one would have had any means of ascertaining when a return had been thus made, except by enquiry from the Returning Officer, who is not by law bound to give any information on that subject. The time moreover in which he is bound to "make and transmit" his return varies according to the circumstances mentioned in s. 134. Sec. 139 obliges the Clerk of the Crown in Chancery, on receiving the return, to give, in the next ordinary issue of the *Gazette* "notice of the receipt of the return, the date of such receipt, and the name of the candidate elected." There is no provision whatever which enables anyone with assurance of certainty to ascertain the day in which the return left the hands of the returning officer. The object of s. 139 was to secure the publication of information of which everybody would be obliged to take notice, and I think it was for the very purpose inter alia of fixing the date from which proceedings to attack the election should run. In my opinion, therefore, bound as we are to read these two Acts in pari materia, the return is made to the Clerk of the Crown within the meaning of, or for the purpose of s. 9 of the Controverted Elections Act, when it has been received by him, and not earlier: *Mackinnon* v. *Clark*, (1898) 2 Q.B. Rep. 251.

The second objection is more troublesome, and certainly is provoked by the omission of the petitioner to comply with a plain direction of the Act, but on the whole, after some consideration, I am of opinion that I ought not to yield to it. S. 9 enacts that the petition is to be presented within twenty-one days, etc., and s. 10 that presentation shall be made by delivering it to the Registrar of the Court or otherwise dealing with the same in the manner prescribed. No other manner is prescribed for dealing with it, and thus a petition is presented within the meaning of the Act by simply filing it with the proper officer, with the affidavit required by s. 11, and s. 18 so speaks of it: "Where a petition has been filed, etc." Then s. 15 under the heading "Service" enacts that "Notice of the presentation of a petition under the Act accompanying a copy of the petition shall within five days after the day on which security for costs has been given, etc., etc., be served by the petitioner on the respondent in the manner in which a writ of service is served, etc. No separate notice of presentation was served, but a copy of the petition itself was duly served, on which was endorsed the following: "This petition is filed, etc., etc."

The question is whether the omission of the separate notice of a presentation of the petition is fatal to the proceedings. Under the Controverted Elections Act of 1871, the first statute on the subject in this province, s. 8 provided that notice of the presentation of a petition under this Act, and the nature of the proposed security, accompanied by a copy of the petition, should be served within five days after the security was given, etc. Under that Act security was to be to the amount of $800, and might be given by recognizance by any number of sureties not exceeding four, or by a deposit of money in the manner prescribed, or partly in one way and partly in the other, and it was therefore extremely important that the respondent should have exact notice of

the nature of the security in order that he might at once within the limited time object thereto if given by, or partly by, recognizance. There is a similar provision in the English Controverted Elections Act, 1868, and in the Municipal Election Act, 1872, under the latter of which the case of *Williams* v. *Mayor of Tenby*, 5 C.P.D. 135, was decided. It was held that the omission to serve notice of presentation of the petition and of the nature of the proposed security, was a condition precedent to the maintenance of the petition, and was a thing imperatively required to be done. In giving judgment, Grove, J., remarks, "It is said that there would be hardship supposing money deposited if mere omission of notice should prevent a petition. I see no more hardship than may occur in any case where a definite time is to be observed, and I see good reason why it should be so. There are two alternatives given, and it is reasonable that the party should know which has been adopted, money deposit or recognizances, and if the latter that he should be set instantly on enquiry, whether the securities are good and valid or not—and not only is the person depositing the security limited as to time, but the person objecting to the security is limited likewise."

Had our Controverted Elections Act remained in the same terms in this respect as when it was first enacted, this decision would no doubt strongly support the respondent's objection. It was, however, amended by 39 Vict., c. 10, s. 29, and security was thenceforward required to be given solely by the deposit of a sum of $1,000, and in the revision of the statutes in 1877, the Commission taking notice of this, omitted that part of the section corresponding to s. 8 above cited, which required notice of "the nature of the proposed security" to be given, though they left that part of it which required service of notice of the presentation of the petition, and so the statute law still stands. The Dominion Act, R.S.C. c. 9, s. 10, still requires notice of the presentation of the petition "and of the security" to be given, and within five days after the petition has been presented, although the security is also by deposit of money only, which is to be made at the time of presentation of the petition.

So far as the Ontario Act is concerned no form of notice of presentation is prescribed. It does not seem necessary that it should specify either when the petition was filed, or when the security was given. The language of the section would be satisfied by a mere notice that a petition had been presented in respect of such and such return under the Act. Had it been required to be signed by the petitioner I might have inferred that the notice was to serve some purpose of verification, and to identify the copy of the petition to be served with that which the petitioner had sworn to. But this is not prescribed. It is difficult to see what purpose is served by a notice of presentation which would be sufficient within the Act, which is not equally well served by the endorsement which appears in the copy of the petition served on the respondent. The reasons which seemed unanswerable in the Tenby case, have here no place, looking at our different legislation. I think, therefore, that the motion must be dismissed, but it is not a case for giving costs to the respondent.

Province of Nova Scotia.

SUPREME COURT.

Macdonald, C. J.] NORTH SYDNEY MINING CO. *v.* GREENER. [July 22.

Equitable execution—Receiver—Application for order to sell bonds refused.

Plaintiff company having recovered a judgment against the defendant for a large sum, obtained an order appointing a receiver, by way of equitable execution, to receive the rents, profits, surplus, and other proceeds, and all moneys which the defendant then was, or thereafter might be entitled to, in respect of his interest in certain bonds of the plaintiff company, which bonds were in the possession of the Eastern Trust Company under an agreement between the defendant and plaintiff company and a third person, by which the first proceeds of the bonds when sold by the plaintiff company were to be paid to the Eastern Trust Company, and $35,000 of such proceeds were to be forthwith paid by the Eastern Trust Company to the defendant. Plaintiff company now applied for an order that the receiver do offer for sale defendant's interest in the bonds.

Held, that there was no jurisdiction to make such an order, and the application was refused. *Flegg* v. *Prentis* (1892), 2 Ch. D. 430, and *De Peyrecave* v. *Nichol*, 42 Weekly Notes, 702, followed.

C. H. Cahan, for plaintiff. *F. F. Mathers*, for defendant.

Macdonald, C.J.] ELLIS *v.* MCDOUGALL DISTILLING CO. [Aug. 2.

Month's notice of intention to proceed—Proceedings in the case.

Plaintiff brought action against defendant company for payment of a dividend, to which defendant company pleaded a defence. The last step taken in the action was notice of trial given about two years before the present motion. The defendant went into liquidation under the winding-up Act, which operated as a stay of all proceedings. The defendant company in July, 1898, gave notice of motion for an order to remove the said stay so far as this cause of action is concerned, and plaintiff objected to the hearing of the motion on the ground that one month's notice of intention to proceed should first have been given.

Held, that defendant's application is a proceeding in the case under O.L.X.R. 9, and is governed by *McLachlan* v. *Morrison*, 23 N.S.R. 139. The month's notice not having been given, the application was dismissed with costs.

J. A. Chisholm, for plaintiff. *J. M. Chisholm*, for defendant company.

Province of New Brunswick.

SUPREME COURT.

Tuck, C. J.] WEATHERHEAD *v.* WEATHERHEAD. [Aug. 30.

Pleading—Set-off—Contract—Tort—60 Vict., c. 24, ss. 112, 113.

The Supreme Court Act, 60 Vict., c. 24, enacts under the title "Set-off and counter claim" as follows: S. 112, "A defendant in any action may set-off against the claim of the plaintiff any right or claim whether such set-off sound in damages or not." S. 113, "Such set-off shall have the same effect as if relief were sought in a cross action and so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claims." To an action for breach of contract the defendant pleaded a set-off in trover. The trover alleged was in no wise connected with the contract sued upon. On an application by the plaintiff to strike out the plea:

Held, that s. 112, read in connection with the title preceding it, and s. 113, included counter claim beside set-off, and was not confined to set-off arising in connection with the plaintiff's cause of action, and that the application should be refused.

D. Mullin, for the plaintiff. *H. A. McKeown*, for the defendant.

ST. JOHN COUNTY COURT.

Forbes, Co.J.] BANK OF MONTREAL *v.* CROCKETT. [August 30.

Practice—Form of order—Variance between order and summons—Application to rescind—Leave to sign judgment for want of a defence—Striking out appearance and plea.

A summons was taken out in an action calling on the defendant to show cause why the appearance and plea should not be set aside, and leave granted to sign final judgment for want of a defence. At the return the defendant objected on the grounds noted in *Bank of Montreal* v. *Crockett*, ante infra, to the appearance and plea being set aside, but the Court empowered the plaintiff to take out the order. The order taken out was merely for leave to sign judgment. The defendant now applied to rescind the order on the ground that there was a variance between it and the summons upon which it was granted.

Held, (1) The plaintiff was not obliged to follow the terms of his summons, but could take any part of the relief asked for if sufficient for his purposes. (2) Leave to sign judgment for want of a defence may be granted under Act 60 Vict., c. 28, s. 48, without the appearance and plea being set aside.

E. F. Jones, for the plaintiff. *D. Mullin*, for the defendant.

Province of Prince Edward Island.

SUPREME COURT.

Sullivan, C.J.] HAYDEN *v.* GOODSTEIN. [Aug. 1.

Practice—Affidavit to hold to bail—Jurat irregular.

This was an application to set aside a bailable writ, and to discharge the defendant from custody on several grounds, inter alia, that the affidavit to hold to bail was insufficient, because the jurat was irregular in that it did not disclose before whom the affidavit was sworn. In other words the word "me" was left out after the word "before." The jurat was as follows: "Sworn before at Charlottetown in Queen's County, etc." concluding in the usual form, and signed by a commissioner. The plaintiff resisted the application on the authority of *Martin* v. *McCharles*, 25 U.C.Q.B. 279, in which a jurat identical with this was held to be good. The defendant cited *The Queen* v. *Bloxam*, 6 Q.B. 528 and *Archibald* v. *Hubley*, 18 Duval 116.

Held, that the jurat was insufficient.

Martin v. *McCharles*, not followed.

McLean, Q.C., and *J. T. Mellish*, for plaintiff. *J. A. McDonald* and *G. S. Inman*, for defendant.

COUNTY COURT.

Queen's Co.] CLARK *v.* PAYNTER. [July 23.

Bills and notes—Consideration.

Action on promissory note. Defence that the note was given for a debt due by defendant's father, who had died intestate, and to whose estate no administration was taken. There was no person who could be sued for the original debt, and defendant was in no sense liable for it, and the note was, therefore, without consideration. Judgment for defendant with costs.

D. A. McKinnon, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] GRAHAM *v.* BRITISH CANADIAN LOAN, ETC., CO. [June 27.

Principal and agent—Constructive notice—Fraud—No lien for taxes paid by mortgagees when mortgage declared fraudulent and void.

Appeal by plaintiffs from the part of that decree of TAYLOR, C. J., noted ante p. 47, giving defendants a lien for taxes allowed with costs on the ground that there is no rule of law or equity enabling the Court to give a party relief who without any interest in the property voluntarily pays money to preserve or protect it. *Falke* v. *Scottish Imperial Ins. Co.*, 34 Ch. D. 234; *Leslie* v. *French*, 23 Ch. D. 552, followed.

Appeal by defendants against that part of the judgment which declared their mortgages void dismissed with costs.

Ewart, Q.C., for plaintiffs. *Mulock*, Q.C., for defendants.

Full Court.] QUINTAL *v.* CHALMERS. [July 9.

Practice—Right to reply—New trial.

This was an action before a judge and jury in which the plaintiff claimed damages on a sale of a number of car-loads of oats by sample on the ground that the goods delivered were not equal to sample. The plaintiff appealed from the verdict, which was in favor of defendants, and asked for a new trial on several grounds. The judgment of the Court, which was delivered by KILLAM, J., dwells mainly on a discussion of the evidence, but the case should be noticed here as to the effect on the trial of the judge's refusal to allow the plaintiff's counsel to reply, the defendants having adduced evidence, although only by way of putting in certain documents on the cross examination of one of the plaintiff's witnesses.

Held, (1) following Best on the Right to Begin, s. 132, and *Rymer* v. *Cook*, M. & M. 86n., that plaintiff's counsel has the right to reply if defendant adduces any kind of evidence, whether verbal or written, or ever so trifling or insignificant. (2) The error of the judge in refusing to allow the reply should only entitle the party to a new trial if it appeared that the course of justice had been thereby interfered with and some substantial injury done to the party complaining: *Doe d. Bather* v. *Brayne*, 5 C.B. 655; *Geach* v. *Ingall*, 14 M. & W. 95. (3) In the present case the plaintiff could suffer nothing from the order in which the jury were addressed, as his evidence was weak and the defendants were entitled to the verdict, and that a new trial should not be granted. Application dismissed with costs.

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

Province of British Columbia.

SUPREME COURT.

Irving, J.] RE TEMPLETON. [Aug. 17.

Life policies—Succession duties—Beneficiary domiciled in B. C.

The proceedings herein were commenced by originating summons for an order that probate of the will of William Templeton, deceased, be issued to his executrix, and for the determination of the question as to whether or not the Succession Duty Act applies to insurance moneys where the same are specifically disposed of under the policies, and also where policies were made payable out of the Province, payment of the duty having been demanded by the registrar.

Under R. S. B. C., c. 175, it is provided (subject to certain exceptions which need not here be referred to) that all property situate within this Province passing by will or intestacy . . . shall be subject to a suc-

cession duty varying in amount to the scale laid down in the Act. The deceased, who, by his will had left everything to his widow, had during his lifetime, taken advantage of the provisions of s. 7 of the Families' Insurance Act, and by a writing identifying three of the policies by their respective numbers had declared those three policies for the benefit of his wife; they therefore formed no part of his estate, and could not pass by his will, and accordingly were not liable to succession duty. There were two other policies payable outside the Province, but the deceased at the time of his death had his domicile within the Province.

Held, that the proceeds of a life policy payable at death without the Province are not liable, in the hands of a beneficiary domiciled in the Province, to succession duty. The Act aims at property having an actual situation within the Province and not to property which can only be deemed to be situate within the Province by legal fiction.

D. G. Macdonell, for executrix. *Charles Wilson*, Q.C., for the Crown.

Walkem, J.] GREEN *v.* STUSSI. [Aug. 24.

Judgment in vacation—Pending trial—Rule 736 (d).

Motion by defendant to set aside a judgment pronounced in favour of plaintiff on August 8, 1898. The action was set down for trial at Victoria on July 30, 1898, and on that day, as there was no judge available to try the case, it was adjourned to August 4, and further adjourned to August 8, when evidence was given, and judgment pronounced by WALKEM, J., in favour of the plaintiff. The defendant did not appear on any of the trial days.

Held, the trial was not pending within the meaning of Rule 736 (d), and that the judge had no jurisdiction to hear it in vacation.

S. Perry Mills, for plaintiff. *L. P. Duff*, for defendant.

Irving, J.] EDWARDS *v.* COOK. [Sept. 8.

Supreme Court, B. C., has no jurisdiction in Admiralty matters.

The Admiralty Act vests all admiralty matters in the Admiralty Court, and there is no jurisdiction in the Supreme Court to interfere.

Bradburn, for plaintiff. *Russell*, for defendant.

Irving, J.] B. C. PERMANENT LOAN, ETC., CO., *v.* WOOTTON. [Sept. 8.

Injunction—Registration of companies—Similarity of names—Cancellation of incorporation.

Motion by plaintiff company for an injunction to defendant, registrar of joint stock companies, to restrain him from cancelling its certificate of incorporation, the registrar having threatened to do so on the ground that the name was so similar to that of the Canada Permanent Loan & Savings Co, previously incorporated, as to be calculated to deceive within the meaning of s. 2 of the Companies Amendment Act, 1898.

Held, that it was not sufficiently clear that the similarity in the names was calculated to deceive to justify the registrar in cancelling the plaintiff com-

pany's certificate, or taking any steps to interfere with its doing business, pending the trial of the action, and that the plaintiff company is consequently entitled to an injunction to restrain him from so doing.

Harris, for plaintiff. *Williams*, for defendant.

EXCHEQUER COURT.

ADMIRALTY DISTRICT.

McColl, C.J.] THE MANAUENCE. [Sept. 8.

Practice—Action in rem—Arrest.

W. H. Cook sued for damages and a return of the amount of his passage money on the ground of failure to transport him according to contract, and caused the ship Manauence to be arrested. This was an application to set aside the warrant of arrest on the ground that such an action could not be brought in rem, the proper form being in personam.

Held, that as far as appeared by the endorsement on the writ and proceedings before the court, the Admiralty practice had been complied with in arresting the ship, and no specific authority for release in such a case having been cited, the application must be refused.

Bradburn, for the Manauence. *Russell*, for Cook.

COUNTY COURT.

Bole, Co. J.] RE MARY LEE'S LICENSE. [Aug. 15.

Liquor license—Cancellation of—County Court Act, s. 30.

Application to County Court Judge for the cancellation of a liquor license issued to Mary Lee by the Steveston Licensing Board. The main objections urged related to the mode and manner of procedure before the Board.

Held, that the Judge's jurisdiction was strictly confined to the question of legality or illegality, and the onus of clearly proving that the license was unlawfully issued lay on the complaint, and that on the facts no such case was made out.

Martin, Q.C., Attorney-General, for applicant. *C. B. Macneill*, for Mary Lee.

Obituary.

GUSTAVUS WILLIAM WICKSTEED, who died on the 18th ult., at his residence in Ottawa, was the son of the late Richard Wicksteed, of Shifual, Shropshire. He was born on December 21st, 1799, and was, therefore, in his ninety-ninth year. He came to Canada in 1821, and entering the legal profession was called to the Bar of Lower Canada in 1832. He had previously been appointed Assistant Law Clerk to the Legislative Assembly of Lower Canada. In 1841, after the Union of the Provinces of Upper and Lower Canada, Mr. Wicksteed was appointed Law Clerk to the Legislative Assembly of Canada, which position

he held until he became in due course Law Clerk of the House of Commons of the Dominion of Canada. After having completed fifty-seven years in the public service he was retired on a pension, since which time he has lived in Ottawa, devoting himself to various literary pursuits, and enjoying a well-earned rest.

He was connected with various public duties outside his position as Law Clerk, having been appointed one of the commissioners for revising the statutes of Lower Canada in 1841, and in consolidating the statutes of Lower Canada and Canada respectively in 1856. He devoted himself assiduously to the duties of his office, and was, from time to time, of inestimable value to the various ministers in power, and enjoyed to the full the confidence of all political parties.

His spare time was largely devoted to writing on various questions of interest to the profession and to the public. A number of his essays, short poems and miscellaneous verses have been collected and published, and show that his classical and scholarly attainments, as well as his knowledge of public affairs, were of a very high order. Many articles of his have appeared in the columns of this journal, and were fully appreciated by our readers. Of unblemished reputation, he was respected and beloved by all who knew him. Notwithstanding the great age that he attained he preserved the use of his faculties almost up to the day of his death. His erect form and bright genial face will long be remembered.

SIR CASIMIR GZOWSKI, K.C.M.G., A.D.C. to the Queen.—This talented man, and highly respected citizen, who passed away on August 25, was not known in Canada as member of the legal profession. He was nevertheless one of us, and as such we record his death. Having been born in St. Petersburg in 1813, he had reached the advanced age of 85. Although best known as an engineer, and for the many great public services rendered to his adopted country, he was in 1837, shortly after arriving in the United States from Poland, which he had to leave after the insurrection against Russia in which he took a prominent part, enrolled as an advocate in Beaver County, Pennsylvania. He practised there for some years, until he came to Canada in 1841. His career since then finds its record in the history of the Dominion.

Book Reviews.

The Law of Mines in Canada, by W. D. MCPHERSON and J. M. CLARK, of Osgoode Hall, Barristers-at-Law; The Carswell Company, 1898.

This volume appears seasonably. It is a comprehensive treatment of a comprehensive subject. The great and growing importance of the mining industry throughout Canada, to use the words of the authors in their preface, "renders some statement of the laws in force therein a matter of convenience amounting almost to necessity."

Chap. I. deals with crown title to lands, mines and minerals, in the various provinces and territories. Chap. II. is a preliminary discussion of the meaning of certain mining terms. Chapters III. to XIII. contain compendious statements of legal principles and rules of more frequent application to mining matters, arranged under such topics as contracts, leases, licenses, workings, aliens and foreign corporations, grants, water, support, taxation, wrongful abstraction, and criminal offences. Chapters XIV. to XIX., inclusive, reproduce the various Provincial and Dominion statutes and regulations in regard to mines and minerals, with notes and comments on the decided cases thereunder, dealing with a selection from the English, American and Australian authorities, wherever analogy would permit of that course being adopted. The notes on the mining laws of the various Provinces appear, from the preface, to have been revised by eminent counsel in each Province, and may therefore be regarded as able and accurate expositions of the laws dealt with.

The appendices, of which there are three, contain the text of a considerable number of statutory enactments not dealt with directly in the text of the work, and apparently completely covering the wide field of subjects kindred to that of mining. They likewise contain a comprehensive list of forms, and a useful glossary of mining terms. The index is particularly well arranged, and very exhaustive, and adds largely to the practical utility of the work.

Taking into consideration the intricacy of the subjects dealt with, the multiplicity, under diverse systems of jurisprudence, of the decisions commented on, and the complicated character of the legislation, Imperial, Dominion and Provincial, discussed, it may be that some criticism will be offered after a more minute examination, but it may safely be said that the authors and publishers have done their work in a highly creditable manner, and have given us a complete and authentic treatise on a subject which touches a great and growing industry.

The Laws of Insurance, by JAMES BIGGS PORTER, of the Inner Temple, Barrister-at-law, etc., assisted by W. F. CRAIES, M.A., and T. S. LITTLE, M.A., Barrister-at-law; Third Edition. London: Stevens & Haynes, Law Publishers, Temple Bar, 1898.

The aim of the author was to produce a book of moderate size, containing in one volume the whole law of insurance (except marine), viz., life, fire, accident and guarantee insurance. The success which the first and second editions met with has proved the value of this work. A third edition has now been called for, which contains about 200 new cases, with some alterations in the text. This work is well known and appreciated in this country, and especially so as, in addition to English, Scotch, Irish and American authorities, it contains a number of cases in our Canadian Courts. We would, however, suggest to the reader to note on p. 213 the recent decision of *Darling* v. *Insurance Companies*, 33 C.L.J. 439, which collects and very intelligently discusses the authorities as to price of stock in trade, and how the insurers' liability is affected by their loss by fire after contract made to sell them at retail prices.