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All good and true men who speak the English tongue will rejoice at the news that a treaty of arbitration is again being formulated between Great Britain and the United States. Let us hope that this time the federal senate will forget its obduracy, born of international narrow-mindedness, and advance the outposts of civilization many a league toward the millennium by ratifying the treaty. We are quite sensible of the fact that a treaty of arbitration does not mean an alliance between the two powers signatory; but who shall say that it does not make for that desideratum to a prodigious degree? On Christmas eve, 1874, the late Joseph Cook, speaking in Tremont Temple, said: "In the possible, I do not say in the probable, future, there lies at a distance of not more than three centuries, an alliance, not a union, of Great Britain, United States, Australia, India, belting the globe and possessed of power to strike a universal peace through half the continents and all the seas." If he had spoken in the altered condition of things to-day between the two great bodies of the Anglo-Saxon race, British and American, he might have reduced the period of the consummation of his prophecy to fifty years.

Apropos of the above, we are forced to say, with regret, that "international narrow-mindedness" does not find its sole exponent in the United States Senate. There are certain English publicists writing in the reviews and other great organs of thought in Europe who seem to be determinedly doing their worst to retard the progress of arbitration. Take an instance at random. In the "Empire Review" for October last, Mr. Edward Dicey, C.B., rudely speaks of International Law as being a "delusion" so far as it possesses any binding authority. (We might ask him, parenthetically, if "public opinion" is not the ultimate sanction of International Law as it is of any code of municipal or civil law?") Then he says: "The whole theory that war might be avoided by arbitration seems to me to be based upon a fundamental misconception of human nature." (Again, parenthetically, we might observe that Aristotle's clanless outlaw might have enunciated a similar opinion about the judicial arbitrament of disputes between

man and man.) But let us quote Mr. Dicey for the last time here. "I read the other day in a leading American newspaper a statement to the effect that if the Goverments of the United States and Great Britain would only issue a solemn protest against the awful butchery occasioned by the Russo-Japanese conflict in Manchuria, the public opinion of the civilized world would compel the belligerents to lay down their arms. More arrant nonsense was never written, even in the columns of the trans-Atlantic press." Contrasting these expressions with the lofty sentiments of Joseph Cook we ought to consign Mr. Edward Dicey, C.B., to the limbo of the forgotten before we censure our American cousins for not furthering an Anglo-Saxon alliance, or being careless in their speech about it.

We are not aware that there has as yet been in this country occasion for any discussion as to the forgery of type-writing, but it may arise at any moment. The subject is discussed in a recent number of the *Law Notes*. As said by the writer, it would hardly occur to any one who had not considered the matter that among the advantages of a type-written document over one in manuscript might be numbered the difficulty with which a successful forgery of the former could be accomplished. In fact, most people entertain the contrary view. A critical examination, however, would seem to indicate that every type-writing machine is possessed of a strange individuality; and that type-writing is, of all kinds of writing or printing, the least susceptible of imitation. We have not space to go into the details that lead to this conclusion; those interested in the subject can work it out for themselves. There is one case of an attempt to forge type-writing which has come before the Courts in the United States: *Levy* v. *Rust*, 49 Atl. Rep. 1017. The defendant was an attorney who was in the habit of having receipts for money paid him made out in type-writing in his office, and then personally affixing his signature thereto. Some of these being produced in Court they were promptly repudiated by him as forgeries. The judge before whom the case was tried carefully examined these documents with an expert, and they came to the conclusion that the receipts never were made in Mr. Rust's office, the mechanical work forbidding such a conclusion. There was also further evidence in that direction owing to the quality of the

paper that was used. An expert in hand-writing was unable to discover anything in the signatures which would lead to a conclusion that they were forged, but the expert in type-writing made the forgery of the type-writing clear to the judge. The conclusion seems reasonable that type-writing as compared with hand-writing is not easily forged, and this is a matter of some practical interest in every solicitor's office.

The extraordinary value of "Chinese Made Easy" to lawyers at nisi prius, and in the inferior courts of criminal jurisdiction, induces us to depart from our usual practice and notice it in our editorial columns. The book is written by Walter Brooks Brouner, A. B., M. D., (Columbia) and Fung Yuet Mow, Chinese Missionary in New York City, and is a royal road to the mysteries of the Chinese language as the same is spoken in the laundries, restaurants opium-joints, and other strictly mundane places where celestials are wont to foregather on this continent. As we all know some very pretty quarrels are apt to ensue at times between these expatriated citizens of the heavenly kingdom; and as the essence of these quarrels is reasonably certain to be distilled in court, a speaking acquaintance with the Chinese tongue is an obvious advantage to members of our profession. To attempt to acquire a knowledge of literary Chinese is enough to convince one that the "yellow peril" doesn't depend for its existence upon yellow journalism alone. Such an exploit proves a very "parlous thing" indeed. But, as Professor Giles in his "China and the Chinese" points out, Chinese embraces two languages, one written, the other colloquial, the latter being comparatively easy of acquirement. In the opinion of this learned authority "a student will begin to speak from the very first, for the simple reason that there is no other way. There are no declensions or conjugations to be learned, and, consequently, no paradigms or irregular verbs. In a day or two the student should be able to say a few simple things, after three months he should be able to deal with the ordinary requirements, and after six months he should be able to chatter away more or less accurately on a variety of interesting subjects." Professor Giles has written an introduction to Messieurs Brouner and Fung's book, in which he strongly commends its value for imparting a speedy knowledge of colloquial Chinese. It is not possible

to institute a comparison between this and any other similar work, because it is a pioneer in the field and has no rival. As to Dr. Brouner's qualifications for the authorship of such a work, it will be noted that he is a graduate (in Arts and Medicine) of Columbia University, and it may be added that he has had exceptional facilities for studying the Chinese tongue because of his holding a position for some time on the medical staff of the department charged with overseeing Chinese emigration at the port of New York. It is unnecessary to say anything of his collaborator's qualifications. When one of the Chinese race attempts to do anything he does it well, and largely because he does it to the extent of his skill and ability. Such a work will be a helpful addition to the general library of the legal practitioner in Canada.

THE EFFECT OF LETTERS OF ADMINISTRATION OBTAINED PENDENTE LITE.

The question of the relation back of letters of administration obtained pendente lite has been recently under the consideration of the court on three or four occasions, and has resulted in the expression of some diversity of opinion by members of the Bench.

It is well known that prior to the Judicature Act there were different rules prevailing in courts of law and equity on this subject. At law as in equity an executor might commence an action or suit before obtaining probate, and if he obtained probate before the trial or hearing of the case that was sufficient to entitle him to maintain the action as executor, and the reason assigned for this rule was that he derived his authority not from the letters probate but from the will. On the other hand a different rule prevailed as regards administrators, and at law their authority was considered to be derived from the grant of letters of administration, and they were considered to have no locus standi to commence an action in respect of the estate of the deceased until they had first clothed themselves with the legal status of administrator of the estate; but in Equity a different rule prevailed and, as in the case of an executor, it sufficed if the plaintiff claiming to be administrator armed himself with the necessary authority at any time before the cause was heard.

After the passing of the Judicature Act it was held that the rule of equity on this point was now the law of the High Court in all cases, that Act having provided that where there was any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter the rules of equity should prevail (see Ont. Jud. Act, s. 58 (13)). Accordingly in *Trice* v. *Robinson*, 16 Ont. 433, it was held that letters of administration obtained pendente lite related back to the death of the deceased, and that it was sufficient if a person suing as administrator obtained a grant of letters of administration at any time before trial. The rule thus laid down seemed simple enough, but like many other rules laid down by judicial decisions it is no sooner laid down than a process of frittering it away begins, and thesame judge who decided *Trice* v. *Robinson*, held in *Chard* v. *Rae*, 18 Ont. 371, that notwithstanding letters of administration related back to the death of the intestate, yet an action commenced by a person who had not already obtained letters of administration would not stop the running of the Statute of Limitations in favour of the defendant until the plaintiff actually obtained them, and that the claim might thus be barred pendente lite, although the action was commenced before the statute had barred the claim. When one reads the facts of that case one is almost tempted to surmise that it is an instance of "a hard case making bad law."

Thus though the letters related back to the death of the intestate they nevertheless were not for all purposes sufficient to validate the plaintiff's status at the beginning of the action. The result of the decision was to create an anomalous condition of affairs: for some purposes the letters related back, and for others they did not, a plaintiff obtaining letters pendente lite was qualified to sue as administrator, and he was not; his action was commenced with sufficient authority, and it was not. The decision, in fact, seems to involve contradictory propositions which it is difficult to reconcile with sound reason. Even at law letters of administration whenever obtained were held to relate back to the death of the deceased. In *Foster* v. *Bates*, 12 M. & W. 226, it is said that "the title of an administrator though it does not exist until the grant of administration relates back to the time of the death of an intestate, and that he may recover against a wrong-

doer who has seized or converted the goods of the intestate after his death in an action of trespass or trover." In fact at law he represented the deceased as from the day of his death, notwithstanding there might have been a prolonged interval between the death and the grant of administration. This being so, the common law rule which denied the relation back of letters obtained pendente lite seems to have been somewhat inconsistent. In *Doyle* v. *Diamond Flint Glass Co.*, 7 O.L.R. 747, an action under the Fatal Accidents Act, Idington, J., held that the rule laid down in *Trice* v. *Robinson* did not apply to causes of action vested in the administrator qua administrator, but which did not constitute any part of the deceased person's estate. He says "the doctrine of relation back to the death of the intestate is applicable to what concerns his estate and the transmission thereof. That is not the case here. The rights sought to be enforced here never were the rights of the deceased. They formed no part of his property or estate. They are the creation of statutes that gave them directly to the widow and the mother under such circumstances as have arisen here. The duty is cast on the administrator to bring for them the action. It might well have been provided by the statute that any other officer as trustee should do so. The right and the duty thus created have nothing to do with the estate of the deceased." Moreover in that case the learned judge further held that the doctrine of relation back could not be invoked by the plaintiff in that case, because in his view he was not rightfully entitled to the grant of administration.

Trice v. *Robinson*, supra, was an action brought under the Liquor License Act for supplying the deceased with drink while in a state of intoxication, but the learned judge points out that the damages recovered under that Act form part of the deceased person's estate, but it may be doubted whether the mere fact of the statutory destination of the damages recoverable in either case ought to make any difference. It is to the personal representative of the deceased in both cases that the right of action is given, and it seems to be introducing a needless and unjustifiable exception into the general rule laid down in *Trice* v. *Robinson* to say that in such cases the doctrine of the relation back of letters obtained pendente lite does not apply.

The material question in such an action is whether or not a duly appointed personal representative is before the Court, and

this fact ought to be conclusively determined by the grant so long as it remains unrevoked; and it seems to be contrary to sound principle to go behind the grant and inquire into the right of the de facto administrator to obtain the grant. But the reasoning of Idington, J., would equally exclude the doctrine of relation back in favour of a person entitled to obtain a grant of administration, but not obtaining it until after suit, so far as an action under the Fatal Accidents Act is concerned.

Doyle v. *Flint Glass Co.* was subsequently appealed to the Divisional Court, and that Court, while reversing the judgment of Idington, J., did not in terms overrule his decision that the doctrine of relation back did not apply, but directed the issue, whether or not the plaintiff was in fact the widow of the deceased to be tried, which, if found in her favour, it was said would validate the proceedings ab initio, and if found against her would result in the dismissal of the action altogether apart from the question of relation back of the grant of administration. But as we have already pointed out, according to the reasoning of Idington, J., the letters obtained pendente lite could not relate back in favour of the plaintiff in this case even if she were rightfully entitled to them.

In *Dini* v. *Fauquier*, not yet reported, the precise point in question in *Doyle* v. *Flint Glass Co.* was again under consideration of the Divisional Court (Falconbridge, C.J.K.B., and Street and Britton, JJ.). In that case Idington, J., following his previous ruling in the *Doyle* case, dismissed the action. But there was the further circumstance in the *Dini* case, that the plaintiff had before action applied for the grant and had obtained an order therefor, though the letters were not actually issued until after the action had commenced. In that case the Divisional Court considered that the distinction which Idington, J., had drawn as to the rights of an administrator suing under the Fatal Accidents Act was not well founded, and reversed his decision, both on the ground that the letters related back to the commencement of the action, and also on the ground that there had been an actual adjudication of the plaintiff's right to the grant before action. The result of this decision is, we take it, not only to overrule *Doyle* v. *Flint Glass Co.*, 7 O.L.R. 747, but also *Chard* v. *Rae*, 18 Ont. 371; because in the *Dini* case also the question of the running of a Statute of Limitations was involved, and the action would have been too late unless the letters related back to the commencement

of the action; and the rule may therefore now be taken to be that letters of administration obtained pendente lite, and before trial, relate back and are sufficient to support the claim of a plaintiff to the status of administrator for the purposes of the action. That is an intelligible rule, and it is to be hoped it may escape being frittered away by judicial refinements and exceptions.

RAILROADS—FAILURE TO LOOK AND LISTEN RULE.

An interesting contribution to the proper determination of the "look and listen rule" is to be found in the recent case of *Garlich* v. *Northern Pacific Railway Company*, 131 Fed. Rep. 837. In this case, plaintiff, without occasion therefor, was walking near a city station in the space between railroad tracks and a river bank, used as a pathway, and ranging in width from 5 to 25 feet. A freight train was moving in the opposite direction on the second track from him, making the usual noise; and, after looking back along the nearest track, which could be seen for about 500 feet, and seeing no train thereon, plaintiff walked on about 150 feet, without again looking back, when he was struck and injured by the end of the pilot beam on the engine of one of defendant's trains which came from behind him. The space between the track and the river bank was there 11 feet wide, and plaintiff was walking at a safe distance from the track until just before he was struck, when he made a side step toward the track. The court held that, without regard to the question of defendant's negligence, plaintiff was guilty of such contributory negligence as precluded his recovery for the injury as a matter of law.

The court in the course of an interesting opinion, said: "The law recognizes the track of an operated railroad as a place of danger, of which danger a view of the track conveys notice; and that when a person goes upon such track, or so near as to be within the overhang of the cars or engine, ordinary care requires that he be alert in the use of his senses of sight and hearing to guard himself from harm. And no reliance on the exercise of due care by persons in control of the movement of trains or engines will excuse any lack of the exercise of such care by persons going upon such tracks. If the use of these senses is interfered with by obstructions or by noises, ordinary, reasonable care calls for proportionally increased vigilance: *Blount* v. *Grand Trunk Ry. Co.*, 61 Fed. Rep. 375, 9 C. C. A. 526; *Pyle* v. *Clark*, 79 Fed. Rep.

744, 25 C. C. A. 190; *C., St. P., M. & O. Ry. Co.* v. *Rossow*, 117 Fed. Rep. 491, 54 C. C. A. 313; *C. & N. W. Ry. Co.* v. *Andrews*, C. C. A., 130 Fed. Rep. 65. The three cases last cited were decided by this court, and pages of citations of cases from this court and all the courts of the country to the same effect might be added. In this case, if the path between the railroad tracks and the river was a dangerous place, the danger was obvious, and the risk was voluntarily and needlessly assumed by plaintiff, who went there for an idle stroll. When, after turning in his walk, he looked back along the nearest track, his view of it extended but a short distance, when it was cut off by a curve and obstructions. Yet, without looking again, or bestowing further attention to the situation, he walked along at an ordinary gait about 50 paces, or 150 feet; and, though the path was there 11 feet wide, just as the engine was nearly opposite him, he blundered, and came by a side step, from a safe distance away, so close to the track that he was immediately struck by the end of the pilot beam. That he was grossly negligent, and that his negligence was a proximate cause of his injury, is manifest.

Since the argument counsel have called our attention to the decision by the Supreme Court of Iowa of the case of *Camp* v. *Chicago Great Western Ry. Co.* (recently filed), 99 N. W. Rep. 735. An employee of the company after clearing snow from a switch in the company's Marshalltown yard, started along the track to a toolhouse 182 feet distant; having looked back along the track without seeing any engine. When within 25 feet of the toolhouse, and walking on the ends of the ties he was struck by an engine which came up on the track behind him faster than 6 miles an hour, which is the limit of speed fixed by a Marshalltown ordinance. Though the switchman had taken no other precaution, the conclusion was arrived at that he would have reached the toolhouse before being so overtaken had the engine not exceeded 6 miles an hour. The Iowa court held that the switchman had the right to rely confidently on the belief that no engine would be run on that track faster than the Marshalltown ordinance prescribed, and that reasonable care did not require that he should again look back, or walk beyond the reach of passing engines. We do not find this decision persuasive, or in harmony with the settled law on the subject. Such ordinances are intended to prevent collisions and accidents in urban communities. The limit of speed fixed is a

designation by the municipal council of the degree of care which shall be exercised in the operation of railroads within the municipality. To exceed the rate of speed so fixed as proper and safe may be some evidence of negligence; but, as between the railroad company and a person injured or put in danger, it is unlawful only in the sense in which any act of negligence which injures or endangers another is unlawful. And the doctrine of contributory negligence is just as applicable to cases of negligence in respect to ordained rates of speed as to any other species of negligence chargeable to a railroad company. In *Pyle* v. *Clark*, decided by this court, and already cited, the opinion states that the train which struck the plaintiff's team was running at about 15 miles an hour, in violation of a municipal ordinance which prohibited a speed of more than 8 miles an hour, yet the plaintiff was held guilty of contributory negligence, because, after looking along the track, he allowed a full minute to elapse before driving upon the track without again looking. And in *Blount* v. *Grand Trunk Ry. Co.*, also above cited, gates at the crossing were established by law to warn travellers, but it was held that the fact that the gates were open when a train was approaching did not excuse a person crossing the tracks for failing to look and listen. The well-settled rule of law is that no reliance upon the exercise of care by a railroad company will excuse a lack of the exercise of proper care by a person going upon a railroad track, or so near as to be in danger from passing trains.

The only other case which we find that seems to hold that running faster than the rate of speed allowed by a municipal ordinance has any bearing upon the matter of contributory negligence is the case of *Smith* v. *St. Paul City Ry. Co.*, 79 Minn. 254, 82 N. W. Rep. 577, where damages were recovered for running over and killing a dog by defendant's trolley car running 20 miles an hour, in violation of a city ordinance limiting the speed to 10 miles. The court conceded that ordinarily the motorman need not stop for dogs, who should care for themselves, and get out of the way of the car, yet held that the jury might properly determine whether, but for this improper rate of speed, in violation of the ordinance, the dog would not in that instance probably have escaped. Without further comment on these cases, it is sufficient to say that we adhere to the prior decisions of this court."—*Central Law Journal.*

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

PRACTICE—WRIT OF SUMMONS—SERVICE OUT OF JURISDICTION—CONTRACT "WHICH ACCORDING TO THE TERMS THEREOF OUGHT TO BE PERFORMED WITHIN THE JURISDICTION"—PLACE OF PAYMENT—RULE 64 (E)—(ONT. RULE 162 (E)).

Duval v. *Gans* (1904) 2 K.B. 685, was an action brought against the defendants out of the jurisdiction or a contract for the price of goods sold in England to the defendants, who resided out of the jurisdiction. The contract of sale did not state in terms where payment was to be made. The defendants applied to set aside the writ of summons on the ground that the contract was not one "according to its terms" to be performed within the jurisdiction. Bucknill J., refused the motion and the Court of Appeal (Stirling and Matthew, L.JJ.) affirmed his decision on the ground that the meaning of the Rule 64 (e), (Ont. Rule 162 (e)) was not that it must be expressly mentioned in the contract that it was to be performed in England, but that it was sufficient if it appeared from the contract that that was the legal intendment of the parties; and further, that it was not necessary that the whole contract should be performable in England, but it sufficed if some substantial part of it was to be so performed. Following *Reynolds* v. *Coleman*, 26 Ch. D. 453, and *Rein* v. *Stein* (1892) 1 Q.B. 753, they held that it was a necessary implication that the payment under the contract in question was to be made in England, and therefore the service of the writ of summons out of the jurisdiction was properly allowed.

TRADE-MARK—"FRANCHISE"

Bow v. *Hart* (1904) 2 K.B. 693, though dealing with other matters concerning the jurisdiction of County Courts, not necessary to be here considered, may be noted for the fact that Kennedy, J., decided that a trade-mark is not a "franchise."

COMPANY—SHARE CERTIFICATE—SEAL OF COMPANY—FORGERY OF DIRECTORS' SIGNATURES—PRINCIPAL AND AGENT—SCOPE OF EMPLOYMENT.

In *Ruben* v. *Great Fingall Consolidated* (1904) 2 K.B. 712, the Court of Appeal (Collins, M.R., and Stirling and Matthew, L.JJ.) have found it necessary to reverse the decision of Kennedy, J. (1904) 1 K.B. 650 (noted ante p. 452), from which, as was anticipated, an appeal was had. It may be remembered that the plaintiffs had advanced in good faith money to the secretary of the defendant company on certificate under the seal of the company certifying him and another person to be the owners of certain shares of the defendant company, and on an assignment of such shares, the certificate proved to be fraudulent and the director's names affixed thereto were forgeries, and the company refused to register the transfer. Kennedy, J., thought the case governed by *Shaw* v. *Port Philip Mining Co.* 13 Q.B.D. 103, and that the company were estopped from disputing the validity of the certficate, the Court of Appeal, however, came to the conclusion that there was no estoppel, because there was no holding out by the company of their secretary as having any right or authority to warrant the genuineness of the certificate; the articles of association expressly providing that such certificates must be signed by two directors. The Court of Appeal also held that the defendant company was not liable to the plaintiffs in damages for the fraud of their secretary. The plaintiffs were therefore practically without remedy.

PRACTICE – ATTACHMENT OF DEBTS — CHOSES IN ACTION — "DEBTS OWING OR ACCRUING"—13 ELIZ., C. 5 (R.S.O. C. 334, SS. 1-5) — PAYMENT BY GARNISHEE AFTER NOTICE OF ATTACHING ORDER—PAYMENT BY CHEQUE—DUTY TO STOP PAYMENT BY CHEQUE.

Edmunds v. *Edmunds* (1904) P. 362, although arising in a divorce case, is a decision on the practice of attachment of debts. A decree for alimony and costs was obtained by the plaintiff against the defendant. The defendant held, amongst other appointments, that of public vaccinator under the guardians of a certain parish, and also that of registrar of births and deaths. As public vaccinator the defendant was bound to keep a register of vaccinations, and the guardians agreed to pay him within a calendar month after the usual quarter days 1s. 6d. for each vaccination duly registered; and his right to pay depended on his punctual attendance for the purpose of vaccinating patients. His accounts

as registrar were required to be vouched by the superintendent registrar. On March 8, 1904, the defendant in consideration of an advance to carry on his business assigned to his father all his fees and salary as public vaccinator and registrar of births and deaths by way of mortgage. The father admitted that he took the assignment for the purpose of preventing his son's home being broken up by execution of the suit of the plaintiff. On the 24th March the first attaching order was issued, attaching all debts due and accruing due from the garnishees to the judgment debtor. At the date of this order the debtor had earned £38 18s. 6d. for vaccination fees and £7 8s. 1d. for registration of births, etc. On April 8th the garnishees gave a cheque to the debtor for £38 18s. 6d. which he indorsed to his father as assignee. And on April 22nd they gave him a cheque for £8 3s. 1d., which included the £7 8s. 1d. and a further sum of 15s. subsequently earned as registrar. This cheque was also indorsed by the debtor in favour of his father as assignee. On the application by the judgment creditor against the garnishees for an order to pay over they set up (1) that the fees in question were not attachable, as not being a present debt; and secondly, because they were in the nature of a salary not payable till pay-day comes, and there was nothing actually due at the time the attaching order was made; (2) that the claims had been assigned. Barnes, J., held that the fees in question constituted a debt accruing due, and as such were bound by the attaching order, and that the assigment was void under the Statute of 13 Elizabeth, c. 5 (R.S.O. c. 334, ss. 1-5); and that the judgment creditor was entitled to payment from the garnishees notwithstanding the payments made to the debtor.

SALE OF GOODS—CONDITIONS ATTACHED TO GOODS AS TO TERMS OF THE SALE THEREOF — NOTICE — RIGHT OF PURCHASER TO DISREGARD CONDITIONS.

McGruther v. *Pitcher* (1904) 2 Ch. 306, was a somewhat similar case to that of *Taddy* v. *Sterious* (1904) 1 Ch. 354 (noted ante p. 306), in which Farwell, J., came to a different conclusion. The goods in question were patent rubber revolving heel pads. The goods were manufactured and sold by the plaintiffs in boxes on the lid of which was a notice that they were sold to dealers subject to a condition that they should not be retailed for less than a certain specified sum. The defendant bought some of the goods and was orally informed of the condition, but had resold some of

them at less than the specified price. The plaintiff claimed an injunction, which Farwell, J., granted, limited to the duration of the patent under which the pads were manufactured. The Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.), however, considered the case was governed by *Taddy* v. *Sterious*, supra, which they held to have been well decided, and the decision of Farwell, J., was therefore reversed, holding that, even if the defendant bought the goods with notice of the condition it could not be enforced against him, there being no privity of contract between him and the plaintiffs, and it not being possible to make a condition of this kind even with the goods.

SEA SHORE—FORE-SHORE—PUBLIC RIGHT OF BATHING.

In *Brinckman* v. *Motley* (1904) 2 Ch. 313, the defendant, who was the headmaster of a public school, had taken the boys of the school down to the sea shore, where the plaintiffs had an exclusive right of fishing with stake nets, in order that the boys might bathe in the sea. The plaintiffs claimed an injunction, and the defendant set up that he and all His Majesty's subjects had a common law right to use the fore-shore of the sea for the purpose of bathing. Farwell, J., held that there was no such common law right, and the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) affirmed his decision, following *Blundell* v. *Catcrall* 5 B. & Al. 268, 24 R. R. 353, the judgment of Holroyd, J., in which case is characterized, by Williams, L.J., as "one of the finest examples of the way in which the judgment of an English judge ought to be expressed and the reasons for it given." In that judgment it may be useful to note the learned judge pointed out, that the passage in Bracton in which such a right as the defendant claimed is asserted to exist, and which is based on Justinian Inst., lib. 2, tit. 1, ss. 2 and 4, has been held not to be the law of England.

VENDOR AND PURCHASER—CONTRACT FOR SALE OF LAND—PART PERFORMANCE—STATUTE OF FRAUDS—(R.S.O. c. 338, s. 5).

Dickenson v. *Barrow* (1904) 2 Ch. 339, was an action for the specific performance of an oral contract for the sale of lands. The contract was to sell the parcel of land in question on which the plaintiffs were to build a house for the defendant. The plaintiffs in pursuance of the alleged agreement built the house, and during the course of its erection the defendant and her husband from time to time visited it, and alterations were made by the plaintiffs at the defendant's request. Kekewich, J., held that these acts done

by the plaintiffs at the request of the defendant constituted a part performance of the contract and took the case out of the Statute. Our recollection of the earlier cases is that they very distinctly laid down that the acts of part performance, sufficient to take the case out of the Statute, must be plainly referable to the contract relied on, and we should venture to doubt whether the present decision would successfully stand the ordeal of an appeal, as it is somewhat difficult to see how the making alterations and improvements in a house in course of erection, at the suggestion of another person, is necessarily referable to a contract to sell the land to such other person.

WINDING UP—CREDITOR OUT OF JURISDICTION COMING IN TO PROVE CLAIM—SECURITY FOR COSTS.

In re Pretoria Petersburg Ry. Co. (1904) 2 Ch. 359, was a winding up proceeding in which a creditor, resident out of the jurisdiction, applied to the Court on originating summons for a declaration that he was entitled to prove a claim. The liquidators applied for an order that the creditor to give security for costs, which was refused by the registrar; but on appeal Buckley, J., held that the liquidators were entitled to the order.

SOLICITOR — COSTS — TAXATION — "THIRD PARTY INTERESTED CREDITOR IN ADMINISTRATION ACTION—SOLICITOR'S ACT, 1843 (6 & 7 VICT. c. 73) s. 39 —(R.S.O. c. 174, s. 45).

In re Jones (1904) 2 Ch. 363, may be referred to as marking a difference between the English and Ontario Solicitor's Act as regards the rights of third parties to tax a solicitor's bills. Under Imperial Stat. 5 & 7 Vict. c. 73, s. 39, a person interested in an estate out of which costs are payable is entitled to have them taxed; and this case decides that a creditor who has obtained a judgment for the administration of an estate is a person so interested, and as such entitled to have a taxation of bills of costs which have been paid by the executor of the estate. The Ontario Act, R.S.O. c. 174, s. 45, on the other hand, is confined in terms to persons "liable to pay or who have paid any bill," and under that Act a creditor upon estate out of which costs are payable is only entitled to have them moderated: see *Re Hague*, 12 P.R. 119.

ESTOPPEL—STATEMENT INDUCED BY SUPPRESSION OF MATERIAL FACT.

Porter v. *Moore* (1904) 2 Ch. 367, was an action brought by the mortgagees of a share in a trust fund against the trustees of the fund, claiming a declaration that the trustees held the mortgagor's

share of the fund as trustees for the plaintiffs, and were estopped from alleging or setting up any prior encumbrance thereon. The ground of the alleged estoppel was the fact that the trustees had prior to the advance being made by the plaintiffs signed a memorandum to the effect that they had not received any notice of any prior claim. The trustee who first signed the memorandum did so at the request of the mortgagee's solicitor, who failed to inform him that the memorandum had been submitted to the trustees' solicitor and was then under consideration. The other trustee signed it, relying on the signature of his co-trustee, and also without being informed that it had been submitted to the trustees' solicitor. On the same day it was signed the solicitor of the trustees wrote to the mortgagee's solicitor informing that they never advised their clients to sign any such memorandum. As a matter of fact notice of a prior claim had been given and lost sight of. Under these circumstances Eady, J., came to the conclusion that the suppression of the information, that the propriety of giving the required memorandum was under the consideration of the trustees' solicitor, was so material that the trustees were not estopped by the memorandum signed under such circumstances from setting up the prior charge.

LEASE—ASSIGNMENT OF LEASE—COVENANT BY ASSIGNEE OF LEASE "TO PERFORM AND OBSERVE" COVEVANT OF LEASE—NEGATIVE COVENANT—RIGHT OF ASSIGNOR OF LEASE TO ENFORCE NEGATIVE COVENANTS IN THE LEASE AGAINST HIS ASSIGNEE—INJUNCTION.

In *Harris* v. *Boots* (1904) 2 Ch. 376, the plaintiffs were lessees of leasehold premises under a lease which contained a covenant by the lessees not to make alterations in the premises without the lessor's consent. The plaintiffs assigned the lease to the defendants, who covenanted with the plaintiffs "to perform and observe" the covenants of the lessee in the lease. After the assignment the defendants made certain structural alterations in the premises without the consent of the plaintiffs or of the lessor, and the present action was brought claiming a mandatory injunction to restore the premises to the condition they were in prior to such alterations. Warrington, J., who heard the action, held that the plaintiffs had no cause of action, and that the effect of defendant's covenant was merely to indemnify the plaintiffs against any damages arising from any breach of the covenants in the lease on the part of the lessees, but did not entitle the assignors of the

lease to sue for specific performance by the assignees of the negative covenants contained therein.

COMPANY—DEBENTURES—CONDITION THAT DEBENTURE IS TO BE PAID TO REGISTERED HOLDER—ASSIGNOR—ASSIGNEE—EQUITY AGA'NST ASSIGNOR—TRUSTEE FOR CREDITORS.

In re Brown, Shepheard v. *Brown* (1904) 2 Ch. 448. The Court of Appeal affirmed the decision of Byrne, J. (1904) 1 Ch. 627 (noted ante p. 458), but it appearing by further evidence that the assignee for creditors was not the registered holder of the debentures, the allowance of the appeal was therefore without prejudice to his applying to the judge below to vary the certificate or enforce any equitable right he might have on that ground.

PUBLIC AUTHORITY—NOTICE OF ACTION—CLAIM UNDER CONTRACT—CONTRACT INCIDENT TO PUBLIC DUTY.

Sharpington v. *Tulham Guardians* (1904) 2 Ch. 449, was an action brought by a contractor against a municipal body to recover for loss and damage incurred in carrying out a contract for works required by the defendants for the purpose of carrying out their public duties. The amount stipulated for had been paid and the additional sum now claimed was for loss alleged to have been occasioned by negligence of and frequent change of plans by the defendants. The defendants set up the objection that they had received no notice of action, but Farwell, J., held that the plaintiff's claim being in respect of a private duty arising out of a contract and not for any negligence in performing a statutory or public duty the Public Authorities Protection Act (see R.S.O. c. 88, Con. Municipal Act, 3 Edw. VII. c. 19, s. 468) did not apply.

COMPANY — WINDING-UP — CONTRIBUTORY FORFEITED SHARES — RIGHT OF PRESENT HOLDER OF SHARES TO CREDIT FOR ALL PAYMENTS ON ACCOUNT.

In re Randt Gold Mining Co. (1904), 2 Ch. 468, adds a further point to our learning respecting shares in joint stock companies and seems to establish that while a share is to be regarded as a legal entity entitling the company after its issue to follow it through all its vicissitudes and to claim payment of the amount due in respect of it until it is paid in full, yet that the present holder of previously forfeited shares is entitled to credit for all sums paid in respect thereof. Therefore, where, as in this case, the articles provided for forfeiture of shares for non-payment of calls and also that notwithstanding the forfeiture the ex-shareholder shall continue liable to pay the amount of the calls, and under this provision

shares were forfeited and allotted to another person, Buckley, J., held that the latter was entitled on the winding-up of the company to be credited with all sums paid by the previous holder in respect of the shares either as shareholder or debtor in respect of his liability under the articles to pay calls notwithstanding the forfeiture of his shares.

COMPANY—DEBENTURE—TRANSFER OF DEBENTURE TO COMPANY ISSUING SAME —SUBSEQUENT TRANSFER BY COMPANY TO PURCHASER FOR VALUE.

In re Routledge, Hummell v. *Routledge* (1904) 2 Ch. 474, also deals with an interesting point of company law. In this case a limited company issued £75,000 of debentures for £100 each, ranking pari passu as a first charge on the assets of the company. Some of these debentures were subsequently purchased by the company itself, to whom they were transferred in common form, and the company was thereupon registered as holders thereof. The company thereafter sold and transferred the debentures so purchased to various persons for value, to whom they were transferred in common form, and the transferees were thereupon registered as holders. On this state of facts Buckley, J., held that by the transfer of the debentures to the company they were extinguished, and the debt created thereby was absolutely gone and could not be revived by merely transferring the debentures to other persons, and that the transferees were not entitled to receive new debentures ranking pari passu with the £75,000 issue.

REAL ESTATE—LIMITATION OF ESTATE—EQUITABLE ESTATE IN FEE—NO WORDS OF INHERITANCE.

In *Re Tringham, Tringham* v. *Greenhill* (1904) 2 Ch. 487, Joyce, J., was called on to construe a settlement whereby land was conveyed to trustees in trust for Mary Ann Tringham for life, and after her death for her husband, and after the death of the survivor in trust for the children of the marriage equally as tenants in common, and in default of issue, then to such uses as Mary Ann Tringham should declare by her will. There were three children of the marriage, and the question was whether they took merely life estates, there being no words of inheritance, or whether they took the fee simple as tenants in common. Joyce, J., was of the opinion that it sufficiently appeared by the instrument that the intention of the settlor was to give the children absolute interests, and that notwithstanding the absence of any limitation to their "heirs" they were entitled to the fee: (see R.S.O. c. 119, s. 4 (3))

Correspondence.

ELECTION LAW—PARLIAMENTARY VACANCIES.

To the Editor of CANADA LAW JOURNAL.

SIR,—Some matters of interest as to Constitutional law have recently arisen in Ontario and seem worthy of discussion Of the least of two evils by which he is just now confronted the Premier of Ontario would probably find it wiser to choose dissolution. Reconstruction, with the attendant feature of clearing off the by-elections, has difficulties peculiar to itself. It is said that portfolios are to be offered to the Speaker and the member for Brockville, if not to the representative for North Grey as well. But is it competent for any of these gentlemen to resign or otherwise bring about the vacation of their seats and come before their old constituencies for re-election?

Section 16 of c. 12, R.S.O. 1897, which treats of the case of a member accepting office, has the following provision:—"If any member of the Legislative Assembly becomes a member of the Executive Council . . . his election shall thereby become void, and his seat shall be vacated, and a writ shall, in the manner provided by sections 36 and 37, issue for a new election as if he were naturally dead; but he may be elected if he is not declared ineligible under the Act." Referring to sections 36 and 37, which are therein spoken of as those proper to be invoked, they seem to comprehend a vacancy arising during a session of the assembly, or a notification of which, at all events, must await its inauguration. This view was deliberately set up by the Attorney-General in the North Renfrew instance to break the force of the Opposition's protest against the long delay in bringing on the election there. He repudiated on the strength of these enactments the charge of default occurring at any stage earlier than the meeting of the House.

Section 36 reads: "If a vacancy happens in the Legislative Assembly by the death of a member, or his accepting any office, commission or employment" [does "office" here mean membership in the Cabinet], "the Speaker, on being informed of the vacancy by a member of the said assembly in his place, or by

notice in writing under the hands and seals of two members of the said assembly, shall forthwith address his warrant to the Clerk of the Crown in Chancery for the issue of a new writ for the election of a member to fill the vacancy, and a new writ shall issue according." Section 37 reads: "If when a vacancy happens, or at any time thereafter, before the Speaker's warrant for a new writ has issued, there is no Speaker of the said assembly, or the Speaker is absent from the Province, or if the member whose seat is vacated is himself the Speaker, then two members," etc. [direction to the same effect as in s. 36].

The first appears to deal with a vacancy created by the action of an ordinary member, the last of the Speaker himself. Removing both from consideration as being inapplicable, one has to fall back on either section 34 or 35 for the modus operandi where a session is not in progress.

Section 34 enacts that "a member may address and cause to be delivered to the Speaker a declaration of his intention to resign his seat, made in writing under his hand and seal before two witnesses, which declaration may be made and delivered either during a session of the Legislature or in the interval between two sessions; and the Speaker shall, upon receiving such declaration, forthwith address his warrant under his hand and seal for the issue of a writ for the election of a new member in the place of the member so resigning."

To say nothing of the circumstance that none of the expected vacancies would involve resignation, does the section contemplate the case of a member resigning with the purpose of appealing anew to his constituency? Does it not refer to distinct personalities when providing that a new member should be chosen in the place of the member resigning? In putting such interpretation on the Act the writer is aware that it would deprive a member of the privilege he is deemed to possess of seeking approval of his course in Parliament at any time. The obdurate clause nevertheless seems to stand in the way.

As to the Speaker, section 35, making provision for his forwarding his declaration to two members of the Legislature, speaks of "the issue of a new writ for the election of a member (whether ordinary or not) in the place of a member so notifying his intention to resign." The changed position of the adjective might be

held to weaken slightly the force of the argument, though it would seem to the writer to leave the point unaffected. It did not suffer transposition, for the original Act, 32 Vict. c. 4, has the same phraseology.

The strongest reasoning that can be employed for the maintenance of the position that a private member who meditates accepting office would have to present himself before a different electorate is obtained, however, from the language of section 28, appointing the course to be followed when a member is declared to have forfeited his seat after the trial of an election petition. These are its terms: "Forthwith after the receipt by the Speaker of a certificate of the judges determining an election petition, and certifying that the election was void, the Speaker shall address his warrant under his hand and seal to the Clerk of the Crown in Chancery for the issue of a new writ for the election of a member for the constituency the election for which has been certified to be void." Has no importance to be attached to the omission of the words "in the place of the member," etc.? Besides, the election for the constituency and not of the member is that which becomes avoided.

J. B. MACKENZIE.

Nov. 15th, 1904.

A CHANCE FOR EVERYBODY.—The Korean penal code lays down explicit directions as to the punishments to fit all the various crimes which the compilers could call to mind, and then, lest any guilty man escape, rounds out the matter in section 672 with a kind of residuary clause to the effect that "any one who has done anything he should not have done shall get forty lashes." This calls to mind Hamlet's remark: "Use every man after his desert and who should 'scape whipping?" Episcopalians who brazenly boast every Sunday that they "have done those things they ought not to have done" would better keep away from Korea.

TO HORSE FOR LIFE, REMAINDER TO MOTHER.—In a will recently probated in New York City the testator bequeathed the sum of $600 in trust to his executor to be used for the care and support of his horse Trilby. In the event of the prior death of Trilby the unexpended balance goes to the testator's mother.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] FENSOM *v.* C.P.R. Co. [Nov. 14.

Railways—Accident—Cattle running at large—Crown lands—Powers of municipalities—Railway Act.

Judgment of the Divisional Court herein, ante p. 160, 7 O. L. R. 254, confirmed.

Hellmuth, K.C., for appellants. *Clary*, for respondent.

Full Court.] MARKLE *v.* DONALDSON. [Nov. 14.

Master and servant—Negligence—Injury to servant—Workmen's Compensation Act—Defect in works, etc.—Person intrusted—Fellow servant.

Judgment of Divisional Court herein, ante p. 350, 7 O.L.R. 376, confirmed.

Lynch-Staunton, K.C., for appellant. *Riddell*, K.C., for respondents.

Court of Appeal.] MCFADDEN *v.* BRANDON. [Nov. 14.

Limitation of actions—Mortgage—Interest—Default.

Under a mortgage containing the statutory provision that in default of the payment of the interest the principal shall become payable, default in payment of interest has the effect of making the principal payable as if the time for payment had fully come and a right of action therefor then arises and the Statute of Limitations then begins to run. Judgment of STREET, J., 6 O.L.R. 247, affirmed.

Judd, for appellant. *Purdom*, K.C., for respondent.

Full Court.] OSTERHOUT *v.* OSTERHOUT. [Nov. 14

Will—Construction—Bequest of personalty—"Reversion"—Gift over—Life interest—Absolute interest.

The testator by his will gave, devised, and bequeathed to his father "one-half of my ready money, securities for money . . . . and one-half of all other my real and personal estates whatsoever and wheresoever with reversion to my brother on the decease of my father;" and gave devised and bequeathed to his brother, his heirs and assigns forever, "the remaining one-half of all my ready money, securities for money . . . . and the one-half of all other my real and personal estate whatsoever and wheresoever." At the time of the testator's death there was a sum of money on deposit to his credit in a bank.

Held, confirming the decision of the court, ante p. 351, 7 O.L.R., 402, that the father was entitled only to the use of one-half of the money, and that, subject to the life interest of the father, the brother took the same absolutely.

Middleton and *Widdifield*, for appellant. *George Kerr*, and *J. Montgomery*, for respondent.

Court of Appeal.] [Nov. 14.

TORONTO GENERAL TRUSTS CORPORATION *v.* CENTRAL ONTARIO R.W.CO.

Interest—Arrears—Bond—Mortgage—Foreclosure—Railway—Limitation of action.

Bonds under seal issued by a railway company contained a covenant to pay half yearly instalments of interest evidenced by attached coupons, and payment of principal and interest was secured by a mortgage of the undertaking which also contained a covenant to pay:—

Held, in foreclosure proceedings upon this mortgage that the interest being a specialty debt and the mortgaged undertaking consisting in part of realty and in part of personalty not subject to division, the holders of coupons whether attached to the bonds or detached therefrom were entitled to rank for all instalments which had fallen due within twenty years, and not merely those which had fallen due within six years. Judgment of Boyd, C., 6 O.L.R. 534, affirmed.

Held, also, that even if the case were dealt with upon the footing of the mortgage being one of realty only there was the right to rank for there were no subsequent encumbrancers and there had been shortly before the action a valid acknowledgment by the railway company of liability for all the interest in question.

T. P. Galt, for appellants. *Aylesworth*, K.C., and *J. H. Moss*, for respondents.

HIGH COURT OF JUSTICE.

Idington, J.] TABB *v.* GRAND TRUNK R.W. CO. [August 18.

Execution—Stay—Judgment affirmed by Court of Appeal—Proposed appeal to the Supreme Court of Canada—Necessity for leave—Powers of Master in Chambers and Judge of High Court—Grounds for exercise.

After a verdict and judgment for plaintiff, affirmed by the Court of Appeal, the Master in Chambers, on the application of defendants, made an order staying proceedings until such time as leave to appeal to the Supreme Court of Canada could be moved for, unless the solicitor for the plaintiff would undertake to return, if now paid, the amount of the damages and costs awarded to the plaintiff, in the event of the judgment of the Court of Appeal being reversed.

Held, that the Master had no jurisdiction to make such an order—Rule 42, clause 17 (d).

If a Judge of the High Court in Chambers has the power to make such an order (and, *semble*, he has) this was not a proper case for the exercise of it. The judgment being for only $400 damages and costs there was no appeal to the Supreme Court without leave, and there was no doubtful question of law of such general importance as to call for extraordinary interference.

Quære, whether the stay of execution in such a case rests with the High Court or Court of Appeal.

Slaght, for plaintiff. *H. E. Rose*, for defendants

Meredith, C.J., Idington, J., Magee, J.] [Sept. 19.

LAWS *v.* TORONTO GENERAL TRUSTS CORPORATION.

Mortgage—Account—Payments by mortgagees—Release of claim—Improvements—Solicitor—Negotiation of sale—Commission.

Mortgagees of land, the mortgage being in default, made an agreement for sale to C., who paid nothing, but entered into possession and made improvements, and in order to do so borrowed money from N., and assigned to N. his agreement from the mortgagees; the agreement and the assignment were registered. The mortgagees found another purchaser, and paid N. a sum of money for a release of his claim.

Held, 1. Upon an accounting by the mortgagees, at the suit of the mortgagors, on the basis of the second sale, the mortgagees were entitled to credit for the money paid to N.

2. They were entitled to credit for a small sum paid to their solicitor for negotiating the second sale—a service which comes within the scope of the professional duties and employment of a solicitor.

Du Vernet, for plaintiffs. *Shepley*, K.C., for defendants.

Cartwright, Master.] CANTIN *v.* NEWS PUBLISHING CO. [Sept. 19.

Discovery—Examination of former officer or servant.

There is no power now under Con. Rule 439 (a), as substituted by Con. Rule 1250 for Con. Rule 439 (1), to make an order for the examination of a former officer or servant of a corporation for discovery.

W. N. Ferguson, for the motion. *Thos. Reid*, contra.

Magee, J.] [Sept. 20.

RE ESTATES LIMITED AND THE WINDING-UP ACT.

Winding up proceedings—Two petitions—Conduct of proceedings given to second petitioner.

When there were two petitioners for a winding-up order against the one company, although orders were made under both petitions, the conduct of the proceedings was given to the later petitioner, a creditor for

money paid, in preference to the earlier one who was shewn to be an employee of and in close touch with the company, and the belief was expressed that he would not take the same interest in the prosecution of the winding-up as the other.

S. B. Woods, for M. M. Anderson. *C. Elliott*, for A. McMillan. *S. King*, for the company.

Master in Chambers.] MOFFAT *v.* LEONARD. [Sept. 21.

Discovery—Examination of person for whose benefit action defended.

Rule 440 providing that a person for whose immediate benefit an action is prosecuted or defended shall be regarded as a party for the purpose of examination, is difficult of application where the plaintiff seeks to examine a person for whose benefit it is said that the action is defended.

Where the action was for infringement of a patent of invention for a certain heater, and the statement of defence denied the infringement and set up that the right to manufacture the heater was acquired by the defendants from C. & Co., and it did not appear that anything had been done by C. & Co. in reference to the action before and after it was brought:—

Held, that the members of the firm of C. & Co. were not persons for whose immediate benefit the action was defended; at the most, a successful defence might relieve them from a possible liability to the defendants.

Kilmer, for plaintiff. *C. A. Moss*, for defendants.

Meredith, J.] IN RE WEST ALGOMA VOTERS' LISTS. [Oct. 4.

Parliament—Preparation of voters' lists—Dominion Franchise Act, 1898, s. 9—Appointment of persons to prepare lists—Order in Council—Prohibition—Powers of High Court.

The High Court of Justice for Ontario has power to prohibit persons assuming to exercise judicial functions in the preparation of voters' lists for an election to the House of Commons for Canada, if these persons have no authority in law for the exercise of any judicial punctions in respect of such lists.

Re North Perth, Hesson v. *Lloyd*, 21 O.R. 538, distinguished.

The Dominion Franchise Act of 1898 changed completely the whole law in regard to the preparation of voters' lists, adopting the provincial lists, instead of having parliamentary lists prepared; but, to provide against the possibility of there being no sufficiently recent provincial lists in some of the electoral districts, s. 9 was passed. This section means that when provincial lists exist—"are prepared"—they shall be used, but when they do not exist the mode of preparing them provided in the section may be adopted. On the facts of this case, it was within the power of the Governor-General in Council to appoint all necessary officers for the preparation of the lists, thus making them officers of a federal court constituted by the section. Their officers are to follow, as far as possible, the

provisions of the laws of the province regulating the preparation and revision and bringing into force of the provincial lists

If the order in Council appointing the officers gives directions to them in conflict with the statute, the order, to that extent, has no effect. If the officers do not proceed in accordance with the statute, they are answerable to Parliament, not to the court upon an application for prohibition.

St. John, for applicant. *W. Barwick*, K.C., for the Minister of Justice for Canada. *J. H. Moss*, for the Secretary of State for Canada. *A. Mills*, for respondent.

MacMahon, J.] [Oct. 26.

IN RE THE CANADA WOOLLEN MILLS, LIMITED.

Winding-up—Purchase by inspector—Fiduciary capacity—Liquidator—Referee—Sale—Jurisdiction—R.S.C. c. 29, ss. 31, 33.

An inspector appointed in a liquidation under the Winding-up Act, R.S.C. c. 29, cannot be allowed to purchase property of the insolvent. Such a sale set aside, and an account of profits ordered.

It rests with the liquidator in such a winding-up to dispose of the estate with the sanction of the Court; but the Court cannot dispose of the estate without the sanction of the liquidator.

W. H. Blake, K.C., for W. T. Benson & Co. *Helmuth*, K.C., for W. D. Long. *G. H. D. Lee*, for certain creditors. *R. Cassels*, for liquidator.

Province of New Brunswick.

COUNTY COURT.

Carleton, Co. J.] [July 26.

IN RE LICENSES GRANTED TO R. B. SIROIS AND OTHERS.

Liquor Licenses—Number regulated by population as found by census returns as to wards—No such information given in census.

This was an application under s. 31 of the Liquor License Act, 1896, to set aside all the licenses (three retail and two wholesale), granted by the commissioners of licenses for the town of Grand Falls, to sell intoxicating liquor within the said town for the year 1904-5.

The only question of law that arose was as to whether the number of licenses granted was in excess of the number authorized by the statute.

Sec. 19 of the act (amended 60 Vict., c. 6, s. 6, sub-s. 1), provides for the number of licenses which may be granted in each municipality in proportion to the number of inhabitants. Grand Falls has three wards, known as wards 1, 2 and 3. All the retail licenses were granted for premises situate within the limits of ward 2. For the regulation of licenses, as per number of inhabitants, under the section above quoted, the statute

gives the following directions: "The number of population which is to determine the number of licenses at any time under this act shall be according to the then last preceding census taken under the authority of the Dominion of Canada.

CARLETON, Co. J.: The last census returns of the Dominion do not give the population of Grand Falls or of any of the cities or towns of New Brunswick, except the city of St. John, by wards, and we are faced with the difficulty of being called upon to decide this question without the means, and the only means by which the law contemplates that it shall be decided. The census returns of Grand Falls are given in bulk, and there is no legal means by which we can determine how many or how few of the population are to be assigned to the respective wards. I am absolutely without knowledge, personal and otherwise, to assist me in saying how many persons live in ward 2. The whole town, for ought I know, may reside within the boundary lines of this ward. In a word we are led to the absurdity of having to ascertain the population of a ward by a given means which means does not exist. The presumption of law is that the commissioners acted legally and within the scope of their authority and the onus of showing the contrary is on the applicants. This they have failed to do, because they could not do it for want of a proper census. Either the commissioners have no power to grant any licenses or they have power to grant them without limitation as to number—and this applies to every city, except St. John, and every incorporated town in the province where the Liquor License Act is in force and operation. To decide either way would be to defeat the objects of the act; and to decide that the commissioners have no power to issue any license would work a great injustice to the present licensees at Grand Falls, imposing upon them personal disabilities as to future licenses together with destruction of business and probable loss of the license fees they have in good faith paid. I am therefore of the opinion that the matter is one for the attention of the legislature and not for the courts.

Application dismissed without costs.

Gallagher, for applicants. *Carvell*, contra.

Province of Manitoba.

KING'S BENCH.

Full Court.] MAKARSKY *v.* C. P. R. Co. [July 12.

Workmen's compensation for Injuries Act—Lord Campbell's Act—Claim of father for damages for death of boy by accident resulting from negligence—Who may sue—Loss of future pecuniary benefit from the life—Pleading—King's Bench Act, rules 306, 453 Demurrer.

The plaintiff's claim was for damages for the death of his son, an infant, alleged to have been occasioned by the negligence of defendants, upon one of whose freight trains he was working as a brakeman at the

time of the accident which resulted in his death. The alleged negligence consisted of the absence of air brakes and bell signal cord from the equipment of the train. The statement of claim was demurred to on various grounds.

Held, 1. No person can sue under the Workmen's Compensation for Injuries Act, R. S. M. 1902, c. 178, for damages for the death of a deceased relative, who could not sue under c. 31, R. S. M. 1902, which takes the place of Lord Campbell's Act, and the statement of claim must show, either that the plaintiff is the executor or the administrator of the deceased, or that there is no executor or administrator, or, if there be one, that no action has been commenced within six months after the death of the deceased by or in the name of the executor or administrator; and it was not sufficient for plaintiff to state simply that he was the father and sole heir at law of the deceased. *Lampman* v. *Gainsborough*, 17 O. R. 191, and *Mummery et ux.* v. *G. T. R.* 1 O. L. R. 622, followed.

2. It is necessary that the statement of claim should shew that the plaintiff had a reasonable prospect of future pecuniary benefit from the continuance of the life of the deceased: *Davidson* v. *Stuart*, 14 M. R. 74. *Chapman* v. *Rothwell*, 27 L. J. N. S. Q. B. 315, not followed. When the failure to prove a fact will cause the action to fail, that fact is a material one upon which the plaintiff relies, and, under rule 306 of the King's Bench Act, R. S. M. 1902, c. 40, should be set out in the statement of claim.

3. Under the circumstances appearing in this case it was not necessary that the action should be shewn to be brought for the benefit of all persons entitled to claim damages.

4. Although the Railway Act in force at the time of the accident required only passenger trains to be equipped with bell signal cord and air brakes, it is still a question of evidence whether the absence of those appliances on freight trains is negligence for the purposes of such an action, that is whether they may be reasonably required or could be reasonably furnished for the protection of the train hands, and the statement of claim was not demurrable because it relied on that absence as constituting negligence.

5. The statement of claim should allege that the defendants were aware of the defects relied on as constituting negligence or should have known of them: *Griffiths* v. *London and St. Katharines Dock Co.*, 12 Q. B. D. 493, 13 Q. B. D. 259. PERDUE, J., dissented from the decision on this point.

6. It is not necessary to allege that the deceased was ignorant of the existence of the alleged defects. Though such an allegation was held necessary in the *Griffiths* case, that case has been reversed on this point in the subsequent cases of *Smith* v. *Baker* (1899) 2 Q. B. 338, and *Williams* v. *Birmingham* (1899) 2 Q. B. 338. Mere knowledge on the workman's part is not in itself a bar to the action. It would have to

appear not only that he knew of the special danger, but that he took upon himself and agreed to assume the risk of injury resulting therefrom.

7. The requirements of s. 9 of the Workmen's Compensation for Injuries Act are directory rather than imperative, and the omission to give the name and description of the person in defendant's service by whose negligence the accident occurred is a matter to be dealt with by an application for particulars and not by demurrer.

8. The refusal or neglect of defendants to provide medical or surgical attendance for the injured employee gives no cause of action: *Wennall* v. *Adney*, 3 B. & P. 247. Therefore the allegations in the statement of claim that the deceased came to his death as a result of injuries received and of the alleged neglect to provide medical or surgical care are demurrable. They make it appear that the injuries were not by themselves the cause of the death, but there is no right of action unless death resulted from the injuries alone. See s. 2 of c. 31, R. S. M. 1902.

9. Plaintiff in such an action has no right to claim for funeral expenses of the deceased.

10. That the time allowed by the statute for the commencement of the action had expired when the demurrer was argued was no objection to the allowance of amendments to the statement of claim, which did not seek to introduce any new or different causes of action. *Weldon* v. *Neal*, 19 Q. B. D. 394, distinguished.

11. Under rule 453 of the King's Bench Act it is only in respect of some question of law which is fundamental or goes to the root of the cause of action or defence set up that there should be a separate argument before the trial. As to all other matters in the pleadings which may be objectionable, an application in Chambers under rule 326 to strike them out is the proper remedy.

Demurrer allowed with leave to the plaintiff to amend as he may be advised, but not to set up any claim for compensation on behalf of any other person, and on condition that he strike out the allegation that he is the heir-at-law of the deceased and the claim for funeral expenses and the allegation of neglect and refusal to provide medical and surgical attendance. Costs to be in the cause to defendants in any event.

Potts and *Hartley*, for plaintiff. *Aikins*, K.C., for defendants.

Perdue, J.] GARDINER v. BICKLEY. [Oct. 24.

Demurrer—Argument of, before trial—King's Bench Act, Rule 453.

This action was founded upon an agreement under which the defendants were to transfer to the plaintiff certain shares in companies and other property in consideration of which the plaintiff agreed to make certain payments in money, deliver certain stock and transfer to the defendants certain lands. The plaintiff alleged that he had conveyed the land, but

charged that he had been induced to enter into the agreement by the misrepresentations of the defendants, and that the shares transferred to him were of no value. He claimed $210,000 damages, and also a lien on the land transferred for $150,000. In the statement of defence a question of law was raised as to the plaintiff's right to a lien on the land as claimed. Defendants moved, under Rule 453 of the King's Bench Act, R.S.M. 1902, c. 40, for an order to have the demurrer disposed of or argument before the trial of the case.

Held, that such an order should only be made when the points of law involved are such as affect the whole case, and the disposition of which would either determine the case or declare some important principle which would influence the consideration of the matters remaining: *Makarsky* v. *C.P.R.*, in this Court, not yet reported; *London, Chatham & Dover Ry.* v. *South Eastern Ry.*, 53 L.T. 109; *Parr* v. *London Assurance Co.*, 8 T.L.R. 88; *Scott* v. *Mercantile Accident Ins. Co.*, ib. 431.

If the question of the plaintiff's right to a lien in this case were argued and decided the main issues raised in the action would still remain undisposed of. Under the rule the question is largely one of convenience, and it would likely prove very inconvenient for the Court to hear and determine piecemeal the various matters involved in a suit so complicated.

Motion refused. Costs to be in the cause to the plaintiff.

Hudson, for plaintiffs. *Minty*, for defendants.

Dubuc, C.J.] MAHER *v.* PENKALSKI. [Oct. 24.

Sale of land—Statute of Frauds—Name of purchaser not stated in memorandum—Specific performance.

Action for specific performance of the following agreement:

"$25.00 Winnipeg, 2nd March, 1904.

Recei ed from Baker & Richardson, the sum of twenty-five dollars deposit on the purchase of lots, 38 and 39 . . . . Price $3,800, payable $1,700 cash (less deposit of $25.00) the balance upon second mortgage for $2,100, payable in monthly payments of $100.00 each, with interest of 6% per annum. Taxes and insurance to be adjusted.

"Oscar M. White,

Agent for the owner, Bazil Penthalski."

Held, 1. Although Baker & Richardson were the agents of the purchaser, the agreement did not comply with the Statute of Frauds, as it did not contain the name of the purchaser or any statement as to the person to whom the property was to be sold: *Potter* v. *Duffield*, L. R. 18 Eq. 4; *White* v. *Tomalin*, 19 O. R. 513, and *Williams* v. *Jordan*, 6 Ch. D. 517 followed.

2. In any event the plaintiff had been guilty of such laches, bad faith and default in payment as to disentitle himself to the exercise of the judicial dissention to grant specific performance of the agreement.

Baker, for plaintiff. *Mathers*, for defendant.

Province of British Columbia

SUPREME COURT.

Full Court.] BAILEY *v.* CATES. [April 26.

Shipping—Vessel moored to another—Negligence—Extraordinary storm—Act of God.

Appeal to the Full Court from judgment of IRVING, J., in favour of the plaintiff.

While plaintiff's tugboat the "Vigilant" was tied to a wharf in Vancouver Harbour, defendant brought his tugboat the "Lois" alongside and tied her to the "Vigilant." The next night (Christmas) a violent storm arose—a storm of which there were no indications, and which was the severest ever experienced in the harbour—and the "Lois," whose crew were absent, bumped against the "Vigilant" and damaged her.

Held, in an action for damages for negligence, reversing IRVING, J., that it had not been shewn that the defendant's act of so mooring his tug was negligent, and that on the evidence the accident was due to the act of God.

W. J. Bowser, K.C., for appellant. *A. D. Taylor*, for respondent.

Martin, J.] MCHUGH *v.* DOOLEY. [July 24.

Will—Testamentary capacity—Undue influence—Delusions—Certificate of Physician—Evidence—Costs.

Action to admit to probate in solemn form a will and codicil.

Held 1 The best evidence of testamentary capacity is that which arises from rational acts, and where the testatrix herself, without assistance, drew up and executed a rational will, medical evidence that she was mentally incapable of so doing will be rejected.

2 Where one who benefits by a will procures it to be prepared without the intervention of any worthy witness or anyone capable of giving independent evidence as to the tastator's intentions and instructions, it will be regarded with suspicion and its invalidity presumed, and the onus is on the party propounding it to clearly establish it.

3 Where a physician improperly gives a certificate as to testamentary incapacity of his patient it should not on that ground alone be rejected as evidence, if otherwise admissible, but the circumstances will affect the weight that should be attached thereto.

Held, on the facts, that the will of the testatrix was valid, but that the codicil was obtained by undue influence, and probate thereof was refused.

In the unusual circumstances the Court made no order as to costs.

A. P. Luxton and *R. H. Pooley*, for plaintiff. *A. E. McPhillips*, K.C., and *G. H. Barnard*, for defendant.

Full Court.] LARSEN *v.* CORYELL. [Nov. 11.

Small Debts Court—Appeal from—Finality of—R.S.B.C. 1897, c. 55, s. 29; B.C. Stat. 1899, c. 19, s. 2, and County Courts Act, ss. 164, 167.

Appeal to the Full Court from a judgment in the County Court on an appeal from the Small Debts Court.

Held, that the appeal, given by s. 29 of the Small Debts Court Act to either a Judge of the Supreme Court or to the County Court, is final.

Clement, for appellant. *Kappele*, for respondent.

Courts and Practice.

CHANGES AT OSGOODE HALL, TORONTO.

Mr. Holmested, K.C., who has held the office of Accountant of the Supreme Court of Judicature for Ontario ever since the establishment of the office in 1881, has recently resigned that office, and on the 10th November last Mr. Benjamin W. Murray, was appointed in his stead, Mr. Lawrence Boyd, Chief Clerk, taking Mr. Murray's place, with the title of Assistant Accountant; Mr. Holmested suffering no loss of income by this arrangement. For nine years prior to Mr. Holmested's appointment as Accountant he had countersigned all cheques issued from the office of the Accountant of the Court of Chancery, which office was merged in that of the Accountant of the Supreme Court of Judicature, on the passing the Judicature Act in 1881, so that for a period of 32 years he has been concerned in the superintendence of payments out of court, which in the aggregate have amounted to about $43,000,000.

The increase in business during the past 23 years has been phenomenal. The amounts paid out during the years 1878-1896 fluctuated from a little over $1,000,000, to $4,000,000 in 1891, the high water mark. Prior to 1890 suits for the administration of deceased person's estates were common and large amounts found their way into court in such suits. In 1896 the Devolution of Estates Act was passed and one of the first results was that the payments out dropped to $875,461, the lowest figure in 20 years. Since then, though administration suits are now rarely brought, the payments out have from various causes increased. In 1899 they reached nearly $2,000,000, but in 1903 dropped to about $1,200,000. The amount now in court is in the neighborhood of $3,000,000, so that it is easily seen what large interests are involved.

Mr. Murray, the new Accountant, has been in the office almost from the time when it merged from its infancy; and though not in office when the breastcoat pocket of the late Mr. Grant was the receptacle of the accounts of the Court of Chancery, he entered the service soon after that embryo condition had passed away, and has given faithful service to the public. More than fifty bulky ledgers now barely suffice to contain the accounts.

Mr. Lee, the efficient Clerk of the Weekly Court, has, we are glad to see, been promoted to the position of a Junior Registrar. He will continue to discharge the duties of Clerk of the Weekly Court, and will in addition perform some of the duties formerly discharged by Mr. Holmested.

ANALYTICAL INDEX

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