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## *JUDGMENTS AGAINST MARRIED WOMEN.*

The married woman, when she comes into litigation, is a fruitful source of difficulty. She has lately been asking the Divisional Court (Mulock, C.J.Ex.D. and Teetzel and Middleton, JJ.) to adjudicate upon a question of liability in the case of *Hamilton* v. *Perry*. In this case she was party to a joint promissory note with her husband. The plaintiff as holder sued her, and her husband in a Division Court. There was nothing in the note, nor in the proceedings in the Division Court, to shew that she was a married woman. She and her husband consented to judgment which was accordingly signed against them both personally. Execution having been issued on this judgment the married woman applied to Clute, J., in Chambers for a prohibition to the Division Court which was refused; but, on appeal to the Divisional Court, the appeal was allowed and prohibition granted against enforcing the judgment as a personal judgment, but without prejudice to the plaintiff applying to the court to amend it by making it merely a proprietary judgment. This serves as another illustration of the absurdities into which the courts are driven by the ridiculous rule that a judgment against a married women is to be in the special form settled in *Scott* v. *Morley*, and other cases. On the face of the proceedings there was nothing to inform the court that the defendant was a married woman, for ought that appeared to the contrary, she might have been a feme sole; the judgment on its face was perfectly warranted by all the evidence before the court at the time it was pronounced and yet is now pronounced invalid because of the existence of a fact within the defendant's knowledge, but not disclosed to the court. The protection of married women from personal liability on their contracts is a protection which they

are entitled to claim, but if they don't choose to claim it and submit to judgment in the personal form, they have merely waived the benefit of a law which they might have set up for their protection.

According to the maxim quilibet potest renunciare juri pro se introducto a defendant may, as a rule, decline to avail himself of a defence which would be valid at law, and a sufficient answer to the plaintiff's demand, and waive his right to rely on that defence, but married women seem to be an exception to this rule. They are to have the rights of femes soles, but are nevertheless in the judicial arena to be treated as if they were infants incapable of consenting.

This case, as we have said, demonstrates the absurdity of the form of judgment judicially prescribed by the courts against married women. The statute does not require any such form, it has been spun and, as we humbly think, ill-advisedly spun, out of the judicial brain. The statute does not appear to contemplate any such special form of judgment against married women as the courts have framed. As far as the statute is concerned, the judgment should be no different in form from any other judgment. It may well be, however, when the judgment comes to be enforced by execution, questions may be raised as to what property of the married woman debtor is exigible.

Holding as the Divisional Court did, that the judge had no jurisdiction to pronounce a personal judgment, although no evidence before him warranted his pronouncing any other kind of judgment, might have the effect of rendering the officer of the court issuing an execution thereon, and the sheriff or bailiff executing it, liable in trespass, notwithstanding that the judgment on its face appeared to be perfectly regular.

We cannot help thinking that the court would have come to a wiser conclusion, if it had held the judgment in question valid, without prejudice to the married woman defendant applying to amend it, if so advised.

## *HAS THE RULE IN SHELLEY'S CASE BEEN REVOKED IN ONTARIO?*

A curious little point was recently before a Divisional Court (The Chancellor and Latchford and Middleton, JJ.) arising on the construction of a will, whereby the testator devised and bequeathed the residue of his real and personal estate to his three children, H. J. and S., share and share alike "subject as to H.'s share that he should hold the same as trustee of his heirs, and use the income as he may see fit." It was argued that the effect of this provision was to give H. an estate in fee under the rule in Shelley's case, but the court came to the conclusion that the rule did not apply and that H. took a life estate and his heirs a remainder in fee, because, as the court held, the effect of the devise was to vest in H. a legal estate for life, and an equitable estate in remainder for those who should be his heirs, and that these two estates being, as it was said, of different qualities the rule did not apply: because, according to Lord Herschell in *Van Grutten* v. *Foxwell* (1897), A.C. at p. 662, "It is well settled that if the estate taken by the person to whom the lands are devised for a particular estate of freehold, and the estate limited to the heirs of that person are not of the same quality—that is to say, if the one be legal and the other equitable, the rule in Shelley's case has no application." The court also thought that if the words "trustee of his heirs" were referable to persons to be ascertained in a particular way pointed out by the testator, or were used so as to embrace all the descendants of the ancestor collectively, successively and indefinitely, the rule did not apply: and reading the word "heirs" as meaning the persons who should become entitled under our statute law as heirs, the Divisional Court came to the conclusion that *Greaves* v. *Simpson*, 10 Jur. N.S. 609 and *Evans* v. *Evans* (1892), 1 Ch. 173, were authorities for holding that the rule in Shelley's case did not apply to the devise in question. The learned Chancellor, who delivered the judgment of the court described the case as inter apices juris, and it is certainly an illustration how the unlearned testator may contrive ingenious puzzles for judges.

With all due deference, we venture to offer some reasons why it appears to us that the court might have reached a different conclusion from what it did. We remark in the first place that the assumption of the Divisional Court that the estates of the tenant for life and the heirs were not of the same quality seems, having due regard to the Statute of Uses, to have been ill-founded. Notwithstanding the words of trust, the estate in remainder was a legal estate in the heirs. If the testator had possessed more technical knowledge he might have directed that H. should hold to the use of B. in trust for H.'s heirs and then the principle to which Lord Herschell refers would have prevented the rule in Shelley's case from taking effect because the life estate would then have been legal and the remainder in the heirs would have been equitable: but, in the case in hand if, as we think, both the estate of the tenant for life and the remainder to his heirs were legal estates, then there seems to be no good reason why they should not have coalesced under the rule in Shelley's case into an estate in fee; Lord Herschell himself says, immediately after the passage above quoted, "If they (i.e. the estates of the tenant for life and that of the heirs) are both legal or both equitable, the rule applies."

And with great respect to the Divisional Court, we submit that if the somewhat subtle construction which the court gave to the word "heirs" in this case in order to oust the rule is tenable, it amounts to a practical revocation of the rule altogether in Ontario. The cases which are referred to in support of that construction, however, seem plainly distinguishable. In *Greaves* v. *Simpson,* 10 Jur. N.S. 609, the limitation was to John Greaves for life and after his decease "then upon trust for the heir or heiresses at law of the said John Greaves *or his or her heirs or assigns forever,*" the words which we have italicised being held by Kindersley, V.-C., sufficient to indicate that the heirs were not to take by descent. He says: "If indeed the court was obliged to decide that the heir took by descent, then indeed the rule in Shelley's case would make it a fee simple to John Greaves, but *the superadded words prevent that.*" So in

*Evans* v. *Evans* (1892), 2 Ch. 173, the limitation was "to the use of A. for life," with "ultimate limitation" to the use of such person or persons as at the decease of A. shall be his heir or heirs at law, *and of the heirs and assigns of such persons;*" which, of course, is a similar limitation to that in *Greaves* v. *Simpson,* supra, and received the like construction, but in the case in hand there are no such "superadded words."

If the construction placed on the word "heirs" in *Re McAllister* is followed in Ontario, then it would appear as if in Ontario there can be no case in which the rule in Shelley's case can apply, because in any limitation in this province the word "heirs" is always open to the construction that it means not the common law heir, but the persons who are to be ascertained as heirs by reference to our statute law. On this point Lord Macnaghten in *Van Grutten* v. *Foxwell,* supra, makes this pregnant observation: "The question now in every case must be whether the expression requiring exposition be it 'heirs' or 'heirs of the body' or any other expression which may have the like meaning, is used as the designation of a particular individual or a particular class of objects, or whether, on the other hand, it includes the whole line of succession capable of inheriting." See *Van Grutten* v. *Foxwell,* supra. If the words are susceptible of the former construction the rule in Shelley's case does not apply, if on the other hand they are susceptible of the latter construction then it will apply. In the words used in the will in question *In re McAllister,* we fail to see any indication of any intention to designate any particular individual or class, on the contrary the words used seem plainly to indicate the whole line of succession capable of inheriting.

## *WHAT IS AN INTERLOCUTORY JUDGMENT?*

This question is one which is apt to arise where it is sought to appeal to the Supreme Court of Canada. That court has no jurisdiction to entertain appeals from Ontario in common law actions from any judgment that is not final. Many curious decisions have been arrived at, as to what are and what are not final

judgments within the meaning of the statute. It seems to be a question which should be dealt with in a liberal spirit, and with a careful avoidance of technicalities. The evident object of the statute is to give an appeal from any adjudication that finally disposes of the action, or, we should think, any substantial and not merely subsidiary question in the action. In the case of *Clarke* v. *Goodall*, noted ante, p. 305, the point came up and the conclusion reached does not appear to us to be satisfactory. In that case, at the trial of the action a reference was ordered to a referee to assess the damages and further directions were reserved. The Master assessed the damages and an appeal was had from him to a Judge, and from the Judge, to a Divisional Court, and from the Divisional Court to the Court of Appeal. On a motion in that case for a judgment on further directions, it is obvious the decision of the Court of Appeal could not be impugned and the High Court would be bound to give judgment for the damages as finally assessed by the Court of Appeal. As regards the assessments of damages, which is really the substantial question in the action, it is perfectly plain, therefore, that the judgment of the Court of Appeal is a final judgment, as far as the Courts of Ontario are concerned; and in reality disposes of the main and principal question in the action, and yet the Supreme Court has reached the conclusion that this is not a "final judgment" within the Supreme Court Act. In *Smith* v. *Davies*, 54 L.T. 478, a judgment of foreclosure was held to be a "final judgment," though no final order had been pronounced. In *Collins* v. *Paddington*, 5 Q.B.D. 368, an order made on a case stated by an arbitrator was held to be interlocutory; but in *Sherbrook* v. *Tufnell*, 9 Q.B.D. 621, such an order was held to be "final." The Supreme Court has decided that no appeal lies from an order refusing to set aside a judgment by default: *O'Donohue* v. *Bourne*, 27 S.C.R. 654; nor from an order perpetually staying proceedings: *Maritime Bank* v. *Stewart*, 20 S.C.R. 105; nor from a judgment on a specially indorsed writ: *Morris* v. *London and Canadian L. and A. Co.*, 19 S.C.R. 434. On the other hand an order refusing a motion to set aside a judgment

by default was held by a Divisional Court of Ontario to be final and therefore appealable: *Voight* v. *Orth*, 5 O.L.R. 443.

In the latter case the Court regarded the substantial effect of the order, and, as we think, reached the proper conclusion, that though in one sense the order might be considered to be interlocutory, it was really and substantially a final order as regards the merits of the action. It has been said that it would be a hopeless task to attempt to reconcile the various decisions as to what are "final" and what are "interlocutory" judgments or orders. The only sure rule seems to be one of common sense; does, or does not, the order or judgment in question, finally dispose of the action or some substantial question therein? If it does then it should be regarded as a "final" order, and as such appealable, and if it does not then it should be held to be interlocutory. It is perfectly clear that no appeal could be successfully brought in the *Goodall* case from a judgment on further directions, because the judgment of the Court would be based on the report of the Referee as varied by the Court of Appeal, and until the order of the latter Court is reversed there can be no question that a judgment based thereon would be unimpeachable.

If the Supreme Court's decision is correct it is obvious that it may have a very wide reaching effect, and may be the means of shutting out litigants from any appeal whatsoever to the Supreme Court, in most important cases involving enormous amounts, and it would seem that some amendment of the Supreme Court Act is needed.

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## *JUDICIAL APPOINTMENTS.*

In discussing the appointment of justices of the peace, the English *Law Times* makes the following remarks: "Lord Loreburn is to be congratulated upon having sternly resisted all political pressure to equalize the politics of the magisterial Bench, and we, in common with the rest of the profession, are fully satisfied that in making these inferior judicial appoint-

ments, as in the case of his appointments to the High Court and County Court Benches, he has striven to obtain the best possible men for the posts. This ideal has not always been adhered to in the past, but it is merely stating an obvious fact, that if the high standard of our judiciary, whether in the High Court, County Court, or petty sessions, is to be maintained, the appointments must be made entirely free from any political, or denominational considerations, and that the sole qualification for judicial office must be the fitness of the candidate himself. If high character and competency are considered as the only reasons for preferment, the composition of our judiciary will be beyond criticism."

If all this be a correct view of the matter of judicial appointments in England, as we think it is, it is certain that the same principles are equally applicable in Canada and each of the provinces; and it is to be hoped that the present and all future ministers charged with the responsible duty of advising as to judicial appointments will act upon then.

In the past, men have been appointed to high judicial office in Ontario for no better reason than that they happened to be of a particular stripe of politics, or of some particular religion. It is, of course, desirable that a judge should be a religious man, but in the administration of the law, neither politics nor religion of a particular stripe are necessary qualifications for the Bench, and men who are appointed for political or religious considerations may be apt to think that they are on the Bench in order to give effect to their political or religious convictions, rather than to administer justice free from all bias, whether political or religious. We had recently a so-called religious paper finding fault with a deceased judge, eminent both for his integrity and impartiality, and who did justice, loved mercy, and walked humbly before his God, because, forsooth, he had not been more subservient to the church through whose influence it was said he had been appointed to the Bench.

## *IMPLIED WARRANTY OF AUTHORITY.*

The more one considers the judgment of the Court of Appeal in *Yonge* v. *Toynbee* (1910), 1 K.B. 215, and *Simmons* v. *Liberal Opinion, Limited, In re Dunn*, 46 L.J. 135; the more one realizes the important and far-reaching effects of the principle laid down in *Collen* v. *Wright*, 27 L.J. Q.B. 215, which may be shortly stated as follows:—Where an agent in good faith assumes an authority which he does not possess, and induces another to deal with him in the belief that he has the authority which he assumes, he makes himself personally liable for the damages sustained by such other as the result of his so dealing. In the leading case an action was brought against the executors of A., who had signed an agreement, describing himself as the agent of B., to grant to the plaintiff a lease of a farm belonging to B. Both the plaintiff and A. believed at the time that A. had authority from B. to make the agreement, out A. had not, in fact, that authority. B. having refused to grant the lease, the plaintiff sued him for specific performance, but the suit failed because A. had no authority from B. Upon these facts it was held that the plaintiff was entitled to recover from A.'s executors as damages, the costs of the suit in equity, which was held to have been properly brought, as being damages naturally resulting from A.'s implied misrepresentation. Mr. Justice Willes in giving judgment said: "I am of opinion that a person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of the authority being untrue. The obligation arising in such a case is well expressed by saying that a person professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact, exist."

If, of course, the agent knew at the time that he had no authority, he would render himself liable in an action of deceit to the person who suffered damage in consequence of acting on such misrepresentation. (*Polhill* v. *Walter,* 1 L.J.K.B. 92.)

The principle laid down in *Collen* v. *Wright* has been repeatedly followed in cases too numerous to mention, and seems reasonable enough, but of recent years it has been extended in such an alarming manner that one feels compelled to ask "when is it going to stop?" The liability was, by the decision in the leading case, applicable to cases in which a contract was brought about by the innocent assumption of a non-existent authority, but more recent cases have extended the liability to every transaction, contracted or otherwise, brought about by such an assumption. Thus, in *Fairbank* v. *Humphreys,* 18 Q.B.D. 54, by an agreement made between a company and a contractor engaged under a contract in carrying out works for the company, it was agreed, that in consideration that the contractor would proceed with the works, the company would issue to him, in discharge of a debt then due to him under the contract, debenture stock of the company. Certificates of debenture stock were thereupon signed by two of the directors and issued to the contractor. The company had, at the time, exhausted its power of issuing debenture stock, but the directors were ignorant of the fact. Held, in an action by the contractor against the directors for breach of an implied warranty that they had power to issue valid debenture stock, that the directors were liable, and that the damages were the nominal value of the debenture stock purported to be issued. "The rule to be deduced," said Lord Esher, M.R., "is that when a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is personally liable for the damage that has occurred."

Again, in *Oliver* v. *Bank of England* (1902), 1 Ch. 610, affirmed by the House of Lords sub nom. *Starkey* v. *Bank of England* (1903), A.C. 114, a stockbroker applied to the Bank of England for a power of attorney for the sale of consols, believing himself to be instructed by the stockholder, and bonâ fide induced the bank to transfer the consols to a purchaser upon a power of attorney to which the stockholder's signature was forged. *Held*, that the broker must be taken to have given an implied warranty that he had authority, and that he was therefore liable to indemnify the bank against the claim of the stockholder for restitution. It was argued in this case that the rule in *Collen* v. *Wright* did not extend to cases where the agent did not know he had no authority and had not the means of finding out, but this was rejected, and it was also laid down that the rule is in no way affected by *Derry* v. *Peek*, 14 App. Cas. 337, and applies not only to contracts but also to any business transaction into which a third party is induced to enter by a representation that the person with whom he is doing business has the authority of some other person.

In *Sheffield Corporation* v. *Barclay* (1905), A.C. 392, a banker in good faith sent to a corporation a transfer of corporation stock which subsequently proved to be a forgery. It was held by the House of Lords that both parties having acted bonâ fide and without negligence, the banker was bound to indemnify the corporation against their liability to the person whose name had been forged, upon the ground that there was an implied contract that the transfer was genuine. This was considered by Lord Davey to be the result of the decision in *Oliver* v. *Bank of England* (1902), 1 Ch. 610.

Then we get the case of *Yonge* v. *Toynbee*, decided last year, and reported (1910), 1 K.B. 215, which we thought would be regarded as the high-water mark in the extension of the doctrine. Before the commencement of the action in question, the defendant had instructed a firm of solicitors to act for him, and had subsequently become of unsound mind. After the issue of the writ the solicitors, not knowing that the defendant had be-

come insane, and acting on the original instructions, entered an appearance for the defendant, and pleadings were delivered, and various interlocutory proceedings took place. After notice of trial had been given, the solicitors for the first time discovered that the defendant had become of unsound mind, and informed the plaintiff. The latter took out a summons for an order that the appearance and all subsequent proceedings should be struck out and that the solicitors should pay the plaintiff's costs. The Court of Appeal held that the plaintiffs were entitled to such costs on the ground that a person who professes to act as an agent, impliedly contracts that he has authority and is liable for a breach of that implied contract, even though the facts are that he originally had authority but that his authority has come to an end (the lunacy, of course, determined the authority) by reason of facts of which he has no knowledge or means of knowledge.—This is truly a startling decision, and one which affects solicitors not a little. It will be necessary for them in future to get express instructions periodically, apparently, throughout the course of an action, to make sure that their authority has not been in any way determined, otherwise they may find themselves landed in costs. Nay, further, may we not say that, strictly speaking, to be absolutely safe the solicitor should, when receiving instructions, stipulate for a medical examination of his client in order to be quite certain of the latter's sanity!

The old case of *Smout* v. *Ilbery*, 12 L.J. Ex. 357, which was followed as recently as 1900 in *Salton* v. *New Beeston Cycle Co.*, (1900), 1 Ch. 43, has long been considered as an authority for the proposition that when a principal gives an agent a continuing authority to make contracts for him, and the agent continues to act after the revocation of the authority but without knowledge of its revocation, the agent incurs no liability towards any person with whom he has made any such contract. This cannot now be considered good law. In fact Buckley, L.J., in his judgment sums up the law as follows:—"The liability of the person who professes to act as agent arises (a) if he has been

fraudulent, (b) if he has without fraud untruly represented that he had authority when he had not, and (c) also when he innocently misrepresents that he has authority when the fact is either (1) that he never had authority, or (2) that his original authority has determined by reason of facts of which he has not knowledge or means of knowledge."

Lastly, in the recent case of *Simmons* v. *Liberal Opinion, Ltd.*, damages for libel to the tune of 5,000l. were awarded to the plaintiff. At the trial it appeared that the defendants were not registered either under the Industrial and Provident Societies Act, 1893, or under the Companies Act, and in fact had no legal entity. An application was made for an order that the plaintiff's costs should be paid by the solicitor for the defence on the ground that he, by entering appearance and conducting the defence, impliedly warranted that he had a client, whereas, as a matter of fact, he had no client recognized by the law. The solicitor, giving evidence, stated that he had been properly instructed by responsible persons interested in "Liberal Opinion," and that he assumed that he was acting for a duly registered company, and did not become aware that such was not the case until the trial. Mr. Justice Darling declined to make the order, but the matter has since been brought before the Court of Appeal, and they have reversed the decision in the court below, relying on the above-mentioned case of *Yonge* v. *Toynbee*. The contention that the solicitor had some persons as clients for whom he was authorized to act was brushed aside on the ground that, if such was the case, appearance should have been entered in the action in their own names, instead of in the name under which they carried on business, as required by Ord. XLVIIIa. r. 5.

Thus a new terror is added to the already onerous liabilities and duties of solicitors. Our readers will forgive us for writing at this length, but we feel that the principle involved is one of extreme importance to the legal profession, and the result of these far-reaching decisions must be fully realised. We cer-

tainly think that the implied warranty of authority theory has been carried too far in the two last decisions of the Court of Appeal; let us hope that it will not be extended any further.—*Law Notes.*

## *QUAINT LAW.*

One of the most interesting of law books is the Scotch classic "Regiam Majestatem." It is well described in a sub-title, as "Auld Lawes and Constitutions of Scotland. Faithfullie collected furth of the Register, and other auld authentick Bukes, fra the Dayes of King Malcolme the Second, untill the Time of King James the First, of gude Memorie; and trewlie corrected in Sundry Faults and Errours, committed be ignorant Writers, And translated out of Latine in Scottish Language, to the Use and Knawledge of all the Subjects, within this Realme; with one large Table, Be Sir John Skene of Curriehill. Quereto are ajoined, Twa Treatises." Editions in 1609 and in 1774, quarto.

The preface, beginning, "It is certaine and manifest to all wise men, that there is na thing mair necessar, or profitable to all kindomes, common-wealthes, cities, and to all assemblies of people leivand together in ane societie; then godlie and gude lawes, known to the people, swa that they can preteid na ignorance thereof;" goes on to say, that the "subtill cautellis, . . . quha were called kirkmen" had "caused all the lawes to be conceaved, formed and published in the Latine tongue . . . to continew the people in ignorance, quhilk is ane great pillar of their kingdom;" but that James the Saxt had commanded "the auld lawes to be sighted, corrected, and collected in ane buke."

Skene quotes certain enacting clauses to prove the laws "authentick," and concludes "Quhat I have done, I remit to thy judgment and censure. I have travelled meikill, ane long time . . . I am the first that ever travelled in this water, and therefore am subject to the reprehension of many quha sall follow after me, quhom I request maist friendly to take in gude parte all my doings."

The Regiam Majestatem is one of the books about which controversies have raged. Regarded as genuine by many, it is denounced by others as spurious. It has been held that Glanville was copied from the Regiam Majestatem. It has also been held that the Regiam was copied from Glanville, in a cunning attempt to Anglicise the Scottish law. Whichever way belief tends, the inherent interest of the volume is sure.

A sample of the law in Regiam Majestatem is this Chapter *Of Pactions.* "Paction is the consent of twa persons or moe anent the giving and receiving of ane thing. (2) Ane paction is nocht quhen ane consent is given anent ane thing quhilk is trew, or quhilk is false: for, gif twa or more persons consent to this false proposition, William is an oxe; or to this true proposition, William is ane man; sic consent is nocht ane paction, non ane way obligatour; for neither of the parties is oblissed to other be sic ane consent. (3) And quhere I said that paction is the consent of twa or moe persons, thereby paction is different fra pollicitation, quhilk is ane hecht or promise of ane person onely. (4) Paction is driven and hes the name fra *pax* and *actus* (that is, from ane action or deid of peace) for they quha makes pactions haveand divers opinions and contrarious motions of minds, after divers and many strifes and contentions, peaceablie convenes and agries in ane constant will and uniforme sentence. (5) Or, paction is driven fra percussion, or striking together of hands; for in auld times, in contracting of obligations, the use was to shaik hands, in signe and taken that faith and trueth sould be keiped by the makers of the paction."

"Item, There is twa kinds of pactions, some are profitable (lawful) and others are unprofitabill (unlawful).

"(2) Profitabill are they, quhilk are not unprofitabill."

After this somewhat obvious statement, subsequent paragraphs are mainly devoted to unprofitabill pactions, ending with "Ane paction quhilk is filthie, or is impossibill, is in no waies obligatour."

"We decerne and ordeine all pactions to be keiped, quhilks are nocht to the detriment or hurt of the saull."—*Legal Bibliography.*

## *REVIEW OF CURRENT ENGLISH CASES.*



WILL—CONSTRUCTION—BEQUEST OF ARREARS OF RENT—ACCRUING RENT—APPORTIONMENT—NET OR GROSS RENTS.

*In re Ford, Meyers and Molesworth* (1911) 1 Ch. 455. A tenant for life of settled estate by her will bequeathed to the person who on her death should become entitled to the possession of the estates "all arrears of rent in respect of the same estates which shall then be due me." The testatrix died on the 4th March, the rents were payable quarterly, but by the custom of the estate they were collected half-yearly on 29th September and 25th March. The questions Eady, J., was called on to decide were, what rents passed by the bequest and whether it carried the gross rents, or merely the net rents, after deductions for outgoings, and collection, and he held that the bequest carried not only all rents unpaid at the preceding 29th September but also the rents which fell due at Christmas, and a proportionate part of those which had accrued since Christmas and up to the death of the testatrix; and that the legatee was entitled to the gross rents without any deductions.

MORTGAGOR AND MORTGAGEE—TENDER BY MORTGAGOR—DUTY OF MORTGAGEE ON TENDER BY MORTGAGOR—RE-CONVEYANCE—REDEMPTION—COSTS OF ACTION.

*Rourke* v. *Robinson* (1911) 1 Ch. 480. This was an action by a mortgagor for redemption. He had given notice to the mortgagee of his intention to pay off the mortgage, and at the appointed time had tendered the full amount due and demanded the execution of a re-conveyance indorsed on the mortgage which had previously been settled between the parties, but the mortgagee's solicitor refused to get his client to execute the re-conveyance until after the money had been actually paid over, consequently when the money was tendered the re-conveyance was not ready to be delivered and the mortgagor then refused to pay the money, and brought the present action for redemption, and Warrington, J., held that the defendant was bound contemporaneously with the tender of the money to hand over the re-conveyance, and the title deeds in his possession, and that therefore he was liable for the costs of the action, and that he was not entitled to any interest or costs subsequent to the date of the tender.

HUSBAND AND WIFE—MORTGAGE OF WIFE'S PROPERTY BY HUSBAND AND WIFE—PAYMENT OF MORTGAGE MONEY TO HUSBAND AND WIFE—PRESUMPTION—SURETYSHIP—EXONERATION OF WIFE'S PROPERTY.

In *Hall* v. *Hall* (1911) 1 Ch. 487, the plaintiffs as the representatives of a deceased married woman, whose estate had been mortgaged by herself and her husband, claimed that it was so mortgaged as surety for her husband, and was entitled to be exonerated by his estate from the mortgage debt. The mortgage in question had been made in 1859 and 1880 and the receipts for the mortgage money were signed by both husband and wife, and Warrington, J., held that a payment to husband and wife is prima facie a payment to the husband, but that by way of rebuttal it may be shewn that the money was in fact paid to the wife in such a way as to become her separate property, or that it was applied by her husband for her benefit. In the absence of such proof he held that the plaintiffs were entitled to the relief claimed.

STATUTE OF LIMITATIONS (21 JAC. 1. C. 16)—(10 EDW. VII. C. 34, S. 49 ONT.)—ACTION BY CESTUI QUE TRUST TO RECOVER TRUST FUND FROM PERSON TO WHOM IT HAS BEEN ERRONEOUSLY PAID—PAYMENT BY TRUSTEE TO WRONG PERSON—MISTAKE OF FACT—MONEY DEMAND—LAPSE OF TIME.

*In re Robinson, McLaren* v. *Public Trustee* (1911) 1 Ch. 502. This was an action by a cestui que trust to recover from the defendant, as representative of a deceased person, certain moneys which had, by mistake of fact on the part of the plaintiffs' trustee, been paid to the deceased instead of to the plaintiff. The payments extended from 1886 to 1900; the defendant relied on the Statute of Limitations as a defence to the claim, and for the defendant it was argued that the action was a mere money demand for money had and received; and the plaintiff contended that by receipt of the money the deceased had became trustee thereof for the plaintiff and that lapse of time was no bar. The trustee was not a party to the action, and Warrington, J., who tried it, came to the conclusion that although if the trust estate had been before the court it might adjust the accounts so that if there were assets to which the deceased person was entitled which the court could deal with so as to recoup the plaintiff thereout, that might be done, yet in the present proceed-

ing it was a mere money demand which the court, by analogy to the Statute of Limitations, would hold to be barred by the lapse of six years. The action therefore failed.

VENDOR AND PURCHASER—UNDERGROUND WATER COURSE—LATENT DEFECT—COMPENSATION—SPECIFIC PERFORMANCE.

*Shepherd* v. *Croft* (1911) 1 Ch. 521 was an action by vendors for specific performance of a contract for the purchase of land. The property was offered for sale as a residential property, and as having advantages as a building site. Beneath the property a natural stream had been carried underground in a culvert, the existence of which was not brought to the attention of the purchaser. Parker, J., held that this was a latent defect, but inasmuch as it did not so affect the property as to prevent the defendant from substantially getting what she had contracted to buy, it was a matter for compensation, and he found that in order to make the property suitable for building it would involve an expense of £600 to divert the watercourse, and he therefore granted specific performance, but subject to compensation which he fixed at £600.

TRADE UNION—ACTION TO RESTRAIN EXPULSION OF MEMBER—ILLEGAL ASSOCIATION—RESTRAINT OF TRADE—JURISDICTION—ENFORCING "AGREEMENT FOR APPLICATION OF FUNDS TO PROVIDE BENEFITS FOR MEMBERS"—TRADE UNION ACT, 1871 (34-35 VICT. C. 31) SS. 3, 4—(R.S.C. C. 125, S. 4).

*Osborne* v. *Amalgamated Society of Railway Servants* (1911) 1 Ch. 540. This was an action by the member of a trade union to restrain the union from expelling the plaintiff from membership, on the ground that the resolution of expulsion was ultra vires and void. The defendants took the preliminary objection that under the Trade Union Act, section 4 (3) (R.S.C. c. 125, s. 4) the court had no jurisdiction to entertain the action. By the rules of the society the executive committee had power to expel a member found guilty of attempting to injure the society or to break it up otherwise than as allowed by the rules. The plaintiff alleged that in consequence of the action of *Osborne* v. *Amalgamated Society of Railway Servants* (1910) A.C. 87, wherein he had succeeded in establishing that the society could not legally make levies on its members for political and parliamentary purposes, the defendants had wrongfully

expelled him from the society. Warrington, J., who tried the action, came to the conclusion that the society was in restraint of trade and illegal at common law, and therefore under the Act the action would not lie, which he therefore dismissed on the preliminary objection, but the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.), on examination of the constitution and rules of the society came to the conclusion that there was nothing illegal or contrary to public policy therein; neither was the action one to enforce an agreement for the application of the funds of the society "to provide benefits for members." The appeal of the plaintiff was therefore allowed and the action ordered to proceed to trial in the usual way.

PUBLIC NUISANCE—SPECIAL DAMAGE—OBSTRUCTION OF VIEW—PECUNIARY LOSS.

*Campbell* v. *Paddington* (1911) 1 K.B. 869. This was an action brought by the plaintiff to recover damages against a municipal body for erecting a stand in the street so as to obstruct the view from the plaintiff's house of the funeral procession of His late Majesty King Edward; whereby the plaintiff lost the opportunity of letting seats in the plaintiff's house to view the procession. The stand was erected pursuant to a resolution of the municipal council; but a Divisional Court (Avory and Lush, JJ.) held it to be a nuisance, and that the plaintiff was entitled to recover the special damage she had thereby sustained.

JUSTICE OF THE PEACE—SUMMONS—ABSENCE OF SEAL—DEFECT IN FORM—SUMMARY JURISDICTION ACT, 1848 (11 & 12 VICT. C. 43, S. 1—(CR. CODE, 753).

*The King* v. *Garrett-Pegge* (1911) 1 K.B. 880. In this case an information had been laid before a justice of the peace charging a person with an offence under the Summary Jurisdiction Acts; the justice issued a summons without a seal. On its return the accused appeared and objected to the sufficiency of the summons owing to the absence of a seal. The objection was overruled and the accused was convicted. On a motion to quash the conviction, it was held by a Divisional Court (Lord Alverstone, C.J., and Hamilton and Avory, JJ.) that if the absence of a seal was a defect, it was a defect in form within the meaning of the Summary Convictions Act, 1848, c. 1, (Cr. Code, s. 753) and that, notwithstanding it, the conviction was good.

BANKRUPTCY—STATUTORY ASSIGNEE—NOTICE—PRIORITIES.

*In re Anderson* (1911) 1 K.B. 896. This was a conflict between two statutory assignees as to the ownership of a fund. The facts were that in 1898 a debtor had been adjudicated bankrupt in New Zealand, being at that time entitled to a reversionary interest in personalty in England which was not discovered by the New Zealand trustee in bankruptcy. In 1904 the debtor was also adjudicated a bankrupt in England and the English trustee in bankruptcy having discovered the fund gave notice of his title to the trustees of it, and he claimed by virtue of such notice to have acquired priority over the New Zealand assignee; but Phillimore, J., held that a statutory assignee cannot by first giving notice of his title to the trustees of a fund, acquire priority over prior assignees for value, nor over a prior statutory assignee. The New Zealand trustee was therefore held to be entitled to the fund.

LANDLORD AND TENANT—LESSEES COVENANT TO REPAIR—"KEEP IN THOROUGH REPAIR AND GOOD CONDITION"—OLD BUILDING —NATURAL DECAY—DANGEROUS STRUCTURE—REBUILDING.

In *Lurcott* v. *Wakely* (1911) 1 K.B. 905 the action was brought by the assignee of a reversion against the assignee of a lease to recover damages for breach of a covenant by the lessee to keep the demised premises in repair and good condition. The demised premises consisted of a dwelling house, the front wall of which had become so dilapidated as to become dangerous and the owners and occupiers were served with notice by the municipal authority to take it down. The defendant refused to comply with this notice, and thereupon the plaintiff took down the wall and rebuilt it, and now claimed from the defendant the expense of so doing, as damages for breach of the covenant to repair. The action was referred to a referee who found in favour of the plaintiffs, and his judgment was affirmed by a Divisional Court (Darling and Bucknill, JJ.) and the judgment of that court was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.). The contention of the defendant that his covenant did not extend to the renewal of the wall because it had become defective by old age, relying on the judgment of Tindall, C.J., in *Guthridge* v. *Munyard,* 1 Moo. & Ry. 334, 7 C. & P. 129, was held to be untenable, and Cozens-Hardy, M.R., points out the discrepancy between the

two reports of the case, and while it is conceded that a covenant to repair might not involve a liability to renew the whole subject matter if it fell simultaneously into decay, yet it does involve renewal of subsidiary parts which from time to time wear out or fall into decay.

TRADE DESCRIPTION—IMPROPER APPLICATION OF TRADE DESCRIPTION TO GOODS—BOTTLES BEARING TRADE DESCRIPTION—USE OF BOTTLES FOR SALE OF GOODS NOT OF DESCRIPTION EMBOSSED ON BOTTLES—TRADES MARKS ACT, 1887 (50-51 VICT. c. 28, s. 5 (1, 2)—(R.S.C. c. 71, ss. 5, 21, 22).

*Stone* v. *Burn* (1911) 1 K.B. 927 was a prosecution for breach of the Trades Mark Act. The defendant was a bottler of beer and had used the bottles embossed with the name of the Felinfoel Brewery for bottling Bass & Co.'s beer. He placed on the bottles labels shewing that it was Bass & Co.'s beer. He was convicted of the offence, and on appeal to a Divisional Court (Lord Alverstone, C.J., and Pickford and Coleridge, JJ.), the conviction was sustained. It may perhaps be a question whether the same conclusion could be reached under R.S.C. c. 71, s. 21, which makes an intent to deceive an ingredient of the offence. Under the English Act the offence is complete by enclosing goods in a package which has on it a trade description not answering to the contents, even though there be no intent to deceive.

SALE OF GOODS—C.I.F. CONTRACT—"TERMS, NET CASH"—RIGHT TO INSPECT GOODS BEFORE PAYMENT—PAYMENT ON PRODUCTION OF SHIPPING DOCUMENTS.

*Biddell* v. *E. C. Horst & Co.* (1911) 1 K.B. 934. In this case the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.), have reversed the judgment of Hamilton, J., (1911) 1 K.B. 214 (noted ante, p. 185), and hold that on a c.i.f. contract "terms net cash," the vendee is entitled to inspect the goods before paying the price. Kennedy, L.J., however dissented; he thought the c.i.f. contract imported an obligation on the part of the vendee to pay on production of the documents of title; and that to hold otherwise would be imposing on the vendor the duty of delivering the goods to the vendee before he can demand payment, which he thought would be contrary to the decision of the Court of Appeal in *Parker* v. *Schuller*, 17 Times L.R. 299. The majority of the Court, however, considered that there was no

usage or custom which had given to a c.i.f. contract the meaning that the vendee was bound to pay the price on production of the documents before seeing the goods.

CRIMINAL LAW—CONSENT OF ATTORNEY-GENERAL TO PROSECUTION—ABSENCE OF CONSENT—NO SUBSTANTIAL MISCARRIAGE OF JUSTICE.

*The King* v. *Bates* (1911) 1 K.B. 964. This was a prosecution under the Explosive Substances Act, 1883, which requires that the consent of the Attorney-General so be obtained to the preferring of an indictment under the Act. The required consent had not been obtained, but the defendant had been convicted, and on appeal from the conviction the Court of Criminal Appeal (Lord Alverstone, C.J., and Lawrance and Pickford, JJ.), quashed the conviction on the ground that, in the absence of the consent, the court had no jurisdiction and that it was impossible for the court to treat the absence of the consent as involving no substantial miscarriage of justice.

SOLICITOR—PERSONAL LIABILITY OF SOLICITOR FOR COSTS—COSTS —APPEARANCE ENTERED FOR NON-EXISTING PARTY—WARRANTY BY SOLICITOR OF HIS AUTHORITY.

*Simmons* v. *Liberal Opinion* (1911) 1 K.B. 966. This was an action for libel published by a newspaper called *St George's and Wapping Progressive Champion*, purporting to be published by "Liberal Opinion, Limited," named as defendant. An appearance was entered for "Liberal Opinion, Limited" by a solicitor, and a statement of defence put in and affidavit of documents sworn by a person who described himself as managing director of the defendant company. The plaintiffs subsequently searched in the proper office, and found that no such company was in existence of the name of the defendant company, and informed the solicitor who had acted for the defendant, and asked for explanation, to which he impertinently replied that they had better continue their search. The case went to trial and a verdict was given for the plaintiff for £5,000 but it was then definitely ascertained that there was in fact no such company, and in consequence thereof all the proceedings were futile. The plaintiffs then applied to Darling, J., for an order to compel the solicitor who had purported to act for the defendant, personally to pay the costs which had been thus thrown away: he refused the application; but the Court of Appeal

(Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.), reversed his order, and held that the solicitor must be deemed to have warranted his authority to act for the client for whom he purported to appear.

SOLICITOR—BILL OF COSTS—DELIVERY OF BILL—ONE MONTH BEFORE ACTION—BILL SENT BY POST—SOLICITORS ACT, 1843 (6-7 VICT. C. 73), S. 37—(R.S.O. C. 174, S. 34).

*Browne* v. *Black* (1911) 1 K.B. 975. This was an action by a solicitor to recover the amount of his bill of costs. The defendant set up that the bill had not been delivered a month before action. The bill had been delivered by post on the afternoon of February 15, which in the ordinary course was delivered to the defendant on the 16th February. The action was commenced on the 16th March. The common serjeant, who tried the action, held that a calendar month must elapse from the date when the defendant would in the ordinary course, receive the bill when sent by post; and consequently, that the action was prematurely brought; and a Divisional Court (Ridley and Channell, JJ.), upheld his decision.

WORKMEN'S COMPENSATION ACT—OMISSION TO GIVE NOTICE—EXCUSE FOR NOT GIVING NOTICE—IGNORANCE OF ACT—LIMITATION OF ACTION.

*Roles* v. *Pascall* (1911) 1 K.B. 982. This was an action under the English Workmen's Compensation Act, 1906. The plaintiff had omitted to give notice of the accident, and no claim for compensation was made until the lapse of eleven months after the injury complained of was sustained. The plaintiff excused the want of notice and the failure to make a claim within the prescribed time, on the ground of his ignorance of the existence of the Act. The English Act provides that the failure to give notice is not to be a bar if the employer is not prejudiced, and the failure to make a claim within the prescribed time is not to be a bar to the maintenance of an action if it is found that the failure was occasioned "by mistake, absence from the United Kingdom, or other reasonable cause." The County Court judge who tried the action held that the omission to give notice did not prejudice the defendants, and he gave judgment in favour of the plaintiff. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.), however, held that ignorance of the Act was not "mistake" within the meaning of the Act, and did not excuse the omission to make a claim within the time prescribed. The action therefore failed.

# Correspondence

## *APPEALS TO SUPREME COURT—INTERLOCUTORY JUDGMENTS.*

*To the Editor*, CANADA LAW JOURNAL:

DEAR SIR,—On reading your note of the judgment in *Clarke* v. *Goodall* (ante, p. 305), it occurs to me that this decision is much more far-reaching than it would seem to be on its surface. The application was apparently to affirm the jurisdiction on an appeal from the Court of Appeal for Ontario, which finally disposed, so far as the Ontario courts were concerned, of the question of damages which the trial judge had referred to a referee, further directions being reserved.

The holding of the Supreme Court appears to be that because further directions were reserved, the judgment sought to be appealed from was not a final judgment within the meaning of the Supreme Court Act. Since then the matter has, as I am informed, gone to a single judge on further directions and judgment entered in accordance with the judgment of the Court of Appeal; and an application to a judge of the Supreme Court in Chambers for leave to appeal to that court per saltum has been refused because of the fact that the question of practice as to whether or not the questions which were before the referee could or could not be raised upon an appeal from the order on further directions is new and could be better dealt with by the Ontario courts. Does this mean that the result of the holding of the Supreme Court is that there cannot be an appeal to that court in probably ninety-nine per cent. of the cases in which further directions are reserved?

Under the facts stated a condition of things has arisen to which the attention of the profession should be drawn. Perhaps you would give them the benefit of your views on the subject.

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[The above matter is referred to at length in our editorial columns.—ED., C.L.J.]

# REPORTS AND NOTES OF CASES.

## England.

### JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Lords Macnaghten and Robson and Sir Arthur Wilson.] [March 28.

BARNETT *v.* GRAND TRUNK RY. CO.

*Railway company—Negligence—Liability for injury to trespasser.*

This was an appeal from a judgment of the Court of Appeal for Ontario affirming the judgment of the Divisional Court refusing to set aside the verdict for the plaintiff in an action brought against the company to recover damages for personal injuries, caused by the negligence of the company's servants. The case was tried before Meredith, C.J., and a jury who gave a verdict for the plaintiff for $600 damages, but the learned judge at the trial entered judgment for the defendants.

The respondent, who was not a passenger, nor a servant of the company, in contravention of the regulations of the company, got on to the platform of a car in an empty train of another railway company, which, in pursuance of an arrangement between the companies, was being shunted over the line of the defendant company. He had no permission or license so to use the car, and did so in order to get a lift along the line on his way home. There was evidence that he had done the same thing on other occasions. The car on which he was, came into collision with a train of the appellant company, in consequence of the negligence of those in charge of that train, whereby he was seriously injured.

*Held*, 1. The defendants were not liable for the injury so caused. The plaintiff was a trespasser and although the company was under a duty to the plaintiff not to wilfully injure him, they were not liable to him for mere negligence and the accident was due to the negligence of the company's servant and not to any wilful act.

2. A person trespassing does so at his own risk and a railway company is not liable to such a person on their line for injury caused to him by the negligence of their servants.

*J. F. Faulds*, and *P. H. Bartlett* (of the Ontario Bar) for the plaintiffs (respondents). *McCarthy*, K.C., and *E. F. Spence* (of the Ontario Bar), for the defendant (appellants).

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Lords Macnaghten and Robson and Sir Arthur Wilson.] [March 28.

GREYVENSTEYN v. HATTINGH.

*Land—Adjoining owners—Right of protection—Extraordinary misfortune—Causing damage to adjoining lands.*

This was an appeal from the Supreme Court of the Colony of the Cape of Good Hope, affirming a judgment of the Divisional Court in favour of the defendant. The parties were farmers in the district of Maltino. The defendant endeavoured to drive a swarm of locusts which were moving from the plaintiff's land away from his own land and so caused them to remain on the plaintiff's land, thereby causing damage.

*Held*, 1. The defendant was not liable for the damage caused to the plaintiff's crops.

2. The owner or occupier of land has a right to repel any extraordinary misfortune coming to him from the land of another though the effect may be to transfer the mischief to his neighbour's premises.

*Holman Gregory*, K.C., and *E. Beaumont*, for plaintiff. *Sir Robert Finlay*, K.C., and *E. Charles*, for defendant.

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# Province of Ontario.

## COUNTY COURT, LEEDS AND GRENVILLE.

Reynolds, JJ.] [May 4.

LAYNG AND TRUESDELL.

*Ditches and Watercourses Act—Outlet and injuring liability.*

*Held*, 1. Under the Ditches and Watercourses Act the engine has power to assess for "outlet liability" and "injuring liability."

2. A landowner within the one hundred and fifty rod limit whose land does not touch the stream being improved, but

who by artificial means concentrates and discharges a substantial body of water across an intervening owner's land (with such owner's consent and assistance) into the stream and thus materially increases the body of water to be got rid of, is liable to be assessed under the D. & W. Act.

*H. A. Stewart*, K.C., for appellant. *W. A. Lewis*, for respondent.

# Province of Nova Scotia.

## SUPREME COURT.

Full Court.] GIFFORD *v.* CALKIN. [April 29.

*Foreign judgment—Enforcement of—Jurisdiction of foreign court—Implication as to.*

A foreign judgment, even regularly obtained according to the practice and procedure of the foreign country, in order to create that duty or obligation to pay which English courts will enforce, must come within one or the other of the five cases mentioned in *Emanuel* v. *Symon* (1908), 1 K.B. 309.

An agreement to submit to the jurisdiction of the courts of the foreign country is not to be implied from the making of a promissory note payable in the foreign country.

A foreign judgment does not in Nova Scotia by reason of O. 35. R. 38 stand on a different footing from foreign judgments sought to be enforced in England.

That rule was merely intended to give to a defendant another defence to an action on a foreign judgment and was not intended to regulate or alter the law of the country as to when a foreign judgment can be enforced.

*Milner*, for appellant. *Mellish*, K.C., and *O'Connor*, K.C., for respondents.

Full Court.] [April 29.

THE ATTORNEY-GENERAL *v.* LANDRY ET AL.

*Schools and school districts—Property acquired for public purposes—Enforcement of trust—Joinder of Attorney-General—Unincorporated religious body—Deeds to and from—Ineffective to pass title.*

The ratepayers of school section 8 in the County of Richmond raised a sum of money to be applied inter alia, to providing a place of residence for members of a religious order then

teaching in the section, so long as they should remain in the section, and in the event of their leaving, to become the property of the section. The defendant L., who was a member of the committee appointed to carry out the purpose of the ratepayers, purchased a property with the funds placed in his hands, and executed a deed in fee simple of it to the Mother of the Order, who, some months after, when the Order decided to leave the province, reconveyed the property to L., who mortgaged it to his brother. The Order was not incorporated in Nova Scotia, and the mortgagee had knowledge of the purpose for which and the circumstances under which the property was acquired.

*Held*, affirming the judgment of Longley, J., and dismissing defendants' appeal with costs:

1. The deed being made to a religious order not incorporated in Nova Scotia was a nullity and no title passed under it.

2. The same defect would affect the title of defendant under the deed to him and the mortgage to his brother who was aware of the facts.

3. The action by the Attorney-General, on the relation of one of the ratepayers, to recover for the section property which rightfully belonged to it would not be affected by a resolution of the majority of the ratepayers instructing discontinuance of the proceedings for the recovery of the property.

4. The property having been obtained by public subscription for the use of the ratepayers of the section, for educational purposes, was a charitable trust for the enforcement of which the Attorney-General was properly made a party, and was property which it was the duty of the trustees to take possession of under the provisions of R.S.N.S. c. 52, s. 55, sub-s. (a), and as to which they were guilty of a breach of trust in abandoning the proceedings for its retention.

*W. B. A. Ritchie*, K.C., for appellant. J. A. Wall, for respondent.

## Province of Manitoba.

### COURT OF APPEAL.

Full Court.] SNIDER *v.* WEBSTER. [May 4.

*Vendor and purchaser—Damages for breach of covenant to convey land—Vendor's lien.*

Appeal from judgment of Robson, J., note ante, p. 154, dismissed with costs.

Full Court.] THORDARSON *v.* AKIN. [May 4.

*Survey of land—New survey—Error in survey.*

Appeal from decision of Prendergast, J., noted vol. 46, p. 670, dismissed with costs.

The court held that the plaintiff had failed, because he had not shewn that a careful and exhaustive search had been made for the original posts or monuments shewing the sub-division survey, and that no vestige of these could be found, it being only in such case that the plan of an equal distribution of the excess in frontage over all the lots in the sub-division should be adopted. *Barry* v. *Desrosiers*, 9 W.L.R. 633, doubted.

*A. B. Hudson* and *Garland*, for plaintiff. *Bergman*, for defendant.

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Full Court.] [May 5.

WINNIPEG *v.* TORONTO GENERAL TRUSTS CORP.

*Municipality—Compensation for land injuriously affected by exercise of municipal powers—Limitation of time for making claim—Winnipeg Charter, ss.* 708, 775.

Appeal from judgment of Macdonald, J., noted ante, p. 115, dismissed with costs on the ground that the claim of the defendants had been expressly recognized by a by-law of the council passed under sub-section (c1) of s. 708, as re-enacted by s. 15 of c. 64 of 3 & 4 Edw. VII, and that s. 775, requiring claims under s. 774 to be made within one year, had no application, under the circumstances, to the claim of the defendants for compensation for their land injuriously affected by the exercise of the powers referred to, and that the defendants had all the time allowed them by the general law applicable to the case for making their claim.

*T. A. Hunt* and *Curlle*, for the plaintiffs. *Wilson*, K.C., *Hoskin*, K.C., and *McKercher*, for the several defendants.

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Full Court.] CITY OF WINNIPEG *v.* BROCK. [May 4.

*Municipality—By-law taking effect on the happening of some contingent event—Meaning of "passage of the by-law"—Winnipeg Charter, s.* 708, *sub-s.* (c1) *as amended by* 3 & 4 *Edward VII. c.* 64, *s.* 15—*Uncertainty in by-laws—Delegation of powers of council.*

Appeal from judgment of Mathers, C.J., noted ante, p. 113, allowed with costs and the action dismissed with costs.

*Held*, 1. The council could only determine by a by-law what persons or classes of persons were injuriously affected by the closing of the streets and this could not be done by a by-law which, in its terms, is not to come into force until the happening of a contingent event which may never happen, and such persons could not appeal from such determination until after the by-law was brought into force by a second by-law, because they could not be injuriously affected by the passage of a by-law which might never come into force.

2. The expression "within ten days after the passage of the by-law," occurring in sub-s. (*c*1) of s. 708 of the Winnipeg Charter, as re-enacted by s. 15 of c. 64 of 3 & 4 Edw. VII., when used in a by-law which, in its terms, provided that it was not to come into force until the execution of an agreement between the railway company and the city and the due ratification of same by the council, should, under the circumstances of this case, be construed to mean within ten days after the coming into force of the by-law, because the literal construction would work a manifest injustice by arbitrarily depriving persons injuriously affected of all remedies. *Attorney-General* v. *Lockwood*, 9 M. & W. 398; *Becker* v. *Smith*, 2 M. & W. at p. 195; and *Schneider* v. *Hussey*, 1 Pac. Rep. 343, followed. *Ex parte Rashleigh*, 2 Ch. D. 9, distinguished.

3. The defendants, therefore, came in time when they brought their appeal within ten days after the passage of the by-law bringing the by-law in question into force.

Per RICHARDS, J.A.:—A by-law, which in its terms provided that it should only come into force on the execution by a railway company of a certain agreement with the city, is bad for uncertainty and because of its delegation by the council of part of their powers to the railway company. *Re Cloutier*, 11 M.R. 220, followed.

*Clarke*, K.C., and *Wilson*, K.C., for plaintiff. *Aikins*, K.C., for defendant.

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. . Court.] MUTCHENBACKER *v.* DOMINION BANK. [May 5.

*Contract—Construction of—Scope and effect of words "deemed to be"—Sale and transfer of right to cut timber—Priority as between unpaid vendor and bank holding security from purchaser on logs cut—Bills of Sale and Chattel Mortgage Act—Bank Act, ss.* 88, 89*—Vendor's lien on goods—Cancellation of contract, effect of.*

By the agreement in question, the plaintiffs sold to one Mc-

Cutcheon their interest in a certain timber berth for $19,000, payable by instalments. It made use of language implying the transfer of the property in the logs as soon as cut, but contained this proviso, "That in each and every year during the currency of this agreement all logs, lumber, laths, timber, etc., shall be deemed to be the property of the (vendors) unless and until the (purchaser) shall have paid all arrears of principal and interest which may be due hereunder and the (purchaser) hereby covenants with the (vendors) not to sell, assign or transfer any such logs, lumber, timber, etc., until all arrears due as of such date are fully paid and satisfied." Pursuant to another clause in the agreement, the plaintiffs on 4th February, 1908, gave notice terminating the agreement, and forfeiting McCutcheon's payments previously made, for default in payment of the instalment due on 1st January, 1908. The logs in question had been cut before that date and were removed from the limit by McCutcheon's assignees, who on 31st March, 1908, gave the defendants a security under section 88 of the Bank Act for advances.

*Held*, 1. The effect of the agreement was to vest the property in the logs in the purchaser as soon as cut, subject to a right of the plaintiffs, on default in any payment, to deal with the logs as if the property therein had become re-vested in them, and that the words "shall be deemed to be" were not equivalent to "shall be" when taken along with the rest of the document. *Reg.* v. *Norfolk County Council*, 60 L.J.Q.B. 379, followed.

2. The logs in question having been in the possession and ownership of McCutcheon's assignees until 1st May, 1908, when the plaintiff first attempted to take possession of them, the Bills of Sale and Chattel Mortgage Act prevented the plaintiffs from acquiring any title to them by virtue of the agreement as against the claim of the defendants.

3. The claim of the bank was valid under sub-section 2 of section 89 of the Bank Act as against any lien of the unpaid vendors, it being proved that the bank had no knowledge of any such lien at the time when the security was taken.

4. The plaintiffs had, in fact, under the circumstances, no vendor's lien in the logs in question after they had been removed from the limit.

5. As the clause in the agreement providing for cancellation of it made no mention of any logs, the consequence of the cancellation was that the logs cut prior to that time remained the property of McCutcheon's assignees wholly unaffected by the cancellation.

*A. B. Hudson* and *Craig*, for plaintiffs. *Munson*, K.C., and *Haffner*, for defendants.

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Full Court.] THE KING *v.* SHARPE. [May 10.

*Criminal law—Summary trial of indictable offence—Assault occasioning actual bodily harm—Jurisdiction of police magistrate.*

Although a police magistrate, who is not one of those officials to whom power is given by sub-s. 2 of 777 of Crim. Code as amended in 1909, to try summarily offences which might, in Ontario, be tried at a Court of General Sessions of the Peace, has power under par. (*c*) of s. 773, to try summarily a charge of unlawfully wounding or inflicting grievous bodily harm, an offence which is indictable under s. 274, yet he has no power to try summarily a charge of assault occasioning actual bodily harm, as that offence, made indictable by s. 295, although of a similar and less serious nature, is not one of those specified in s. 773.

*Hoskin*, K.C., for defendant. *Patterson*, K.C., for the Crown. *A. B. Hudson*, for the private prosecutor.

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Full Court.] [May 22.

PARKS *v.* CANADIAN NORTHERN RY. CO.

*Railway company—Liability for animals killed on track—Fences—Negligence.*

Appeal from decision of Mathers, C.J., noted vol. 46, p. 749, dismissed with costs.

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Full Court.] [May 22.

ANDERSON *v.* CANADIAN NORTHERN RY. CO.

*Negligence—Master and servant—Injury to employee caused by negligence of fellow employee intrusted with superintendence—Liability of employer at common law—Workmen's Compensation for Injuries Act—Railway Act, R.S.C.* 1906 *—Limitation of actions.*

The plaintiff's claim was for injuries sustained by the explosion of some dynamite while he was thawing it for use in blasting out hard pan in a gravel pit under the superintendence of one Campbell, a roadmaster in defendant's employ. In an-

swer to questions, the jury at the trial found that the plaintiff was ignorant of the material he was using, that Campbell had not given him proper instructions, that the injury had been caused by the negligence of the defendant company, that such negligence consisted in not employing a competent person to superintend the work and in not furnishing proper appliances and storage for explosives, and that the defendant company had not used reasonable and proper care and caution in the selection of the person to superintend the work.

*Held,* HOWELL, C.J.M., dissenting, that the evidence at most shewed that, on the occasion in question, Campbell might have been negligent in his superintendence of the work, that there was no proof of his incompetency otherwise, or that the defendants had been negligent in appointing him, or in furnishing proper appliances, the onus of proving which was on the plaintiff, and, therefore, the plaintiff could not recover at common law, but was entitled under the Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178, s. 3, to the amount alternatively fixed by the jury under section 6 of that Act.

*Smith* v. *Howard,* 22 L.T.N.S. 130; *Young* v. *Hoffman* (1907), 2 K.B. 650, and *Cribb* v. *Kynoch* (1907), 2 K.B. 548, followed.

*Wilson* v. *Merry,* L.R. 1 H.L. Sc. 332, distinguished.

Per HOWELL, C.J.M.:—There was evidence to submit to the jury on all the questions answered by them and the verdict for damages at common law should not be disturbed.

*Held,* also, by all the judges, that the damages had not been "sustained by reason of the construction or operation of the railway," and therefore the plaintiff was not barred by section 306 of the Railway Act, R.S.C. 1906, c. 37, from bringing his action after the lapse of one year.

*Macneil* and *Deacon,* for plaintiff. *Clark,* K.C., for defendants.

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Full Court.] THE KING *v.* RITCHIE. [May 23.

*Liquor licenses—Construction of statute—Local option—Conveyance of liquor between points in territory under local option.*

The prohibition of carrying or conveying "liquor from *any point in the province* to any point in any territory under a local option by-law except the same is consigned to a licensee

therein," enacted by section 32 of chapter 26 of 7 & 8 Edw. VII. in amendment of the Liquor License Act, R.S.M. 1902, c. 101, applies equally whether the point *from* which the liquor is conveyed is within or without the local option territory.

*Andrews*, K.C., for defendant. *Graham*, for the Crown.

## KING'S BENCH.

Robson, J.]. [April 27.

RE TOWN TOPICS COMPANY, LIMITED.

*Company—Appointment of inspector to investigate affairs of company—Objects for which appointment made—Mismanagement of company—Winding-up company.*

The object of s. 81 added to the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, by 4 & 5 Edw. VII. c. 5, providing for the appointment by a judge, if he deems it necessary, of an inspector to examine and report on the affairs of a joint stock company incorporated under the Act, on the application of shareholders, is simply that facts and circumstances not otherwise open may be disclosed to those concerned. *In re Grosvenor Hotel Co.*, 76 L.T. 337, followed.

A judge, therefore, should not make such an order unless it is made to appear that there is reason on substantial grounds to believe that material information regarding the affairs or management of the company is being concealed or withheld from shareholders, whose interests entitle them to the disclosure, and it is not sufficient to adduce facts tending to shew mismanagement by the directors.

The only course open to shareholders complaining of the management, who cannot change it, is to apply for a winding-up: *In re Sailing Ship "Kentmere" Company*, W.N. 1897, p. 58.

*Fullerton*, for applicants. *Manahan*, for company.

Metcalfe, J.] [April 29.

GOLD MEDAL FURNITURE CO. *v.* STEPHENSON.

*Guaranty—Joint guarantors—Husband and wife—Undue influence—Liability for remaining guarantors when one declared not to be bound—Principal and agent—Warranty of authority of agent—Oral evidence to explain signature of document—Right of contribution between co-sureties—Estoppel—Construction of contract.*

*Held,* 1. When a married woman disputes her liability to a creditor of her husband upon a guaranty signed by her at his request, the onus is upon her to prove that the husband had exerted an overpowering influence upon her to induce her to sign it and that the guaranty was an immoderate and irrational act on her part. *Nedby* v. *Nedby,* 5 De G. & Sm. 377, and *Bank of Montreal* v. *Stewart* (1911), A.C., at p. 137, followed.

2. Such onus is satisfied by evidence that the wife, without questioning her husband, signed any and all documents brought to her by him without any knowledge of their contents or of their nature or purport, simply because the husband asked her to sign, and that the document was one which transferred a large portion of her property and the signing was of no material benefit to her or her husband. *Turnbull* v. *Duval* (1902), A.C. 429, and *Chaplin* v. *Brammall* (1908), 1 K.B. 233, followed.

3. The rule of law that, when one of several joint or joint and several sureties is released, all are released, is based on the principle that the creditor must do nothing to affect prejudicially the right of contribution between the co-sureties, and does not apply to a case when it is by no act or default of the creditor but only by the operation of the law that the one is released; as, for example, a wife under the circumstances above outlined.

4. When the creditor supplied goods upon the strength of a guaranty signed by three persons and also by one of those three as attorney for a fourth, two of them representing to the creditor that there was a good and sufficient power of attorney from the fourth person to the person who signed her name, and it turned out that there was no such sufficient power of attorney, the two who made that representation will be liable to the creditor for a breach of warranty of authority on the principle laid down in *Collin* v. *Wright,* 8 E. & B. 647; *Fairbanks* v. *Humphries,* 18 Q.B.D., at p. 60, and *Olivier* v. *Bank of England* (1902), 1 Ch., at p. 623, and it makes no difference that the attorney did not know that the power was insufficient. *Weeks* v. *Propert,* L.R. 8 C.P. 437, followed.

The document sued on was signed (in part) as follows: "M. Stephenson, per Attorney W. Stephenson," and W. Stephenson contended that he had not signed for himself, but only as attorney for M. Stephenson his wife.

*Held* that oral evidence was admissible to shew that W. S. intended the document as executed to bind both himself and

his wife, as such evidence, while explaining, in no way contradicted the writing. *Young* v. *Schuler,* 11 Q.B.D. 651, followed.

The defendant J. A. S., who was president of the debtor company, and had undertaken to get the guaranty signed so that the plaintiffs would continue to supply goods to the company, objected that, as the guaranty was not really executed by his mother, M.S., he was relieved, upon the principle that it was not the guaranty which he intended to sign.

*Held,* that J. A. S. was estopped from saying that his mother was not a party to the guaranty, because he had told the creditor that W. S. had a power of attorney from his mother to sign, intending that the creditor should believe the fact and act upon it, and the creditor did believe in and act upon it by supplying goods on the strength of it.

Following general words of guaranty, the document sued on contained this clause: "and in case of insolvency of the said (debtor) you may rank on the estate for your full claim and we jointly and severally agree to pay any balance."

*Held,* that this expression should not be construed as in any sense limiting the effect of the prior general words, or requiring the creditor to wait until the winding up of the estate by an assignee before suing for his claim.

*Laird* and *McArthur,* for plaintiffs. *H. A. Burbidge, Fullerton* and *Foley,* for defendants.

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# Province of British Columbia.

## COURT OF APPEAL.

Full Court.] HEPBURN *v.* BEATTIE. [April 10.

*Libel—Finding by the jury that the article complained of "did not amount to a libel"—Question of libel or no libel left entirely to the jury—No objection to the charge.*

Plaintiff was in 1910 an alderman of the city of Vancouver. At a meeting of the city council, held in March, 1910, he moved a resolution calling the attention of the authorities of adjoining municipalities to proposed real estate subdivisions and asking them to look carefully into all subdivision plans submitted for their approval. He made some remarks in support of his resolu-

tion in which he referred to the undue boosting of real estate by dealers, wild cat subdivisions, hotels on mountain tops, etc. The resolution and plaintiff's remarks were published in the *News-Advertiser* newspaper and on the following day defendant wrote a letter to that paper commenting on plaintiff's remarks, and referred to plaintiff's connection with a hotel in Vancouver, the license of which had been suspended by the license commissioners, suggesting that plaintiff had used his position as alderman to secure the license and was responsible for the conduct of the hotel business. Plaintiff then took action. A trial before Clement, J., and a special jury resulted in a disagreement. On the second trial before Hunter, C.J.B.C. and a special jury, the verdict was that the article complained of "did not amount to a libel." Judgment was entered for the defendant accordingly, and plaintiff appealed. No objection was made to the charge to the jury

*Held* (IRVING, J.A., dissenting), that the question of libel was for the jury and that the verdict should not be disturbed. *Sydney Post Publishing Co.* v. *Kendall* (1910), 43 S.C.R. 461, not followed.

*S. S. Taylor*, K.C. and *Woodworth*, for the appellant. *A. D. Taylor*, K.C., for the respondent.

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Full Court.] WILSON *v.* MCCLURE. [April 10.

*Action—Survival of cause of—Death of plaintiff—Injury to personal estate—Property in timber licenses applied for—Fraudulent procurement of timber licenses—Revivor.*

In an action for a declaration that defendants were, trustees for the plaintiff in certain timber licenses, or in the alternative for $250,000 damages, it was alleged that the plaintiff had done all things necessary under the Land Act to obtain special timber licenses; that before he made his formal application for such licenses, the defendants applied and falsely represented to the commissioner that they had performed all the statutory requirements to entitle them to licenses for the same limits; that the plaintiff had filed a protest against defendants' application; that before the determination of such protest, or of its having been heard, the defendants fraudulently represented to the commissioner that plaintiff had not complied with the Land Act as to staking or advertising, etc., and that he had withdrawn his protest, and was willing that licenses should be granted to defend-

ants. Plaintiff died after action brought, and his executrix applied to be substituted as plaintiff.

*Held*, on appeal, reversing the order of Gregory, J. (MARTIN, J.A., dissenting) that the cause of action did not survive to the executrix.

Per MACDONALD, C.J.A.:—The right given to an individual by the Land Act to apply for a license to cut timber on Crown lands, though all conditions precedent to the actual grant of the license have been fulfilled, does not confer upon the applicant any legal or equitable interest in the subject matter applied for.

*Harold Robertson*, for defendants. *W. J. Taylor*, K.C., for respondent.

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Full Court.] [April 28.

KRZUS *v.* CROW'S NEST PASS COAL COMPANY.

*Statute—Construction of—Workmen's Compensation Act*, 1902 *—Alien dependants residing in a foreign country.*

Appeal from the judgment of CLEMENT, J., upon a case stated submitted for his opinion by WILSON, Co.J., acting as an arbitrator under the Workmen's Compensation Act, 1902. The deceased, a workman employed by the respondent company, was killed in an accident arising out of and in the course of his employment, and the applicant applied for compensation under the Workmen's Compensation Act, 1902, on behalf of the widow, who resided at the time of the accident, and since, in Austria. The widow was not a British subject and never resided in British Columbia. WILSON, Co.J., submitted the following questions: (1) Can the applicant, who is the legal personal representative of the deceased workman, and who was a resident of the Province of British Columbia, obtain an award under the Workmen's Compensation Act, 1902, the dependant of the deceased being an alien, residing in a foreign country at the time of the accident out of which the claim for compensation arose and at the time of the death of the deceased workman and ever since? (2) Can such legal personal representative in such circumstances enforce payment to him of compensation so awarded by an action on the award? (3) Can such legal personal representative in such circumstances enforce payment of the award pursuant to section 8 of the second schedule of the Workmen's Compensation Act, 1902. CLEMENT, J., answered the first question in the affirmative, and expressed no opinion on the other two. The respondent company appealed.

*Held,* that, the provisions of the Workmen's Compensation Act, 1902, awarding compensation to the dependants of a deceased workman in circumstances provided for in the Act, do not apply to alien dependants of such workman resident in a foreign country.

IRVING, J.A., dissented.

*Davis,* K.C., for appellant. *S. S. Taylor,* K.C., for respondent.

## SUPREME COURT.

Murphy, J.] [May 18.

FRENCH *v.* MUNICIPALITY OF NORTH SAANICH.

*Municipal law—By-law regulating trade—Power to regulate does not include power to prohibit—Reasonableness—Intention of council in passing by-law—Object aimed at in by-law.*

*Held,* 1. A menagerie kept within the municipal area is not a nuisance per se.

2. Where, therefore, a municipal council passed a by-law purporting to regulate the maintenance of a menagerie within the municipal bounds, but imposed such conditions as to make such maintenance virtually prohibitive, the by-law was held bad and was quashed.

3. A by-law manifestly passed in pursuance of a particular section of the Municipal Clauses Act, and aimed at regulating or governing a specific matter, cannot be supported as applying to other matters.

4. Thus, where a by-law was framed under subsection 27*a* of section 50 for regulating the keeping of wild animals in captivity, such by-law cannot be supported under other provisions of the same section dealing with public health and sanitation.

*A. E. McPhillips,* K.C., in support of the application. *Aikman,* for the municipality, contra.

## Obituary.

ROBERT VASHON ROGERS, K.C. —WALTER READ, K.C.

The profession has recently lost from its ranks two men, whose loss will be widely regretted, Mr. Robert Vashon Rogers, K.C., and Mr. Walter Read, K.C. Mr. Rogers in his earlier years distinguished himself by giving to the study of law a humorous turn, and his books "The Law of the Road, or the Wrongs and Rights of a Traveller by Boat, by Stage, by Rail" (1875), "The Law of Medical Men" (1884) will be remembered, not only as being sound expositions of the law, but also for the jocularity with which they abound. Like many humorous men, Mr. Rogers had a somewhat melancholy cast of countenance. His life-work was done in his native city of Kingston, where he enjoyed the general respect of all classes. He was at one time a frequent contributor to this journal.

Mr. Read, son of D. B. Read, K.C., well known to the Bar of Upper Canada, will also be remembered as a cheerful soul, who, in spite of physical infirmities, fought a brave and honest fight and was generally beloved and respected by his brethren. Latterly he had been engaged in the work of revision of the statutes and his loss from the statute revision committee will be seriously felt. His illness was brief, and he passed to his rest as the result of an attack of congestion of the lungs, from which it was hoped that he was recovering. Many members of the Bench and Bar attended his funeral on Monday, the 8th May.

## Flotsam and Jetsam.

Mr. Asquith's reference to the decay of duelling in his recent speech at the Mansion House in support of the peace proposals of the American Government recalls an amusing incident which took place some time ago in an Irish court. An eminent leader of the Irish Bar, who happens also to be a wit, had subjected one of the witnesses for the other side to an exceedingly severe cross-examination. When the cross-examination had concluded and the witness had resumed his seat, he immediately wrote out a challenge to counsel and threw it across the table to him. Counsel replied that this was a matter that came within the province of junior counsel, and he handed the challenge to the latter with a request that he should deal with it in the proper way. It is believed that this method of dealing with the question did not satisfy the challenger, but the duel did not take place on that occasion.—*Ex.*