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The recent development of anarchy has been sufficiently discussed. Legal journals are now taking up the question of its suppression. It may be said in passing that neither England nor the United States can boast of having done in the past all that they might have done in that direction. Being free countries, they are naturally the resorts of political refugees, and have become too much hiding places for desperate criminals of the anarchist type. The rest of the world may well call upon them to be diligent in the duty they owe to other nations in connection with this matter. The United States especially, having now felt the sting of the reptile fraternity, may be expected to take strenuous measures to cope with the evil, especially in view of the part played by American anarchists in the Italian regicide of last year. A consideration of the subject naturally draws attention to the repression of crime from a wider point of view, and suggestions appropriate thereto are now in order. The *Central Law Journal*, in a recent issue, published a summary of the views expressed on this subject by Prof. Arthur McDonald, of the United States Bureau of Education, who has made a special study of the criminal, pauper, and defective classes. The conclusions he has arrived at are, as our contemporary remarks, very pertinent at this crisis, and are commended to law makers as a basis for a practical advance in the treatment of criminals. These conclusions are as follows: 1. The prison should be a reformatory and the reformatory a school. The principal object of both should be to teach good, mental, moral, and physical habits. Both should be distinctly *educational*. 2. It is detrimental financially, as well as socially and morally, to release prisoners when there is a probability of their returning to crime; for in this case the convict is much less expensive than the ex-convict. 3. The determinate sentence permits many prisoners to be released who are morally certain to return to crime. The indeterminate sentence is the best method of affording the prisoner an opportunity to reform without exposing society to unnecessary dangers. 4. The ground for the imprisonment of the criminal is, first of all, *because he is dangerous to society*. This principle avoids

the uncertainty that may rest upon the decision as to the degree of freedom of will; for upon this last principle some of the most brutal crimes would receive a light punishment. If a tiger is in the street the main question is not the degree of his freedom of will or guilt. Every man who is dangerous to property or life, whether insane, criminal, or feeble-minded, should be confined, but not necessarily punished. 5. The publication in the newspapers of criminal details and photographs is a positive evil to society, on account of the law of *imitation.* In addition, it makes the criminal proud of his record, and develops the morbid curiosity of the people; and it is especially the mentally and morally weak who are affected.

A discussion as to the nature and value of legal maxims appears in a short but very interesting article in the July-August number of the *American Law Review* from the pen of Charles Morse, D.C.L., of Ottawa, who made his début in the CANADA LAW JOURNAL in 1895, with a rhymed version of *Marriott* v. *Hampton*, and has since been a frequent and valued contributor. After sketching the use of legal maxims in ancient days, their origin and domain, the writer details the great diversity of opinion that exists in the minds of judges and jurists as to their utility and convenience. On the one side is heard "a perfect symphony of praise, on the other a strenuous chorus of disapproval." After referring shortly to these varied views, Dr. Morse comes to the conclusion that the true philosophy of the subject lies in the mean between two extremes. His summary of the situation may best be expressed in his own words: "So far as our maxims embody fundamental conceptions of justice and are of the essence of English law they are valid, and require to be reckoned with, for all time. But the wit of the jurist has occasionally devised axioms suitable only to his own epoch of legal development, and consequently, bound to become obsolete. The line of growth of our system of jurisprudence is strewn with the relics of outworn rules, the exhuming of which is only of interest to the historian and archæologist. Again some of the old maxims have been frequently misinterpreted, and some that are found in the books have been demonstrated to be entirely false and misleading. Even those whose usefulness has survived to our own day require judicious treatment in their practica

application. While they cannot be ignored, their utility cannot be stretched beyond its proper boundary. They are first principles only, and not abridgments of the law. The practitioner who discovers a 'wise saw' pertinent to his case has only found a good anchor whereby his brief may be moored. Unless he can fill its sails with the prospering gale of 'modern instances' he can hardly hope to reach the desired haven of success."

The trial of Gerald Sifton at the London Assizes for the murder of his father is fresh in the memory of our readers. There are some matters connected with this prosecution which we think should not be allowed to pass without comment. As our readers are aware one Edgar Morden was supposed to be an important witness for the Crown. His name is on the indictment and he was a witness before the Grand Jury. It is also on record that some nine months ago the jury found that an alleged will of the deceased was a forgery. This will was witnessed by Edgar Morden, and he had sworn before the magistrate that the signature was that of Joseph H. Sifton. If the finding of the jury was correct, and it may be assumed that it was as there was no appeal, the man who thus testified that the will was genuine was guilty of perjury and presumably of forgery. It will be remembered also that the reason given for the execution of this will by Sifton the day before his death was that Morden had stated to him that his life was in danger from his son, as Morden had been asked by his son to aid in killing him. The County Crown Attorney of Middlesex, whilst engaged in the prosecution of Gerald Sifton and Walter Herbert for the murder of the elder Sifton, was retained as the legal adviser of Edgar Morden, and his firm acted as solicitors in the attempt to uphold the alleged will in which Edgar Morden was very much interested. This latter individual was also actively engaged in assisting the prosecution against Gerald Sifton. Morden was naturally under the circumstances an important witness for the Crown, and presumably would have been called but for the fact that the verdict in the will case discredited him, and it would not have been policy on the part of the Crown to put him in the box. This man Morden is, we understand, still at large, no charge having been preferred against him. A recital of these facts brings into prominence the difficulties and complication likely to arise when a

County Attorney takes up a civil case which is in any way connected with criminal business in his county. We are quite sure that the County Attorney acted in this matter in perfect good faith, and we only refer to it now by way of warning for future cases. It would, of course, be in the best interests of the public that County Attorneys should devote themselves entirely to their official business. This, however, may not be practicable, except possibly in special cases. There was another incident connected with this trial which seems to demand investigation. It was said that the High Constable, for the alleged purpose of obtaining evidence from two women, took them, along with Edgar Morden, not to the police office or to the County Attorney's office or elsewhere in the city, but to a tavern some three miles from London, under such circumstances as to create unfavourable comment and lead to suggestions which might be unfounded, but which are calculated to bring the administration of justice within the realm of adverse criticism.

THE MARRIED WOMEN'S PROPERTY ACT.

The English Married Women's Property Act, 1882, from which the Ontario Act, c. 163, R.S.O., and the New Brunswick Act, 58 Vict. c. 24, are largely taken, is influenced and leavened to such a considerable extent by equitable doctrines prevailing at the time of its adoption, that an acquaintance with the status in equity of a married woman and her property would seem to be indispensably necessary to a proper study of it, or of the Canadian Acts, particularly in those instances where its meaning has not been determined by accepted decisions of the courts, or where its text provides for a recognition and continuance of the rules of equity. Much of the terminology of the Act is taken from well-known and authoritative judgments expounding the doctrines of equity relating to the property or contractual capacity and liability of a married woman.

The fundamental object of the Act to constitute in general law, independently of an express declaration contained in any instrument for the purpose, a married woman's property, her separate property, is founded upon the equitable doctrine that property may be settled to the separate use of a married woman and be made free of the common law marital rights of the husband.

The limitation in the Act restricting her contractual liability to her separate property and exempting her from penal or personal consequences is derived from the rule in equity. Where a restraint upon anticipation is imposed in a settlement in favour of a married woman, it is provided in the Act that its operation shall not be interfered with by anything contained in the Act, and therefore questions affecting it involve a knowledge of the principles of equity relating to it. However radical the Act may be deemed the changes and results effected by it are intimately identified with or supplement modifications made in equity upon the position at common law of a married woman and obviously cannot be adequately understood without reference to the conditions and learning that preceded them. For the purpose of construing the Act reference may not be had to the doctrines of equity as furnishing a proper standard by which to measure the meaning of the Act: *Moore* v. *Jackson*, 22 S.C.R. 217. Any historical treatment of the Act here engaged in must therefore not be deemed to be made upon the supposition that it constitutes an ultimate or even a primary test of the meaning of the Act. Nor is it proposed to enter upon an historical enquiry connected with the Act except with respect to those features of it either retaining rules of equity or not admitting of intelligent discussion in the absence of such an enquiry.

In equity the general engagements of a married woman could only be enforced against so much of her separate estate as she was entitled to, free from any restraint on anticipation, at the time when the engagements were entered into, as might remain at the time when judgment was recovered against her, and that they could not be enforced against free separate estate to which she became entitled after the engagements were made: *Pike* v. *Fitzgibbon*, 17 Ch. D. 454. The mischief of this decision was directly aimed at by s. 1, sub-s. 4 of the Act of 1882, by which it was provided that "Every contract entered into by a married woman with respect to, and to bind her separate property, shall bind not only the separate property which she is possessed of, or entitled to, at the date of the contract, but also all separate property which she may thereafter acquire." Following the rule in equity it was held that a married woman could not contract under the section so as to bind property acquired by her after her coverture had ceased, on the ground that such property was not separate property within the

meaning of the section: *Beckett* v. *Tasker*, 19 Q.B.D. 7; *Pelton Bros.* v. *Harrison* (1891), 2 Q.B. 428; *Softlaw* v. *Welch* (1899), 2 Q.B. 419. While the section created a liability against her future acquired free separate property it did not enable her to contract so as to bind such property unless she had some existing separate property at the date of the contract: *Pallisier* v. *Gurney*, 19 Q.B.D. 519; *Tetley* v. *Griffith*, 57 L.T. 673; *Leak* v. *Driffield*, 24 Q.B.D. 98; *Stogdon* v. *Lee* (1891), 1 Q.B. 661; *Pelton Bros.* v. *Harrison* (1891), 2 Q.B. 422. A construction evading or rendering illusory in these essential respects the status of a feme sole affected to be conferred by the Act upon a married woman with respect to her debts and liabilities, invited legislative intervention, and in 1893 it was enacted by Act 56 & 57 Vict., c. 63, s. 1, in substitution and repeal of s. 1, sub-s. 3 and 4 of the principal Act that "Every contract hereafter entered into by a married woman, otherwise than as agent, (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to. Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating." This amendment is with slight verbal alterations carried into the Ontario Act c. 163, s. 4. That portion of it from clause (c) inclusive to the end is omitted from the New Brunswick Act, 58 Vict. c. 24, s. 3. Property acquired by a woman while discovert would, under the New Brunswick Act, not be liable upon a contract previously made by her when under coverture: *Beckett* v. *Tasker*, 19 Q.B.D. 7; *Pelton Bros.* v. *Harrison* (1891), 2 Q.B. 428; *Softlaw* v. *Welch* (1899), 2 Q.B. 419.

The most serious difficulty connected with the construction of the Act arises from the effort made thereby to create a liability upon the contracts of a married woman against her separate property, while providing in stringent terms for its protection where it is settled upon her with a restriction against anticipation.

By section 19 of the English Act of 1882, repeated in s 21 of the Ontario Act and in s. 19 of the New Brunswick Act, "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement, made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached, or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors." In section 1 of the amending Act of 1893, already quoted, it is provided that nothing in the section contained shall render available to satisfy any liability or obligation arising out of a contract made by a married woman any separate property which at that time or thereafter she is restrained from anticipating.

The protection to property afforded by a restraint upon anticipation to a married woman against the influence of her husband, has led to the adoption in England of the invariable practice of inserting a clause against anticipation in wills and settlements in favour of a woman. See *Axford* v. *Reid*, 22 Q.B.D. 553. In equity it was necessary that a restraint upon anticipation should be supported by property vested in the married woman as her separate property under a declaration that it was for her separate use. Since the Act the restraint may be annexed to the separate estate created by the statute as well as by settlement: *Re Lumley, Ex parte Hood Barrs*, 65 L.J. Ch. 837, *In re Davenport; Turner* v. *King* (1895), 1 Ch. 361. No particular form of words is necessary to create the restraint. The usual form directs payment of income to the wife for her separate use, "and so that the said (wife) shall not have power to deprive herself of the benefit thereof by sale, mortgage, charge or otherwise in the way of anticipation, and that her receipts only shall be effectual discharges for the same": *Hood Barrs* v. *Cathcart* (1894), 2 Q.B. 569. A declaration that the receipt of the wife or any person to whom she

should appoint the income of the property after the same should become due, should be a valid discharge was held to be a good restraint upon alienation: *Field* v. *Evans*, 15 Sim. 375; *Baker* v. *Bradley*, 7 DeG. M. & G. 597. So also a provision that the receipt of the married woman to trustees for rents bequeathed to her separate use for life should be given as the same should become due from time to time: *Re Smith*, 51 L.T. 501. Property given to the separate use of a married woman, "not to be sold or mortgaged," is subject to a restraint against anticipation: *Steedman* v. *Poole*, 6 Hare 193. And so is a gift of property to the separate use of a married woman without power to anticipate: *Parker* v. *White*, 11 Ves. 221; *Sockett* v. *Wray*, 4 Bro. Ch. 483; *Jackson* v. *Hobhouse*, 2 Mer. 487; or where it is merely expressed to be for her sole, separate and inalienable use; *D'Oechsner* v. *Scott*, 24 Beav. 239; *Spring* v. *Pride*, 4 DeG. J. & S. 395; or to be enjoyed "independent of a husband": *Tullett* v. *Armstrong*, 1 Beav. 1. Where a testator bequeathed his property to trustees upon trust to pay a third of the income to G. during the whole of her natural life free from her debts or engagement, whether any such might be contracted by herself or any husband or husbands whom she might marry, it was held that these words imported a restriction on anticipation, and consequently that a charge on her annual income created by her in favour of certain creditors of her husband could not be sustained: *White* v. *Herrick*, 21 W. R. 454. The restraint may be attached to real or personal estate or to the income therefrom: *Baggett* v. *Meux*, 1 Ph. 627; *Re Sykes' Trusts*, 2 J. & H. 415; *Stogdon* v. *Lee* (1891), 1 Q.B. 661.

After the passing of the Act of 1882 cases began to come before the courts with respect to the extent income of property without power of anticipation was available in satisfaction of judgments obtained upon contracts made by married women. In equity no such question could arise where the income was not due at the time the contract was made, as contractual liability was there limited to the separate property then in her hands, and did not extend to subsequently acquired separate property: *Pike* v. *Fitzgibbon*, 17 Ch. D. 454. The Act having altered the law in this respect by enacting by s. 1, sub s. 4, that "Every contract entered into by a married woman with respect to, and to bind her separate property, shall bind not only the separate property which she is possessed of, or entitled to, at the date of the

contract, but also all separate property which she may thereafter acquire," there could be no question that income accruing due to her subsequently to the date of the contract as well as to the date of a judgment was bound except as protected by section 19 of the Act, by which it is provided that nothing contained in the Act should interfere with or render inoperative any restriction against anticipation. In conformity with section 19, a judgment obtained against a married woman upon a contract made during coverture is required by English and Ontario practice to be in the form settled in *Scott* v. *Morley*, 20 Q.B.D. 132, that is to say, "To be paid out of her separate property as hereinafter mentioned and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant not subject to any restraint upon anticipation, unless by reason of s. 19 of the Married Women's Property Act, 1882, the property shall be liable to execution notwithstanding such restriction." In *Hood Barrs* v. *Cathcart* (1894), 2 Q.B. 559, the actual decision of the Court of Appeal was that a judgment against a married woman whose property is restrained from anticipation, could not be enforced against arrears of income to which the restraint applied accruing due after the date of the judgment, but Kay, L.J., who delivered the second judgment of the court incidentally affirmed in the course of his reasoning that income which had become due before the date of the judgment would be subject to the clause against anticipation until actual payment to the married woman, however long that might be after the due date of payment. In *Loftus* v. *Heriot* (1895), 2 Q.B. 212, the Court of Appeal adopted this proposition, but on the case going to the House of Lords, *sub nom. Hood Barrs* v. *Heriot* (1896), A.C. 174, it was held that the restraint does not apply to income accrued due at or before the date of the judgment although it has not reached the wife's hands. In *Whitely* v. *Edwards* (1896), 2 Q.B. 48, and in *Re Lumley, Ex parte Hood Barrs* (1896), 2 Ch. 690, the actual decision in *Hood Barrs* v. *Cathcart* (1894), 2 Q.B. 559, that income to which a restraint upon anticipation applies, accruing due after the date of a judgment whether in arrears or in the hands of the married woman, cannot be taken in payment of the judgment, was followed. Where the judgment creditor delayed to enter judgment under Order XIV. with the object of recovering arrears of income which accrued due after he had obtained leave to enter judgment, the court refused to

assist him by appointing a receiver: *Colyer* v. *Isaacs*, 77 L.T. 198. It is a curious inconsistency that while income of property subject to restraint not falling due until after the judgment cannot be reached by the judgment creditor, it can be reached by a creditor who postpones obtaining his judgment until, or until after the due date of the income. While the proviso in s. 1 of the amending Act of 1893 is not included in the New Brunswick Act, it may not be without practical interest to the New Brunswick reader to briefly advert to the question whether the proviso does not render obsolete, in cases to which it applies, the decisions that income subject to restraint upon anticipation due at or before the date of a judgment can be reached. The words of the proviso are: "Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract, any separate property which at that time or thereafter she is restrained from anticipating." In *Hood Barrs* v. *Cathcart* (1894), 2 Q.B. 576, Kay, L.J., in the concluding paragraph of his judgment says the question decided in that case does not seem to be affected as to future contracts and judgments by the proviso. He therefore apparently regarded the words "at that time," to refer to the date of a judgment against a married woman. That would appear to be highly disputable. It is the opinion of A. L. Smith, L.J., and Vaughan Williams, L.J., as stated in *Barnett* v. *Howard* (1900), 2 Q.B. 788 that these words clearly mean "at the time of entering into the contract." If that construction prevails then income of property subject to restraint accruing due at or after the date of the contract is protected from liability.

A conflict of opinion is to be found among English judges upon the question whether property subject to a restraint upon anticipation can be taken in satisfaction of a judgment obtained against a feme upon a contract made by her during coverture upon the coverture ceasing. As the restraint upon anticipation is a device for the protection of a married woman's separate property against alienation at the instance of the husband it can only be annexed to separate property. Until coverture arises or upon it ceasing the restraint is suspended and has no operation, and the power of alienation is unfettered: *Tullett* v. *Armstrong*, 1 Beav. 1, 4 M. & C. 390. Property, therefore, given to the separate use of a woman, subject to a restraint upon anticipation may be aliened by her at any time when she is a feme sole, whether by reason of

her husband's death: *Jones* v. *Salter*, 2 Russ. & M. 208; or a decree for judicial separation; *Munt* v. *Glynes*, 20 W.R. 823; *Waite* v. *Morland*, 3[illegible] Ch. D. 135; or a divorce: *Watkins* v. *Watkins* (1896), P. 228; *Stroud* v. *Edwards*, 77 L.T. 280. Upon the happening of any subsequent marriage the restraint against alienation becomes again operative: *Tullett* v. *Armstrong*, 1 Beav. 1; 4 M. & C. 390; *Shafto* v. *Butler*, 40 L.J. Ch. 308; *Stroud* v. *Edwards*, 77 L.T. 280. The argument that property freed from the restraint by the wife surviving her husband is made liable under the Act to satisfy her debts contracted during coverture turns upon the construction of s. 1, sub-s. 2 and sub-s. 4 of the Act of 1882, or upon s. 1 of the Act of 1893 where it is applicable.

It is provided by s. 1, sub-s. 2 of the former Act, that a married woman shall be capable of entering into and rendering herself liable in respect of her separate property, and of suing and being sued either in contract or in tort or otherwise in all respects as if she were a feme sole, and her husband need not be joined and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise. By sub-s. 4, Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire. As the cases containing differences of judicial opinion upon the question under discussion relate to the Act in its unamended form, it will be convenient to postpone reference to the Act of 1893 for separate consideration. It may be observed in passing that s. 19 of the principal Act, by which it is provided that nothing contained in the Act shall interfere with or render inoperative any restriction against anticipation, is not involved in the discussion, for the reason that the coverture being at an end the restraint is no longer operative and could not be prejudiced by the property being taken. The most explicit pronouncement that property subject to a restraint upon anticipation may be applied in satisfaction of a judgment upon a contract made by a married woman after the coverture has ceased is by Cozens-Hardy, J., in *In re Wheeler's Settlement Trusts* (1899), 2 Ch. 717. The value of his opinion is hardly diminished by the circumstance that it was unnecessary for the purposes of his judgment, as the opinion is a considered one, and its disagreement with

the contrary decision in *Pelton Bros.* v. *Harrison* (1891), 2 Q.B. 422, is frankly recognized. Moreover in any question upon the Married Women's Property Act the opinion of this learned judge is entitled to exceptional weight as he appears to have been engaged as counsel in almost every case bearing upon the Act that has come before the courts in recent years. The property made liable by the Act is "separate property." Can a feme's property be said to be such where the coverture has ceased? While the property in the question before Cozens-Hardy, J., was not separate property by virtue of the Act but by reason of a settlement to the feme's separate use, no distinction between the two classes of property can be suggested to render his argument inapplicable to the case of separate property under the Act, and Cozens-Hardy, J., makes it clear that he intends his observations to bear no such limitation. In his opinion property settled to the separate use of a woman does not cease to be separate estate upon her becoming discovert. He points out that in *Tullett* v. *Armstrong*, 1 Beav. 1, 4 M. & C. 390, Lord Langdale treated the separate use as "suspended" and having no operation while the woman is discovert, though it is capable of arising upon the happening of a marriage, and that Lord Cottenham expressly negatived the idea that a new separate estate arises on the second marriage, and asserted that the old separate estate continued through the second coverture. "There are authorities which speak of that which was separate estate still being separate estate after the husband's death: See *Pike* v. *Fitzgibbon*, 14 Ch. D. 837; 17 Ch. D. 454. The judgment of Mallins, V.-C., as varied by the Court of Appeal, is given in Seton, 5th ed. p. 757. It declares that such of the separate property of the widow as was immediately before the death of her husband and at this present date is vested in her, excluding any separate property which during coverture she was restrained from anticipating, was chargeable with the payment of the amount due to the plaintiffs. There are also authorities which speak of that which was separate estate being still separate estate after the wife's death; see *Heatley* v. *Thomas*, 15 Ves. 596, where the decree directed an account of the separate estate of the deceased lady against her executors; and *London Chartered Bank of Australia* v. *Lempriere*. I may point out that s. 23 of the Act of 1882 treats a married woman's separate estate as something which may vest in her executors: see *Surman* v. *Wharton* (1891), 1 Q.B. 491. It

seems to me to follow, from the authorities I have cited, that separate estate may be said to exist notwithstanding discoverture. It is suspended in this sense—that the widow's power of disposition over it is the same as if it had been given to her simply and without words creating a separate use. It is not extinct, because it becomes operative upon a second marriage. If the coverture ends by her death, it is still regarded as her separate estate, and is applied in satisfaction of her debts and liabilities. If the coverture ends by the husband's death, the same principle ought to apply." This reasoning can scarcely command assent. Its palpable weakness lies in its attributing to words a definite, deliberate significance, not shewn to be present to the minds of their authors, and assuming that they were used in the Act in the same sense. It fails to offer an explanation for the use of a phrase selected to denote the property of a married woman after the reason for its use has ceased. Before her marriage the property of a woman is not known and cannot be described as separate property. Though it is settled upon her to her separate use, or is made separate property by virtue of the Act, in the event of her marrying, it is a misuse of words to designate it as separate property when it is not held by her separate from a husband.

One turns with much more satisfaction to those decisions which insist that there is no such thing as separate property of an unmarried woman. In *Beckett* v. *Tasker*, 19 Q.B.D. 7, it was sought to make liable after the death of the husband property subject to a restraint on anticipation in satisfaction of a debt contracted by the widow during coverture, but the court took the obvious position that under s. 1, sub-s. 4 of the Act a married woman by her contract binds the separate property she is possessed of at the date the contract and all separate property thereafter acquired during the coverture, and that property acquired after coverture is not separate property and is not bound. *Pelton Bros.* v. *Harrison* (1891), 2 Q.B. 422, is an express decision by the Court of Appeal to the same effect, and when the question again came before the same court in *Softlaw* v. *Welch* (1899), 2 Q.B. 419, it was treated as being effectually disposed of by the former judgment of the court. A dictum of Lindley, L.J., occurs in *Holtby* v. *Hodgson*, 24 Q.B.D. 103, to the effect that separate property that the wife is restrained from anticipating becomes subject to a judgment against her as soon as her husband is dead. Importance was

attached to it but without effect in the argument on behalf of the creditor in the case of *Softlaw* v. *Welch*. It was also commented upon adversely by Vaughan Williams, J., in *In re Hewitt* (1895), 1 Q.B. 332. The reasoning in favour of the view that the contract of a married woman binds only her separate property would seem to be too weightily supported and to be too convincing to make it likely that the contrary view would prevail in New Brunswick upon the question arising there. In Ontario the question has been dealt with in accordance with the preponderating opinion in England: *Hammond* v. *Keachie*, 28 O.R. 455. It might be said to follow that the separate property of a married woman which might during the coverture be made liable for her engagement is no longer liable after the coverture has ceased by reason of the property ceasing to be separate property. That result plainly would not happen. Such property is bound under the Act and would not be released by any subsequent event. See *Pelton Bros.* v. *Harrison* (1891), 2 Q.B. 422.

Passing to the Act of 1893, or to s. 4, c. 163, R.S.O., one finds an express proviso relating to the principal question under consideration, but not wholly free from ambiguity. The Act provides, "Sec. 1, Every contract hereafter entered into by a married woman (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to: Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating." In *Barnett* v. *Howard* (1900), 2 Q.B. 784, C.A., the meaning of the proviso arose for express consideration, and it was held by A. L. Smith, L.J. (Vaughan Williams, L.J., concurring, dubitante), following the decision of Bucknill, J., that income restrained from anticipation accruing due to a divorced woman after divorce was protected from answering a judgment upon a contract made by her while married. Vaughan Williams, L.J., did not see his way to differ from this conclusion,

but he was far from thinking that the words of the section were clear. As the argument setting forth his misgivings is expressed with some little subtlety, it may not be inconvenient to state it in different words, if I rightly apprehend it. The difficulty experienced by him lies in the meaning of the phrase "separate property" in the proviso. By the removal of the coverture the property ceases to be separate. Therefore the proviso must not be applied to it but must be limited to separate property mentioned in clauses (a) and (b). This construction is in harmony with clause (c). In that clause the phrase is "all property." As property relieved from the restraint upon anticipation by the feme becoming discovert ceases to be separate property, it could be urged that it falls within the operation of clause (c).

A restraint upon anticipation does not protect the separate property of a married woman from her ante-nuptial creditors: s. 13 of the English; s. 16 of the Ontario; and s. 14 of the New Brunswick Act. It is held that the words "separate property" in that section will not be limited to such separate property as is free from a restraint upon anticipation: *Sanger* v. *Sanger*, L.R. 11 Eq. 470; *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773; *In re Hedgely, Small* v. *Hedgley*, 34 Ch. D. 379; *Axford* v. *Reid*, 22 Q.B.D. 548; *Kirk* v. *Murphy*, 30 L.R. Ir. 508. The words "before marriage" in the provision of s. 19 that "no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself, shall have any validity against debts contracted by her before marriage," mean before the existing marriage, and not before ever having been married; so that where a married woman contracted a debt during marriage, and subsequently obtained a decree absolute for a divorce, and married again, and thereupon settled property belonging to her to her separate use without power of anticipation, the restraint was held to be void: *Jay* v. *Robinson*, 25 Q.B.D. 467. The last clause of s. 19, "No settlement, or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors," does not apply to creditors upon contracts made during marriage if the settlement is not executed with a fraudulent purpose: *Hemingway* v. *Braithwaite*, 61 L.T. 224. This provision of the section merely states a well understood

principle of law; otherwise a woman might contract debts having the means to pay them, and then marry and execute a settlement of her property to her separate use without power of anticipation, and thereby absolve her property from all liability for her debts. See *Chubb* v. *Stretch*, L.R. 9 Eq. 555. In *Barnard* v. *Ford*, L.R. 4 Ch. 247, it was held that creditors of a woman remaining unpaid after her marriage in respect of debts incurred before her marriage, have a right to be satisfied out of her property in priority to any equity to a settlement she might possess. The provision does not apply to settlements made before the commencement of the Act: *Beckett* v. *Tasker*, 19 Q.B.D. 12; *Smith* v. *Whitlock*, 55 L.J. Q.B. 286.

A settlement or agreement for a settlement is not interfered with or affected within the meaning of the section so long as it is not invalidated or rendered inoperative. Property therefore of a married woman limited to her under a settlement but without any restriction on anticipation, may be reached by her creditors. In such a case the creditors are claiming under the settlement, not against it. They seek to affect the property comprised in the settlement, but not to affect the settlement itself. The Act annexes to her separate estate the incident of liability for her debts. In order that s. 19 should relieve property limited to her under a settlement from her debts, it should read that nothing in the Act shall interfere with or affect the incidents annexed to separate estate contained in a settlement. See *In re Armstrong*, 21 Q.B.D. 264. This construction of the section is illustrated by those cases in which it is held that the incident of separate use may be added to the reversion of property where the life interest under the settlement is limited to the separate use of the feme with power of appointment by will to her as to capital, with the result of vesting the interest in the reversion in her absolutely: *In re Onslow*, 39 Ch. D. 622; *In re Davenport* (1895), 1 Ch. 361. Section 19 applies to settlements made before or after marriage: *In re Armstrong*, 21 Q.B.D. 271.

The New Brunswick Act affects to make a distinction between the case of a woman married before and a woman married after the commencement of the Act with respect to the ownership and disposition by her of her real estate. Involved in the distinction is the question whether a woman married before the commencement of the Act may since the Act bind her real estate by contracts

entered into during coverture. By s. 4 (1) "Every married woman who shall have married before the commencement of this Act, shall and may, without prejudice and subject to the trusts and provisions of any settlement affecting the same, notwithstanding her coverture, have, hold, enjoy and dispose of all her real estate, whether belonging to her before marriage or in any way acquired by her after marriage, otherwise than from her husband, free from his debts and obligations and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried;" (2) "The real estate of any woman married after the commencement of this Act, whether owned by her at the time of her marriage or acquired in any manner during her coverture, and the rents, issues and profits thereof respectively shall, without prejudice and subject to the trusts and provisions of any settlement affecting the same, notwithstanding her coverture, be held and enjoyed by her for her separate use, free from any estate therein of her husband, during her lifetime, and from his debts or obligations, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried, and her receipts alone shall be a discharge for any rents, issues and profits of the same." The striking dissimilarity in the wording of these provisions naturally forbids placing a construction upon them which shall not give effectual recognition to the effort of the Legislature to place upon a separate footing the two classes of married women dealt with by the section. The difficulty suggested in construing sub-section 1 is in large part due to the necessity felt of preserving a distinction between it and sub-section 2, for by itself sub-section 1 is comparatively free of doubt.

In determining the meaning of sub-s. 1 it does not seem that recourse can be had to s. 3 (1) by which it is provided that "a married woman shall be capable of acquiring, holding and disposing by will or otherwise of any real or personal property as her separate property in the same manner as if she were a feme sole, without the intervention of any trustee." It is held to be a general, enabling section, and its force is restricted by or subordinated to other sections of the Act: *In re Cuno*, 43 Ch. D. 12; *In re Drummond & Davies' Contract* (1891), 1 Ch. 530. Nor do I think that the question whether a woman married before the commencement of the Act can contract during coverture since the Act so as to bind her real estate is concluded by the provision of s. 4 (3) that

"in respect to all contracts entered into by a married woman after the commencement of this Act, all the property of such married woman mentioned in this section shall be deemed to be her separate property." The provision is of very material assistance in support of the contention that a woman married before the commencement of the Act may contract with respect to her real estate, but it is by no means decisive of the question, for if sub-s. 1 does not admit of the contention its meaning cannot be controlled by sub-s. 3, and the words of sub-s. 3 would have to be transposed so as to limit their application to contracts entered into by a married woman married after the commencement of the Act. An argument of great weight to be adduced from the sub-s. is that an incongruity is present in the section unless it is considered that the property mentioned by sub-s. 1 is subject to the contracts of a married woman married before the commencement of the Act, and this argument would be of determining effect if the meaning of sub-s. 1 were doubtful.

The distinguishing features of sub-ss. 1 and 2 are that the real estate of a married woman married before the commencement of the Act is not declared to be "for her separate use, free from any estate therein of her husband" as is provided in the case of a woman married after the commencement of the Act, and that while it is enacted in the first sub-section that a married woman shall have, hold, enjoy and dispose of all her real estate the sub-section is susceptible of the argument that it is merely to the extent of being free from the debts and obligations of her husband, whereas in sub-s. 2 it is clearly expressed that the rents, issues and profits of the real estate belong to the wife to the exclusion of the husband's rights. On the other hand sub-s. 2, unlike sub-s. 1, omits to confer a jus disponendi upon the married woman, and were it not conferred by s. 3 (1) a married woman coming within sub-s. 2 would be powerless to contract with respect to her separate property: *Wallace* v. *Lea*, 28 S.C.R. 595. It is quite apparent that the construction of the first sub-section cannot be made to depend upon a comparison between it and the succeeding sub-section.

The view that sub-s. 1 does not divest a husband of his common law marital rights to the enjoyment of the income of his wife's real estate rests upon a number of considerations. The most prominent of these is that a construction is not to be placed upon the statute with the effect of depriving the husband of his existing

rights unless the words of the statute make such a construction irresistible. See *Reid* v. *Reid*, 31 Ch. D. 402; *In re Cuno*, 43 Ch. D. 12; *Turnbull* v. *Forman*, 15 Q.B.D. 234. At the time of the commencement of the Act the rights of a husband in the property of his wife were governed by c. 72, C.S.N.B. By s. 1 of that chapter it is enacted that "the real and personal property belonging to a woman before, or accruing after marriage, except such as may be received from her husband while married, shall vest in her and be owned by her as her separate property, and it shall be exempt from seizure or responsibility in any way for the debts or liabilities of her husband," etc. This statute did not enable a married woman to contract with respect to her property as the jus disponendi was withheld. While her property is declared by the statute to be her separate property it was held that no analogy existed between it and separate property arising under the peculiar doctrines of the Court of Equity with reference to the equitable interests of married women in property settled to their separate use, and that consequently the jus disponendi which is the foundation of the doctrine of equity that a married woman may charge her separate property by her contracts, could not be assumed to be an incident of the separate estate created by the statute: *Wallace* v. *Lea*, 28 S.C.R. 595. But the jus disponendi is not essential to the existence of separate property: *Lawson* v. *Laidlaw*, 3 A.R. 85. That the statute vested the unfettered enjoyment of the property in the wife, and that the enjoyment of it did not remain in the husband was conceded in *Wallace* v. *Lea*, 28 S.C.R. 595. The contention that the statute merely exempted the wife's property from seizure for the husband's debts is considered by Barker, J., in his judgment in *Lea* v. *Wallace*, 33 N.B. 492, 509, and is disposed of by him by the argument that that could not have been the intention of the Legislature, for if it had been it was a very simple thing to have made a declaration to that effect without encumbering the section with words vesting the property in the wife as her separate estate. See further *Moore* v *Jackson*, 22 S.C.R. 219. The only right of the husband not extinguished under the statute in the real estate of his wife was his tenancy by the curtesy. That being the former state of the law the argument upon it can plainly not be that a restricted meaning should be put upon sub-s. 1 of the present Act, but that it should be liberally construed in order to preserve to a married woman her vested rights in her property.

Examining sub-s. 1 by the ordinary canon of construction that the language of a statute must be read so as to give effect to its plain intent and meaning, one would say that its terms were straightforward and that its meaning did not admit of dispute. Words better fitted to vest the real estate of a married woman in her could scarcely be devised. So far from being experimental and untechnical in their nature, they appear to be framed with particular aptness and to have been chosen with deliberate care. If the words of the sub-section stopped short of conferring a power of disposition upon a married woman, there can be no doubt that they would be ample to make her real estate her separate estate. Dealing with ch. 73 C.S.U.C., s. 1, by which a married woman was declared to "Have, hold and enjoy her lands free from the debts and obligations of her husband and from his control or disposition, without her consent in as full and ample a manner as if she continued sole and unmarried," Spragge, V.-C., in *Royal Canadian Bank* v. *Mitchell*, 14 Gr. 418, held that the words constituted the lands of a married woman her separate estate. That would not be an accurate phrase if the enjoyment of the income did not belong to the married woman. Therefore the stipulation of the section that she should have, hold and enjoy her real estate free from the debts and obligations of her husband cannot mean that the real estate was to be the wife's to that extent only, and that the income remained vested in the husband. How conclusive does it appear that the sub-section confers a separate estate upon the wife when words sufficient for the purpose are supplemented by a gift of the jus disponendi. If the sub-section was merely for the protection of the wife's real estate from the debts of her husband, the jus disponendi is without logical relevancy to the sense of the provision. Having enacted that she should have, hold and enjoy her real estate free from her husband's debts it was wholly unnecessary to enact that it could be disposed of free from his debts, if it was not intended that the jus disponendi should be vested in the wife. The purpose of the sub-section to protect the real estate from the husband's debts, being secured, the power of disposition would have been left in the wife and husband. The argument that the insertion of the words "free from the debts and obligations of the husband," denotes that in all other respects the property remains in the husband, is also available under sub-s. 2 as the expression occurs there, yet it could not be

seriously contended that it should prevail against the clear declaration that the real estate of a woman married after the commencement of the Act shall be held and enjoyed by her for her separate use, free from any estate therein of her husband. The forcibleness of sub-s. 1 for the purpose of vesting property in the wife is strikingly illustrated by comparing it with s. 3 (1). That is a general and enabling provision and its office appears to be to make explicit in the respects dealt with by it any obscurity obtaining in other portions of the Act. The most efficacious part of it lies in the words "as if she were a feme sole," the legal equivalent of which are reproduced in sub-s. 1. Again in sub-s. 2, the meaning of which is not disputable, the emancipation of the wife's property is effected in part by similar language. Numerous legislative examples may be found in which are used the words embodied in sub-s. 1 where the Legislature wished to make it plain that the wife had an absolute disposing power over her property to the exclusion of the husband's interest. Thus in s. 25 of the English Divorce and Matrimonial Causes Act, 20 & 21 Vict., c. 85, it is enacted that "In every case of a judicial separation the wife shall, from the date the sentence, and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire, or which may come to or devolve upon her, and such property may be disposed of by her in all respects as if she were a feme sole." The section was considered in *Re Insole*, L.R. 1 Eq. 470, by Romilly, M.R., and it was his opinion that it disposed of the rights of the husband, and that the moment judicial separation took place the property belonged to the wife exactly in the same manner as if the husband were dead. See also *Wilkinson* v. *Gibson*, L.R. 4 Eq. 162; *Dawes* v. *Creyke*, 30 Ch. 500; *Waite* v. *Morland*, 38 Ch. D. 135; *Hill* v. *Cooper* (1893), 2 Q.B. 85. In *Cooper* v. *Macdonald*, 7 Ch. D. 288, Jessel, M.R., said the effect of the words "in the same manner as if she were a feme sole" is to destroy the right of the husband altogether. Not only do the words get rid of the disability of coverture: *In re Bowen* (1892), 2 Ch. 294; but they vest the legal as well as the equitable estate in the wife: *Hope* v. *Hope* (1892), 2 Ch. 339. They are wider words than words declaring her property to be for the "separate use" of the wife, for those words do not include a power of alienation. See *Howard* v. *Bank of England*, L.R. 19 Eq. 301. The observation that by sub-s. 2 of the Act the real estate is declared

to be for the "separate use" while the expression is omitted in sub-s. 1, with the object of founding thereon an argument in depreciation of sub-s. 1 is thus converted into an argument for a liberal interpretation of sub-s. 1.

Coming back to what after all is the real difficulty in construing sub-s. 1, the palpable effort of the Legislature to make a distinction between the case of a woman married before and a woman married after the commencement of the Act, one must frankly admit that the sub-section should, if possible, be so construed as to give effect to that distinction. By sub-s. 4 of the section "nothing contained in this Act shall prejudice the husband's tenancy or right to tenancy by the curtesy in any real estate of the wife." In the case of a woman married before the commencement of the Act the husband's rights in his wife's property were governed by c. 72, C.S.N.B., and I have already pointed out that that statute did not prejudice the husband's estate by the curtesy. In construing sub-s. 4 in conjunction with sub-s. 1 effect should be given to it so as not to deprive the husband of a right accrued in him at the commencement of the Act. The power of alienation conferred by sub-s. 1 must therefore be held to be limited by sub-s. 4.* Where a woman is married after the commencement of the Act it would seem proper to hold that as her real estate is declared to be free from any estate of her husband that the husband's curtesy would only attach to it in the event of it not being disposed of in her lifetime. This is the conclusion I came to in a note at page 312 of New Brunswick Equity Cases analysing s. 4 of the Act under consideration, and I am aware of no reason to induce me to change the opinion there expressed. It appears to me that this is the distinction between sub-s. 1 and sub-s. 2 and that it is of sufficient moment to account for the difference in their phraseology without placing a construction upon sub-s. 1 that would minimise its express terms and that would interfere with vested rights. The conclusion that under sub-s. 1 a married woman may dispose of her real estate without the concurrence of her husband save that if he is not a consenting party to its alienation his curtesy will not be barred, places a construction upon the sub-section in harmony in a very substantial respect with sub-s. 3

* This opinion is confirmed by the judgment of Barker, J., in *De Bury* v. *De Bury*, 2 N.B. Eq. 278, delivered since the writing of this article.

by which it is enacted that "In respect to all contracts entered into or torts committed by a married woman after the commencement of this Act, all the property of such married woman mentioned in this section shall be deemed to be her separate property."

The New Brunswick Act in s. 15, following the Ontario Act, s. 17, contains a very material modification of the English Act in respect of the liability of the husband for the wrongs of his wife committed during marriage. The rule in equity that a woman's separate estate was liable upon her contracts or general engagements made with reference to her separate property obviously could not be extended to her torts or to her breaches of trust, though where she was an actual participant in a breach of trust and did not merely acquiesce in it her separate estate was liable: *Crosby* v. *Church*, 3 Beav. 485; *Clive* v. *Carew*, 1 J. & H. 199; *Sawyer* v. *Sawyer*, 28 Ch. D. 605; *Davies* v. *Stanford*, 61 L.T. 234, including arrears due of income subject to a restraint on anticipation; *Pemberton* v. *McGill*, 1 Dr. & S. 268. Equity followed the common law rule that redress for the wife's wrongs, including her breaches of trust, must be had against the husband. This rule has not been modified by the English Act, except with respect to breaches of trust or devastavit committed by the wife (s. 24), even though the husband has received no estate from the wife: *Seroka* v. *Kattenburg*, 17 Q.B.D. 177; *Earle* v. *Kingscote* (1900), 2 Ch. 585. The New Brunswick Act, s. 15, adapted from the Ontario Act, s. 17, limits the liability of the husband for wrongs committed by the wife after marriage to the extent of property received by him. By s. 2 of the New Brunswick Act (s. 2 of the Ontario Act), it is enacted that a husband shall not be liable for breaches of trust or devastavit committed by his wife unless he has acted or intermeddled in the trust. Whether this section must be read subject to s. 15 of the New Brunswick Act is an undecided point. In an action against the husband it would seem that it is sufficient to allege that the husband is liable upon the tort without pleading that he has received assets from the wife. See *Mathews* v. *Whittle*, 13 Ch. D. 811. As the husband is not liable upon the wife's contracts made after marriage he is not liable for a fraud or other tort directly connected with a contract made by her: *Earle* v. *Kingscote* (supra). In respect to the liability of the separate estate of a married woman for her wrongs committed after marriage there would seem to be no ground for holding that the liability under

the Ontario or New Brunswick Act is not identical with that given by the English Act. In sub-s. 2 of s. 1 of the English Act it is distinctly provided that a married woman shall be capable of suing and being sued in tort, whereas the words of s. 3 (2) of the New Brunswick Act, or of the Ontario Act, are that she shall be capable of suing and being sued in all respects as if she were a feme sole. It is not likely these words will be construed narrowly as they seem to have been purposely chosen to make it clear that her right to sue or her liability to be sued was not in respect of a limited class of actions, which might be contended if it was specified that she might sue or be sued in contract or in tort as in the corresponding section of the English Act. See *Whittaker* v. *Kershaw*, 45 Ch. D. 329, where such a construction of the English Act was held to be avoided by the words, "or otherwise," in s. 1, sub-s. 2. Section 4 (3) of the New Brunswick Act contemplates that a married woman may be sued for her torts committed during marriage. The liability of the separate estate of a married woman to make good a breach of trust or devastavit committed by her is conclusively stated in both the English and Canadian Acts. By s. 18 of the New Brunswick Act (s. 20 of the Ontario Act), adapted from the corresponding section of the English Act, a married woman who is an executrix or administratrix alone, or jointly with any other person or persons, of the estate of any deceased person, or a trustee alone, or jointly as aforesaid, of property subject to any trust, may sue or be sued . . . as if she were a feme sole. Section 2 of the New Brunswick Act (s. 2 of the Ontario Act), t ken from s. 24 of the English Act, provides that "In this Act the word 'contract' shall include the acceptance of any trust or of the office of executrix or administratrix, and the provisions of this Act as to the liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by a married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration," etc. An order against a married woman administratrix to pay into court money belonging to the trust estate, in her possession, should be in the common form, and not in the form settled in *Scott* v. *Morley*, 20 Q.B.D. 132; unless, semble, she has committed a devastavit and it is sought to compel her to make good the loss: *Re Turnbull* (1900), 1 Ch. 180.

The liability of a husband for the debts and contracts of his wife entered into before marriage is by s. 14 of the English Act (s. 15 of the New Brunswick and s. 17 of the Ontario Act) limited to the extent of the property of the wife received by him. At common law the liability of the husband in such instances was personal and unlimited, whether he knew of the existence of such debts or contracts or not, and whether he obtained any property from his wife or none. It was necessary that the wife be made a party to the action, and on her death no action could be brought against him. See *Bell* v. *Stocker*, 10 Q.B.D. 129. If he and she were both sued and judgment was recovered against both, the judgment could be enforced against the survivor. Where judgment was obtained against her before her marriage a judgment could be obtained on a sci. fa. against him and her after marriage which would bind him upon her death. Since the Act he may now be sued without her, and whether she be alive or dead: *Beck* v. *Pierce*, 23 Q.B.D. 321, or he can be sued with her under s. 15 of the English Act (s. 16 of the New Brunswick Act; s. 18 of the Ontario Act), where the plaintiff seeks to establish his claim wholly or in part against both husband and wife. In such case the judgments may be separate although to the extent to which they are both liable, the judgment may be "a joint judgment against the husband personally, and against the wife as to her separate property." A judgment obtained under the Act against the wife upon a debt incurred before marriage is not a defence to an action against the husband in respect to the same matter: *Beck* v. *Pierce*, 23 Q.B.D. 316. The husband cannot be made liable under the Act for an ante-nuptial debt of the wife which accrued due against the wife more than six years before the commencement of the action: Ibid. In an action against the husband in respect of a debt incurred by his wife before marriage it is not, it would seem, necessary to allege that the husband has received assets of the wife if it is pleaded that the husband is liable for the debt: *Mathews* v. *Whittle*, 13 Ch. D. 811. A judgment debt recovered against a married woman during a former coverture is a debt contracted before her marriage within s. 14 of the English Act (s. 15 of the New Brunswick Act; s. 17 of the Ontario Act): *Jay* v. *Robinson*, 25 Q.B.D. 467; *Pelton* v. *Harrison* (1891), 2 Q.B. 422. A debt accruing due after marriage on a contract made before marriage is, for the purpose of O. XIV. of the English Jud. Act

rules, on the same footing as an ante-nuptial debt: *Gunston* v. *Maynard*, 77 L.T.J. 102.

The personal liability of a married woman at common law upon contracts made by her before marriage is not taken away by the Act: *Scott* v. *Morley*, 20 Q.B.D. 120; *Robinson* v. *Lynes* (1894), 2 Q.B. 577; *Alliance Deposit, etc., Co.* v. *Gardiner*, 105 L.T.J. 244, and a judgment in such a case may be entered against her in the common form. The advantage of such a judgment is that it is not limited to the separate estate of the wife, and that she may be committed to prison under s. 5 of the English Debtors' Act, 1869, upon proof that she has had means to pay the judgment since its date: *Scott* v. *Morley* (supra); *Robinson* v. *Lynes* (supra). It is optional with the plaintiff to take a jugment in respect of an ante-nuptial debt in the form settled in *Scott* v. *Morley*, 20 Q.B.D. 132, instead of in the common form: See *Downe* v. *Fletcher*, 21 Q.B.D. 11; *Molony* v. *Harney* (1895), 2 Ir. R. 169; *Re Teasdall* v. *Brady*, 18 P.R. 104. A husband could not before and cannot since the Married Women's Property Act maintain an action against his wife for money lent to her or paid for her by him at her request before marriage, but he may under the Act as he could have done in equity maintain an action against her and charge her separate property for money lent by him to her after their marriage, and for money paid by him for her after marriage though the request was made before, and it is not necessary since the Act that she should have contracted with her husband with respect to her separate estate: *Butler* v. *Butler*, 14 Q.B.D. 831; 16 Q.B.D. 374. See *Michaels* v. *Michaels*, 30 S.C.R. 547, where it was held that under the Nova Scotia Act a married woman may bring an action against her husband upon a debt incurred by him to her during marriage.

Whether the limitations in a judgment against a married woman approved of in *Scott* v. *Morley*, 20 Q.B.D. 132, will be prescribed by New Brunswick courts is an undetermined question, though the writer is informed that judgments have been signed by New Brunswick practitioners in accordance with the form adopted in that case. In Ontario the practice appears to be in conformity with the English practice. See *Cameron* v. *Heighs*, 14 P.R. 56; *Nesbitt* v. *Armstrong*, 14 P.R. 366; *Hammond* v. *Keachie*, 28 O.R. 455; *Davidson* v. *McClelland*, 32 O.R. 382, though in *Watson* v. *Ontario Supply Co.*, 14 P.R. 96, Rose, J., said that he knew it to be

the opinion of several judges that there is no good reason why the judgment should be in a form different from the usual form, as the question of what property is exigible in execution is determined not by the judgment, but by statute, and can be raised, and raised only, when any property is seized in execution. In *In re Widmeyer*, 32 C.P. 187, Wilson, C.J., considered that a married woman might be held liable generally, leaving the creditor to find by his execution any of her separate property. The provision in the form of judgment settled in *Scott* v. *Morley*, limiting execution upon the judgment to the married woman's separate property "Not subject to any restriction against anticipation, unless, by reason of s. 19 of the Married Woman's Property Act, 1882, the property shall be liable to execution, notwithstanding such restriction," is to be found in judgments preceding that case, with slight verbal differences, but I am unacquainted with any case setting forth a substantial reason for its use. In *Bursill* v. *Tanner*, 13 Q.B.D. 691, where its evolution can be distinctly traced, Field, J., merely observes that it is desirable that the judgment should shew on its face that it is by virtue of the Act, and that the execution is to be limited to the separate estate of the defendant, and the same learned judge uses a similar expression in *Perks* v. *Mylrea*, W.N. (1884) 64. The matter is more definitely dealt with in *Scott* v. *Morley*. It is shewn that by s. 1, sub-s. 2 of the Act the liability attaching to a married woman is not personal but is limited to her separate property, and it is therefore considered that the judgment ought to follow the words of the Act. As the form of judgment adopted in that case has ever since been persistently followed in English practice except with a variation necessary to carry out the proviso to s. 1 of the Married Women's Property Act, 1893 (*Barnett* v. *Howard* (1900), 2 Q.B. 785), one is reluctant to suggest that the form does not serve a practical or useful purpose. It is obvious that the form does not exclude the determination of questions as to what is separate property of defendant liable to be taken upon execution The form embodies certain provisions of the Act, but it leaves open to question the construction of the Act. Whether income subject to a restraint upon anticipation has accrued due at the date of the judgment so as to be reached by the creditor must be determined collaterally to the phraseology of the judgment or of the execution based upon it. If the purpose of the form of judgment was to decide some question upon the construction of the

Act it would be no reason for its use unless the principle were adopted of expressing in every judgment all decisions relating to the question as to what property is available in satisfaction of a judgment obtained under the Act. The actual decision in *Scott* v. *Morley*, was that a married woman was not liable in a case to which the Act applied to committal under s. 5 of the Debtor's Act, 1869, and the form of the judgment was so framed as to make that clear. But if the judgment were in the ordinary form in a case within the Act no personal consequences could be put upon the defendant, as the rights of the parties are exclusively regulated by the Act. I do not think that the English practice can be said to rest upon any demonstrably scientific ground. Upon the argument of convenience the language of Bowen, L.J, in *Hyde* v. *Hyde*, 13 P.D. 175, may be adopted that "There is great convenience in keeping to a general form, without attempting to define by negation all the property that is not to be seized, or to define categorically the property which can be seized."

W. H. TRUEMAN.

St. John, N.B.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

WILL—BEQUEST TO VOLUNTARY ASSOCIATION—CHARITY—PERPETUITY.

In re Clarke, Clarke v. *Clarke* (1901) 2 Ch. 110, brought up the validity of a bequest in favour of a voluntary unincorporated association. The association was one formed for the purpose of providing a home and employment for discharged and disabled soldiers and sailors, and was self-supporting. As it increased, buildings were from time to time acquired to provide quarters for the men, and for carrying on the business of the association. The management and property of the association was vested in a board of governors consisting of two permanent trustees, an administrative board of eighteen, and an executive board of seven. The bequest was "to the committee for the time being of (the association) to aid in the purchase of their barracks, or in any other way

beneficial to that corps." Byrne, J., held that if, and so far as, the objects of the association were charitable, the gift was good; and if, and in so far as, they were not charitable, still it was a good gift and did not tend to create a perpetuity, because there was nothing in the constitution of the association to prevent the members from disposing of the property if they should think fit, following *Cocks* v. *Manners*, L.R. 12 Eq. 574, where a gift to a Dominican convent was upheld.

FRAUDULENT CONVEYANCE — POST-NUPTIAL SETTLEMENT — ANTE-NUPTIAL AGREEMENT FOR SETTLEMENT — STATUTE OF FRAUDS (29 CAR. 2, C. 3) S. 4 —13 ELIZ., C. 5.

In re Holland, Gregg v. *Holland* (1901) 2 Ch. 145, (Farwell, J.) determined that where a post-nuptial settlement is made in pursuance of an ante-nuptial agreement, it is necessary, in order that the settlement shall be valid as against the creditors of the settlor, that the ante-nuptial agreement shall have been writing duly signed as required by s. 4 of the Statute of Frauds, and that the mere recital of an ante-nuptial agreement in the settlement, even if sufficiently full and precise to bind the settlor and volunteers claiming under him by estoppel, is not sufficient as against creditors.

MORTGAGE—MORTGAGEES IN TRUST — PAYMENT TO PARTNER OF ONE OF TWO JOINT MORTGAGEES.

In *Powell* v. *Brodhurst* (1901) 2 Ch. 160, the action was brought upon a mortgage for £4000, which in 1890 was assigned to two trustees of a settlement as joint tenants, but the mortgagor had no notice of the trust; one of the trustees named Ingram was a member of a firm of solicitors to whom the mortgagor in 1892 remitted £1000 on account of the mortgage. This sum was credited to Ingram in the books of the firm, but was not in fact applied on the mortgage, and the firm continued to pay to the mortgagees interest on £4000. Ingram survived his co-trustee and died in 1897, and his executors transferred the mortgage to the plaintiffs, the new trustees of the settlement. The mortgagor claimed that the £1000 paid to the solicitors in 1892 was a valid discharge pro tanto of the mortgage debt, but Farwell, J., held that in the absence of evidence that the firm of solicitors were authorized to receive the private debts of one of the firm, it was not a good payment as against the trustees. The evidence shewed that

Ingram had been incapacitated by illness, and had since 1891 taken very little part in the business of the firm, and it was possible that he knew nothing of the receipt of the £1000 in 1892. The payment to his partners, therefore, was held ineffectual to discharge the mortgage, and it was held to be immaterial that Ingram afterwards became the survivor of his co-mortgagee.

WILL — GIFT TO A CLASS — GIFT "TO A. AND CHILDREN OF B." — DEATH OF MEMBER OF CLASS IN TESTATOR'S LIFETIME—LAPSE—SURVIVORSHIP.

Kingsbury v. *Walter* (1901) A.C. 187, is a case which was known in the Court below as *In re Moss, Kingsbury* v. *Walter* (1899) 2 Ch. 314 (noted ante vol. 35, p. 715), and in which the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Shand, Davey, and Brampton) have affirmed the judgment of the Court of Appeal. The case turns on the construction of a will, whereby the testator gave property to his niece Elizabeth and the children of his sister Emily. Elizabeth died in the lifetime of the testator, and the children of Emily claimed to be entitled to the whole as survivors of a class. The Court of Appeal decided in their favour, and the House of Lords upheld the judgment.

PRACTICE — DISCOVERY— PRODUCTION OF DOCUMENTS—PRIVILEGE—COMMUNICATION BETWEEN SOLICITOR AND CLIENT—"EVASION" OF STATUTE—FRAUD.

Bullivant v. *Attorney-General* (1901) A.C. 196, was known in the Court below as *The Queen* v. *Bullivant* (1900) 2 Q.B. 163, (noted ante vol. 36, p. 444). In this case the House of Lords (Lord Halsbury, L.C., and Lords Shand, Davey, Brampton, and Lindley) have upset the Court of Appeal on a point of practice. The action was brought against the representative of a deceased person to recover succession duties and to avoid certain transactions alleged to be an "evasion" of the Succession Duty Act of the former colony of Victoria. In answer to an order for production of documents, the defendant claimed privilege for certain communications between himself as solicitor and his deceased client, the Court of Appeal ordered them to be produced on the ground that there is no privilege in respect of documents passing between solicitor and client for the purpose of the client obtaining professional advice as to how he may evade a statute. The House of Lords, however, took a different view of the matter, and held that the privilege was not lost by the death of the client, that the word "evade" was ambiguous and capable of a perfectly innocent

meaning, and without expressing any opinion as to the sense in which it was used in the statute in question, still there was no proof or allegation of any fraud or illegality to displace the privilege, and the order for production was accordingly reversed.

CONTRACT—SALE OF GOODS—PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL—RATIFICATION.

Keighley v. *Durant* (1901) A.C. 240, is an important decision of the House of Lords on the law of principal and agent. The case was called in the Court below *Durant* v. *Roberts* (1900) 1 Q.B. 629, (noted ante vol. 36, p. 328) and may be remembered as having given rise to a very marked difference of opinion among the members of the Court of Appeal. Their Lordships (Lord Halsbury, L.C., and Lords Macnaghten, Shand, James, Davey, Brampton, Robertson, and Lindley) unanimously adopt the view of Smith, M.R., in preference to that of Collins and Romer, L.JJ., the other members of the Court of Appeal. The question was whether a contract made by a person intending to contract on behalf of a third party, but without his authority, can be ratified by such third party so as to render him able to sue, or be sued, on the contract, where the person who made the contract did not, at the time of making it, profess to be acting on behalf of a principal. The House of Lords have answered the question emphatically in the negative.

TRUSTEE—BREACH OF TRUST—LOAN—DISCHARGE—LIABILITY OF DEBTOR NOTWITHSTANDING DISCHARGE.

Smith v. *Patrick* (1901) A.C. 282, although an appeal from a Scotch Court, is nevertheless to be noted as dealing with principles which are applicable also to English law. A partner of a firm died and nominated his wife and two of the three other partners trustees of his will, and he authorized his trustees to allow his share of the capital to remain as a loan to the firm so long as his trustees thought it safe to do so. The wife died. The amount of the testator's share of the capital was ascertained and continued as a loan to the firm. The third partner, not a trustee, retired from the firm and withdrew his share of the capital. The trustees, the two remaining partners, assumed all the debts and liabilities of the firm, and paid half a year's interest on the debt due to the trust estate. A year after the retirement of the third partner, the trustees granted to the firm and the retired partner a discharge of the debt due to the trust estate, and about a month afterwards the

new firm became insolvent, and the two trustees bankrupt. They resigned their trusteeship, and new trustees were appointed in their place, and they proved a claim against, and received a dividend from, the estate of the two partners. They then brought the present action against the retired partner, claiming payment from him of the debt due to the trust estate, notwithstanding the discharge executed by the former trustees; and the House of Lords (Lord Halsbury, L.C., and Lords Shand, Davey, Brampton, and Robertson) held, affirming the First Division of the Court of Session, Scotland, that the plaintiffs were entitled to recover, on the ground that the discharge was a breach of trust on the part of the trustee partners from which the third partner could not profit, and that the proving a claim against, and accepting a dividend from, the estate of the two partners did not discharge the liability of the old firm; and moreover a power to lend trust money to a firm consisting of certain individuals does not authorize a loan, or the continuance of the loan, to a firm differently constituted, whether including more individuals or less.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Osler, J.A.] FAHEY *v.* JEPHCOTT. [Oct. 4.

Appeal—Conditional allowance of—Reduction of damages—Election—Further appeal.

After the plaintiff's damages had been assessed by a jury the trial Judge dismissed the action. The plaintiff appealed, and the Court of Appeal ordered that, if the plaintiff elected to reduce the damages assessed by the jury, her appeal should be allowed with costs, and judgment entered for her for the reduced amount with costs, or otherwise that there should be a new trial.

Held, that the plaintiff was entitled to have a clause inserted in the order of the Court protecting her, in the event of an appeal by the defendant to the Supreme Court of Canada, against her election to reduce the damages.

Gordon Waldron, for plaintiff. *McGregor Young*, for defendant.

Falconbridge, C.J., Street, J.] [Oct. 4.

WASON *v.* DOUGLAS.

Deed—Description—Boundary—Medium filum aquæ—Ascertainment of centre line—Jury—Misdirection—Objection not taken at trial—New trial—Costs—Evidence—Statute of Limitations—Occasional acts.

In a question of boundary between two persons claiming under a paper title, where there has been no enclosure, occasional acts, which would be merely acts of trespass if done by one not the owner, do not operate to give a statutory title; and evidence of such acts offered by the defendant was in this case properly rejected.

The plaintiff and defendant were the owners of adjoining farms: the division line was a small stream running about south-west: the plaintiff owned the land on the north-west side of the stream, and the defendant that on the south-east side. The dispute was as to the ownership of an island in the stream. Down to the 5th March, 1883, both parcels were owned by R., who on that day conveyed to the defendant the land lying south-east of the stream, describing it by metes and bounds, the boundary on the north-west being "the southerly edge of the stream." In 1884 R. conveyed to the plaintiff the residue of the lot by a description which expressly crossed the stream and ran along its south-easterly edge. At the time of this action there were signs of a channel on each side of the island, but the main stream at all times, and the whole stream in the dry seasons, flowed in a channel on the north-west side. It was contended by the plaintiff that in 1883 and 1884 the stream ran very largely in the southerly channel, and by the plaintiff that the northerly channel had always been the only regular one.

Held, that the description in the conveyance to the defendant entitled him to the medium filum aquæ as his boundary, and the plaintiff's deed, being subsequent, could not entitle him to claim anything beyond that boundary. The boundary line was, therefore, the centre line of the stream, and the position of that line was the matter to be determined. The centre line of whichever channel was the main channel in 1883 would be the centre line of the stream. The question left to the jury was whether there was any southerly channel at all, and they were told that, if they found there was, the plaintiff was entitled to succeed. They should have been asked to find, if there were two channels, which was the main channel in 1883.

Effect was given to an objection to the Judge's charge not taken at the trial, and a new trial ordered, but without costs.

Cases involving the title to land should be tried without a jury, so that the necessity for a second trial may be avoided.

G. Edmison, for plaintiff. *E. B. Edwards*, K.C., for defendant.

HIGH COURT OF JUSTICE.

Boyd, C.] [June 18.

CANADA ATLANTIC R.W. CO. *v.* CITY OF OTTAWA.

AND

MONTREAL AND OTTAWA R.W. CO. *v.* CITY OF OTTAWA

Railways—Right to cross streets—Expropriation proceedings or compensation—Necessity for—Extension of city limits—Toll road, purchase of—Effect of.

Railways incorporated by the Dominion Parliament, in the construction of their lines of railway, which have complied with the requisites of the Railway Act, and obtained the approval of the Railway Committee, have the right to cross over the highways of a city without taking expropriation proceedings under the Railway Act, or without making any compensation to the city therefor.

Where under the powers conferred by 51 Vict, 1897, c. 53, s. 9 (O.) for extending the limits of the city of Ottawa, the city acquired at an agreed price, part of the road of a toll road company within such extended limits, such part thereupon ceased to have its previous character of a toll road, and became the same as the other public streets of the city.

Wallace Nesbitt, K.C., *D'Arcy Scott* and *C. J. R. Bethune*, for plaintiffs. *Aylesworth*, K.C., and *McVeity*, K.C., for defendants.

Street, J.] FROST *v.* MCMILLEN. [June 22.

Prohibition—Division Court—Transfer of action—Order issued under s. 90 instead of s. 91 of Act.

Where an order was made by a Division Court judge for the transfer of an action brought in that division, to the Division Court of another county, the order being made under the powers conferred by s. 90 of the Division Court's Act, R.S.O. 1897, c. 60, whereas, under the circumstances, the order should have been made under s. 91, an order for prohibition was made prohibiting the Division Court to which the transfer had been made from acting under the order of the transfer, but such order of prohibition was to be without prejudice to the right to apply for an order under said s. 91

B. N. Davis, for plaintiffs. *Milliken*, for defendants.

Divisional Court.] REGINA *v.* SCULLY. [July 10.

Mandamus—Malicious prosecution—Record of acquittal—Clerk of the Peace—Quarter Sessions—Fiat of Attorney-General.

The bills, indictments and records of the Court of Quarter Sessions, which are in the hands of the Clerk of the Peace, are public documents, which every one who is interested in them has the right to see; so that a defendant who has been tried and acquitted at the sessions is entitled to a copy of the record of acquittal, and it is not necessary to obtain the fiat of the Attorney-General therefor.

Regina v. *Ivy* (1874) 24 C.P. 78 and *Hewell* v. *Cane* (1894) 26 O.R. 135, distinguished.

F. Arnoldi, K.C., for plaintiff. *J. R. Cartwright*, K.C., for Attorney-General and Clerk of the Peace. *J. H. Moss*, for private prosecutor.

Meredith, C.J.] RE CHISHOLM. [July 17.

Vendor and Purchaser's Act—Will—Restrictions against selling, mortgaging or encumbering—Mortgage by devisee—Breach of condition.

A will providing for the division into specified halves of a certain farm lot, between testator's two sons, contained restrictions against the devisees selling or mortgaging their respective halves until after the expiration of twenty-five years from the testator's death, and also against encumbering it for a like period.

Held, on a special case under the Vendor and Purchaser's Act, that the latter restriction was void; but following the decision of FERGUSON, J. in *Chisholm* v. *London and Western Trusts Co.* (1897) 28 O.R. 347, the former restriction was good, so that the giving of a mortgage by one of the devisees on his half constituted a breach of condition for which the heir might enter and divest the devisee; and therefore the title was not such a one as a purchaser could be compelled to take.

A. B. Cox, for vendor. *Stuart*, for purchaser.

Meredith, C.J.] HILL *v.* HILL. [July 18.

Alimony—Lunatic—Admission to asylum under R.S.O. 1897, c. 317, s. 12—Removal by wife's relatives.

A husband on two occasions procured the release of his wife from the provincial lunatic asylum, where he had procured her admission as a lunatic. After second release she grew worse, becoming violent and dangerous, and he again applied for her admission, which was refused, it being insisted that she would only be admitted as a warrant patient, whereupon he took proceedings under s. 12 of R.S.O. 1897, c. 317, which resulted in her being committed to jail as a dangerous

lunatic, from whence she was transferred to the asylum. The wife's relatives then applied to the Lieutenant-Governor and obtained her release, and she went to live with them, and claimed alimony.

Held, that an action therefor would not lie.

Swayzie, for plaintiff. *Riddell*, K.C., for defendant.

Boyd, C.] GRAND HOTEL COMPANY *v.* WILSON. [July 18.

Trade name—Infringement of—"Caledonia water," "Caledonia mineral water."

The plaintiffs had been for many years the owners of certain springs and had procured a trade mark to be registered of the water therefrom under certain devises and the names "Caledonia Water" and "Caledonia Mineral Water." This water through the plaintiffs' exertions and the expenditure of large sums of money, had become widely known, and was used medicinally and as a beverage. The name Caledonia was the name of the township in which the springs were situated, but this had been lost sight of in the name given to the plaintiffs' place "Caledonia Springs" where they had erected a hotel around which a village of that name had sprung up and a railway station of the same name had been placed. The defendants purchased a lot about a quarter of a mile from the plaintiffs' place, where they sank an artesian well from which they procured a water which they sold under the name of "Caledonia Water" and "Water from the New Springs at Caledonia," imitating the shape and make of the plaintiffs' goods, the object admittedly being to sell their water in the market established by the plaintiffs.

Held, that the defendants' acts were calculated to mislead and did mislead purchasers, and an injunction was granted restraining the defendants for selling the water under the names adopted by them.

W. Cassels, K.C., and *F. Arnoldi*, K.C., for plaintiffs. *Shepley*, K.C., and *W. E. Middleton*, for defendants.

Meredith, C.J.] RE TATHAM. [July 18.

Execution—Goods exempt from—Right of widow to—Effect of provision for wife in will—Devolution of Estates Act—Gift of property belonging to wife—Election—Insurance moneys—Charge on—Payment by devisees pro rata.

The goods of a deceased husband, exempt from seizure under the Execution Act, R.S.O. 1897, c. 77, are not, except as to funeral and testamentary expenses, assets in the hands of the husband's executors for the payment of debts, the effect of s. 4 of that Act being to give his wife a parliamentary title thereto; that the fact of the wife being residuary devisee under the husband's will did not put her to her election as to

taking these goods either under her statutory title or under the gift of the residue, for though such goods, apart from the statute, would pass under the residuary devise, it was otherwise here, fo. the husband would not under the circumstances be presumed to be dealing with such goods; nor would any such presumption arise from the fact that under the terms of the will the provision made for her should be in lieu of dower; nor did s. 4 of the Devolution of Estates Act affect her right, for that section must be read as being subject to said s. 4 of the Execution Act.

A piano belonging to the wife, who was the residuary devisee under the husband's will, was dealt with by him under his will as part of his estate by giving it to his son.

Held, that the wife must elect either to allow the son to retain it under the devise to him or to take it herself, making good to the son the value thereof out of the provision made for her in the will.

A policy of insurance for $2000 was by the husband's will made payable to and for the benefit of his wife and son, and he apportioned the proceeds by giving the son $500 and his wife the residue thereof. The policy was charged with a payment of a loan procured by the testator from the company.

Held, that the amount of the loan was payable by the wife and son pro rata out of their respective shares of such moneys, the gifts to them being specific.

Jeffery, for executors. *Luscombe*, for the son. *Cowan*, for widow.

Divisional Court.] TRUNKFIELD *v.* PROCTOR. [July 19.

Equitable assignment—Trust—Bill of exchange.

McE., who had mortgaged certain lands to P. to secure a sum of $5,000, conveyed it to McK. and M. in trust for McK. subject to a life estate to McE., McK. assuming and covenanting to pay off $1,500 of the mortgage debt, McE. covenanting to pay off the balance. Subsequently, on 4th January, 1900, McE., who had a deposit account with M., who was a private banker, authorized M. to pay $650 to P. on the mortgage, and for such purpose signed the following document: "B. M. & Co., bankers. Pay to P. (on mortgage McE.'s share) or bearer $650," which he delivered to M., who, a day or two afterwards, informed P. of his having the money, though he did not tell him of the execution of the document, and he also notified McK. P. said he did not want the money before the beginning of the next month, and M. did not pay over the money until the 29th of January, and after the death of McE., who had died in the meantime, of which all the parties had notice.

Held, by FALCONBRIDGE, C.J.K.B., that under s. 72, sub-s. 2, and s. 74 of the Bill of Exchange Act, 53 Vict., c 33 (D.), the document was not a

cheque being drawn on a private banker, but a bill of exchange, and that it was not revoked by McE.'s death.

On appeal to a Divisional Court, the judgment was affirmed, but on the ground that the transaction amounted either to an equitable assignment of the $650, or a trust to pay over the same to P., which became irrevocable on its being communicated to the parties and assented to by them.

W. A. Boys, for plaintiff. *T. Ernest Godson*, for defendant.

Meredith, C.J.] BENNETT *v.* WORKMAN. [July 20.

Patent of invention—Assignment for limited period—Sale thereafter.

A person who is the assignee of a patent right for a limited period with a right of purchase, but who, at the expiration of such period, elects not to purchase and reassigns the patent, cannot thereafter sell the patented article, though made during the time he was assignee, his right to make and sell being restricted to such limited period; and under the powers conferred on the Court by s. 31 of the Patent Act, R.S.O. 1886, c. 61, an injunction may be issued restraining such sale.

U. A. Buckner, for plaintiff. *I. H. Hellmuth*, for defendant.

Meredith, C.J.] PINHEY *v.* MERCANTILE FIRE INS. CO. [July 20.

Fire Insurance—Insurance by mortgagor—Loss payable to mortgagee—Release of equity redemption—Cessation of mortgagor's interest—Right of mortgagee to claim insurance moneys.

H., who had made a mortgage, under the Short Form Act, on certain lands to the plaintiff, such mortgage containing a covenant to insure the mortgaged premises, effected thereon a policy of insurance against fire, on the face of which was the endorsement, "Loss, if any, payable to the plaintiff as his interest may appear under the mortgage." The interest having become in arrear, H. made a deed to the plaintiff, whereby he granted, released and confirmed unto the plaintiff the said mortgaged lands, without the consent of the insurance company having been obtained therefor. The premises having been subsequently destroyed by fire:—

Held, that the plaintiff could make no claim for the insurance moneys, for (1) the fact of the conveyance made by H. to the plaintiff, whereby he ceased to have any interest at the time of the fire, was a good answer to the claim; and (2) such conveyance constituting a breach of the fourth statutory condition, which provides against the insured premises being assigned without the insurance company's consent.

W. E. Middleton, for plaintiff. *C. S. MacInnes*, for defendant.

Street, J.] [July 22.

EXCELSIOR LIFE INSURANCE CO. *v.* EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

RE FAULKNER.

Arbitration and award—Insurance policy—Provision for appointment of arbitrators—R.S.O. 1897, c. 62, s. 8 (O.).

A guarantee policy of insurance made by the defendants in favour of the plaintiffs contained a provision that if any difference should arise in the adjustment of a loss, the award should be ascertained by two disinterested persons, one to be chosen by each party; and on their disagreement the two should choose a third, the award of the majority to be sufficient. Differences having arisen, the plaintiffs appointed their arbitrator, of which they notified the defendants, and required them to appoint theirs, which they refused to do, thereupon the plaintiffs, acting under s. 8 of R.S.O. 1897, c. 620, appointed their arbitrator sole arbitrator, and he went on and made his award.

Held, that this submission properly came within the terms of the statute.

Aylesworth, K.C., for applicants. *R. McKay*, contra.

Divisional Court.] WILDMAN *v.* TAIT. [August 12.

Assessment and taxes—Sale for taxes—Validity of assessment—Lien for purchase money.

Section 218 of the Assessment Act, R.S.O. 1897, c. 224, which gives a tax purchaser a lien for the purchase money and the ten per cent. thereon, has no application where the taxes have not been lawfully imposed, or where there are no taxes in arrear.

On appeal to the Divisional Court, the judgment reported in 32 O.R. 274, was varied by holding that the lands had been validly assessed for the years 1892 and 1893, and that the defendant, therefore, had a lien for the amount of the purchase money to the extent of the taxes for those years, with costs and expenses, ten per cent. interest, and the taxes subsequently paid, with like interest. In other respects the judgment was affirmed.

A. C. Macdonell, and *J. J. C. Thompson*, for appellants. *H. T. Beck*, for respondents.

Meredith, C.J.] MURDY *v.* BAER. [August 17.

Surrogate Court—Guardian appointed by—Right to pass accounts before Surrogate judge.

There is no authority in the judge of the Surrogate Court to pass the accounts of the guardian of an infant appointed by such Court. Sec. 18 of

63 Vict., c. 17 (O.) does not apply, such guardian not being a trustee within the meaning of the section.

Held, also that under the circumstances of this case six per cent. interest was a fair rate to charge the guardian on the moneys in his hands.

W. R. Riddell, K.C., for plaintiff. *Aylesworth*, K.C., and *Vance*, for defendant.

Boyd, C., Ferguson, J.] [Sept. 17.

IN RE LIVINGSTONE ESTATE.

Tenants in common — Joint tenants — Title by prescription—Statute of limitations.

Where of five tenants in common of a farm, three acquired a title against the other two by virtue of the statute of limitations,

Held, that the title so acquired by the three tenants in common was a joint tenancy of the two-fifths, and they were then tenants in common of their original three-fifths and joint tenants of the two-fifths so acquired.

W. H. Blake, for adult heirs of John Livingstone. *Glyn Osler*, for May Livingstone.

Boyd, C., Ferguson, J.] [Sept. 17.

GREENLEES *v.* PICTON PUBLIC SCHOOL BOARD.

Public Schools—School Board—Notice of meeting Terminating contract with school master.

The plaintiff was the master of a public school. There were eight members of the school board, and at a meeting on Feb. 19th, a resolution was passed instructing the secretary to notify the plaintiff that the contract between him and the board should cease on March 31st, which he accordingly did. The notice of the meeting given to the members of the board did not state that the matter of determining the plaintiff's contract was to be considered, and some of the members had no knowledge of this fact nor had the plaintiff any knowledge or notice of the meeting. Only six members of the board attended the meeting of whom four voted in favour of the resolution and two against it.

Held, that the above resolution and notice to the plaintiff in pursuance of it was not a fair or proper exercise of the power and option to determine the plaintiff's contract contained in it, and the agreement with the plaintiff was not terminated thereby.

The plaintiff brought this action under the above circumstance, claiming a balance of salary, and had recovered judgment for $132.03.

Held, that the matters of difference between the parties fell within R.S.O. c. 292, s. 77, sub-s. 7, and the Division Court had jurisdiction.

Allison, for plaintiff. *Clarke*, K.C., for defendants.