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The Right Hon. James Patrick Bannerman Robertson, Lord Justice General and President of the Court of Session in Scotland, has been appointed a Lord of Appeal in Ordinary in the room of the late Lord Watson. He was called to the Scottish Bar in 1867, About twenty years afterwards he became Solicitor General for Scotland, and in 1888 became Lord Advocate and was appointed to the Privy Council. In 1891, he became Lord Justice General in succession to Lord Inglis. He is said to possess natural abilities of a high order, and when at the bar had a large practice.

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We notice English legal journals complain of the suggestion of the President of the Incorporated Law Society to reduce the hours of sittings of the Courts from 10.30 a.m. to 4 p.m. on every week day, with an interval for lunch, with no sittings on Saturday, and say that if the Judges did a fair day's work, causes of complaint as to the accumulation of cases would be largely removed.

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We refer elsewhere to the proceedings of the American Bar Association at their recent meeting in Buffalo. This meeting was followed by the eighteenth conference of the International Law Association held at the same place, by invitation of the first named Association. Hon. Sir Willian R. Kennedy, Judge of the High Court of Justice, England, presided, and many excellent papers were read.

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The Canadian Bar Association has made no move this year. The difficulties which surround such undertakings are great and obvious. Perhaps the time for it has not yet arrived. A suggestion has been made that it might be more successful if the body were formed of delegates selected from existing law societies in the various provinces. Others again think it would be well in these days of rapprochement between the Anglo-Saxon countries to unite with our professional brethren to the south of us in forming an association which might be mutually advantageous. This

may not commend itself to some, but in these troublous days we feel drawn to those who are largely of our own kith and kin, whose laws are largely the same, and who should, and we believe will, stand by the motherland when compelled to draw the sword for justice and for freedom.

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Those interested, and there are many, in the present condition of military matters in England will find in the London *Law Times* of October 21st, an interesting article entitled "Calling up Reserves." The writer there treats of the subject historically, and gives a summary of the English Army Acts, under which the reserves have been called out in the present emergency. As far as this Dominion is concerned, whilst it is interesting to know in this as in other matters how the law stands, the desire to take our share of the burden as component parts of a great Empire makes us care very little as to our exact position in view of the system of responsible government under which we live. Our contingent has gone with the hearty good will of all, with, perhaps, the exception of an opposition of such microscopic propositions as to be unworthy of notice. We have another to send if it is wanted, and if any Act of Parliament is needed, the people will see that it is passed.

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The following remarks by Lord Hobhouse seem to suggest some of the best arguments in favour of retaining jury trials. Observations of a somewhat similar character might be made as to the advantages of case law as against codification, provided always that the judiciary has the capacity to safely guide the ship of judge made law through the ever-changing sand bars of commerce and social life: "It seems to me that juries have kept our laws sweet; they have kept them practical; they still do so; they are like the constant, unseen, unfelt force of gravitation which enables us to walk on the face of the earth instead of flying off into space. Certainly nothing can be more important to the welfare and coherence and strength of the nation, than that its laws should be in general harmony with its convictions and feelings. * * * Juries are passing every day innumerable decisions, each of them very small, but constant, ubiquitous, and tending to carry superfine laws down into practical life so as to make them fit for human nature's daily food."

## *THE AMERICAN BAR ASSOCIATION.*

The meeting of this Association recently held at Buffalo was largely attended and very successful, the well-known hospitality and courtesy of American citizens to their guests adding to the pleasure of those who attended it.

The meeting was, in a sense, international in its character, owing to the presence of a distinguished representation from England, including amongst others Mr. Justice Kennedy and Mr. Joseph Walton, Q.C., who contributed papers, and also of a delegation from the Law Society of Upper Canada, composed of the Treasurer and Messrs. B. B. Osler, N. W. Hoyles and W. R. Riddell.

In the absence of the President, Hon. Joseph H. Choate, who was unable to be present by reason of his duties as Ambassador to Great Britain, one of the Vice-Presidents, who was afterwards elected as President for the ensuing year, Senator Charles F. Manderson, of Nebraska, presided, and did so with conspicuous ability and courtesy.

The President's opening address, delivered by Senator Manderson, dealt, according to custom, with the most noteworthy changes in statute law on points of general interest made by Congress and in the several States during the past year, and also drew attention to other questions of interest to lawyers; amongst them the alarming "drift of both law-makers and the Courts" in regard to "trusts." The subject matter of the annual address, which was made by Senator Lindsay was the policy of the United States in regard to the Philippines; he, while professing to treat his subject from a purely legal standpoint, in reality used the occasion for a very vigorous defence of the McKinley administration.

The most noteworthy feature of the meeting, however, was the admirable paper, read by Mr. Justice Kennedy, on the "State Punishment of Crime," which is printed in full in the September-October number of the *American Law Review*. This paper will well repay careful study; the main lines of thought (as the *Review* points out) were "(1) That the crimes denounced by the statute law ought to bear a closer relation to moral turpitude. For example, that in general the law ought not to punish such a crime as smuggling, or stealing a chattel of no great value, with the same severity as the seduction of an innocent girl or the debauching of

a child. (2) That the primary effect of punishment is not merely an outgrowth of the idea of retaliation, transferring it from the individual to the State, nor is it merely the necessity of protecting society by holding up to the members of it the example of punishment following crime; but it is the idea of *pain* following *sin*."

The proposal of a resolution of sympathy with M. Labori provoked a spirited debate; many feared that the effect of it might be to prejudice Dreyfus; but eventually, in a modified form, the resolution was carried by a large majority.

One of the most useful committees of the Association is the one that concerns Legal Education. This subject attracts many eminent men engaged in educational work in the law schools of the United States. The retiring chairman, Judge Howe, of New Orleans, made an earnest plea for more attention being paid to Roman law as part of a lawyer's education.

Mr. Walton, Q.C., read a paper on the subject of "Legal Education in England," which gave many interesting details of the life of students in the Inns of Court in past days. A paper prepared by Mr. Thomas Barclay, President of the British Chamber of Commerce, Paris, who was not present in person, was listened to with close attention, and threw considerable light upon French legal training and methods; very appropriately, in view of the object lesson then being given at Rennes. Mr. Hoyles, Q.C., the Principal of the Law School, Osgoode Hall, read an excellent paper on Legal Education in Canada, which was received with much interest, and was followed by an animated and insructive discussion on the subject of Moot Courts.

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Mr. Justice Trevelyan, formerly of the High Court of Justice at Calcutta, in the course of an address before a meeting at which the Archbishop of Canterbury presided last month, said that "it was quite a fallacy to suppose that every Englishman in India made a fortune. A large number of these residents had barely enough, oftentimes, to keep body and soul together. Those who lived in Calcutta had to live amongst the lowest classes of the natives, and he had known from experience many of them who were simply living upon charity." The visions of the junior English Bar of "All the wealth of Ormuz or of Ind," and their chances to participate in it, are evidently fading away.

# The Forum.

## A CAUSERIE OF THE LAW.

CONDUCTED BY CHARLES MORSE.

Reaching our hands so shortly after the conclusion of the famous Dreyfus trial, M. Alfred Giron's article in the last number of the *Revue de Droit International et de Législation Comparée* entitled "De la Condition Juridique des Juifs," is most timely reading. Here we have traced for us in a clear and impartial way the sad legal condition of the Jew in most European countries after the spread of Christianity. The unconverted Hebrew was by customary law regarded as the serf and slave of king or seigneur. He was debarred from holding land. He was denied the meanest privileges of citizenship. As a premium upon his embracing the Christian religion, his master was entitled in such event to confiscate his personal belongings. We know this "coutume bizarre" to be a fact in France, says M. Giron, by the law which abrogated it, viz., the Royal edict of April 4th, 1393. The position of the Jews in England was no whit better, and Matthew of Paris is quoted in reference to the stupendous exactions from them of that pusillanimous thief, King John. Passing in review the Jewish persecutions and massacres in Spain, Germany and elsewhere, well known to students of history, M. Giron arrives at the eighteenth century, when, he says, the ancient severity of the laws against this long-suffering race began to be relaxed. In 1715 Abraham Aaron was admitted to the rights of a burgess in the City of Antwerp, and a similar privilege was accorded to one Jacob Cantor. In 1758, however, the Belgian Jews received a set-back in their social progression by the decree that profession of the Catholic faith was to be a condition of admission to the rank of burgess. This restriction was removed by the Austrian Government in 1769. M. Giron further points out that while so late as the year 1753 when George II. proposed to Parliament a measure for the naturalization of the Jews, the low-class Londoner met the proposal with the dual cry: "No Popery! No Jews!" yet they obtained the rights of the burgess in London in the year 1830, and the full privileges of English citizenship in 1858, thanks to the efforts of that distinguished scion of their race, Lord Beaconsfield. In France the Jew secured a recognition of his claim to complete citizenship at the hands of

the Constituent Assembly in 1791. In 1831 the Jewish clergy were declared to be beneficiaries of the fund set apart by the French Government for the purposes of religion. And so M. Giron, having established that there is complete equality in France and other enlightened countries to-day between "les Juifs et les non-Juifs," claims that the former should be treated "non comme des pourceaux, mais comme des hommes; non comme des étrangers ou des ennemis, mais comme des fréres et des concitoyens."

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While Mr. Chamberlain and Sir H. Campbell-Bannerman were splitting hairs and evolving the haziest nuances of difference in the meanings of "suzerainty" and "paramountcy" from the standpoint of international law, Oom Paul was preparing in the most practical way to cut the Gordian knot for them. There is not the slightest doubt that England is justified in her conduct towards the Boers by the comity of nations. Their attitude was simply incompatible with the maintenance of peace and good government in the various South African communities, and by the common consent of all fair-minded publicists Great Britain is the proper party to wield the policeman's baton. 'Tis a pity that the baton was not used a little earlier in the proceedings.

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We commend to the perusal of our old professional friend "Laudator Temporis Acti" the article entitled "The Golden Age of Law" in the last number of the *Law Magazine and Review*. It will prove interesting to him, providing he withstands the shock of the opening paragraph, which contains the following: "It is impossible to imagine how anyone who has read Lord Campbell's Lives, the State Trials, and such important legal works as Stephen's History of the Criminal Law can ever regard the past with feelings other than those of profound disgust."

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After the following observations of Strong, C.J., in delivering the judgment of the Supreme Court in the Exchequer Appeal of *The Queen* v. *Grenier*, we imagine that the case of the *Grand Trunk Railway Co.* v. *Vogel*, 11 S.C.R. 623 will be treated by the profession as relegated to the shades of oblivion: "For the reasons I gave in *Vogel's case*, I am of opinion that a wrong construction of the clause in question (sec. 246 (3) of the Railways Act) in that case prevailed by the majority of a single voice. * * Since the case of *Robertson* v. *G.T.R. Co.*, (24 S.C.R. p. 615) it would seem that

*Vogel's case* can scarcely be considered as binding authority, at all events I should not hesitate to reconsider it if a similar question arose." So counsel hereafter wishing to rely on the impugned case will have reason to sigh for the majority which subsisted in—

"the sound of a voice that is still."

## ENGLISH CASES.

### *EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.*



**LANDLORD AND TENANT**—LEASE—COVENANT TO REPAIR—MESNE ASSIGNMENT—COVENANT BY ASSIGNEE TO INDEMNIFY ASSIGNOR—BREACH OF COVENANT BEFORE ASSIGNMENT—THIRD PARTY—INDEMNITY.

*Gooch* v. *Clutterbuck* (1899) 2 Q.B. 148; this was an action brought by lessor against the lessees to recover damages for breach of a covenant to repair. The term had vested in the defendants as executors of a deceased assignee, and the defendants had become bound by the covenant, but they had assigned the residue of the term to one Davis, who had covenanted with the defendants to pay the rent and perform the lessee's covenants in the lease and keep the defendants indemnified from the payment and performance thereof respectively. At the time of this assignment the premises were out of repair. Davis having been brought in by the defendants as a third party liable to indemnify them, the only question discussed was whether the third party was liable for the damages recovered by the plaintiff against the defendants, and the only ground relied on was that the covenant of Davis only extended to future breaches, and did not apply to damages recoverable in respect of breaches of the lessee's covenant, which had taken place prior to the assignment. The Court of Appeal (Smith, Rigby and Williams, L.JJ.) agreed with Channell, J., that the covenant of Davis extended to past as well as future breaches of the covenant to repair.

**CHARGING ORDER**—PROPERTY RECOVERED OR PRESERVED—COSTS—SOLICITORS' ACT, 1860 (23 & 24 VICT., C. 127), S. 28—(ONT. RULE 1129)—PROPERTY OF PERSONS NOT EMPLOYING SOLICITOR—PROBATE ACTION.

*Ex parte Tweed* (1899) 2 Q.B. 167. This was an application by a solicitor who had taken proceedings in the Probate Division at the instance of the executor for the purpose of establishing a

will, for a charging order on the property, real and personal, devised and bequeathed by the will in question, which had been duly established. The application was opposed by the beneficiaries under the will, and Grantham, J., refused to make the order. The Court of Appeal (Smith, Rigby and Williams, L.JJ.), however, held that the solicitor was entitled to the order, as the property in question must be deemed to have been preserved through his instrumentality. Williams, L.J., points out that under 20 & 21 Vict., c. 77, the granting of probate now binds the heir or other person interested in realty as well as those interested in the personalty, and therefore in a probate action both real and personal property may be said to be preserved by successful proceedings to establish a will.

**BANKING**—CROSSED CHEQUE—"NOT NEGOTIABLE"—DEFECTIVE TITLE—PAYMENT—BANKER, LIABILITY OF—"CUSTOMER"—BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT., C. 61), S. 82—(53 VICT., C. 33, SS. 80, 81, D.)

*The Great Western Ry. Co.* v. *London & County Banking Co.* (1899) 2 Q.B. 172, is a case illustrating the fact, that the crossing of a cheque and marking it 'not negotiable' is not an absolute protection to the drawer, against liability thereon, when fraudulently used by the holder. In this case a rate collector had been in the habit of receiving cheques for rates and cashing them at the defendants' bank, where he was known, but had no account. By falsely pretending that rates were due, he induced the plaintiffs to send him a cheque drawn to his order on a London bank, crossed generally, and marked "not negotiable." The cheque was cashed, and a part of the proceeds was applied according to the collector's request, and the balance was paid to him, and he misappropriated it. The cheque was subsequently presented by the defendants and paid, and the plaintiff, the drawer of the cheque, now sued to recover the amount of it from the defendants. The case principally turns on whether, under the circumstances, the rate collector could be deemed "a customer" of the defendant bank within the meaning of the Bills of Exchange Act, s. 82, (see 53 Vict., c. 33, s. 81, D.). Bingham, J., who tried the case, found that the defendants had received payment of the cheque in good faith and without negligence for the collector, and were therefore entitled to protection under s. 82. The question of whether the collector was a 'customer' the learned judge held to be one of fact, and he found as a fact that he was.

**MARINE INSURANCE**—FREIGHT—LOSS NOT INSURED AGAINST.

In *Brankelow S.S. Co.* v. *Canton Ins. Co.* (1899) 2 Q.B. 178, the plaintiff sued on a policy of insurance of freight payable under a charter party. The freight shipped, and for which bills of lading were given, more than equalled the freight payable under the charter party, but, owing to an accident to the ship in the course of the voyage, part of the cargo was jettisoned, or otherwise lost, and owing to the loss thus occasioned the bill of lading freight received by the plaintiff was less than the freight payable under the charter party. The question in the action was whether this loss of freight was within the perils insured against. The Court of Appeal (Smith, Williams and Romer, L.JJ.) affirmed the judgment of Bruce, J. dismissing the action on the ground that the loss was not due to the perils insured against, but arose from the neglect of the insured to so frame the bills of lading as to preserve to themselves their lien over the whole cargo for the freight payable under the charter party.

**TROVER** - CONVERSION OF GOODS—ESTOPPEL—PROXIMATE CAUSE OF LOSS—WAREHOUSEMAN.

*The Union Credit Bank* v. *Mersey Docks* (1899) 2 Q.B. 205, is a report of the trial of three actions arising out of the fraud of a broker in dealing with goods on which he had obtained advances. The first action related to seventeen hogsheads of tobacco, as to these the facts were as follows: Nicholls, the broker, was entitled to eighteen hogsheads of tobacco in the custody of the defendants as warehousemen. These he pledged with the plaintiffs as security for advances. He subsequently repaid the advance on one hogshead, and presented a delivery order to the plaintiffs for their signature, in which the place for the quantity was left blank. The plaintiffs signed the delivery order in blank, and Nicholls then fraudulently filled in the blank space with the words "eighteen hogsheads" and procured delivery of them all from the defendants, and then disposed of them. Under this state of facts Bigham, J. held that the plaintiffs could not recover, because they had, by signing the order in blank, impliedly given Nicholls authority to fill up the blank, and were estopped from showing that his authority was limited.

In the second action the facts were somewhat different. Nicholls had pledged two separate consignments of tobacco. He paid off

the advance on one, and presented to the plaintiffs and they signed a properly drawn delivery order in respect of it; but after its signature Nicholls fraudulently altered it by adding above their signature the description and distinguishing marks of the other consignment, and by this means fraudulently obtained delivery of both consignments. In this action it was held that the plaintiffs were entitled to succeed as they had not been guilty of any negligence which was the proximate cause of the wrongful delivery.

In the third action it appeared that Nicholls after fraudulently obtaining the tobacco as above stated, pledged it with the defendant bank as security for an advance, and, before the fraud was discovered, he repaid the advance and recovered possession of the tobacco. Under these circumstances, it was held no action for conversion would lie against the defendant bank, because Nicholl's dealings with it had been concluded before the plaintiffs discovered the fraud, although if they had not been repaid their advance, it is clear from the judgment of Bigham, J. they could not have held the goods as against the plaintiffs.

**SHIP**—SEAMAN—MERCHANTS SHIPPING ACT, 1894, (57 & 58 VICT., C. 60, S. 186)—"PASSAGE HOME."

In *Purves* v. *Straits of Dover S.S. Co.* (1899) 2 Q. B. 217, Matthew, J. follows the dicta in *Edwards* v. *Steel* (1897) 2 Q. B. 327, noted ante vol. 33 p. 620, and holds that where the service of a seaman belonging to a British ship terminates at a foreign port, and the master elects to provide him with a passage home under s. 186 of the Merchants Shipping Act, such passage must be provided by the master to the port in Her Majesty's dominions at which the seaman was originally shipped, or to a port in the United Kingdom agreed to by him.

**RAILWAY COMPANY**—FENCE, OMISSION OF, BY RAILWAY COMPANY.

*Luscombe* v. *Great Western Ry.* (1899) 2 Q.B. 313, was an action brought to recover damages for cattle killed on the defendants' railway. The cattle in question had strayed on to a highway adjoining the defendants' railway, and from thence had got upon an unfenced approach leading to the track, and by this means had got upon the track and been killed by a passing train. The plaintiff claimed to recover on the ground of the omission of the defendants to construct a fence as required by the English Railway

Act (8 & 9 Vict., c. 20), s. 68. (See Dominion Railway Act 51 Vict., c. 29, s. 194) but the Divisional Court, (Darling and Channell, JJ.) affirmed the judgment of the County Court dismissing the action, on the ground that the cattle were not on the highway for a lawful purpose, but had strayed thereon, and therefore the railway company was not bound to fence against them. It would seem that in Canada, under the Dominion Railway Act as amended by 53 Vict., c. 28, s. 2, the railway company under such circumstances is not liable to the owner for cattle so killed, unless there be some law authorizing the cattle in question to run at large; see *Duncan* v. *C.P.R.*, 21 Ont. 355; and *Nixon* v. *G.T.R.*, 23 Ont. 124.

**MASTER AND SERVANT**—INJURY TO WORKMAN ON HIS WAY TO WORK—ACCIDENT ARISING OUT OF, AND IN COURSE OF, EMPLOYMENT.

In *Holness* v. *MacKay* (1899) 2 Q.B. 319, an attempt was made to make an employer liable for an injury sustained by his workman in the course of going to his work, as being an accident arising out of, and in the course of his employment. The facts were that the defendants were contractors for ballasting the siding of a railroad. The siding could only be reached by walking a considerable distance through the premises of the railway company, and the workmen were advised by the defendants, with the consent of the railway company, to enter by a gate from which a path led by the side of the track to the siding which was being ballasted; it was necessary in following this route to go upon the track. On a foggy morning a workman was run over some minutes before the time for commencing work, on the main line 150 yards from the siding. The Court of Appeal (Smith, Williams, L.JJ., Romer, L.J. dissenting), held that the action failed, on the ground that it was no part of the contract of employment, that it should include the time in getting to and from the work, and that the defendants owed no duty to the workman while proceeding to or from his work, and that therefore the accident did not arise in the course of his employment. Smith, L.J. was also of opinion that a workman who is injured in a place not under his employer's control while going to, or returning from, his work, is not within the Workmen's Compensation Act 1897, (60 & 61 Vict., c. 37), and a fortiori he could not recover under the Ontario Act (R.S.O. c. 160). Romer, L.J. bases his opinion on the ground that the workman as soon as he

entered upon the railway company's premises must be deemed to have entered upon his employment, and it was like the case of a workman going from one part of a factory where he was employed to another, in order to perform his work.

**NEGLIGENCE**—MASTER AND SERVANT—EMPLOYER AND WORKMAN—DEFECT IN PLANT OR MACHINERY—KNOWLEDGE OF WORKMEN OF DEFECT—RISK VOLUNTARILY INCURRED—VOLENTI NON FIT INJURIA—(WORKMEN'S COMPENSATION ACT (R.S.O. C. 160) S. 4)

*Williams* v. *Birmingham B. & M. Co.* (1899) 2 Q.B. 338: was also an action by the representatives of a deceased workman to recover damages from his employer for negligence resulting in the workman's death. In this case the workman was, in the course of his employment, descending from an elevated tramway, belonging to his employers, when his foot slipped and he fell to the ground receiving injuries which caused his death. The employers had provided no ladder or other safe means for ascending to, and descending from, the tramway. The jury found that the defendants had not provided proper means of descending from the tramway, and that it was dangerous to descend therefrom without a ladder, and that the deceased knew that it was dangerous. Darling, J. gave judgment for the defendants, but the Court of Appeal (Smith, Williams and Romer, L.JJ.) reversed his decision, holding that in the absence of any finding, that the deceased workman had agreed to undertake the risk of descending without a ladder, or other safe means of descent, on the findings of the jury the plaintiff was entitled to succeed under the decision of the House of Lords in *Smith* v. *Baker* (1891) A.C. 325, noted ante vol. 28, p. 11.

**STATUTE OF LIMITATIONS**—VOID GIFT TO CHARITY—EXECUTOR'S POSSESSION—EXECUTOR NOT EXPRESS TRUSTEE FOR NEXT [illegible]N OR HEIR—REAL PROPERTY LIMITATION ACT, 1874, (37 & 38 VICT., C. 57.)

*In re Lacy, Royal Theatrical Assoc.* v. *Kydd* (1899) 2 Ch. 149, is an interesting decision touching the application of the Statute of Limitations as to claims against an executor. The facts were that a testator who died in 1873, and by his will gave all his property real and personal, charged with certain annuities, to the trustees of a charity, and appointed one Kydd, his executor. The estate included freehold and leasehold property. Kydd entered into possession, and paid the income to the trustees of the charity in accordance with the will, for a period of twenty years. The

testator's heir at law and sole next of kin, was informed of the contents of the will soon after the testator's death, but the executor, who was a barrister, gave him no information as to his rights under the will, having regard to the fact that the gift to the charity so far as it affected real estate and impure personalty was invalid, and he died in 1895 without having made any claim. The trustees of the charity were the plaintiffs in the action, and claimed a declaration of their rights under the will. The representatives of the testator's heir and next of kin claimed to be entitled, on the ground that the gift to the charity was void as to the realty and impure personalty, of which the executor Kydd was therefore trustee for the heir and next of kin. Sterling, J. agreed that the gift to the charity was void, but he held that the executor was not an express trustee for the heir or next of kin, and that by the Statute of Limitations their claim to the property as to which the gift to the charity was invalid, was now barred. The representatives of Kydd do not appear to have made any claim, and the effect of the case therefore would seem that the plaintiffs were held to have acquired a valid title to the property in question under the Statute of Limitations, notwithstanding the invalidity of the gift made by the will.

**STATUTE OF LIMITATIONS**—(21 JAC. 1, C. 16)—MORTGAGE OF PERSONAL PROPERTY—MORTGAGE DEBT BARRED—FORECLOSURE AFTER DEBT BARRED.

*London and Midland Bank* v. *Mitchell* (1899) 2 Ch. 161, is a case in which the effect of the Statute of Limitations (21 Jac. 1, c. 16) is considered. In this case the action was brought to foreclose the equity of redemption in an equitable mortgage, by deposit, of certain shares in a limited company, made to secure a simple contract debt. The defence was that the remedy for the debt was barred by the Statute of Limitations (21 Jac. 1, c. 16), and that as no action could now be maintained for the debt, the right to the equitable relief claimed by the plaintiffs was also barred by analogy to the statute. A passage in Robbins on Mortgages p. 1059, was relied on in support of this defence; but Stirling, J. was of opinion that though the remedy for the debt was barred, the debt itself was not barred, and that an action of foreclosure is not an action for the recovery of the debt, but an action to recover the mortgaged property, and that no Statute of Limitations applied to bar the plaintiff's right to foreclosure or sale of the

mortgaged property, and he therefore granted the relief prayed by the plaintiff.

**CONFLICT OF LAWS**—CONTRACT—LOCUS CONTRACTUS—LOCUS SOLUTIONIS.

In *South African Breweries* v. *King* (1899) 2 Ch. 173, the action was brought to restrain the defendant from committing a breach of a contract whereby the defendant had bound himself in the event of his leaving the plaintiff's employ not to carry on the business of a brewer within five years thereafter in South Africa; and the principal question considered by Kekewich, J., was by what law the contract was to be governed. The plaintiffs were an English company carrying on business in the South African Republic known as the Transvaal, and at other places in South Africa, the defendant was an Englishman, and the contract was made at Johannesburg, and was one for service by the defendant in the plaintiff's employment as a brewer in the defendant's business at Johannesburg or in the Colony of Natal in South Africa. It was claimed by defendant that by the law of the Transvaal the stipulation that defendant would not carry on business as a brewer after leaving the plaintiffs' employment, was invalid, and the preliminary question was therefore argued whether the contract was to be construed according to the law of the Transvaal or by English law. The learned judge held that the contract was one which was intended to be partly performed in one place and partly in another, but having regard to the surrounding circumstances it was one which had the "most real connection" with the Transvaal, and by the law of that republic it was governed.

**TRADES UNION**—DISSOLUTION OF BENEFIT SOCIETY—UNEXPENDED FUNDS OF BENEFIT SOCIETY—RESULTING TRUST.

*In re Printers & T. A. Trades Protection Society* (1899) 2 Ch. 184, the point considered was the proper disposition of the unexpended funds of a trades union society which had been dissolved. The society was formed for the purpose of raising funds by means of weekly contributions from its members, for the purpose of defending and supporting members in obtaining reasonable remuneration for their labour. There were two classes of members, one of which contributed twice as much as the other, and were entitled to receive twice as much as the others in the case of a strike or lock out; the scale of payments also varied with the

length of time a member had belonged to the society. No provision was made by rules of the society for the division of its funds in the event of a dissolution. The Attorney-General was notified, but disclaimed any interest in the fund on the part of the Crown as bona vacantia. Byrne, J. held that the fund was distributable among the existing members at the time of dissolution in proportion to the amounts respectively contributed by them, irrespective of fines, or payments made to members in accordance with the rules of the society.

**RESERVATION IN GRANT**—MINES AND MINERALS—MINERALS OF NO COMMERCIAL VALUE—INJUNCTION.

*Johnstone* v. *Crompton* (1899) 2 Ch. 190, was an action in which the plaintiffs, (one Johnstone, and Fletcher & Co.) sought to restrain the defendants from boring through minerals underlying land leased to the defendant by the plaintiff Johnston's predecessor in title, subject to a reservation of all mines or minerals within or under the said land, and which underlying mines and minerals were subsequently leased to the plaintiffs Fletcher & Co. The defendants desired to obtain water, and for that purpose commenced to bore therefor, and in so doing made a hole eighteen inches in diameter through a stratum of red rock, and a layer of coal from six to eight inches in thickness. The defendants did not propose to interfere with the minerals, except so far as was necessary for the purpose of obtaining water, and it was conceded that the red rock and coal which had thus been bored by them had no commercial value; but the effect of the boring, if persisted in, would be to cause the water to rise so as to flood the workings of coal mines whereof the plaintiffs Fletcher & Co. were lessees. Byrne, J., under these circumstances held that the plaintiffs were entitled to the injunction, notwithstanding the strata through which the defendants were boring were of no commercial value, on the ground that the stratum of coal through which the defendants were boring was clearly a mineral, and within the reservation, and that it was immaterial whether or not it could be worked at a profit, although there are dicta in some of the cases, indicating that the question of whether a substance can be worked at a profit is one of the tests for determining whether it is within the term "mineral," and he came to the conclusion that the proper test is whether the substance in question "has a use

and value of its own independent and separable from the rest of the soil."

**RENT CHARGES**—GRANT SUBJECT TO—GRANT OR RESERVATION—EVICTION OF GRANTOR FROM PART OF LAND SUBJECT TO RENT CHARGE—APPORTIONMENT.

*Hartley* v. *Maddocks* (1899) 2 Ch. 199, involves two questions, first the construction of a deed, and second the right to apportionment of a rent charge, where the grantor subject to the charge is evicted from part of the land. The deed in question was in a somewhat peculiar form, it was made in 1840 by one Bramwell to one Bailey to the use that Bramwell the grantor should receive a perpetual rent charge and subject, and charged as aforesaid, to dower uses in favour of Bailey, and by the same deed Bailey granted to Bramwell in fee the same rent charge out of the land thereby granted. In 1898 Bailey's successors in title were evicted from part of the lands by title paramount, and thereupon claimed an apportionment of the rent charge. Bramwell's successors in title, on the other hand, claimed that the rent charge was payable in full out of the remainder of the land, on the ground that Bailey had granted the rent charge to Bramwell; but Cosens-Hardy, J., agreed with the plaintiff, that the effect of the deed of 1840 was to reserve the rent charge in favour of the grantor, and that the grant thereof in the deed by Bailey was therefore inoperative, as it was already vested in the grantor under the reservation, and therefore the grantee and his assigns were entitled to have the rent charge apportioned, to be fixed not according to the acreage, but according to the respective values of the properties at the date of eviction.

**STATUTORY POWERS**—GAS COMPANY—NUISANCE.

In *Jordeson* v. *Sutton S. & D Gas Co.* (1899) 2 Ch. 217, the Court of Appeal (Lindley, M.R. and Rigby and Williams, L.JJ.) have affirmed the decision of North, J., (1898) 2 Ch. 614, (noted ante p. 108). Williams, L.J., however while agreeing with the rest of the Court that the defendant's statutory powers gave them no right to carry on their works so as to create a nuisance, was of opinion that no nuisance had been proved, giving the plaintiffs any right of action, because in his view of the facts the subsidence complained of had been caused merely by the withdrawal, through the defendants' draining operations on their own lands of subterranean water-support of the plaintiff's land, and that on principle,

as well as on the authority of *Popplewell* v. *Hodkinson*, (1869), L.R. 4 Ex. 248, the withdrawal of subterranean water-support from a neighbour's land in the course of clearing one's own land, even though it damages the neighbour's land, gives no cause of action. The majority however differed from Williams, L.J., on the fact, holding that in the present case the plaintiff's land was not supported by a stratum of water, but by a bed of wet sand or running silt, and therefore *Popplewell* v. *Hodkinson* did not apply. From a note at the end of the case, it appears that the Judicial Committee of the Privy Council in *Trinidad Asphalt Co.* v. *Ambard*, on July 8th last, held that *Popplewell* v. *Hodkinson* does not apply where the substratum of support was asphaltum or pitch.

**LEASE**—OPTION TO PURCHASE—EQUITABLE ASSIGNEE—POSSESSION.

In *Friary H. & H. Breweries* v. *Singleton* (1899) 2 Ch. 261, the decision of Romer, J., (1899) 1 Ch. 86 (noted ante p. 221) was affirmed on the point of law, but reversed on the facts, the Court of Appeal (Lindley, M.R., Jeune, P.P.D., and Rigby, L.J.) being of opinion that the correspondence, the effect of which had not been brought to the attention of Romer, J., established that the parties had proceeded on the assumption that the plaintiffs, though merely equitable assignees, were entitled to exercise the option of purchase, and that the defendant the reversioner in fee, waived the notice required by the law to be given of the intention to exercise the option.

**NOTICE**—GROSS NEGLIGENCE—PRIORITY.

*Oliver* v. *Hinton* (1899) 2 Ch. 264, is a case which could hardly arise under the Ontario system of registration of deeds, but it may be useful to refer to it, as bearing generally on the doctrine of notice. The facts were simple, the defendant had purchased a parcel of land and obtained a conveyance, but in carrying out the transaction he employed an unprofessional agent, who innocently neglected to call for the production of the title deeds, which had been deposited by way of mortgage with the plaintiff. The Court of Appeal (Lindley, M.R., Jeune, P.P.D., and Rigby, L.J.) agreed with Romer, J., that this amounted to such gross negligence on the part of the purchaser as to disentitle him to the protection of the court as a bona fide purchaser for value without notice.

**PATENT**—JOINT GRANT—SURVIVORSHIP - COVENANT BY JOINT OWNERS.

*National Society for Distribution of Electricity* v. *Gibbs* (1899) 2 Ch. 289, was an action brought by the plaintiffs for the performance of an agreement to assign certain patents of invention and for damages for breach of contract and warranty. The patents had been granted to Garland & Gibbs, their executors, administrators and assigns, and Garland & Gibbs entered into an agreement to sell the patents to the plaintiff company, and by the agreement it was provided that the assignment and transfer of the patents should contain a covenant by the vendors that all the letters patent assigned were valid, and in no wise void or voidable. Before the execution of the assignment Garland died, and the defendant Ruelle was his administratrix. The plaintiffs had settled with Gibbs, and the only question at issue was as to the liability of the administratrix to join in the assignment of the patents and to enter into a covenant as to their validity and to answer in damages for the breach of contract. The answer to this question was held to depend on the proper construction of the original letters patent. Cosens-Hardy, J. held that the grants were made to Gibbs & Garland jointly, and vested in them a joint estate or interest in the patents, and not a tenancy in common, and that consequently Gibbs, the survivor, alone could make a good conveyance or assignment, and that the administratrix was not bound to join therein or to enter into any covenant, inasmuch as the agreement for sale was a joint contract of Gibb & Garland. The action was therefore dismissed.

**COMPANY**—ARTICLES OF ASSOCIATION—SPECIAL ARRANGEMENTS AS TO CALLS AND SHARES AUTHORIZED—DIRECTORS, POWERS OF.

*Alexander* v. *Automatic Telephone Co.* (1899) 2 Ch. 302, was an action brought by a shareholder of a joint stock company against the company and three of its directors. The object of the action was to obtain an adjudication that the directors were bound to pay a like call, on shares allotted to themselves, as had been made on all other shares. The articles of association expressly provided, that it should be competent for the directors to make arrangements on the issue of shares for a difference between the holders of shares in the amount of calls to be paid, and the time of payment of such calls. The plaintiffs complained that the defendant directors had taken advantage of this provision to allot shares to themselves, and

provide that the calls should not be payable on such shares at the time when calls were payable on all other shares, but Cozens-Hardy, J., was of opinion that as the application for, and allotment of the shares, had been made on the faith of the agreement that the calls should not be made, it would be a breach of the contract now to require the defendant directors to pay calls, and he dismissed the action.

**LEASE**—CONSTRUCTION—RIGHT OF WAY—MISDESCRIPTION—MISTAKE—REFORMATION OF DEED.

In *Cowen* v. *Truefitt* (1899) 2 Ch. 309, the Court of Appeal (Lindley, M.R., Jeune, P.P.D., and Rigby, L.J.) affirmed the decision of Romer, J. (1898) 2 Ch. 551, noted ante p. 64, but on a different ground to that taken by him. It may be remembered that the plaintiff was lessee of rooms on the second floor of Nos. 13 and 14 Bond Street, together with right of access to and from the premises, "through the stairway and passages of No. 13;" there was in fact no staircase on 13 leading to the demised premises, but there was such a staircase in No. 14. Romer, J. treated the case as one of falsa demonstratio, and held that the description of the staircase as being in No. 13 might be rejected. The Court of Appeal on the other hand, considered it was a case of common mistake, and that the intention of the parties was that the lessee should have the use of the staircase in No. 14, and as the court was thus able to see what the parties really intended, the doctrine of falsa demonstratio did not apply; but the lease was ordered to be rectified in accordance with the real intention of the parties, by the substitution of the staircase in No. 14, for that in No. 13, which was in effect saying that Romer, J. had reached the right result, but by a wrong process of reasoning.

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

*In re Moss, Kingsbury* v. *Walter* (1899) 2 Ch. 314, deals with the construction of a will. The testator gave property in trust for his wife, (who survived him) for life, and after her death for his niece, Elizabeth Jane Fowler, and the children of a sister Emily, then living. The testator died in 1873, his niece Elizabeth Jane Fowler having predeceased him, the testator's sister and her four children survived the testator. The question was whether the share

devised to Elizabeth Jane Fowler had lapsed, and that depended on whether the gift to her and the children of Emily was or was not to be treated as a gift to a class. North, J., considering the cases on the subject were irreconcilable, and acting on his own view of the case, came to the conclusion that the gift to Elizabeth Jane Fowler was not to her as a member of a class, and that consequently the bequest in her favour lapsed. From his decision the children of Emily appealed, and the Court of Appeal (Lindley, M.R. and Jeune, P.P.D. and Romer, L.J.) allowed the appeal, holding that Elizabeth Jane Fowler constituted with the children of Emily a class, and that the ordinary rule applied that on the death of one member of the class before the period of distribution, the other members who survived were entitled to the whole fund. Lindley, M.R. admits that he would himself have decided the case as did North, J., but for the fact that Romer, L.J., had convinced him that that conclusion was erroneous.

**VENDOR AND PURCHASER**—CONTRACT FOR SALE—SALE OF LEASEHOLD SUBJECT TO CONSENT OF LESSOR—DEFAULT OF VENDOR IN OBTAINING CONSENT—LOSS OF BARGAIN—DAMAGES.

*Day* v. *Singleton* (1899) 2 Ch. 320, was an acton brought to compel performance of a contract for the sale of a leasehold property. The sale had been made subject to a condition that the lessor's consent could be procured. Pending the action the defendants, who were the personal representatives of the vendor, wrote to the lessor and induced him to refuse his consent. The plaintiff then amended his claim by claiming a return of his deposit and interest thereon, and also payment of his expenses and damages for the loss of his bargain. Romer, J., tried the action and held that the plaintiff was not entitled to any damages for the loss of his bargain; but the Court of Appeal (Lindley, M.R., Jeune, P.P.D., and Rigby, L.J.) held that as the defendants had induced the lessor to refuse his consent to the sale, they were liable to the plaintiff not only for the deposit interest and expenses, but also for damages for loss of bargain. It may be remarked that Romer, J., to some extent proceeded on a different view of the facts to that adopted by the Court of Appeal, being of opinion that it had not been proved that the defendant had induced the lessor to withhold his consent, the Court of Appeal thought that it had been proved, and at all events it was clear that they had not done what they could

to procure the consent. Lindley, M.R. described the rule laid down in *Bain* v. *Fothergill*, L.R. 7 H.L. 158 as an anomalous rule based upon and justified by the difficulties in shewing a good title to property in England, but one which ought not to be extended to cases in which the reasons on which it is based do not extend As the latest authority on the law governing a purchasers' right to damages for loss of his bargain, the case is interesting and useful.

**ADMINISTRATION**—GIFT OF REVERSION FOR LIFE, SUBJECT TO AN EXECUTORY GIFT OVER—REVERSIONARY INTEREST—CONVERSION—ENJOYMENT IN SPECIE.

*In re Bland, Miller* v. *Bland* (1899) 2 Ch. 336 was a case in which a testator gave all his property, which included, inter alia, a revisionary interest, to his wife, and by a codicil to his will directed that in the event of his wife dying without issue leaving the plaintiff in the present action surviving, the gift in the will in favor of his wife should take effect as if the plaintiff's name were substituted therein for that of his wife. In the course of the administration of the testator's estate, the question arose whether the reversionary interest ought to be sold, and the funds applied in accordance with the rule laid down in *Howe* v. *Earl Dartmouth* (1802) 1 W. & T., 7th ed., p. 68. Sterling, J. decided that it should not, on the ground that he considered that by the terms of the will and codicil the testator had shewn an intention that the property should be enjoyed in specie.

**VENDOR AND PURCHASER**—NOTICE OF TRUSTS OF MORTGAGE MONEY—REQUISITIONS ON TITLE.

*In re Blaiberg & Abrahams* (1899) 2 Ch. 340 was an application under the Vendors' and Purchasers' Act. In the course of investigation of title it was disclosed, by mistake, that a mortgage in the chain of title made to two persons without disclosing any trust, was, in fact, held by them as trustees of a marriage settlement. The purchaser thereupon delivered requisitions requiring to be furnished with an abstract shewing that the persons claiming to be now entitled to the mortgage (one of the original mortgagees having died) were duly appointed trustees of the settlement, and that the estate of the original mortgagees had been duly transferred to those now claiming to be trustees. Kekewich, J. held that the purchaser was entitled to require such proof. He distinguished the case from *In re Harman* 24 Ch. D. 720, because there

the trust deed was not disclosed, all that appeared there being that the testator was a trustee, but it did not appear that any persons other than the trustee had any interest in the trust.

**RIVER** - SPRING—RIPARIAN PROPRIETOR, INTERFERENCE WITH RIGHT OF—INTERCEPTING WATER AT ITS SOURCE FROM FLOWING INTO STREAM.

In *Mostyn* v. *Atherton* (1899) 2 Ch. 360, which was an action by a riparian proprietor and his tenant to restrain the defendant from intercepting the flow of water into a stream, the water of which the plaintiffs were entitled to use for working a mill, the defendant claimed that he was entitled to abstract the water before it had risen to the surface, or flowed into a defined channel; but Byrne, J., held that he had no such right, and granted an injunction as prayed against such interference.

**PROBATE**—ADMINISTRATION WITH WILL ANNEXED—PROBATE ACT 1857 (20 & 21 VICT., C. 77), S. 73—(R.S.O., C. 59, S. 59)—"SPECIAL CIRCUMSTANCES."——GRANT TO STRANGER.

*In the goods of Potter* (1899) P. 265, was an application for a grant of letters of administration with the will annexed to a stranger in blood to the deceased, under the following circumstances: The deceased had left three documents of a testamentary nature, disputes arose between the next of kin, and for the purpose of putting an end thereto and to all litigation, all parties interested in the estate agreed that one Boughton, a stranger in blood to the deceased who had been engaged in auditing his accounts, and who had been appointed administrator pendente lite, should apply for, and obtain a grant of administration with the will annexed. Barnes, J., considered these "special circumstances," justifying the grant under the Probate Act, 1857, s. 75 (see R.S.O., c. 59), and, subject to such consents, and an affidavit of fitness being filed, made the grant as asked.

# REPORTS AND NOTES OF CASES

## Province of Ontario.

### HIGH COURT OF JUSTICE.

Falconbridge, J.] RICKETTS *v.* VILLAGE OF MARKDALE. [Oct. 21.

*Municipal law—Highway—Injuries to playing children due to defects—Liability of municipality.*

Children using a highway merely for the purpose of play are putting it to a use for which it was not intended, and cannot recover for injuries due to defects or obstructions.

An action brought by parents for the death of a child caused by being crushed between some timbers while playing on them, which were negligently piled on the side of a road was dismissed.

*A. G. Mackay* for plaintiffs. *J. B. Lucas* and *W. H. Wright* for defendants. *W. J. Hatton* for third parties.

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Ferguson, J.] Nov 8.

BARRIE PUBLIC SCHOOL BOARD *v.* TOWN OF BARRIE.

*Parties—Joining plaintiff without authority—Motion by defendant to strike out—Solicitor—Retainer—Sufficiency of—Corporate seal—Costs.*

Solicitors who began an action in the name of a public school board and an individual as plaintiffs were retained for the board by a special committee appointed by resolution of the board, not under the corporate seal; the purposes of the resolution, as stated on the face of the resolution, embraced the commencement of any action respecting the matters referred to and the employment of counsel, the subject of the action being one of such matters.

*Held*, that this was not proper authority from the school board to the solicitors to bring the action, and the defendants had the right to have the name of the board as plaintiffs struck out. *Town of Barrie* v. *Weaymouth*, 15 P.R. 95, followed.

The solicitors having acted in good faith and under the belief that their retainer was sufficient, no costs were awarded.

*A. E. H. Creswicke* for plaintiffs. *Strathy*, Q.C., for defendants.

Armour, C.J., Falconbridge, J.] [Nov. 10.

IN RE SOLICITORS.

*Solicitor—Bill of costs—Delivery—Taxation—R.S.O., c. 174—Employment—Transaction of business—Foreign estate—Scope of business—Agreement—Benefit to solicitor—Public policy—Inherent jurisdiction.*

The jurisdiction granted by the provisions of the Act respecting solicitors, R.S.O., c. 174, to order the delivery of a bill of fees, charges, or disbursements for business done by a solicitor as such, is distinct from and independent of the jurisdiction thereby granted to order the same to be taxed; and there is power to order delivery of a bill whether it has been paid or not and whether or not it is one which the Court would have power to refer to taxation. *Duffett* v. *McEvoy*, 10 App. Cas., 300, *Re West*, (1892) 2 Q.B. 102, and *Re Baylis*, (1896) 2 Ch. 107 followed.

Where the employment of a solicitor is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, the Court will exercise its summary jurisdiction over him. *Re Aitkin*, 4 B. & Ald. 47, followed.

Solicitors in Ontario being employed to transact business in relation to a claim of their client upon an estate in England,

*Held*, that they were employed because they were solicitors, and the business was within the scope of the business of solicitors, and it made no difference that the estate was in England, for they were employed in Ontario and the business was transacted there.

*Held*, also, that an agreement that the solicitors should retain $500 as commission for business done and to be done could not stand in the way of the taxation of the solicitors' bill, for such an agreement is against the policy of the law, and solicitors cannot enter into any stipulation on the terms of getting a better benefit than they would get by the costs which they are entitled to charge. The agreement was void as being for business done and to be done, and upon the taxation it should be disregarded.

*Held*, lastly, that the Act respecting solicitors did not deprive the court of its inherent jurisdiction over solicitors and officers of the court. See R.S.O. c. 174, s. 56; *Stover* v. *Johnston*, 15 App. Cas. 203.

*W. H. Blake* for solicitors. *F. S. Mearns* for client.

## MUNICIPAL LAW.

### IN RE APPEAL OF TRUSTEES OF THE MCMASTER ESTATE.

*Assessment of trustees—Liable as though actual owners —Assessment Act s. 46.*

Appeal by the trustees of the above estate from the assessment of the income coming to their hands as such trustees, derived from the principal money of the estate. The major part of the income of the above estate went to a university as an endowment fund. The trustees contended that such portion of the income was not taxable inasmuch as the annual expenditure of the university exceeded their gross revenue from all sources, and, as the university would not be assessable for any sum whatever, the portion of the income coming to it from the endowment fund is not assessable in the hands of the trustees.

*Held*, that as the Assessment Act ignores the existence of trusts and deals only with the persons holding the property as though they were actual owners the income coming into the hands of the trustees was assessable.

[Toronto, Nov. 8, 1899—McDougall, Co. J.

This was an appeal by the trustees of the estate of Hon. William McMaster, resident of Toronto, from the assessment by the City of Toronto of the income coming into their hands as such trustees derived from the investment by them of the principal moneys realized from said estate or arising from the unrealized outstanding assets. By the terms of Mr. McMaster's will all his estates (save his private residence and its contents, which his wife was to be allowed to occupy during her pleasure, but at her death, or when she ceased to reside therein, the residence and contents should form part of his estate) was bequeathed to his trustees in trust to call in, convert, realize, sell and dispose of as they in their discretion deemed best, and after payment thereout of debts and funeral and testamentary expenses, and a large pecuniary legacy of his nephew, to hold the balance of the proceeds subject to the payment of certain annuities as an endowment for McMaster University. The will further recited that until the death of the annuitants, or their refusal to accept payment of their annuities, the trustees should invest the balance of the proceeds realized from his estate after payment of debts and the specific legacy to his nephew in such securities as the trustees should think proper subject to the supervision of a committee on investments to be appointed by the Board of Governors of the said University. The will then directed that out of the income arising from such investments certain annuities should be paid to his wife and several other persons, and that the balance of such income, after payment of all necessary expenses and outgoings, should be paid over from time to time as the same should come into the hands of the trustees to the Board of Governors of McMaster University, to be by them employed for the promotion of the work of the said University, requesting, however, the Board of Governors to devote not less than fourteen thousand five hundred dollars per annum ($14,500) to the Toronto Baptist College as the faculty of theology of the said University. After the death of the annuitants, or their refusal to accept their annuities, the will directed that

the principal funds should be transferred directly to the McMaster University Corporation, subject to a charge thereon of two thousand dollars a year in favour of the regular Baptist Missionary Society of Ontario. Several of the annuitants were still living, and, consequently, the principal funds constituting the estate were still vested in the trustees who managed the same and annually paid over the income to the annuitants, and the balance thereof to the University. The net income coming into the hands of the trustees last year was $30,324.85. Of this amount it was stated by the trustees that $8,504.16 consisted of rents arising from real estate in their hands, and the balance was interest from mortgages and other investments. They paid out of income last year to the annuitants, $7,400 and to the University $22,924.85.

*D. E. Thompson*, Q.C., for the appellants. This $22,924 must be regarded as part of the income of McMaster University. If the accounts of the University are taken it will appear that the University has no taxable income, because the proper annual expenditure of the University equals or exceeds their gross revenue from all sources, including in such income this $22,924; so that, as the University would not be assessable for any sum whatever, that portion oftheir income coming to them from the endowment fund at present vested in the trustees is not assessable in the hands of the trustees. The salaries of the University staff paid by the University out of its general income (the major part of which consists of the moneys annually paid to the University by the trustees) pay a municipal tax already, the professors, lecturers, etc., being individually assessed by the city on their several annual stipends. If this portion of the University income should he held to be assessable in the hands of the trustees it is tantamount to a double assessment.

*Drayton*, for the City of Toronto, contra.

McDOUGALL, Co. J.: I need not point out that this latter contention is untenable. The professors and lecturers are taxed under s. 35 of the Assessment Act as individuals upon their respective incomes. Their liability to taxation has nothing whatever to do with the liability to taxation of either the McMaster University or the trustees, the present appellants. But can I take cognizance in any case of the destination of income in determining the liability of trustees to be assessed for income? The apparent intention of the Assessment Act is to ignore the existence of trusts and to treat for the purposes of the Act the person actually holding or controlling the personal property as the actual owner of the property. Sec. 46 of the Assessment Act states that personal property in the sole possession or under the sole control of any person or trustee, guardian, executor or administrator shall be assessed against such person alone. Sub.-s. 2, "Where a person is assessed as trustee, guardian, executor or administrator, he shall be assessed as such with the addition to his name of his representative capacity, and such assessment shall be carried out in separate line from his individual assessment. He shall be assessed for the value of the real and personal

estate held by him whether in his individual name or in conjunction with others in such representative character at the full value thereof, etc. etc."

In the case of personal property or non-resident owners s. 44 declares that it "shall be deemed to be the individual property of such agent, trustee of other person for the purposes of the Act." If, then, the personal property vested in the appellants as trustees is to be considered for the purposes of the Assessment Act as the property of the trustees the income arising therefrom is the income of the trustees for the like purpose.

As the strictness of construction to be put upon taxing acts I cannot do better than to cite a sentence or two from the judgment of Earl Cairns in *Partington* v. *Attorney General*, L. R. 4 E. & I. App. 122: "As I understand the principle of all fiscal legislation it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be; on the other hand, if the Crown seeking to recover a tax cannot bring the subject within the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

It is not open, therefore, for me to apply any equitable construction to this statute if the language is plain. I think the language is clear that personal property (which includes income) vested in or under the control of trustees, as in this case, must be regarded for the purpose of assessment as their own property, and the income as their income. The trustees as such qualified owners are of course entitled to the usual exemption allowed by the statute. This will be so much of the annual income as arises from rents from real estate, and the $400 allowed upon all incomes derived from any source other than personal earnings. The amount liable to be assessed will be computed as follows:

| | | |
|---|---|---|
| Gross income | | $30,324.85 |
| Deduct: | | |
| Portion accruing from rentals from real estate | $8,504.16 | |
| Exemption | 400.00 | 8,904.16 |
| Net income for assessment | | $21,420.69 |

The appeal will be dismissed.

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IN RE APPEAL OF TRUSTEES OF GRAYSON SMITH.

*Assessment of trustees—Non-resident beneficiaries—Assessment Act s. 44.*

*Held*, 1. Trustees are liable to be assessed on all the income derived from the property of the trust fund coming into their hands within the province as though they were the actual owners thereof.

2. The fact of the beneficiary residing without the province makes no difference.

[Toronto, Nov. 8, 1899—McDougall Co. J.

This was an appeal by the trustees of the estate of Mrs. Grayson Smith, residents of Toronto, from the assessment by the City of Toronto

of the income coming into their hands as such trustees derived from the investment of the trust funds. The facts sufficiently appear in the judgment.

*Smoke* for the appellants. *Caswell* contra.

McDOUGALL, Co. J. :—The judgment in the appeal of the McMaster University (see ante p. 721) disposes of this appeal of the trustees of Mrs. Grayson Smith, unless the fact of the income received b the trustees who are residents of this municipality being payable to a beneficiary who is not a resident of this province makes a distinction. I am unable after the most careful consideration to establish any distinction between the two cases. Mr. Smoke has made a most elaborate and ingenious argument, but if I have correctly determined the appeal of the McMaster estate trustees I cannot look beyond the trustees who are residents of Toronto, and if I find that they are in receipt of an annual income from the investment of trust funds in their hands, that income becomes assessable in this municipality.

Sec. 44 of the Assessment Act declares that personal property of a non-resident in the hands of a trustee "shall be deemed to be the individual property of the trustee for the purposes of the Act." By sub-s. 10 of s. 2 of the Assessment Act personal property is defined as including income. The annual income or return from these invested funds if actually the individual property of the appellants would unquestionably be assessable. The statute declares that for the purpose of determining its liability for assessment it must be regarded as their individual property. Sec. 11 of the Act expressly makes all personal property of non-residents of the province in the possession or control of any agent or trustee for or on behalf of the owner liable to assessment in the same manner and subject to the like exemption as the personal property of a resident.

I have examined the English income tax Acts and I find similar provisions are contained in them. Sec. 41 of the Act of 1842 after dealing with the trustees of incapacitated persons, as infants, lunatics, etc., etc., enacts "that any person not resident in the United Kingdom, whether a subject of Her Majesty or not, shall be chargeable in the name of such trustee, etc., in the like manner and to the like amount as would be charged if such person were resident in the United Kingdom;" and sched. D. of the Act of 1853 limits the income liable to taxation to income derived from property in the United Kingdom. Sec. 11 of our Assessment Act is in effect the same both as to the liability to assessment and as to the limitation of the property assessable. It declares that it is only the personal property of such non-resident within the province that is liable. This appeal will be dismissed.

# Province of British Columbia.

## SUPREME COURT.

Full Court.] BIRD *v.* VIETH. [Sept. 6.

*Practice—Evidence—Exclusion of witnesses—Parties to action.*

Appeal by defendants from a judgment of DRAKE, J., pronounced in favour of the plaintiffs. During the trial the defendants (appellants) were excluded, at the instance of the plaintiffs, with other witnesses, no special reason being given for the request, and the case is reported as to this point.

*Held*, that the mere fact that a party intends to give evidence does not entitle the other party to call for his exclusion as in the case of an ordinary witness.

If a party has been wrongfully excluded it is not necessary for him to shew that he was substantially prejudiced thereby in order to get a new trial.

*Quære*, in case of harmless exclusion. New trial allowed.

*Duff*, for appellants. *Cassidy* (*A. D. Crease* with him), for respondents.

# Province of Quebec.

## EXCHEQUER COURT.

### QUEBEC ADMIRALTY DISTRICT.

Routhier, Loc. J.] [July 28.

HINE *v.* STEAM TUG "J. SCULLY."

*Towage—Salvage—Sufficiency of tender—Costs.*

The steam-tug J. S., of 111 tons burthen, bound from New York, U.S. to St. Johns, P.Q., was prosecuting her voyage off Cape Chatte, in the Lower St. Lawrence, when a slight accident happened to her boiler in consequence of which her fires had to be extinguished in order for the boiler to cool to allow the engineer to make the necessary repairs. At the time she was in the ordinary channel of navigation, and the weather was fine and the sea calm. The accident happened at 8 p.m. Three hours afterwards, and before repairs could be made, the steamship F., of 2,407 tons burthen, bound from Maryport, England, to Quebec, approached the tug, and at the request of her captain took the tug in tow. The towage covered a distance of some 230 miles, and continued for a period of thirty hours, during which neither ship was in a position of danger, nor were the crew of the F. at any time in peril by reason of the services rendered to the disabled tug.

***Held***, that as the services to the disabled tug were rendered under the easiest conditions, without increase of labour or delay to the F. it was clearly a towage and not a salvage service.

2. It not being a case of salvage the officers and crew of the F. were not entitled to participate in the amount awarded for the towage but that it belonged to the owners of the ship.

3. The defendants having paid into Court an amount sufficient to liberally compensate the plaintiff for the services rendered, they were given their proper costs against the plaintiff.

*A. H. Coook*, Q.C., for plaintiff. *Pentland*, Q.C., for defendants.

## Flotsam and Jetsam.

Lawyers have no objection to jokes against themselves provided there is something jocular about it; but when they are simply stupid and evidently manufactured by some one who has no sense of the humorous, they are a bore. Our brother of *Green Bag* devotes considerable space to Facetiæ. Some of these are good, some indifferent, some only stupid, and some in bad taste. Recent numbers contain some of all the above classes, the last being much in evidence in the September number. This matter is of very little consequence, but perhaps worth noting as a suggestion to the editor of that very readable magazine. The following from the October number are of the kind that are good:—One of the neatest instances of the tables being turned upon a bullying counsel was afforded by a clergyman, who gave evidence at the Worcester Assizes in a horse-dealing case. He gave a somewhat confused account of the transaction in dispute and the cross-examining counsel, after making several blustering but ineffective attempts to obtain a more satisfactory statement, said, "Pray, sir, do you know the difference between a horse and a cow?" "I acknowledge my ignorance," replied the reverend gentleman. I hardly know the difference between a horse and a cow, or between a bull and a bully—only a bull, I am told, has horns, and a bully"—here he made a respectful bow to the advocate—"luckily for me, has none." Quite as palpable was the hit of the farmer who, though severely cross-examined on the matter, remained very positive as to the identity of some ducks which he alleged had been stolen from him. "How can you be so certain?" asked the counsel for the prisoner; "I have some ducks of the same kind in my own possession." "Very likely," was the cool answer of the farmer, 'those are not the only ducks I've had stolen."

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In the Court of Appeal, before the Lord Chief Justice and Lords Justices Smith and Williams, counsel contended, in the case of *Styles* (*Surveyor of Taxes*) v. *Treasurer of the Middle Temple*, that the hall and

offices used by the members of the inn, the benchers' rooms, and the two lecture rooms for students were not inhabited dwelling-houses, and had improperly been assessed to inhabited house duty. Lord Russell, in the course of the argument, said: "I well remember in a case argued by Mr. Lushington, some years ago now, the question turned on what was a man's residence, and the learned counsel—I think very properly—defined 'residence' as 'the place where a man habitually ate, drank and slept.' I don't accede to your definition, replied the late Lord Chief Baron Pollock (before whom the case was being argued), for I habitually do all three on the bench, and yet I can't be said to reside there." In the result, the appeal of the Inn for exemption was refused."—*Law Times.*

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THE Japanese courts of justice, since the beginning of July, 1899, have been completely re-organized. There is now a supreme court, seven courts of appeal, forty nine provincial high courts, 298 county courts, 1301 local magistrates. The legal code, modelled chiefly after the German, has been translated into English by a German professor of law, Dr. Lonholm. The objection to the English and American system was that it was not definite enough, favors too much the rich and powerful, and opens the door to corruption. Such, at least, was the verdict of the eminent Japanese lawyers who for nearly twenty years sifted the laws of the world to find a code suited to their country. Curiously enough, the German code, a work of excessively slow growth, will not take full effect until 1900, or a year later than the Japanese code which has been shaped after it.—*Green Bag.*

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COMPANY LAW.—Statutes granting an extension to corporate charters, which are passed after the adoption of an act making all grants to corporations subject to amendment, are held, in *Deposit Bank of Owensboro* v. *Daviess County* (*Ky.*) 44 L. R. A. 825, to be subject to that act, although the original charters contained exemptions which were irrevocable.

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HIGHWAYS.—A tricycle in which a person unable to walk is travelling on a sidewalk is held, in *Wheeler* v. *Boone* (*Iowa*) 44 L. R. A. 821, not to be within the scope of an ordinance against leading, riding, or placing "any beast of burden or vehicle on any sidewalk," or an ordinance prohibiting riding or driving other than between curb lines of the street.

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MASTER AND SERVANT.—The rule that an employer is not liable for the negligence of an independent contractor is denied application in Bonaparte *v.* Wiseman (Md.) 44 L.R.A. 482, where a contractor is employed to excavate a lot close to a neighbor's house in a populous city, but the proprietor is held liable to see that in doing the work due care is taken to protect the neighbor's wall, or timely notice given him to protect it.

LAND AGENTS.—The right of a real estate broker to commission from both sides is denied in *Leathers* v. *Canfield* (Mich.) 45 L. R. A. 33, where he has contracted expressly to serve the buyer, and throughout the negotiations has endeavored to depress the price and arrange conditions favorable to the buyer.

PROXIMATE CAUSE.—One who unlawfully and maliciously shot and wounded a dog lying near his owner's house is held, in *Isham* v. *Dow* (*Vt.*) 45 L. R. A. 87, to be liable for injury to a woman who was thrown down by the sudden and violent rushing of the wounded dog into the house, on the ground that the shooting was the proximate cause of her injury.

FALSE PERSONATION.—The unreasonable refusal of a prisoner to state his name when asked by a conductor, to whom he tenders a mileage ticket, if the name thereon was his own, is held, in Palmer *v.* Maine Central R. Co. (Me.) 44 L.R.A. 673, insufficient to justify the conductor in procuring his arrest without a warrant on the charge of fraudulently evading payment of fare. But it is held to mitigate the damages for the passenger's wounded pride and sensibilities.

FIXTURES.—Stock mantels sold separately and made adaptive to any kind of a house, and which support themselves without any fastenings, or may be fastened merely by screws, are held, in Philadelphia Mortgage & Trust Co. *v.* Miller (Wash.) 44 L.R.A. 559, not to constitute fixtures as matter of law, but it is held that the jury may find that they are removable. The same was held as to bath tubs resting upon legs and attachable to any heating system, and also as to a hot-water heater attached only by plumbing connections.

"WHAT is the woman's offence?" "She threw a brick at a neighbor woman, your honor, and hit a man standing behind her." "The man is guilty of contributory negligence. If he hadn't been an idiot he would have stood in front of her. Case is dismissed."—*Cleveland Plain Dealer.*

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*The Living Age, Boston, U.S.*—The November 4 number is of special interest, containing articles carefully selected from *The Contemporary Review, Nineteenth Century, Macmillan, Temple Bar, Saturday Review, Longman's Magazine.* In no one periodical is to be found the same amount of interesting and valuable literature. We look for it every month as an old friend, and should feel lonely without it. There is something in it for every class of reader.