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LAW AND LORE.

The publication of "The Pathways to Reality," by the Right Honourable R. B. Haldane, K.C., which comprises a series of Gifford lectures, serves to remind us that the English Bar to-day has not forsworn its learned traditions. Mr. Haldane's name is perhaps more widely known to us by reason of his professional connection with many important Canadian cases before the Judicial Committee of the Privy Council; but he holds a high place in the estimation of the savants and literati of his native land, and withal can find time for the faithful performance of his duties as a member of Parliament. To be admitted to the honour of delivering a series of Gifford lectures before the University of Edinburgh is a certificate of intellectual fitness that few are privileged to possess whose energies are wholly devoted to scholarship; and for the choice to fall upon one who plays a busy part both at the Bar and in Parliament is a distinction indeed. To give some idea of Mr. Haldane's contributions to philosophy and literature we may mention, in addition to the work referred to, his "Essays in Philosophical Criticism," "Life of Adam Smith," his translation (in collaboration with Mr. Kemp) of Schopenhauer's "World as Will and Idea," and "Education and Empire," published in 1902. This is a catalogue fit to be the product of a life-time, but Mr. Haldane is a young man yet with many years of usefulness before him in the ordinary course of nature.

It is just such a case as Mr. Haldane's that emphasizes the difference between the English and Canadian points of view with regard to the expediency of limiting the lawyer's intellectual activities to the domain of the law. In England it has never been a deterrent to professional success to be suspected of literary leanings, or to be known to devote a portion of the day to walking "studious cloisters" outside the jurisdiction of Astræa. In Canada, and to a certain extent in the United States, there is an unreasoning prejudice against the "literary lawyer;" and clients shy at the door of him who "turns a madrigal for half a crown," but are in no

wise fearful of trusting their legal fortunes to one who flirts with politics—an enterprise which kills more good lawyers than anything else we wot of. We have never seen the case for literary diversion as against political dalliance on the part of lawyers better put than in the following extract: "One can choose his opportunities to study and write when other engagements do not press. But he who is influential in political life has no moment to call his own. He must make and keep regular appointments, no matter how much his business is interfered with; and besides this, he commonly spends many valuable hours in private consultations, in countermining and petty diplomacy. The lawyer who takes literature instead of politics as his "led horse," has much more command of his time, and unquestionably much less exhaustive drain upon his vital energy."

Bolingbroke in his day found cause to chide the "mere lawyer," and counselled those who would devote themselves to the province of jurisprudence to approach it by the "vantage-grounds" of metaphysical and historical knowledge. When we cast our eye over the illustrious roll of savants and authors who have adorned the English Bench and Bar from Bacon to Mr. Haldane we are ashamed of the provincialism that hedges about the ambitions of the profession in our own country, and are constrained to urge a prompt widening of our horizon in this respect. "There are more things in heaven and earth, Horatio, than are dreamt of in your philosophy."

SURVIVAL OF THE UNFIT.

The same subject has cropped up for discussion, at the same time, and without any apparent connection, both in England in the *Law Times* and in the United States in the *Law Notes*. One article is styled "The Problem of the Degenerates" and the other, "Penal Legislation and Crime." The saying that "great minds jump together" is further applicable as there is a similarity of treatment by both writers.

The problem for solution is the anthithesis of the proposition as to "the survival of the fittest". The bold proposal suggested in the *Law Times* by Dr. Rentoul, an eminent English Physician, would be to cut the gordian knot (possibly more senses than one),

He publishes a pamphlet advocating the sterilization of certain mental and physical degenerates. This pamphlet contains a candid statement of a condition of affairs, physical and mental, which he alleges is rapidly becoming worse. He tells us that "we are engaged in the apparently pleasant manufacture of lunatics and others of this class. Our asylums and like places are practically manufactories for degenerates; and he asks, "How long does the public propose that these things shall go on?"

Figures are given to show that in England, in 1901, one in every 301 is an officially notified lunatic, in Scotland one in every 247, in Ireland, one in every 206. Our statistics show for Canada, are also large. There are of course a large number of lunatics and idiots who do not appear in any returns. Statistics also show that of the many lunatics and other degenerates who were discharged from certain asylums in England from 1895 to 1903 as cured, nearly half of them were returned again. Obviously these cases were not cured at all, but all the same they had a year or so in which to enter into or resume the relations of marriage. "It would be less dangerous," observes Dr. Rentoul, "to send out among the public, persons cured of small pox or plague, without first having disinfected their clothes." It was stated in the House of Lords, as a proof of the degeneracy of the British population, that fully fifty per cent. of the candidates for the navy are rejected for physical causes. As to our charitable institutions it is asserted that very many of them are working indirectly for the survival of the unfit; and the trouble is that this class reproduce themselves as industriously as do the healthy ones.

The subject is undoubtedly a difficult as well as a delicate one. A remedy has been suggested which has already found its way into some systems of law, and it is that no one should be allowed to marry without having first obtained leave so to do from some governmental board, after a rigid examination. This, however, manifestly would only be a partial remedy.

The *Law Notes* argues it out in this way: The government spends large sums in investigating the cause and cure of diseases among animals and plants and how to produce the best results, but has spent nothing in this line as regards the securing a profitable species of the human being. The writer then continues: "We have often tried to consider what would be the result if for

a few years we should apply the same principles to raising the next generation of citizens that we apply to raising the next crop of wheat or our next crop of hogs. A farmer who raises stock for the money there is in it would be condemned by his neighbors as 'cracked' if he voluntarily permitted his runts to reproduce themselves, or refused to apply to his business all he knew or could learn about artificial selection of the best. But we as a people go on year after year allowing our physical and mental and moral runts to reproduce themselves ad libitum and then wonder why crime does not decrease faster. In government we seem to imagine that the criminal has as much right to reproduce his kind as has the virtuous, and that to restrain him would infringe his rights. This is true only if we admit that the rights of the individual outweigh those of society, and that the rights of crime are equal to the rights of decency and virtue. The runt as progenitor of a species may be eliminated by simply isolating him and not permitting him to multiply and replenish the earth. We may treat him with kindness, as we are responsible for his existence, but we may also say, in self-defence, we do not want and will not have any more of your kind. Let some wise legislator devise some way of applying to human beings the rational principles that are already followed by the departments of biology and animal life and breed our criminals out instead of continuing to breed them into our national and social life."

Something more practical, however, than this is wanted; and Dr. Rentoul is on hand with something very definite in the way of a remedy. The details of it, however, are more fit for discussion in a medical than in a legal journal. His remedy would not interfere with marriage, but would render marriage unproductive amongst the degenerates in a physical sense. He would induce sterilization in the lunatic, the confirmed inebriate, the epileptic, and others of that class, and would not omit those who are confirmed tramps and vagarants and known to be such to workhouse officials and to the police.

This is rather a startling proposition but the statements regarding degeneracy of the race are equally startling. If we read history aright, the healthiest, the cleanest and most vigorous nation that the world has ever seen were the people that crossed the Jordan under Joshua, after having been subjected for nearly half a century

to the physical training and control, as well as to the moral and religious discipline, of the greatest lawgiver and teacher of hygiene of any age. But the cleaning up and weeding out of the slave stock, and the training of the "fit" survivors, on that occasion, is an event not possible of repetition in these days. The sociologist must therefore look elsewhere for a remedy. The time may come when something along the line indicated above may take more definite shape.

HARD LABOR IN COMMON LAW MISDEMEANORS.

May not the convictions in the ballot fraud cases, which have recently given a malodorous reputation to Toronto municipal history, be impeached on the ground that hard labor attaches to the sentences of the various offenders sentenced to detention in the Central Prison?

The Crown, it is now understood, is driven to argue that a misdemeanor at common law appears. That being the case, the punishment, whether fine, or imprisonment, or both, is according to the books, in the discretion of the Court. And it would seem to be no part of that discretion to weight a prisoner's confinement in gaol with hard labor, if indeed, the place of custody may be other than the common gaol. This accessory of hard labor, it should be observed, is a matter of course, in respect of imprisonment in the Central Prison, by virtue of sec. 955, s-s 5 of the Code, which provides that "imprisonment in a penitentiary, in the Central Prison for the Province of Ontario, . . . shall be with hard labor, whether so directed in the sentence or not." Sub-s. 6 reads, "imprisonment in a common gaol, ... shall be with or without hard labor, in the discretion of the Court or person passing sentence, if the offender is convicted in indictment, or under the provisions of Part LIV (Speedy Trials), or Part LV, (Summary Trials.)" The section, judged by its opening clause, rather makes against the notion of its having to do with any punishments but those awardable between a maximum and minimum—such, in other words, as hamper the Court's discretion.

The evolution of hard labor, as a concomitant of punishment by restraint of the person, is interesting to follow. It was first warranted by the statute 5 Ann, c. 6, but was restricted to con-

victions for what then bore the distinguishing titles of Grand and Petit larceny. Later, by 16 Geo. III, c. 6, when transportation beyond the seas was decreed for certain felonies, condemnation to hard labor might be superimposed. After the passage of 19 Geo. III, c. 74, explorers were driven back, for the law on the subject, until 3 Geo. IV., c. 114, upon the statute of Ann, before mentioned. The provisions of 7 & 8 Geo. IV., c. 28, extended the infliction of hard labor to all offences within the category of felonies. It will be seen, therefore, that when, in 1791, the common law, as then existing, was transplanted to this country, hard labor was sanctioned as an auxiliary punishment in larceny only. We are not concerned in these accusations with anything prescribed by 7 & 8 Geo. IV., c. 28, because conspiracy was never counted a felony. Moreover, 14 & 15 Vict. c. 100, s. 29, demonstrates that conspiracies did not come within the prior legislation appointing hard labor, by enacting that "any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert or defeat the course of justice," was to carry with it this aggravation of the sentence.

Hodge v. *The Queen*, 9 App. Cas. 117, determined of course that the term "imprisonment" in sec. 92 of B.N.A. Act (conferring power on a legislative body) must be construed as including hard labor; still, the view expressed by the Court in *Reg.* v. *Frawley*, 46 Q.B. 153, has a bearing on this discussion. Hagarty, C. J., in delivering judgment, says, "We are satisfied that if the law merely directs imprisonment as the punishment of an offence, no Court of Justice, can, in the absence of any general discretionary power to that effect, award hard labor in addition. We are of opinion that it is an additional substantive punishment, varying only in degree from the infliction of whipping, the treadmill, solitary confinement, etc."

The Encyclopædia of English Law (tit Conspiracy) points out that other conspiracies laid in our time, as misdemeanors at common law, would not justify the imposition of the greater burden. The advent of hard labor in England—synchronous with the formation of Houses of Correction—as part of a felon's expiation was delayed for the time it was by reason of the vogue which hanging so long enjoyed.

J. B. MACKENZIE.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

MORTGAGE—DEVOLUTION OF MORTGAGED ESTATE—MORTGAGEE'S REPRESENTATIVES IN POSSESSION—REALTY OR PERSONALTY—REAL PROPERTY LIMITATIONS ACT, 1874 (37 & 38 VICT. c. 57), s. 7—(R.S.O. c. 133, s. 19.)

In re Loveridge, Pearce v. *Marsh* (1904) 1 Ch. 518. A mortgagee who died in 1864, by his will, made his wife executrix and tenant for life of his estate, and subject thereto, died intestate, leaving his brother Isaac his heir. The widow and Isaac were entitled to the testator's personalty. The widow went into possession of the mortgaged property and died after having been in possession from 1864 to 1900. The mortgagor's title was barred on 1st January, 1879. Isaac, the brother, died in 1880 intestate; he was insane at the testator's death and continued so until his own death. The present action was brought for the administration of the testator's estate, and it became necessary, therefore, to determine in what character the mortgaged estate was to be regarded. Buckley, J. had previously held S.C. (1902) 2 Ch. 859 (noted ante vol. 39, p. 186), that though the land descended to Isaac as heir, he held as trustee for the widow who was entitled to the mortgage debt as executrix, and that Isaac was not discharged from his trusteeship when the mortgagor's title was barred; and that the land devolved on the executrix as personalty; and he now held that, as the mortgagor was barred on 1st January, 1879, when s. 7 of the Real Property Limitations Act, 1874 (R.S.O. c. 133, s. 19) came into force, that from that date Isaac's one half share of the land was beneficially vested in him until the time of his death as realty, and descended on his death to his heirs.

WILL—DEVISE TO WIFE OF ATTESTING WITNESS—DEVISE TO DAUGHTER OR HER CHILDREN—WILLS ACT, 1837 (1 VICT. c. 26), s. 15.—(R.S.O. c. 128, s. 17.)

Alpin v. *Stone* (1904) 1 Ch. 543. The Wills Act s. 15 (R.S.O. c. 128, s. 17), as is well known, has the effect of invalidating gifts made by a will to an attesting witness or the husband or wife of an attesting witness. In the present case the testator gave a life estate to his widow and subject thereto one half of his estate to his daughter

Ellen or her children. Ellen's husband, unfortunately for her, attested the will, the disposition in her favour was, therefore, void, and it was contended that the disposition in favour of the children took effect; but Eady, J., refused to give effect to that contention because it was clear that, apart from s. 15, the devise must be construed as a devise to Ellen, if living at the widow's death, and if not, then to her children. But, as he pointed out, the gift to the children was only to take effect if Ellen was not living at the death of the tenant for life, an event which had not happened, consequently there was really no devise to them.

EASEMENT—PRESCRIPTION—CLAIM OF RIGHT OF WAY BY PRESCRIPTION BY ONE TENANT AGAINST ANOTHER HOLDING UNDER SAME LANDLORD—UNITY OF OWNERSHIP—DOMINANT AND SERVIENT TENEMENTS—FORTY YEARS USER BY LESSEE—PRESCRIPTION ACT. 1832 (2 & 3 WM. 4, C. 71), SS. 2, 8—(R.S.O. C. 133, SS. 35, 41).

Kilgour v. *Gaddes* (1904) 1 K.B. 457, was an action for trespass in which the plaintiff also claimed an injunction to restrain further trespasses by the defendant. The plaintiffs were tenants of adjoining tenements held under the same landlord. For forty years during the defendant's term he had been accustomed without objection to enter on the plaintiff's premises and make use of a pump thereon, and it was to prevent his further doing so that the action was brought. The defendant claimed that he had by his forty years' user acquired a prescriptive right to an easement, relying on the Prescription Act, 1832, s. 2, (R.S.O. c. 133, s. 35). Walton, J., who tried the action, upheld his contention, but the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) reversed his decision, holding that one tenant cannot acquire a title by prescription against another tenant holding under the same landlord; because the tenant's possession is the possession of the landlord, and there is consequently a unity of ownership preventing the acquisition of any prescriptive rights by either tenant against the other. The dictum of Chitty, J., in *Harris* v. *De Pinna*, 33 Ch. D. 238, to the contrary, was held not to be well founded.

CONTRACT—IMPOSSIBILITY OF PERFORMANCE—MONEY PAID UNDER CONTRACT—FAILURE OF CONSIDERATION—RIGHT TO PAYMENT ACCRUING BEFORE PERFORMANCE OF CONTRACT IMPOSSIBLE.

Chandler v. *Webster* (1904) 1 K.B. 493, was another case arising from the postponement of the Coronation. In this case the defendant agreed to let the plaintiff a room for the purpose of viewing

the procession, on June 26, 1902, for £141 15s. By the terms of the contract the price was to be paid before the time fixed for the procession and before it was known that it would not take place. The plaintiff had paid £100 on account, which he now sought to recover as on a total failure of consideration, and the defendant counterclaimed for the balance of £41 15s. remaining unpaid. Wright, J., held that the plaintiff was not entitled to recover the £100 paid, and that the defendant was not entitled to the £41 15s. because, in the view he took of the contract, that was not payable until after the procession had taken place. The Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) affirmed his judgment as to the £100, but took a different view of the contract as to the payment of the £41 15s., which they held was payable prior to the date fixed for the procession and before it had become impossible.

LIFE INSURANCE—INSURABLE INTEREST—POLICY ON LIFE OF ANOTHER—WAGERING POLICY—14 GEO. 3, C. 48, SS. 1, 2—(R.S.O. C. 339, SS. 1, 2)—RECOVERY OF PREMIUMS PAID ON VOID POLICY—IN PARI DELICTO.

In *Harse* v. *Pearl Life Assurance Co.* (1904) 1 K.B 558, the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) have reversed the judgment of the Divisional Court (1903) 2 K.B. 92 (noted ante vol. 39, p. 613). The plaintiff had effected an insurance on the life of his mother, relying upon a representation of the agent of the insurance company that the policy would be valid. Having subsequently discovered that the policy was void under 14 Geo. 3, c. 48, s. 1, (R.S.O. c. 339, s. 2), he sued for the recovery of the premiums. The Divisional Court held him entitled to succeed, being of opinion that the plaintiff was entitled to assume that the defendants' agent was familiar with insurance law and therefore the parties were not in pari delicto. The Court of Appeal, on the other hand, came to the conclusion that as the representation of the agent was innocently made, the parties were in pari delicto, and therefore the plaintiff could not recover.

CONTRACT—IMPOSSIBILITY OF PERFORMANCE—PAYMENT ON ACCOUNT OF CONTRACT—EXPRESS PROVISION FOR EVENT OF PERFORMANCE OF CONTRACT BECOMING IMPOSSIBLE.

In *Elliott* v. *Crutchley* (1904) 1 K.B. 565, the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) have affirmed the judgment of Ridley, J. (1903) 2 K.B. 476 (noted ante vol. 39, p. 746).

This was another of the actions arising out of the postponement of the Coronation. In this case, it may be remembered, a ship was hired to convey passengers to see the intended naval review. By the terms of the contract £300 was to be paid on account of refreshments on a day prior to that fixed for the review, and the contract expressly provided that in the event of the cancellation of the review before any expense was incurred there should be no liability on the part of the defendants. The plaintiff expended a small sum for extra knives and forks, but nothing for refreshments. A cheque for £300 was sent in accordance with the contract, but, before its presentation, payment was stopped. The plaintiff sued on the cheque, but the Court of Appeal agreed with Ridley, J., that he could not recover, as, on a true construction of the contract, in the event of the cancellation of the review the defendants were only liable to reimburse the plaintiff any expense then incurred by him.

CONFLICT OF LAWS—CONTRACT OBTAINED ABROAD BY DURESS—CONTRACT VALID WHERE MADE.

Kaufman v. *Gerson* (1904) 1 K.B. 591, was an action tried by Wright, J. The action was brought on agreement to pay a certain sum of money, and the defendant set up that it had been obtained by duress and threat of criminal prosecution of the defendant's husband. It was shewn that the agreement sued on was made in France, and that according to the laws of France it was legal and binding, notwithstanding the duress. Wright, J., gave judgment for the plaintiff (1903) 2 K.B. 114 (noted ante vol. 39, p. 614). We are not surprised to see that the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) have come to a different conclusion. The Master of the Rolls adopts the view of Story, that where an English Court is asked to enforce a contract made in a foreign country it is entitled to enquire whether, though the contract may be valid according to the laws of that country, it violates some moral principle which, if it is not, ought to be universally recognized. The distinction which Wright, J., drew between physical and moral duress the Court of Appeal found not to be tenable. In their view all duress is immoral. As the Master of the Rolls puts it, "What does it matter what particular form of coercion is used, so long as the will is coerced?"

BAILMENT—MASTER AND SERVANT—UNAUTHORIZED ACT OF SERVANT—INJURY TO ARTICLE BAILED—LIABILITY OF MASTER.

Sanderson v. *Collins* (1904) 1 K.B. 628, is one of those cases calculated to provoke a good deal of difference of opinion. It turns on the somewhat thorny law of bailments. The plaintiff was a carriage builder and had lent the defendant a carriage to use whilst his own was being repaired. The defendant's servant, without his authority, and not in the course of his employment, took the plaintiff's carriage out for his own purposes and got drunk, and while driving it ran into a tram-car whereby the carriage was damaged. The question therefore was, whether the master was liable to the plaintiff for the injury thus done to the carriage. The case was tried in a County Court, and the County Court judge held that the defendant was not liable. On the other hand the Divisional Court (Lord Alverstone, C.J., and Wills and Channell, JJ.) held that he was liable, following, as they supposed, *Coupé Co.* v. *Maddick* (1891) 2 Q.B. 413 (noted ante vol. 27, p. 524); but the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) distinguished that case, on the ground that the servant there, though exceeding his instructions, was acting in the course of his employment, whereas in the present case he was not. As the Court of Appeal puts it, a bailee is not responsible if, without his fault, the article bailed is stolen, so neither is he responsible if, without his fault, the article bailed is injured by some stranger. At the same time it does seem somewhat hard that as between the bailor and the bailee the latter should not be answerable for the act of his servant; the answer the Court makes to that, however, is, that in doing the act which resulted in the damage the servant was doing an unauthorized act, and therefore qua that act he was not the defendant's servant, which is one of those refinements of law which the average man will hardly think looks like common sense.

CHARTER-PARTY—FREIGHT AT THE RATE PER TON OF CARGO SHIPPED—FREIGHT PAYABLE ON RIGHT AND TRUE DELIVERY OF CARGO—LOSS OF PART OF CARGO—BILL OF LADING FREIGHT COLLECTED BY SHIPOWNER—RIGHT OF CHARTERER TO RECOVER DIFFERENCE BETWEEN FREIGHT COLLECTED AND FREIGHT DUE FOR CARGO DELIVERED.

The *London Transport Co.* v. *Trechmann* (1904) 1 K.B. 635, was an action brought by the plaintiffs as charterers of a vessel to recover a sum alleged to have been received by the shipowners for freight in excess of the freight actually earned owing to a loss of

part of the cargo. The charter-party provided that the freight should be at the rate of 10s. 6d. per ton gross weight of cargo shipped, "payable on right and true delivery of the cargo." The vessel loaded a cargo, but on the voyage part of it was lost. The remainder was delivered at the port of discharge, and the full amount of freight reckoned on the total cargo shipped was collected by the shipowners. The plaintiffs claimed to recover as money had and received to their use the difference between the freight reckoned on the cargo actually delivered, and that shipped. Walton, J., held that they were entitled to recover, and the Divisional Court (Lord Alverstone, C.J., Collins, M.R., and Romer, L.J.) affirmed his decision. Romer, L.J., dissentiente, he being of opinion that the freight, though fixed at so much per ton, was in fact a bargain for a lump sum, and therefore that the shipowners were entitled to the whole freight notwithstanding the partial loss of the cargo.

SHIP—DAMAGES FOR DETENTION OF SHIP—NEGLECT TO DISCHARGE CARGO—BILL OF LADING—CARGO TO BE DISCHARGED "AS FAST AS THE STEAMER CAN DELIVER OR GOODS WILL BE LANDED."

The Arne (1904) P. 154, was an action by shipowners against the consignees of a cargo for damages for detention of the ship. The bill of lading provided that the consignees were to discharge the cargo as fast as the steamer could deliver "or the same will be transhipped into lighters or landed." The consignees were guilty of delay in discharging the cargo owing to a scarcity of wagons. The County Court judge who tried the action thought that by the terms of the bill of lading the shipowner's only remedy in the event of delay was to transfer into lighters or land the cargo; but the Divisional Court (Jenne, P.P.D., and Barnes, J.) reversed his decision, holding that the shipowner had an option either to pursue his ordinary remedy for damages, or tranship, and further that the shipowner was entitled to damages as the consignees had failed to shew that they had done their best in the circumstances to make the appliances of the port available for the discharge of the cargo.

PRACTICE—CONTEMPT—MOTION BY PARTY IN CONTEMPT.

Gordon v. *Gordon* (1904) P. 163, though a divorce case, deserves attention because of the point of practice which it involves. It is well known that the general rule is that a party in contempt cannot

make any application to the Court until he has first purged his contempt. This rule, however, is subject to an exception as this case illustrates, viz., that the rule only applies to voluntary applications by the contemnor, i.e., when he comes into court asking for something but does not preclude him from applying to set aside an order which he claims to be erroneous. In this case the applicant in contempt moved to vary an order made against her ordering costs to be paid out of her separate estate notwithstanding it might be subject to a restraint against anticipation, and the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.), being of opinion that the order was erroneous in this respect, it was varied accordingly.

NOTARY—APPOINTMENT OF COLONIAL NOTARY BY MASTER OF FACULTIES.

Baillean v. *Victorian Society of Notaries* (1904) P. 180, is referred to here not because it can be considered to have any authority here, but because of the fact that the Master of the Faculties of the Archbishop of Canterbury, under the powers conferred by 25 Hen. 8, c. 21, appointed a notary for the State of Victoria. This is a matter of constitutional interest. Notaries in England prior to the Reformation were quasi ecclesiastical officers, or, perhaps it would be more correct to say, public officers deriving their authority from the ecclesiastical authority. This jurisdiction of appointing notaries, which had originally been exercised by the Roman Emperors, was one of those numerous imperial powers which in process of time had been assumed by the Roman Pontiffs who regarded themselves in this, as in many other respects, as the natural heirs of imperial prerogatives, and so it had come to pass that this, with many other appointments, was a fruitful source of revenue to the Holy See. One of the first of the Reformation Acts was to cut off the Papal jurisdiction in this matter, and the power of appointing notaries was vested in the Court of Faculties of the Archbishop of Canterbury by 25 Hen. 8, c. 21, s. 3. It is somewhat surprising at this late day to find that jurisdiction being exercised in Australia, and no doubt the various States of Commonwealth will ere long provide by local legislation for such appointment, as has been done by the various Provinces of Canada.

INSURANCE—LIFE POLICY—MUTUAL ASSURANCE—STIPULATION AS TO PARTICIPATION IN PROFITS—POWER OF COMPANY TO ALTER RIGHTS OF POLICY HOLDER BY BY-LAW.

Baily v. *British Equitable Assurance Co.* (1904) 1 Ch. 374, is an important decision on a point of insurance law. The defendant company had a department called "the Mutual Life Assurance Department," and by a by-law made in 1854 they provided that the profits of that department, ascertained triennially, should, after deduction of expenses, be divided among the policy holders in that department. The plaintiff effected an insuranee in that department while the by-law was in force. The deed of settlement under which the company was constituted provided that the profits should be divided as provided by by-law, and that any provision of the deed and every by-law might be altered by by-law. After the plaintiff's insurance was effected, and while it was still in force, the defendant company passed a by-law making a different division of the profits, and one less beneficial to the plaintiff, and the question was whether this could be validly done as against the plaintiff; and the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) affirmed the judgment of Kekewich, J., holding that the company could not by a subsequent by-law altering its articles justify a breach of contract, and that the attempted alteration in the division of the profits was therefore inoperative as against the plaintiff.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] WHITING *v.* BLONDIN. [March 10.

Contract—Condition precedent—Right of action.

In a contract for the construction of works, it was provided that the works should be fully completed at a certain time and that no money should be payable to the contractors until the whole of the works were completed. In an action by the contractors for the full amount of the contract price, the trial judge refused leave to amend the claim by adding a count for quantum meruit. He found that the works were still incomplete at the time of action, but entered judgment in favour of the plaintiffs for a portion of the contract price with nine-tenths of the costs. The defendant appealed from this decision and the trial court judgment was affirmed by the court of review.

Held, reversing the judgment appealed from, that, as the whole of the works had not been completed at the time of the institution of the action, the condition precedent to payment had not been accomplished and the plaintiffs had no right of action under the contract. Appeal allowed with costs.

Lafleur, K. C., and *Cate*, for appellant. *Belcourt*, K. C., and *Panneton*, K.C., for respondents.

Que.] CHAMBLY MANUFACTURING CO. *v.* WILLET. [March 25.

Appeal—River improvements—Continuing damages—Contract—Protective works—Discretion of court below—Practice—Exception—Acquiescence—Motion to quash.

Owing to the condition of the locality and the character of certain improvements made for the purpose of increasing the water power at Chambly Rapids, in the Richelieu River, the parties entered into an agreement respecting the construction of dams and other works at the locus in quo, and it was provided that the company should assume the responsibility and pay for all damages caused by "flooding of land, bridges or roads, if any, as well as all other damages caused" to the plaintiff "during or by reason of" the constructions.

Held, reversing the judgment appealed from, that under the agreement the plaintiff could recover only such damages as he might suffer from

time to time in consequence of the floods at certain seasons being aggravated by the constructions in the stream and that, in the special circumstances of the case, the courts below erred in decreeing the construction of protective works, inasmuch as the company was entitled to take the risk on payment of indemnity as provided by the contract.

Where a respondent, on an appeal to the court below, has failed to set up the exception resulting from acquiescence in the trial court judgment, as provided by art. 1220 of Code of Civil Procedure, he cannot, afterwards, take advantage of the same objection by motion to quash a further appeal to the Supreme Court of Canada. Appeal allowed with costs.

R.C. Smith, K.C. and *Campbell*, K.C., for appellants. *Lafleur*, K.C. and *Aime Geoffrion*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

From Falconbridge, C.J. K.B.] [Jan. 5.

HARRINGTON *v.* SPRING CREEK CHEESE CO.

Registry laws—Easement—Artificial waterway—Parol permission—User—Subsequent unregistered grant—Notice—Prescription.

In 1871 the defendants' predecessor in title, with the permission (not in writing) of the plaintiff's predecessor in title, laid pipes under the land of the latter for the purpose of conveying water from a spring to the lands of the defendants. These pipes continued there and in use up to the time this action was brought in July, 1903. In 1878, the plaintiff's predecessor in title, by an instrument under seal, purported to grant and convey to the defendants' predecessor the right to convey the water in pipes "in such manner and under such circumstances as the same are now;" and at the time of the conveyance to the defendants in 1879 their predecessor purported to grant to the defendants the same right. The plaintiff, who was a son of his predecessor in title, in 1887, became the owner of the lands through which the pipes were laid, by virtue of a conveyance to him, registered before the registration of the instruments of 1878 and 1879. The plaintiff knew of the existence of the pipes under ground, and the use that was being made of them. He believed that they could not have been placed there without his father's permission, but he was not aware of the instruments of 1878 and 1879 or their nature.

Held, that the plaintiff was entitled to rely upon his conveyance, the registration of which without notice of the defendants' interest or claim rendered it void as against him; and there had not been a sufficient lapse

of time since to give the defendants a right under the statute or by prescription. Judgment of Falconbridge, C.J., reversed.

Douglas, K. C., and *W. T. McMullen*, for plaintiff, appellant. *Armour*, K.C., and *G.F. Mahon*, for defendants.

From Boyd, C.] GRAND TRUNK R.W. Co. *v.* VALLIEAR. [Jan. 25.

Way—Private way—Easement—Prescription—Railway—Station grounds—Implied grant—Powers of railway company—Benefit of railway—Superfluous lands—Way of necessity.

The defendant claimed a right of way through the plaintiffs' station grounds at M. by virtue of open, continuous, and uninterrupted user for more than 30 years.

Held, that the right must rest upon the presumption of a grant, and if an actual grant would have been illegal and void, a grant implied from 20 years' user could not be valid.

The use on which the defendant relied began in 1872. At that time the Northern Railway Company of Canada, through whom the plaintiffs derived title, had no power to make a sale or grant of any of their property otherwise than for the benefit and account of the railway: 12 Vict. c. 196 (C). In 1868 the Northern Railway was declared to be a work for the general advantage of Canada, but none of the general Railway Acts passed by the Dominion Parliament were made applicable to it until the passing of the Railway Act, 1888, ss. 3 and 5; and by s. 90 (D) the power of a railway company to sell and dispose of lands and other property was limited to so much thereof as was not necessary for the purposes of the railway. The land in question was acquired for use by the company as a railway station, and the area was within the quantity which they were authorized to acquire for the purpose.

Held, that neither at the time when the user on which the defendant relied began, nor since, was there power in the railway company to make a grant of such a right; it was not for the benefit of the railway; neither was it of lands not required for its purposes; and the defendant had, therefore, failed to establish his right.

Between the lot owned by the defendant and the station grounds there was a strip of land laid out as a street which he was occupying as part of his premises.

Held, that, even assuming that he had acquired title to the strip by possession, that did not carry with it any right to a way, of necessity or otherwise, over the plaintiffs' lands in order to give him an outlet.

Judgment of Boyd, C., reversed; Osler, J.A., dissenting.

Riddell, K.C., and *Rose*, for plaintiffs, appellants. *McCullough*, and *McKeown*, for defendant, respondent.

From Co. J., Simcoe.] IN RE ORILLIA AND MATCHEDASH. [Jan. 25.

Assessment and taxes—Exemptions—Property of municipality situate in another municipality.

Upon the proper construction of s. 7, sub. s. 7, of the Assessment Act, R.S.O. 1897, c. 224, providing that "the property belonging to any county or local municipality" shall be exempt from taxation, property acquired by a town corporation under a special Act, 62 Vict. c. 64 (O.), as amended by 2 Edw. VII. c. 53, situate in a neighbouring township, at a distance of 19 miles from the town, and consisting of land, buildings, machinery, and plant for the purpose of generating and transmitting electrical energy to the town for lighting, heating, manufacturing, and such other purposes and uses as might be found desirable, with power to distribute, sell, and dispose of such electrical power in the town and elsewhere within a radius of 25 miles, is exempt from taxation by the township corporation.

Judgment of Judge of County Court of Simcoe reversed.

D. Inglis Grant, for the town appellants. *Brokovski*, for the township respondents.

From Britton, J.] IN RE ROSS AND DAVIES. [Jan. 25.

Executor and administrator—Power of executor to sell lands—Payment of debts—Lands devised in fee—Executory devise over—Devolution of Estates Act, ss. 4, 9, 16—Trustee Act, ss. 18, 20.

A testatrix by her will gave to her daughter some personal effects and $4,000 to be paid to the daughter by the son of the testatrix, and charged on property devised to the son; all the rest of her real and personal property she gave, devised, and bequeathed to the son, charged with the $4,000. The will then directed that in case of the death of either the son or daughter without issue, the whole of the property and estate was to go to the survivor, and in case of the death of both without issue, to the brothers and sisters of the testatrix. The executors contracted to sell a part of the real estate to the appellant, the daughter being alive and having three children, the son alive and unmarried, and brothers and sisters being also in existence. At the time of the death of the testatrix, her estate, including the land which was the subject of the contract, was incumbered, and there were other debts.

Held, that the executors, even without the concurrence of the son and daughter, and a fortiori with their concurrence, could make a good title, either under the Devolution of Estates Act, R.S.O. 1897, c. 127, ss. 4, 9, 16, or under the Trustees Act, R.S.O. c. 129, s. 18. Sec. 9 of the former Act enables executors to sell for the payment of debts, and the power to sell is not qualified by s. 16. That section was intended to make it clear that executors had power to sell for the purpose of distribution where there were no debts as well as where there were debts; and the consent of the official guardian on behalf of infants, lunatics, and non-concurring heirs or

devisees, is only necessary when the sale is for purposes of distribution only. The power of sale given to executors by s. 18 of the Trustee Act was exercisable in this case, notwithstanding the last clause of s. 20; "a devise to any person or persons in fee or in tail, or for the testator's whose estate and interest," does not mean a devise of a life estate to one or more persons, and a remainder or several remainder to one or more others, either jointly or successively, and with, it may be, executory devises over to still other persons, so that his whole fee simple, or less estate, whatever it may be, is disposed of; but it means a devise of his whole interest, whatever it may be, whether it be an estate in fee simple or any less interest, to the same person or persons, either as joint tenants or tenants in common.

In re Wilson, Pennington v. *Payne*, 54 L.T.N.S. 600, 2 Times L.R. 443, approved.

Judgment of BRITTON, J., affirmed.

Ritchie, K.C., for appellant. *D.C. Ross*, for respondents, the executors.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P.] LANGLEY *v.* KAHNERT. [Jan. 22.

Bankruptcy and insolvency—Goods in possession of insolvent—Agreement between insolvent and vendor—Construction—Sale or agency for sale—Bills of Sale Act, R.S.O. 1897, c. 148, s. 41.

Certain goods were supplied by the defendant to a trading company, and it was arranged between the company and the defendant that the company might sell the whole or any part of the goods to whomsoever they chose, and for such price and on such terms as they might see fit, but they were, whenever a sale was made, to pay in cash to the defendant the price of the article sold, according to a price list which was furnished to them by the defendant, when the goods were from time to time delivered to the company. The company had also the right, whether they had made a sale or not, to become the owners of the whole or any part of the goods at the prices named in the list, and they had also the right at any time to return the whole or any of the goods which remained unsold. The company having made a statutory assignment to the plaintiff for the benefit of creditors, and the defendant having retaken the goods:—

Held, in an action for return of the goods or damages for their conversion, that the goods were not at the time of the assignment the property of the company, but were in their possession either as bailees or agents of the defendant, with the right, if and when they elected to buy, to become the purchasers of the whole or any part of them at the prices mentioned in the price list.

Ex p. White, L.R. 6 Ch. 397, and S. C. in appeal, sub nom *Towle* v. *White*, 21 W.R. 465, 29 L.T.N.S. 78, explained and distinguished.

Held, also, that section 41 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, c. 148, did not apply to this case; it refers to sales, or transfers in the nature of sales, by which the possession is to pass presently but not the property in the merchandise until the agreed price or consideration is paid. *Mason* v. *Lindsay*, 4 O.L.R. 265, applied.

W. R. Smyth, for plaintiff. *F. A. Anglin*, K.C., for defendant.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Jan. 12.

HUFFMAN *v.* RUSH.

Limitation of actions—Real Property Limitation Act—Wild land—Boundary—Entry—Occupation—Evidence of possession—Survey.

In an action of trespass the dispute was as to the ownership of a strip of land about 53 links in width, which the plaintiff claimed as part of his lot, 16, and the defendants as part of theirs, 17, or if not, as having become theirs by the operation of the Statute of Limitations. Neither of the lots had ever been cleared or cultivated, and no fence separating them had ever been built. Both parties had cut timber, and that was the only use that had ever been made of either lot.

Held, that the statute did not apply; to render it applicable it would be necessary to shew, if not an entry and cultivation of some part of the land, at least an entry and actual occupation.

Semble, that even if the statute applied, there was not, upon the facts, that clear and unequivocal evidence of possession by the defendants of the strip in dispute which was necessary to bar the right of the true owner.

Davis v. *Henderson*, 29 U.C.R. 344, distinguished. *Harris* v. *Ludie*, 7 A.R. 414, and other cases, considered.

Held, however, that the plaintiff's evidence of his title to the land in question as forming part of his lot was not sufficient to establish it.

Proper method of ascertaining the true position of the dividing line between lots pointed out.

Brewster, K.C., for plaintiff (appellant). *Harley*, K.C., for defendants (respondents).

Street, J.] IN RE ABEEL. [Jan. 25.

Extradition—Forgery—Uttering forged document—Letter of Introduction—Intent—Criminal Code, ss. 422, 424.

There was evidence that the prisoner handed to a young woman in charge of an office of the Western Union Telegraph Co. a letter purporting to be signed by a vice-president of that company, in these words: "To any employé, Western Union Telegraph Co. This will introduce Mr. J. O. Goelet, a personal friend of the management of this company. Any

favors shewn him will be duly appreciated by the corporation and myself." The vice-president whose name was used did not himself sign it, nor authorize anyone else to sign it for him, nor was he aware of it. There was evidence that the prisoner shortly afterwards gained the affections of the young woman, and proposed under the name of J. O. Goelet, to marry her, although he had a wife living. There was no evidence that any person named J. O. Goelet existed. There was no evidence to shew that the prisoner had himself written any part of the document.

Held, that the facts were sufficient to make out a prima facie case that the prisoner presented the document with the intention that the young woman should believe and act upon it as genuine to her own prejudice within the meaning of s. 422 of the Criminal Code; and therefore a prima facie case of uttering a forged document within the meaning of s. 424; and an order for extradition was right.

The language used in s. 422 is intended to extend to cases which would not have come within any former common law or statutory definition of forgery in force in Canada.

German, K.C., for prisoner. *Riddell*, K.C., for United States Government. *Cowper*, for prosecutor.

Street, J.] SMITH *v.* GREER. [Jan. 26.

Partnership—Dissolution—Solicitors—Goodwill—Right to firm name—Acquiescence—Abandonment—Injunction—Parties.

Upon the dissolution of a partnership, in the absence of an agreement between the partners to the contrary, the firm name being a part of the goodwill, and not having been dealt with upon the dissolution, remains the property of all the partners, like any other undisposed of partnership property; and each member of the late partnership is entitled to carry on business in the firm name, subject to the limitation that no man has a right to hold out of his late partner as still being his partner in business, contrary to the fact. *Burchell* v. *Wilde*, (1900), 1 Ch. 551, followed.

A firm of solicitors had carried on business as "Smith, Rae & Greer" down to October, 1902, and after that until the dissolution of the firm in January, 1903, as "Smith & Greer."

Held, that both names must be taken to have formed part of the goodwill of the firm at the time of the dissolution.

At the time of the dissolution the firm consisted of four members. Three of them formed a new firm and used the name "Smith, Rae & Greer." The fourth, the defendant, protested against the others assuming that name, but, on their refusing to abandon it, notified his clients, the legal profession and the public, that he had severed his connection with the firms of Smith, Rae & Greer and Smith and Greer, and intended to carry on his own business under his own name. For nearly ten and a half months he adhered to this position, frequently addressing his late partners

as "Smith, Rae & Greer," and permitting them to acquire the right to be known by that name as its sole owners.

Held, that he could not, after this conduct and lapse of time, assume the name of "Smith, Rae & Greer," and that the members of the firm who had adopted that name were entitled to have him enjoined from using it. *Levy* v. *Walker*, 10 Ch. D. 436, 448, followed.

Rae had at one time been a member of the old firm of Smith, Rae & Greer, but had ceased to be so for some years before the dissolution. He permitted his name to be used in the style of the new firm, but was not a member of it, and was not practising as a solicitor.

Held, that he was not a necessary party to the action, nor was there such danger of liability being incurred by him by his being held out by the defendant as a partner as entitled him to an injunction.

Shepley, K.C., for plaintiffs. *Aylesworth*, K.C., and *W. N. Tilley*, for defendant.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Jan. 30.

MARKLE *v.* DONALDSON.

Master and servant—Injury to servant—Workmen's Compensation Act—Defect in ways, works, etc.—Person intrusted with duty of seeing that condition is proper—Fellow servant—Negligence.

The plaintiff was employed by the defendants as a carpenter, and was engaged in shingling a building when a cleat which he was using as a means of support gave way, and he was thrown to the ground and injured. There was evidence that the cleat gave way owing to one of the shingles to which it was attached not having been properly fastened to the roof, and that the mode adopted of fastening it and the other cleats on the roof was an unsafe one. It did not appear by whom the cleats had been put on; they were on before the plaintiff began to shingle the roof; and he was not one of the workmen employed on the building when they were put on.

Held, that the cleat was a part of "the ways, works, machinery, plant, buildings or premises connected with, intended for or used in the business of the employer," within the meaning of sub-s. 1 of s. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160; and, there being evidence upon which a jury might find that the cleat was defective in that it was not securely fastened, that the defective condition was the proximate cause of the injury, and that it was due to the negligence of the defendants' workmen who put on the cleats. The defendants would be answerable for that negligence (if found) as being negligence of persons intrusted by them with the duty of seeing that the condition or arrangement of the ways, etc., was proper, within the meaning of sub-s. 1 of s. 6. Differences between sub-s. 1 of s. 6 and the corresponding provision of the English Act pointed out.

Under sub-s. 1 of s. 6 of the Ontario Act the employer is answerable, so far as the condition or arrangement of the ways, etc., is concerned, for the negligence of any person, whether in his service or not, to whom he intrusts the duty mentioned in the sub-section, in the performance of that duty, in the same way and to the same extent as he would have been answerable at the Common Law had he taken upon himself personally the performance of the duty; and where an appliance necessary for the safety of the workman is required in the course of the work, and the employer directs any one to provide it ready for the use of the workman, that person is one intrusted with the duty of seeing that the appliance is proper. *Giles* v. *Thames Iron Works Shipbuilding Co.*, 1 Times L. R. 469, and *Ferguson* v. *Galt Public School Board*, 27 A.R. 480, followed.

In this case it made no difference that it was not shewn that any one had been employed to put on the cleats as a separate piece of work; the defendants knew that the cleats were required and would be put on by the workmen whom they sent to do the work of shingling. If the plaintiff had been the workman intrusted with the duty, or even one of a number of workmen sent to do the work of shingling, different considerations would apply.

Lynch-Staunton, K.C., for plaintiff. *Riddell*, K.C., for defendants.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [Feb. 5.

LEONARD *v.* BURROWS.

Appeal—County Courts—Order dismissing appeal from taxation of costs—Final or interlocutory.

An order made by the Judge of a County Court in a County Court action dismissing an appeal from a ruling as to the scale of costs upon taxation of the plaintiffs' costs of the action awarded by the judgment, is in its nature interlocutory and not final, within the meaning of s. 52 of the County Courts Act, R.S.O. 1897, c. 55, and no appeal lies therefrom to a Divisional Court to the High Court.

Blakey v. *Latham*, 43 Ch. D. 23, followed. *Babcock* v. *Standish*, 19 P.R. 195, distinguished. *In Kreutziger* v. *Brox*, 32 O. R. 418, the question of the right to appeal was not raised or considered.

M. C. Cameron, for defendant. *W. H. Blake*, K. C., for plaintiffs.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [Feb. 20.

OSTERHOUT *v.* OSTERHOUT.

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

The testator by his will gave, devised and bequeathed to his father "one-half of my ready money, securities for money . . . and one half of all other my real and personal estate whatsoever and wheresoever,

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

Held, that the father was entitled for his life only to the use of one-half of the money, and that, subject to the life interest of the father, the brother took the same absolutely. *In re Percy*, 24 Ch. D. 616, *In re Jones, Richards* v. *Jones* (1898), 1 Ch. 438, and *In re Elma Walker* (1898), 1 Ir. 5, distinguished.

Judgment of MACMAHON, J., reserved.

George Kerr and Joseph Montgomery, for plaintiff. *Widdifield and Middleton*, for defendant.

Boyd C.] HARRISON *v.* HARRISON. [Feb. 20.

Will—Devise—Accumulation over twenty-one years—Contingent interest—Non-acceleration—Executors' duty for twenty-one years—R.S.O. 1897 c. 332—Provision against litigation—Construction of will—Adverse litigation.

The testatrix who died on Feb. 14, 1892, devised certain money and lands to her executors and trustees with directions to invest and keep invested and reinvested (compounding interest) until March 17, 1915, when the whole accumulated fund was to be handed over to the plaintiff if, he was then alive. But if he died at an earlier date, leaving living issue then to his children, and if he died without leaving any living issue then to the other children of the testatrix.

Held, that the illegal part of the will was not in payment of the corpus in 1915 but in the undue accumulation of income for over twenty-one years; that the plaintiff's interest was merely contingent or subject to be devested if he did not live until 1915: that the court will accelerate payment in cases which rest on the postponement of enjoyment of property absolutely bestowed on the beneficiaries as it is against public policy to restrain a man in the use or disposition of property in which no one but himself has any interest but that in this case there is no acceleration in the enjoyment of any interest under the will as an effect of the statute R.S.O. 1897, c. 332, and no such absolute vested interest in the plaintiff as entitled him to stop the accumulation in order to claim a present payment: that the executors might proceed with the conversion of the lands and the combination and accumulation of the interest for twenty-one years: that for the following two years the accumulation must cease and the income be paid out to those entitled, personalty to the next of kin and realty to the heirs at law if the plaintiff is then alive.

Held, also that the plaintiff's action was to obtain a construction of the will and declaration of his rights rather than seeking a modification or changing of the will, and so did not operate a forfeiture of his share within the meaning of the prohibition in the will against adverse action against the testatrix's bounty.

Mabee, K. C., for plaintiff. *Idington*, K. C., for executors. *R. S. Robertson*, for other members of the family.

Falconbridge, C.J.K.B.] [March 25.

IN RE GEORGE M. ROSS.

Will—Construction—Condition subsequent.

Devise in fee provided devisee "comes to live and reside on the land devised during the term of his natural life;" with gift over "provided devisee does not come to reside on the said land so devised to him within one year after my decease."

Held, that the condition as to residence of the devisee was void for uncertainty; and that it was a condition subsequent, not a condition precedent to the acquisition of the land devised, but a condition of its retention.

Delamere, K. C., for executors. *C. A. Moss*, for Robert and Mary Fraser.

Boyd, C.] [March 30.

DUNN *v.* BOARD OF EDUCATION OF TORONTO.

Public Schools—Collegiate Institute—Dismissal of teacher—Investigation by committee of Board—Reports of committee and inspector—Power to dismiss without investigation, or on report—Suspension of teacher after injunction—Contempt—Voidable order—Costs.

Plaintiff, a school teacher in a collegiate institute managed by the defendants, was requested to resign, which she refused to do, making charges against the principal of her institute, and demanding an investigation. A committee of the defendant Board held an enquiry, examining the plaintiff and others separately, and refusing to allow counsel to be present or have shorthand notes of the proceedings taken, the result of which was a resolution demanding her resignation, or the Board would recommend her dismissal to the Board. A motion to continue an injunction restraining the Board from acting on the committee's resolution, and to commit certain members who, after the injunction had been granted, had carried a resolution to suspend the plaintiff. It was:—

Held, 1. The power of dismissal, if deemed needful, without parley or investigation, would appear to be essential to proper discipline.

2. The members of the Board were honorary trustees of the property held for the purposes of public education, but their relation towards the staff of teachers is not in any legal or equitable sense fiduciary.

3. Their power and duty is to employ "teachers, officers and servants," and "to appoint and remove such teachers, officers and servants as they may deem expedient."

4. The members of the Board are the judges of what they deem expedient in each particular case. In the matter of removal or dismissal of a teacher they may institute an investigation, or they may dispense with it and proceed on their own conviction of what is right from a general knowledge of the situation; they may act on the report of the provincial inspector even if irregularly obtained, if they are satisfied with it; and they may remit the matter to a committee and act on its report.

5. Cases of charitable endowments in which property is clothed with a trust for the maintenance of a schoolmaster considered, and *Willis* v. *Childe* (1850), 13 Beav. 117, and *Attorney-General* v. *Magdalen College*, Oxford (1847), 10 Beav. 402 contrasted. *Haman* v. *Governors of Rugby School* (1874), L.R. 18 Eq. 18 referred to with approval.

6. The injunction was improvidently or erroneously granted, but, while it stood unavoided or not appealed from, it should not be lightly regarded by those enjoined: what was done here was not a violation of its terms, but was in contravention of its reasonable import. The order contemplated the retention of the status quo. The Board suspended the teacher possibly with a view to turn the edge of the injunction, but, as the active members inculpated disclaimed, under oath, any intentional disrespect, the Court marked its sense of what was done by giving the plaintiff the costs.

McBrady, K.C., for plaintiff. *F. E. Hodgins*, K.C., for the Board and some of the trustees. *Godfrey*, for L. S. Levee, a trustee.

Boyd, C.] RE FULLER V. MCINTYRE. [April 5.

Vendor and purchaser—Partnership land—Death of one partner—Conveyance to surviving partner by administratrix—Infants—Consent of official guardian—Personalty.

Two brothers in partnership in business were the owners of certain land as partnership assets which was used in the business. One of them died intestate, leaving a widow and infant children and the widow took out letters of administration and conveyed the land to the surviving partner. Later the surviving partner died and his personal representative agreed to sell the land.

On an application under the Vendors' and Purchasers' Act R.S.O. 1897, c. 134, in which the purchaser claimed that the consent of the official

guardian should be obtained to the conveyance to the surviving partner under sec. 8 of the Devolution of Estates Act, R.S.O. 1897, c. 127.

Held, that the latter Act did not apply as the property devolved by operation of law upon the personal representative virtute officie and not by virtue of the statute and that the children were not concerned or interested in the land in any sense contemplated by the Act.

Joseph Montgomery, for vendor. *Holmar*, K.C., for purchaser.

Teetzel J.] REX EX REL. MACNAMARA *v.* HEFFERNAN. [April 14.

Municipal councillor—Judgment against, by council—Disqualification—Interested in "Contract."

The object of s. 80, of Municipal Act, 1903, 3 Edw. VII., c. 19, (O.) as to prevent anyone being elected to a Municipal Council whose personal interest might clash with those of the Municipality: and the word "contract" used therein must be construed in its widest sense: and a member of a Municipal Council against whom that corporation held an unsatisfied judgment for costs was unseated as being disqualified under that section. Judgment of the County Court of the County of Bruce affirmed.

J.H. Spence, for the appeal. *Ludwig*, contra.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] MCNEIL *v.* CULLEN. [March 8.

Promissory note—Agreement set up in answer to action.

To plaintiff's claim against defendant as maker of a promissory note for $238.58, the defence was set up that in consideration of defendant's forbearance to commence proceedings in the Probate Court for proof in solemn form of the will of A.C., plaintiff agreed to advance defendant on account of a legacy to which she was entitled as guardian of her infant children a sum of money to be expended in repairs of property of her said children, and that plaintiff not having the money required for that purpose requested defendant to sign a note for the amount which note was endorsed by plaintiff to a firm which had done a portion of the repairs, and that said note was given on the understanding that plaintiff would pay it when it became due and would deduct the amount from the amount payable to defendant as guardian of her said children.

Held, reversing the judgment of the County Court Judge in defendant's favour that defendant having violated her agreement by commencing proceedings in the Probate Court and having succeeded in setting the will aside, could not set up the agreement as a defence to plaintiff's action on the note.

Per RITCHIE, J., dissenting, that the trial judge having found all the facts in defendant's favour, one ground being that the note sued on was accommodation, there was no reason for not accepting his view.

In an action on a second note for the sum of $150, defendant, on the trial, sought to give evidence to shew that the note, although expressed to be payable on demand, was made subject to a condition that defendant should not be called upon for payment unless her children should die before a legacy to which they were entitled under the will of A.C. should become payable.

Held, affirming the judgment of the County Court Judge, that the note being absolute on its face evidence could not be given to vary its terms, there being no evidence to shew that it was given on a condition, or as an escrow, or only to be treated as a note in a certain event.

W. A. Henry, for appeal. *W. B. A. Ritchie*, K.C., contra.

Full Court.] AKTIESELSKABET HECKLA *v.* S. CUNARD & Co. [March 8.

Charter of vessel—Contract made by letter and telegram.

Plaintiffs, through their agents H., and defendants negotiated for the chartering by plaintiffs to defendants of the steamer T., then at Chatham, N.B. Defendants desired to have the steamer delivered to them at North Sydney, but, after some negotiation, on the 9th October, offered to take delivery at Chatham and use the vessel for three months if navigation remained open. Plaintiffs declined to take the risk of navigation remaining open, and on October 15th plaintiffs offered to close at three months and take the risk of navigation remaining open. On the same day plaintiffs' agents replied "have closed in accordance your telegram to-day and arranged delivery North Sydney." On the following day defendants replied "Telegram received closing T. Try to get her delivered North Sydney end October."

Held, 1. dismissing defendants' appeal, that defendants, by their telegram of October 15th, in view of previous correspondence, disclosed an intention to authorize a contract accordance to what had already been expressed in writing and that the reply to that telegram conveyed all that was required to embody the terms of the charter.

2. The defendants, when the contract was once concluded, could not by continuing the correspondence and raising other questions escape the effect of the mutual terms previously agreed upon.

Harris, K.C., for appeal. *T. R. Robertson*, contra.

Full Court.] DONHAM *v.* POOR DISTRICT 11, CLARE. [March 8.

Pauper, medical attendance upon—Liability of overseers.

In an action by plaintiff against the defendant overseers to recover fees for medical attendance upon a pauper, it was shewn that the pauper in question was chargeable to defendants, that he was in urgent need of medical attendance; that defendants were informed that such attendance would be required and failed to provide it, and that they were aware of the fact that plaintiff was affording medical aid.

Held, per RITCHIE and MEAGHER, JJ., that plaintiff could not recover.

Per WEATHERBE and TOWNSHEND, JJ., that where the necessity for relief was brought home to the overseers, and there was a request for relief, however informal, and a neglect to provide relief, there was a liability under R.S., c. 51, s. 29. The words of the section in question are "The overseers shall pay any expense which has been necessarily incurred for the relief of any pauper entitled to relief from such overseers by any person who is not liable for the support of such pauper if he has before incurring such expense requested such overseers to furnish such relief and no provision has been made for such pauper."

Held, per MEAGHER, J., inter alia, that the request shewn, if any, was by the father of the pauper and was not sufficient to support an action by plaintiff.

J. J. Ritchie, K.C., for appeal. *H. Mellish* K.C., and *J. A. Grierson*, contra.

Full Court.] BURCHELL *v.* BIGELOW. [March 8.

Registry Act—Imperfect registration—Not constructive notice.

The execution of a mortgage by a married woman who owned land in her own right was not proved by acknowledgment under oath, or by the oath of a subscribing witness, as required by the Registry Act, R.S. 1900, c. 137, s. 25, but the certificate of a justice of the peace was indorsed upon the mortgage of the declaration of the married woman that she "signed, sealed and delivered the same as and for her act and deed freely and voluntarily without fear, threat or compulsion, etc." There was no certificate of the execution of the instrument in the presence of the justice as required by the Act, s. 28.

Held, affirming the judgment of the Trial Judge that the proof of execution being defective the conveyance should not have been registered and that the registration was illegal and of no effect and would not operate as constructive notice to a third party. And the plaintiff a subsequent purchaser who had no actual notice was not affected by it.

As to the effect of improper registration see *Heister* v. *Fortner*, 4 Am. Dec. 417 and *Carter* v. *Champion*, 21 Am. Dec., and cases cited.

J. A. Chisholm, and *H. F. Bigelow*, for appeal. *H. Mellish*, K.C., and *C. J. Burchell*, contra.

Full Court.] PETITPAS *v.* COUNTY OF PICTOU. [March 8.

Public Health Act—Destruction of private property to prevent spread of infectious disease—Liability of municipality for

The Public Health Act, R.S., c. 102, s. 32, provides that "all necessary expenses incurred by a local board in suppressing any infectious or contagious disease shall be a charge against the municipality."

In an action by plaintiff against the defendant municipality to recover the value of personal property destroyed as alleged by direction of the board of health during an epidemic of small-pox for the purpose of preventing the spread of the disease.

Held, allowing with costs defendant's appeal from the judgment entered in favour of the plaintiff, that in the absence of proof of proper authority for the destruction of the property, neither the board nor the municipality could be held liable.

Per WEATHERBE, J., that assuming the property to have been destroyed by order of the board, there was no provision in the Act to render the municipality liable to make compensation for the destruction of infected property dangerous to the public health.

TOWNSHEND, J., dissented.

H. Mellish, K.C., *E. M. Macdonald* and *W. B. Ives*, for appeal. *E. L. Gerroir*, contra.

Full Court.] ROSS *v.* MORRISON. [March 8.

Canada Temperance Act—Sale of liquor to be disposed of contrary to provisions—Action to recover price.

To an action by plaintiff for goods sold and delivered, defendant pleaded that plaintiff's claim, if any, was for the price of intoxicating liquors sold by plaintiff to defendant at North Sydney, in the County of Cape Breton, the plaintiff well knowing that the same were to be sold and were actually sold within said county, in which the second part of the Canada Temperance Act was at the time of such sale in force and effect. The date of purchase of the liquor and the price were admitted. Also that plaintiff knew that the Canada Temperance Act was in force in North Sydney where defendant was carrying on business as a dealer in intoxicating liquors. Also that the order for the liquor was given by defendant to an agent of plaintiff at North Sydney, such order being subject to the approval of plaintiff. Defendant proved that the liquor in question was purchased through D., with whom he had dealt as an agent for the sale of liquor for a number of years, and that when he made the purchase D. was aware that defendant was in the retail trade.

Held, dismissing plaintiff's appeal with costs that there was sufficient ground to justify the judgment for defendant.

Fullerton, for appeal. *O'Connor*, contra.

Full Court.] PARKER *v.* IRVINE. [March 8.

Verdict—Failure of jury to agree.

In an action based upon a contract for the exchange of horses, it was alleged by plaintiff that it was a part of the contract that defendant's horse was kind and quiet and would make a good team horse. The jury found in answer to questions submitted that defendant's mare was not kind and quiet and was not a good team horse, but they were unable to agree as to whether such a representation was made at the time of the contract.

Held, that there must be a new trial, the jury having failed to agree upon one of the principal issues submitted to them.

Roscoe, K.C., for plaintiff. *T. R. Robertson*, for defendant.

Full Court. IN RE ALICIA CULLEN. [March 8.

Will—Defective execution—Probate.

The last will and testament of A.C. was contested on the ground that it was in the handwriting of the residuary legatee, that it did not express the true will of the deceased, that deceased did not know or approve of it, and that it was not properly executed, not having been "signed or acknowledged by deceased in the presence of two or more witnesses present at the same time, etc. The evidence taken before the Surrogate Judge shewed that at the time the will was executed deceased was present, but was sitting about fifteen feet away from the witnesses; that the words at the end of the will were read over in a low tone so that the witnesses were unable to say whether they were heard by deceased or not. Neither of the witnesses was able to say that the signature of deceased was affixed to the will when they signed or that he saw it if it was there and both agreed that if the signature was there deceased did not in their presence acknowledge it to be her signature, nor did they hear her asked the question whether it was her signature, nor was there evidence of any other act or conduct on her part which could be considered the equivalent of an acknowledgment. According to the evidence of the witnesses she said nothing and appeared to be indifferent as to what was going on. One of the witnesses was unable to say after leaving whether he had witnessed a will or not.

Held, affirming the judgment of the Surrogat Judge, setting aside the probate of the will, that assuming it to be true as sworn by the witness in support of the will, that deceased was asked in presence of the witnesses whether this was her will and whether she wished the witnesses to sign the evidence did not go far enough, it being essential to shew that the witnesses heard both question and answer.

W. B. A. Ritchie, K.C., for appeal. *Harris*, K.C., contra.

Full Court.] GRANT *v.* GRANT. [March 8.

Order taken on judgment—Need not follow exact terms—Power of judge to vary.

On motion for an attachment for contempt the learned judge before whom the motion was made allowed it with costs, and concluded his judgment by saying that the defendant must in addition to paying the costs undertake not to publish or circulate anything calculated or liable to prejudice the course of justice in respect to the action while pending, and that he must also publish in an early number of *The Truth* an expression of regret for having published therein anything touching this action. The order taken out was granted in different terms, requiring the defendant to deposit with the prothonotary of the court a statement under his hand stating his regret at having made such publication and undertaking not to publish further comments upon this suit, etc.

Held, that the order not having been drawn up at the time judgment was delivered there was no necessity for following the terms of the written decision, but that it could be varied in any way that seemed proper to the judge, and that the case was one in which an appeal would not lie.

Drysdale, K.C., for appeal. *W. B. A. Ritchie*, K.C., and *T. R. Robertson*, contra.

Full Court.] ATTORNEY-GENERAL EX REL. DOMINION IRON AND STEEL CO. *v.* MCGOWAN. [March 8.

Crown grant—Jurisdiction to vacate—Fraudulent concealment—Town Incorporation Act—Effect of, in vesting streets in town—Expropriation.

Defendant in making application for a grant of land from the Crown represented that the land applied for was "near" the town of Sydney when in fact it was in said town. Also that the land was "unoccupied and unimproved" when in truth, to defendant's knowledge, it was then in the occupation of the Dominion Steel Co., being a part of land which had been expropriated by the town and conveyed to the company for use in connection with their works.

Held, affirming the judgment of RITCHIE, J., in favour of plaintiff, that the Crown having been induced by false suggestions and fraudulent concealment to make a grant which it would not have made if the Crown officers had been properly informed, the grant must be set aside. The land in question was a portion of what was known as the "Cornish town road," being land reserved by the Crown many years previously for the purpose of a public road or highway, but which had never been used and was wider than was required for the purpose, and out of which some grants had been

made. By the provisions of the Towns Incorporation Act, R.S., c. 71, s. 170, all public streets, roads, etc., were vested absolutely in the town, and the town council were given full control over the same.

Quære, whether, after the passage of this Act, the Crown had any further control over the portion of the Cornish town road lying within the limits of the town.

Held, that the statute was not to be construed as not applying to the road in question merely because it had not been used or was wider than was required, and that the grant was one which the court had jurisdiction to vacate.

The right of the town to expropriate the land in question was contested on the ground that being Crown land the Act enabling the expropriation to be made (Acts of 1899, c. 84) did not apply.

Held, that the absence of authority, if any, was removed by the act ratifying and confirming the expropriation proceedings (Acts of 1900, c. 66).

T. R. Robertson, for appeal. *H. A. Lovett*, contra.

Full Court.] PAULIN *v.* TOWN OF WINDSOR. [March 8.

Will—Bequest for public purposes—Fulfilment of condition—Words "or otherwise"—Ejusdem generis.

G.P.P., by his last will and testament, directed his executors to transfer and pay over to the corporation of the town of W. the sum of $20,000 "to assist in building, maintaining and supporting a hospital . . . so soon as the like sum . . . should be procured by the corporation by a tax on the citizens or from private donations or otherwise to be added to the said bequest." The corporation claimed that the sum of $20,000 required had been procured by means of a grant of the sum of $14,000 from the Province of Nova Scotia and by private donations, and claimed payment of the sum of $20,000 by the executors.

Held, that the obtaining of the sum granted by the province carried out the obvious intention of the testator, viz., the establishment of an hospital and was covered by the words "or otherwise" in the will, and that the corporation was entitled to claim payment of the legacy.

Per WEATHERBE, J., dissenting, that the words "or otherwise" must be read as referring to other sources ejusdem generis. Also that the sum granted by the legislature of the province was not given for such an hospital as that contemplated by the will, viz., "an hospital for the use of the inhabitants of the town of W."

W. B. A. Ritchie, K.C., for appeal. *H. Mellish*, K.C., and *J. A. Kenny*, contra. *W. M. Christie*, for executors.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] HAWTHORNE *v.* STERLING. [Sept. 15, 1903.

Account—Jurisdiction—Master and servant—Division of office—Receipts—Discovery.

In a suit for account plaintiff stated that he was appointed deputy-sheriff by the defendant, under an agreement that he was to have half of the net receipts of the sheriff's office. The defendant stated the agreement to be that the plaintiff was to have one-half of the fees from writs and executions only. On the probabilities of the evidence the court found in favour of the defendant's version of the agreement. Of the receipts in which under this finding the plaintiff might be entitled on discovery to share the fees in one case amounting to $35.00, alone remained undivided.

Held, that the bill should not be dismissed.

Phinney, K.C., for plaintiff. *Gregory*, K.C., for defendant.

Barker, J.] CROSBY *v.* TAYLOR. [Nov. 17, 1903.

Interrogatories.

The bill alleged that a testator by his will bequeathed a fourth part of his estate to be divided equally among the four children of his son who were living at the date of the will; that the plaintiff was one of the children and a beneficiary under the will. The defendants, trustees under the will, to interrogatories whether thep laintiff was not one of the four children of the son mentioned in the will, and living at the date thereof, and beneficially entitled thereunder to some and what interest in the estate, after admitting the will, answered that they did not know that the plaintiff was one of the children of the said son, that she was living at the date of the will, and that she was beneficially entitled to an interest in the estate, although they were so informed and believed:

Held, sufficient.

Specific information should be given in answers upon facts within the knowledge of the party answering, and the matter should not be left to inference.

F. R. Taylor, for plaintiff. *Allen*, K.C., for defendant.

Barker, J.] SMITH *v.* WRIGHT. [Dec. 19, 1903.

Fraudulent conveyance—13 Eliz., c. 5.

A son living on a farm owned by his mother, worth about $700, and who had worked on it without wages, and had contributed his earnings rom other work to the support of herself and family, expressed dissatis-

faction with the arrangement, and refused to continue it. A conveyance of the farm was thereupon made to him for $500, his contributions from his earnings being placed at $300, and the balance being paid by cash and a horse. At the time the mother was indebted to the plaintiff in the sum of $131.00.

Held, that the conveyance was not fraudulent under 13 Eliz., c. 5.

W. P. Jones, for plaintiff. *F. B. Carvell*, for defendant.

Barker, J.] TURNER *v.* TURNER. [Jan. 19.

Jurisdiction—Probate.

Probate of a will devising real estate is not conclusive evidence of the validity of the will in this court.

Teed, K.C., for plaintiff. *Jordan*, K.C., for defendant.

Barker, J.] BURDEN *v.* HOWARD. [Jan. 19.

Breach of injunction—Motion to commit—Costs.

Where in the suit for a declaration that the plaintiff and defendant were partners, the defendant in breach of an interim injunction order collected debts due the firm, but which subsequently to the service of a notice of motion for his commitment he paid to the receiver in the suit, he was ordered to pay the costs of the motion.

Teed, K.C., for plaintiff. *Jordan*, K.C., for defendant.

Barker, J.] CUSHING SULPHITE CO. *v.* CUSHING. Jan. 19.

Company—Managing director—Powers—Breach of trust—Pleading—Fraud—Costs.

The defendant promoted the formation of the plaintiff company for the manufacture of pulp upon the understanding that slab wood from his saw mill should be used as fuel and pulp wood by the company. P., residing in England, contributed two-thirds of the capital under an agreement that he was to control the building of the mill, supply the machinery and have the selection of the manager. He was elected president and the defendant was elected managing director of the company. The mill was erected under P.'s plans near the defendant's mill, and was fitted with machinery for the use of mill-wood both as pulp and as fuel. A by-law provided that the managing director should have general charge of the property and business of the company, and he was given by the directors a free hand in the management. The defendant without orders, but with the knowledge of all the directors except P., erected at a cost of about $17,000 to the company a fuel house and conveyors thereto from his saw

mill for the conveyance of mill-wood. The expenditure was necessary if the company was to use mill-wood. The defendant supplied the company with mill-wood under an agreement that it should be paid for on the basis of its relative value to round wood for pulp and coal for fuel. The wood was invoiced by the defendant at $2.00 per thousand of mill cut on account of which he paid himself $5?,391.30, leaving a balance due of $10,589.57. The mill-wood was of a poor quality. No practical test was made of its relative value to round wood and coal. In the absence of any other than an approximate estimate the court held that it should be charged at $1.90 per cord for pulp wood and .90 per cord for fuel wood, on which basis the defendant had overpaid himself $2,432.92. The defendant resigned his position as managing director at the end of ten months, and the company ceased to use mill-wood. The company sought to charge the defendant with the cost of the fuel house and conveyors, which were no longer of use, as an unauthorized and improper expenditure and made for the defendant's benefit. The defendant had always been willing to have the price of the mill-wood determined by an actual test. Charges of fraud against the defendant were preferred in a number of sections of the bill, which was unsupported at the hearing.

Held, that the defendant should not be charged with the cost of the fuel house and conveyors; that the decree in plaintiff's favour for the balance due by the defendant on overpayment should be without costs; and that the defendant should have the costs of the sections of the bill alleging fraud.

Powell, K.C., *Teed*, K.C., and *Hanington*, K.C., for plaintiffs. *Pugsley*, Atty.-Gen., *Currey*, K.C., and *Barnhill*, for defendant.

Barker, J.] WHITE *v.* HAMM. [March 25.

Fraudulent conveyance—13 Eliz., c. 5—Injunction.

A conveyance by an insolvent debtor in good faith and for valuable consideration though made with intent to defeat creditors to the knowledge of the purchaser is not void under 13 Eliz., c. 5.

The defendant in an action for false arrest immediately after a verdict in his favour was set aside and a new trial ordered, conveyed a farm to his wife, which subsequently she conveyed to W., the purchase money being alleged to be paid partly by cash and partly by notes. At the time the conveyance was made by the defendant he was free of debt, and it was doubtful what the result of the action would be. The plaintiff succeeding in the action sought to set the conveyance aside as made without consideration and fraudulent under 13 Eliz., c. 5. An application for an interim injunction restraining the transfer of the land by W. was granted.

Belyea, for plaintiff. *Currey*, K.C., and *Wilson*, K.C., for defendants.

Province of Manitoba.

KING'S BENCH.

Richards, J.] HOUGHTON *v.* MATHERS. [March 21,

Practice—Motion for judgment on admissions in pleadings—King's Bench Act, Rule 615—Costs.

Action for specific performance of an alleged contract to sell a certain parcel of land for $500. The defence to the amended statement of claim denied both the contract originally set up and the allegations introduced by the amendment, but stated that the defendant had always been ready and willing to convey the land on payment of the $500, and offered to convey as required by the plaintiffs. Defendant then moved that the case be disposed of by the court on the offer to convey contained in his pleading, and relied on Rule 615 of the King's Bench Act, R.S.M. 1902, c. 40, which provides that: "Any party to an action may at any stage thereof apply to the court or a judge thereof for such an order as he may, upon any admissions of fact in the pleadings, or in the examinations of the other party, be entitled to; and it shall not be necessary to wait for the determination of any other questions between the parties." "(b). The court or a judge may, on such application, give such relief, subject to such terms, if any, as such court or judge may think fit."

Held, that the words "admissions of fact in the pleadings" in that Rule are not confined to such admissions made by an opposite party, but that the Rule may be availed of by the party making the admissions, and an order made accordingly, and the consent and offer made by defendant, although strictly speaking not an admission of fact, should be treated as one for the purposes of the Rule, as its object is to save further proceedings and further costs when the need of trying issues is removed by admissions.

Held, also, that, as defendant by applying in that manner, put it out of the power of the plaintiffs, to prove their allegations and out of the power of the court to decide, on the merits, who should pay the costs of the action, the case should be treated, for the purpose of awarding costs, as if the defendant had admitted the truth of the plaintiffs' pleadings, as well as submitted to the relief asked for, and that the defendant should pay the main costs of the actions including the costs of the motion.

Elliott, for plaintiffs. *Mathers*, for defendant.

Dubuc, C.J.] KINSEY *v.* NATIONAL TRUST CO. [March 28.

Contract—Representation influencing conduct—Promise to devise interest in land—Part performance—Statute of Frauds, s. 4—Will—Lapse of devise to party who predeceased testator—Acceptance of offer by conduct.

The plaintiff was an illegitimate daughter of D. C. Kinsey, who lived in Winnipeg with her mother until the plaintiff was about six years old, when they separated, the plaintiff going abroad with her mother who

died in 1897. On April 1, 1899, the plaintiff then at service at Schreiber, Ontario, wrote a letter to Kinsey expressing her loneliness and poverty and her great desire to know him better and to have him write to her. After receiving the letter Kinsey talked the matter over with some friends, stating his intention to adopt the girl and make her his heir, and some months afterwards he got a friend to go and see her and report to him what sort of a girl she was. After getting the friend's report Kinsey wrote to the plaintiff encouraging her to come to him and offering to make her his "daughter hard and fast," and to adopt her as his child and lawful heir provided her relations would offer no obstacles to it, sending her money and inviting further correspondence, and adding the following postscript: "Now I have agreed to become your real solid father as hard and fast as you could wish."

Then followed many letters between them resulting in her acceptance of his offer and coming to live with him as his daughter on 25th December, 1899. They lived together as father and daughter until he died suddenly on the 6th June, 1903, leaving no will but one made in 1881. There was no evidence that Kinsey had any other relative left. Plaintiff swore that on various occasions her father told her that all his property would be hers when he died and that he would make a will to that effect. Other witnesses heard him express the same views and intentions, and were shown some of Kinsey's letters to the plaintiff before he mailed them, and it was proved that he had stated that he had no other relations to whom he might leave his property.

Held, that there was a definite offer by Kinsey, in writing, that, if plaintiff would come to him and live with him as his daughter, he would keep her and leave all his property by will to her. That the offer was accepted, if not in formal terms, at least by acts and conduct; that plaintiff had fully performed her part of the contract; that the fact that Kinsey had not made the promised will should be attributed to mere negligence and procrastination, and that plaintiff was entitled to the assistance of the Court by way of specific performance of the agreement, notwithstanding the want of mutuality, which is not material after the one party has performed completely all he had undertaken to do: Fry on Specific Performance, pars. 465, 468; *Fitzgerald* v. *Fitzgerald*, 20 Gr. 410; *McDonald* v. *McKinnon*, 26 Gr. 12, and *Roberts* v. *Hall*, 1 A.R. 388, followed.

Completed performance by one party entitles him to enforce a contract against the opposite party, notwithstanding the Statute of Frauds: *McDonald* v. *McKinnon*, 26 Gr. 12; *Halleran* v. *Moon*, 28 Gr. 319; *Ridley* v. *Ridley*, 34 Beav. 478, and *Sappers* v. *Mare*, 3 Giff. 572; *Maddison* v. *Alderson*, 8 A.C. 467, *Walker* v. *Boughner*, 18 O.R. 448; *Cross* v. *Cleary*, 29 O.R. 542, and *McGugan* v. *Smith*, 21 S.C.R. 263, distinguished. The last three cases on the ground that, in each of them, the deceased with whom the agreement was alleged to have been made, had clearly shewn

his intention in regard to it by subsequently making a will contrary to the terms thereof.

By the will made in 1881 Kinsey had left all his property to David Young, his heirs, executors, administrators and assigns, and appointed two executors. David Young died in 1887, and the two executors named in 1886 and 1990 respectively, and the defendants, National Trust Co., in June, 1903, took out letters of administration, with the will annexed. The executors of the will of David Young were also made parties defendant in this action.

Held, following Jarman on Wills, pp. 307, 308; Williams on Exetors, pp. 1072, 1074. That the bequest and devise to David Young lapsed on his death in the lifetime of the testator.

Order for judgment giving the whole estate to the plaintiff.

Haggart, K.C., and *Manning*, for plaintiff. *Wilson* and *Rothwell*, for National Trust Co. *J. Campbell*, K.C., for executors of David Young.

Province of British Columbia.

SUPREME COURT.

Full Court.] CHRISTIE *v.* FRASER. [Jan. 25.

Injunction—Sale of property—Misrepresentation—Rescission of contract.

Appeal from an order of IRVING, J., refusing to continue an injunction. An agreement for the sale of timber limits and logging outfit provided that the purchaser should pay in instalments, that he should have immediate possession of the assets sold, but that no property therein should pass to the purchaser until the purchase price was fully paid and in default of payment of any instalment the vendors might retake the assets and keep the instalments paid. The purchaser did not pay the second instalment and then repudiated the contract and sued for rescission on the ground of fraud. Defendants accepted the repudiation and resumed possession of the property which the plaintiff applied to have them restrained by interim injunction from dealing with in any way:

Held, that it was not a case for an injunction.

The court has no jurisdiction to prevent by interim injunction a party dealing with his own property as he sees fit and in which the plaintiff has no interest or to which he makes no claim. Appeal dismissed, DRAKE, J., dissenting.

McCaul, K.C., for appellant. *Kappele*, for respondent.

Courts and Practice.

JUDICIAL APPOINTMENTS, ONTARIO.

His Honour Charles Wesley Colter, Judge of the County of Haldimand, to be Judge of the County Court of Elgin, in the room of His Honour D. J. Hughes, retired.

George B. Douglas, of the Town of Chatham, Barrister, to be Judge of the County Court of Haldimand, in the room of His Honour Judge Colter, transferred to the County of Elgin.

Flotsam and Jetsam.

The Judicial Committee of the Privy Council, consisting of Lord Macnaghten, Lord Davey, Lord Lindley, and Sir Arthur Wilson, resumed their sittings on Wednesday after the Easter Vacation. The list of business before them included twenty eight appeals -viz., from Bengal, seven; Newfoundland, four; Bombay, three; New South Wales, two; Oudh, two; New Zealand, two; and Madras, Lower Burma, Trinidad and Tobago, Canada, Western Australia, Cape of Good Hope, Sierra Leone, and the Straits settlements, one each. There were also two judgments for delivery in appeals heard before the vacation.—*Law Times.*

Having fined a young man for entering a train while in motion, Mr. Plowden embarked on a short piece of autobiography which will not be found in his recently published book. "I should be very sorry" he remarked "to say how often I have done the same thing myself." This recalls to a comtemporary a story which is believed to refer to Mr. Marchant Williams. He had to try a man for exceeding twelve miles an hour on a motor-car, and on the day of trial he overslept himself. The court was twenty-five miles from his house. He hired a motor, started off, and reached the court well inside the hour, in excellent time to fine the twelve-mile-an-hour desperado five pounds.—*Law Times.*