Canada Law Journal.

VOL. XLII. JUNE 1. NO. 11.

PRECATORY TRUSTS.

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1. General remarks,—whether name a misnomer.

The pregnant subject of precatory trusts is once more brought prominently forward by the recent case of *In re Hanbury, Hanbury* v. *Fisher* (1904) 1 Ch. 415 decided last year by the House of Lords (sub nomine *Comiskey* v. *Bowring-Hanbury* (1905) A.C. 84).

It is worth while remarking that vigorous exception has on occasion been taken to the term precatory trust as being a misnomer and indeed "nothing more than a misleading nick-name." The passage will be found in the judgment of Rigby, L.J., in *In re Williams, Williams* v. *Williams* (1897) 2 Ch. D. at p. 27, and is as follows: "A great deal has been said in argument, and a great many cases have been cited as to what are awkwardly and, in my opinion, incorrectly called 'precatory trusts.' As I understand the law of the Court this phrase is nothing more than a misleading nick-name. When a trust is once established, it is equally a trust, and has all the effects and incidents of a trust, whether declared in clearly imperative terms by a testator or deduced upon a consideration of the whole will from

language not amounting necessarily and in its prima facie meaning to an imperative trust."

With all possible deference to the learned justice we venture to think this criticism is scarcely warranted. Nobody, we take it, imagines for a moment that, once the existence of a trust is established, it can be a matter of any moment whether it is created by words precatory or words imperative. A trust is of course a trust: and its essence and attributes are identical quite irrespective of its mode of creation. The learned justice treats the matter as though the expression "precatory trust" were intended to indicate a trust of a nature different in some respects from an ordinary trust, but we do not understand that to be the case. As we understand the matter the word "precatory," as applied to trusts, refers to the manner of their creation. "Precatory words" are defined to be "words in a will praying or recommending that a thing be done" and a precatory trust is a trust created by words of that nature. In that view of it the expression seems to be entirely appropriate as well as convenient.

2. A notable instance of revolution in the current of decision—Cases indicating the change.

The subject is one which has from time to time largely engaged the attention of the Courts, and is of peculiar interest, quite apart from its practical importance, as furnishing a notable illustration of that class of cases in which a gradual departure from early principles is distinctly traceable in the series of reported decisions. The present doctrine is the outcome of a gradual process of evolution, a striking instance of what has been aptly termed "judicial legislation." The change in the current of authority upon the subject may be readily observed in such cases as *Lambe* v. *Eames* (1871) L.R., 6 Ch. 597; *In re Hutchinson* and *Tenant* (1878), 8 Ch. D. 540; *In re Adams* and *Kensington Vestry* (1884), 27 Ch. D. 394; *In re Diggles* (1888) 39 Ch. D. 253. 1 Jarman on Wills, 4th ed., c. 12, p. 385, et seq. (And see the series of cases cited in foot note(*b*) infra). This change is quite frankly recognized by the judges,

the modern cases abounding in expressions to the effect that doubtless, in earlier days, an entirely contrary decision would have been come to in the case. Thus in the recent case of *In re Oldfield, Oldfield* v. *Oldfield* (1904) 1 Ch. D. Div. at p. 550, we find Kekewich, J., expressing himself as follows: "I may venture to say that two or three generations back this would have been construed to be a trust. The words quoted by Rigby, L.J., in *In re Williams* (1897) 2 Ch. 29, from the judgment of Lord Langdale—no mean authority—in *Knight* v. *Knight* (1840) 3 Beav. 148, 172: 52 R.R. 74, 84, seem to point to that. He does not use the word 'desire' but uses a weaker expression, namely, 'recommend.' It is sufficient for me to say that what Lord Langdale laid down is now no longer law(*a*). There are many cases which shew that the Court is inclined now to accept the natural construction of words of this character."

And again we find the same judge using the following words in the case of *In re Hanbury, Hanbury* v. *Fisher*, supra, at p. 419. "But I put that aside and turn to what Lord St. Leonards said in the passage quoted by Lindley, J., in the judgment in *In re Williams, Williams* v. *Williams* (1897) 2 Ch. 12. 21 from the work on the Law of Property published in 1849, p. 375. "The law as to the operation of words of recommendation, confidence, request or the like attached to an absolute gift, has in late time varied from the earlier authorities. In nearly every recent case the gift has been held to be uncontrolled by the request or recommendation made, or confidence expressed. This undoubtedly simplifies the law, and it is not an unwholesome rule that if a testator really means his recommendation to be imperative he should express his intention in a mandatory

(*a*) The statement of the old doctrine by Lord Langdale in *Knight* v. *Knight*, supra, which is here referred to and condemned is as follows: "As a general rule it has been laid down that when property is given absolutely to any one person, and the same person is, by the giver, who has power to command, recommended or entreated or wish to dispose of that property in favour of another the recommendation, entreaty or wish shall be held to create a trust, first, if the words are so used that upon the whole they ought to be construed as imperative; secondly, if the subject of recommendation or wish be certain; and thirdly, if the object or person intended to have the benefit of the recommendation or wish be also certain."

form," and he adds, "But this conclusion was not arrived at without a considerable struggle," and turning to the judgment of Lindley, J., in *In re Williams*, supra, from which the above is quoted, we find that that learned judge adds, "The more modern authorities from *Lambe* v. *Eames*, L.R. 6 Ch. 597, to *In re Hamilton* (1905) 2 Ch. 370, shew how strong the tendency now is to recognize this sensible rule." Again we find Romer, J., in *In re Williams, Williams* v. *Williams*, supra, at p. 14, using the following words: "I do not think the authorities are of very much use in considering this particular will—certainly not the old authorities, for I think that at last the Courts have laid down a general rule according to which questions of this kind ought to be considered. As stated in the head note to *In re Hamilton* (1895) 2 Ch. 370, the rule you have to observe is simply this, "In considering whether a precatory trust is attached to any legacy the Court will be guided by the intention of the testator apparent in the will, and not by any particular words in which the wishes of the testator are expressed. In other words the Courts now are not so fettered by the older authorities as they might otherwise have been, and are at liberty to carry out the wishes of the testator when they have ascertained them from the words as actually used in the will."

Lindley, L.J., in the same case says, "Moreover in some of the older cases obligations were inferred from language which in modern times would be thought insufficient to justify such an inference."

3. Statement of the old and modern doctrines.

The result of an analysis of the cases seems to be that the earliest decisions on the subject were rather of a negative character merely holding that words expressing confidence such as "hoping," or "not doubting" are not to be construed as creating a trust where there is any uncertainty either as to the objects (*Harland* v. *Trigg* (1782) 1 B.C., c. 142), or the subject (*Wynne* v. *Hawkins* (1782) 1 B.C., c. 179) of the gift. Later the doctrine assumed a somewhat more advanced character, the converse of the above proposition having received distinct judicial sanction,

the decisions going to the effect that, where both the objects and subject are certain, words importing confidence or recommendation will be held to create a trust (*Pierson* v. *Garnett* (1787) 2 B.C., c. 38, 226). The rule was laid down by Pepper Arden, M.R., in *Malim* v. *Keighley* (1794) 2 Ves. Jr. 333, 335 as follows: "Wherever any person gives property, and points out the object, the property, and the way it shall go, that does create a trust, unless he shews clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it." This expression of the rule is approved by Lords Lyndhurst and Cottenham, in *Knight* v. *Boughton* (1844) 11 Cl. & F. 513, pp. 548, 551. And see *Briggs* v. *Penny* (1851) 3 Maen. & G. 456, *Bernard* v. *Minshull* (1859) Johns 276, 5 Jur. (N.S.) 931.

The approved modern doctrine is that, unless looking at the whole instrument it is apparent that the donor has intended to impose an obligation on the donee to carry his wishes into effect, not leaving the donee any discretion in the matter, no trust is created(*b*).

The modern doctrine is further elucidated by the words of Lindley, L.J., in *In re Williams*, *Williams* v. *Williams* supra, at p. 18, "There is also abundant authority for saying that if property is left to a person in confidence that he will dispose of it in a particular way, as to which there is no ambiguity, such words are amply sufficient to impose an obligation. Nothing can be plainer than Lord Eldon's statement to this effect in *Wright* v. *Atkins*, T. & R. 157. The books are full of cases decided in accordance with this doctrine. See *Shovelton* v. *Shovelton* (1863) 32 Beav. 143; *Curnick* v. *Tucker* (1874) L.R. 17 Eq. 320; *Le Marchant* v. *Le Marchant* (1874) L.R. 18 Eq. 414, in all of which

(*b*) *Meredith* v. *Heneage* (1824) 1 Sim. 542 (H.L.). *Williams* v. *Williams* (1851) 1 Sim. (N.S.) 358, *Lambe* v. *Eames* (1871) L.R. 6 Ch. 597; *Stead* v. *Mellor* (1877) 5 Ch. D. 225; *In re Hutchins and Tennant* (1878) 8 Ch. D. 540; *Mussoorie Bank* v. *Raynor* (1882) 7 App. Cas. 321, 330; *In re Adams and Kensington Vestry* (1884) 27 Ch. D. 394; *In re Hamilton* (1895) 2 Ch. 370; *Hill* v. *Hill* (1897) 1 Q.B. 483; *In re Williams* (1897) 2 Ch. 12; *In re Oldfield*, *Oldfield* v. *Oldfield* (1904) 1 Ch. 540 and see the judgments of Vaughan, Williams, L.J., and Stirling, L.J., *In re Hanbury*, *Hanbury* v. *Fisher* in 1 Ch. (1904) supra, at p. 414.

the devise or bequest was to the devisee or legatee absolutely. See also other cases cited in Lewin on Trusts 9th ed., p. 137. But still in each case the whole will must be looked at, and, unless it appears from the whole will that an obligation was intended to be imposed, no obligation will be held to exist; yet, moreover in some of the older cases obligations were inferred from language which in modern times would be thought insufficient to justify such an inference."

These expressions, we think, fairly indicate the full length to which the revolution in judicial sentiment on this subject has, up to the present, proceeded.

4. Whether precatory trusts now abolished.

And it is worth while remarking this because in some way misapprehension upon the subject has crept in, and we find the statement occasionally made that precatory trusts are a thing of the past, having been practically abolished by the trend of the modern decisions(*c*).

So far as we are able to judge of the matter this seems to be an entire misconception. We cannot discover that the cases support that conclusion.

(*c*) Amongst others, so careful a writer as Mr. E. D. Armour, K.C., has given currency to this view, expressing the matter as follows, (10 C.L.T. 154: "The technical signification of precatory words having been abandoned, and the Courts having repeatedly stated that they must look at the whole will to discover the intention, the logical result is that precatory trusts are abolished, and that nothing but an imperative direction, or a direction so clear in its terms as to indicate what the donee must do to carry out the testator's wishes, will be construed into a trust."

We are inclined to think, however, that the passage quoted must not be taken as a declaration of that learned writer's definite opinion that precatory trusts are in very fact abolished, but rather as an intimation of what must be the eventual result if the present process of evolution is continued. Indeed, that would seem to be clearly the case, as, at a later stage of the same article, we find Mr. Armour proceeding with the discussion of his subject on the basis that the doctrine of precatory trusts is still in full force. The passage is as follows: (p. 154). "A consideration sufficiently embarrassing may arise when there is a bequest to a stranger who is regarded with some degree of confidence by the testator. We have just given instances of cases in which testators have left their property to their wives, and have expressed confidence that they would carry out what the testator would have done. Such reasoning as was applied in the cases of *Lambe* v. *Eames*, supra, where the testator was said to intend his wife to 'remain head of the family and to do what was best for the family' . . . . cannot well be applied to a person who does not naturally

No doubt the leaning of the Courts is now against construing precatory words as creating trusts, but that is a very different matter. Indeed, language being infinitely various, and the principle of decision being to discover from the language used what was the meaning and intention of the testator, it is difficult to see how precatory trusts could be abolished, without an entire abrogation of the present principle of decision. Touching upon this subject in his judgment in *In re Williams, Williams* v. *Williams*, supra, at p. 18, Lindley, L.J., says: "It would however be an entire mistake, to suppose that the old doctrine of precatory trusts is abolished. Trusts, *i.e.*, equitable obligations to deal with property in a particular way, can be imposed by any language which is clear enough to shew an intention to impose them." And A. L. Smith, L.J., in S.C., at p. 27 says, "I do not say that a precatory or implied trust may not still be created and exist, for I apprehend it may."

5. Ontario cases in harmony with English.

The decisions in our own Courts have not differed from the general trend of the English cases (*Nelles* v. *Elliot*, 25 Gr. 329; *Bank of Montreal* v. *Bower*, 17 O.R. 548; 18 OR. 226).

6. Difficulty of subject—A question of intention—Discussion of principle of decision.

One cannot help being struck, in reviewing the cases on this subject, with the frequency with which eminent judges have found themselves compelled to differ in their decisions. This is noticeable from the early case of *Meredith* v. *Heneage* (1824) 1 Sim. 542, 10 Price 230 (where Richards, C.B. and Garrow, B., held that no obligation was imposed upon the devisee while Graham and Wood, B.B., held the reverse), to the present time. In the recent case of *In re Hanbury, Hanbury* v. *Fisher*, supra,

succeed the testator as the head of the family, if the supposed beneficiaries are his children. The question arises, will a different rule be applied?"

It will be seen that the question here raised though of much interest if the doctrine is still in force, can have no place if it is abolished, as in the latter case it would be immaterial whether the first taker of the property were a relative or a stranger, the sole question being whether the words used were imperative or precatory.

the judges were divided as follows: On one side, and against the creation of a trust, were Kekewich, J. (who heard the application on originating summons), Vaughan Williams, L.J., and Stirling, L.J. (in the Court of Appeal), and Lord Lindley (in the House of Lords), while on the other side were Cozens-Hardy, L.J. (in the Court of Appeal), and the Earl of Halsbury, L.C., and Lords Macnaghten, Davey, James and Robertson, in the House of Lords. This seems to indicate that the subject is one of unusual difficulty. It has seemed to the writer, in considering the cases that possibly the somewhat loose statement of the principle of decision, which has generally been adopted, may have been to some extent to blame for the numerous differences of opinion that have arisen.

The question of trust or no trust must, of course, in the last analysis depend on the intention of the testator or donor. This has been recognized in all the cases. Thus in the head note to *In re Hamilton*, supra, it is stated, "The rule you have to observe is simply this, in considering whether a precatory trust is attached to any legacy the Court will be guided by the intention of the testator apparent in the will, and not by any particular words in which the wishes of the testator are expressed." And Lindley, L.J., in *In re Williams, Williams* v. *Williams*, supra, at p. 22, says, "There is no principle except to ascertain the intention of the testator from the words he has used, and to ascertain and give effect to the legal consequences of that intention when ascertained."

Rigby, L.J., in S.C., at p. 26 says, "No authoritative case ever laid it down that there could be any other ground for deducing a trust or condition than the intention of the testator as shewn by the will taken as a whole."

And Vaughan Williams, L.J., in *In re Hanbury, Hanbury* v. *Fisher*, supra, at p. 425, puts it thus: "You must take the will which you have to construe and see what it means. See, that is, what is the intention of the testator, as expressed in his will, and then answer the question aye or no according to the intention of the testator as expressed by his will."

In the same case in the House of Lords, Lord Davey said, "I

observe first that the testator obviously intended that his nieces should have an interest in and should be entitled to this estate in some event."

And Lord James says, "It it admitted on all hands that our only duty is to discover what was the intention of the testator."

This question of intention may be put in the following form: By whom did the testator (or donor) (*d*) intend his property to be enjoyed? The idea conveyed by this question though apparently simple and obvious is in reality not so. The question is in fact open to an ambiguity. In other words it does not seem to go far enough in the analysis of the testator's intention. It seems quite clear that in very many cases the decision that the precatory words created a trust owed its origin to the fact that it seemed plain that the testator contemplated a benefit to the person who was held to be a cestui que trust, without perhaps sufficient discrimination as to whether such contemplation amounted in fact to a definite intention on the part of the testator to secure that benefit by a binding legal or equitable limitation.

Take for instance the passage just quoted from Lord Davey's judgment in the *Hanbury case*, "I observe that the testator obviously intended that his nieces should have an interest," etc., "in this estate in some event."

The course of reasoning is—

The testator obviously intended that A.B. should receive a benefit under the will, that benefit can only be secured by the declaration of a trust. A trust is accordingly declared.

But can we not imagine a case where the testator contemplated, and even intended that A.B. should derive a benefit under his will, and at the same time never intended to give A.B. a legal right to claim that benefit irrespective of some act of volition on the part of a third person.

Can we not imagine for instance the case of a husband about to bequeath his property to his wife (with full knowledge, let

(*d*) The doctrine of precatory trusts has been held to apply to settlements inter vivos as well as to wills (*Liddard* v. *Liddard*, 28 Beav. 266 and see *Hill* v. *Hill* (1897) 1 Q.B. (C.A.) 483).

us say, of the exact state of the law on the subject), saying to himself, "No, I will not make it absolutely compulsory upon her to adopt such and such a course in the disposition of the property I give her, but I will give her the most solemn of all declarations, viz., a declaration in the will itself, of what my desire would be as to her disposition of it, and then if she choose to ignore my wishes I cannot help it." Many a testator would prefer not to deprive his legatee of all freedom of action, to convert him or her into a mere passive machine, but would think it a fitter exercise of his bounty to place that legatee in the position of a thinking reasoning being upon whose shoulders should rest the burden of a well-defined moral responsibility, the proper discharge of which it might well seem to the testator could not fail to prove a cogent beneficial factor in the formation or strengthening of the character of the legatee(*e*).

(*e*) Curiously enough, after writing the above, the writer came upon a passage in a reported judgment which singularly illustrates the idea under comment. It is from the judgment of Lord Justice Cotton in *In re Adams and Kensington Vestry*, 27 Ch. D. 394, and is as follows: "It may be noted that the words of the will in that case were 'I give' . . . . 'all my real and personal estate' . . . 'unto and to the absolute use of my dear wife, in full confidence that she will do what is right as to the disposal thereof among my children either in her lifetime or by will after her decease' and that the decision was against the creation of a trust." Lord Justice Cotton said: "Now just let us look at it in the first instance alone, and see what we can spell out of it, and see what was expressed by the will. It seems to me perfectly clear what the testator intended. He leaves his wife his property absolutely but what was in his mind was this: 'I am the head of the family, and it is laid upon me to provide properly for the members of my family—my children; my widow will succeed me when I die, and I wish to put her in the position I occupied as the person who is to provide for my children.'

"Not that he entails upon her any trust so as to bind her, but he simply says in giving her this: "I express to her, and call to her attention the moral obligation which I myself had, and which I feel she is going to discharge.' The motive of the gift is in my opinion not a trust imposed upon her by the gift in the will. He leaves the property to her, and he knows that she will do what is right and carry out the moral obligation which he thought lay on him, and on her if she survived him, to provide for the children. But it is said the testator would be very much astonished if he found he had given his wife power to give the property away. This is a proposition which I should express in a different way. He would be very much surprised if the wife, to whom he had left his property absolutely, should so act as not to provide for the children, that is to say not to do what is right. That is a very different thing. He would have said: 'I expected that she would do what was right, and therefore, I left it to her absolutely. I find she has not done what I think is right, but I cannot help it. I am

No doubt it was a feeling of this kind that led Lord Justice James, in *Lambe* v. *Eames*, supra, to enveigh against the "officious kindness" of the Court of Chancery in interposing trusts when in many cases the father of the family never meant to create them, and virtually making a new will for the testator. It seems to the writer that perhaps the decision of these cases of precatory trust might be simplified, if, in deciding them, the attention were directed not simply to what the testator intended or contemplated should be the destination of his property, but more particularly to the sanctions (using the word in its technical jurisprudential sense(*f*)) by which he meant his directions to be enforced.

Perhaps our meaning will appear more clearly if we have recourse to the somewhat cumbrous forms of logic. Let us take the two typical cases of *Shovelton* v. *Shovelton*, 32 Beav. 143 (1863), and *Re Adams and Kensington Vestry*, supra, (1884), in the former of which it was held that a trust was created, in the latter not. The bequests in these two cases were as follows: in the former, "I bequeath unto my dear wife all my" personal property "to and for her own absolute use and benefit, in the fullest confidence that she will dispose of the same for the benefit of her children according to the best exercise of her judgment, and as family circumstances may require at her hands;" and in the latter "I give . . . all my real and personal estate . . . . unto and to the absolute use of my dear wife . . . . in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease"(*g*).

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very sorry that she has done so. That would be the surprise, I think, that he would express and feel if he could do either, if the wife did what was unreasonable as regards the children."

(*f*) See Austin's Jurisprudence, 4th ed. p. 91 et seq.

(*g*) There could be no stronger case for adjudging the creation of a trust than the Ontario case of *Bank of Montreal* v. *Bower*, supra, where the provisions of the will were as follows: "An absolute gift of all the testator's property to his wife followed by the clause 'and it is my wish and desire after my decease that my said wife shall make a will dividing the real and personal estate and effects hereby devised and bequeathed to her among my said children in such manner as she shall deem just and

It will be observed that *in both of these cases it would be quite correct to say that the testator "intended" that the persons designated should benefit by his will.*

The syllogism—to proceed with logical forms—would stand as follows: The major premiss would be—"In all cases where the testator intended that the persons in question should benefit by his will a precatory trust is created;" and the minor premiss—"In the particular case under consideration the testator clearly intended that the persons in question (his children) should benefit by his will"—and the conclusion would be "therefore, in the present case, a trust is created by the will."

So stated the argument looks sound, and yet it is, or may be, essentially vicious. Its fallacy consists in the fact that the word "intend" is susceptible of a double meaning. It is used in one sense (which we may call, for the sake of distinction its . . . . imperative sense) in the major premiss, but it may be, and often is, used in quite another sense (which may be called its optative sense) in the minor premiss; and in the latter case the conclusion will of course be a non sequitur.

To elaborate this somewhat—let us suppose that the testator's meaning and intention, in framing his will, was as follows: "I wish to provide by my will for my wife and children—I shall give my property to my wife, I have absolute confidence in her and know that she will use the property for the benefit of my children as well as herself. I shall intimate as much in my will, but I shall place no legal fetter upon her, but shall leave my children to receive their benefit through an act of volition on her part."

Obviously it could be said with absolute truth of such a testator that he "intended" his children to benefit by his will. But obviously also it would be a case where, notwithstanding such intention, a trust would not be declared.

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equitable,' and it is gratifying to observe that our own judges (Boyd, C. and Ferguson and Robertson, JJ.) had no difficulty in resisting the blandishments of counsel for the children, who urged upon them the seductive argument found on the 'obvious intention' to benefit, etc., and in unanimously deciding against the creation of a trust, to the enduring advantage of uniformity of decision in our law."

If we have made ourselves clear therefore this goes to emphasize the point under consideration, viz.; that it is not sufficient to enquire simply whether the testator "intended" the children to benefit; you must go further and analyze that intention with a view of ascertaining by what sanction he intended each direction in his will to be enforced. In the example given it is plain that the gift to the wife was intended by the testator to be a legal gift, enforceable by the ordinary sanctions that uphold any legal right, whereas the direction relating to the children was intended by the testator to be enforced merely by moral sanctions, which, so far as the law is concerned, are no sanctions at all.

It is not intended in the foregoing remarks to leave the impression that the suggestion made involves the introduction of any new principle of decision. It relates to matter of form entirely, not of substance.

In point of fact though the argument has never been enunciated in any of the judgments so far as we are aware, in a form expressly directing attention to the sanction, yet the idea has been constantly and necessarily present to the mind of the judges in their consideration of the cases arising.

7. Recent cases affirm modern doctrine.

One of the most thoroughly discussed cases on the subject is the very recent one, referred to at the opening of this article, *In re Hanbury, Hanbury* v. *Fisher* (in Dom. Proc. *Comiskey* v. *Bowring-Hanbury*).

In that case the orginal decision (Kekewich, J., on originating summons) was against the creation of a trust, and entirely in line with the modern trend of the decisions, the attempted gift over after an absolute devise to the widow being held to be repugnant and void on the authority of *Holmes* v. *Godson* (1856) 8 D.M.G. 152, and *In re Wilcocks Settlement* (1875) 1 Ch. D. 229.

That judgment was affirmed by the Court of Appeal.

On learning that the decision had been almost unanimously reversed by the House of Lords, one is inclined at first sight to

suppose that a blow had been struck at the modern accepted doctrine on the subject of precatory trusts, but a closer examination of the case reveals the fact that the decision in the House of Lords went off on a different ground, viz.: that the attempted gift over was not void as repugnant to the original gift, but was in fact a valid executory devise.

Their lordships do not pretend to question or affect established doctrine with regard to precatory trusts. In fact the Earl of Halsbury, L.C., says in his judgment (p.88): "I do not stop to bring in any rules of law or any canons of construction." The result therefore is that this case does not in any way clash with the uniform series of modern decisions, but on the contrary constitutes a valuable contribution to the law upon the subject under discussion, more especially by reason of the admirable judgments of Kekewich, J., in the Court below and of Vaughan Williams, L.J., and Stirling, L.J., in the Court of Appeal.

The recent case of *In re Oldfield, Oldfield* v. *Oldfield*, supra, is also a valuable contribution to the subject and is entirely in harmony with the accepted modern doctrine.

LONDON, ONT. F. P. BETTS.

CHRISTOPHER ROBINSON MEMORIAL.

The following circular has been issued by the committee of the Ontario Bar which has this matter in charge.

"At a meeting called to consider the best means of perpetuating the memory of the late Christopher Robinson, K.C., a committee consisting of the undersigned was appointed to carry out this object. After consideration it was resolved that a fitting commemoration would be a brass tablet with a suitable inscription placed in Osgoode Hall and a scholarship or scholarships founded in connection with the Law Society, to be known as 'The Christopher Robinson Scholarship.' It was further resolved that the subscriptions should be limited to the amount of five dollars each. We confidently rely upon every member of the profession in Ontario remitting without delay a subscription to Angus MacMurchy, 152 Bay Street, Toronto, the treasurer

named by the committee, so that this fitting tribute may be paid to a life well worthy of commemoration by our profession."

Much thought has been given to the form this memorial should take; that which has been decided upon will, we doubt not, meet with the approval of the profession. The busy rush of events in these strenuous days has not obliterated the memory of this great lawyer and beloved member of our profession.

We note that individual subscriptions are limited to $5. This seems a small sum, but was placed at that amount to enable all, including the younger members of the profession, to have a part in this memorial. That there will be a prompt response from every member of the profession we feel quite sure. Even those who had not the privilege of knowing Mr. Robinson personally will appreciate and be glad to embrace this opportunity of paying their tribute to his memory and thus keep his name before the legal profession as an example to succeeding generations. It remains with the profession at large to see that the recommendation of the committee is carried out in a manner and with a promptitude that will do honour to him whose memory we all desire to preserve.

Apropos of the Conveyancing Bill in the Ontario Legislature which the Government made the mover withdraw, a correspondent writes calling our attention to the following announcement which appeared last week in a country paper: "A. T. proposes leaving next week to spend some time in the West. During his absence, Mrs. T. (we presume his wife), will carry on the conveyancing and insurance business." This step in advance will doubtless commend itself to the newspaper writer whose remarkable article we recently called attention to (ante p. 258). Presumably, Mrs. T. knows quite as much about conveyancing as Mr. T., possibly, more so, for, if she excels her spouse, now about to take a jaunt in the West, in "personal character and moral fibre," she will necessarily be much better qualified than Mr. T. to carry on the conveyancing business. With what freedom and vigour do our brethren of the lay press take up and discuss legal matters of which they are profoundly ignorant!

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

B.C.] [April 6.

MILNE *v.* YORKSHIRE GUARANTEE AND SECURITIES CORPORATION.

Suretyship—Collateral deposit—Ear marked fund—Appropriation of proceeds—Set-off—Release of principal debtor—Constructive fraud—Discharge of surety—Right of action.

K. owed the corporation $33,527.94 on two judgments recovered on notes for $10,000 given by him to R., and a subsequent loan to him and R. for $20,000. M., at the request of and for the accommodation of, R. had indorsed the notes for $10,000 and deposited certain shares and debentures as collateral security on his indorsement. K. and R. deposited further collateral security on negotiating the second loan, but K. remained in ignorance of M.'s indorsements and collateral deposit until long after the release hereinafter mentioned. These judgments remained unsatisfied for over six years, but, in the meantime, the corporation had sold all the shares deposited as collateral security, and placed the money received for them to the credit of a suspense account, without making any distinction between funds realized from M.'s shares and the proceeds of the other securities and without making any appropriation of any of the funds towards either of the debts. On 28th February, 1900, after negotiations with K. to compromise the claims against him, the agent of the corporation wrote him a letter offering to compromise the whole indebtedness for $15,000, provided payment was made some time in March or April following. This offer was not acted upon until November, 1901, when the corporation carried out the offer and received the $15,000, having a few days previously appropriated the funds in the suspense account, applying the proceeds of M.'s shares to the credit of the notes he had indorsed. These negotiations for compromise and the final settlement with K. took place without the knowledge of M., and

K. was not informed of his remaining liability towards M. as surety.

Held, per SEDGEWICK, GIROUARD, DAVIES and IDINGTON, JJ., reversing the judgment appealed from (11 B.C. Rep. 402) that the secret dealings by the corporation with K. and with respect to the debts and securities were, constructively, a fraud against both K. and M.; that the release of the principal debtor discharged M. as surety, and that he was entitled to recover the surplus of what the corporation received applicable to the notes indorsed by him as money had and received by the corporation to and for his use.

Per MACLENNAN, J., reversing the judgment appealed from (11 B.C. Rep. 402) that, on proper application of all the money received, the corporation had got more than sufficient to satisfy the amount for which M. was surety and that the surplus received in excess of what was due upon the notes was, in equity, received for the use of M. and could be recovered by him on equitable principles or as money had and received in an action at law.

Appeal allowed with costs.

Aylesworth, K.C., and *Deacon*, for appellant. *Davis*, K.C., for respondents.

Man.] GILMOUR *v.* SIMON. [April 14.

Principal and agent—Sale of land—Authority to make contract —Specific performance.

The defendant gave a real estate agent the exclusive right within a stipulated time, to sell, on commission, a lot of land for $4,270 (the price being calculated at the rate of $40 per acre on its supposed area), an instalment of $1,000 to be paid in cash and the balance, secured by mortgage, payable in four annual instalments. The agent entered into a contract for sale of the lot to the plaintiff at $40 per acre, $50 being deposited on account of the price, the balance of the cash to be paid "on acceptance of title," the remainder of the purchase money payable in four consecutive yearly instalments and with the privilege of "paying off the mortgage at any time." This contract was in the form of a receipt for the deposit and signed by the broker as agent for the defendant.

Held, affirming the judgment appealed from (15 Man. Rep.

205) that the agent had not the clear and express authority necessary to confer the power of entering into a contract for sale binding upon his principal.

Held, affirming the judgment appealed from (15 Man. Rep. ing off the mortgage at any time." This contract was in the not be enforced against the defendant. Appeal dismissed with costs.

Nesbitt, K.C., and *Coutlee*, K.C., for appellant. *Aylesworth*, K.C., and *Affleck*, for respondent.

EXCHEQUER COURT.

Burbidge, J.] [Oct. 23, 1905.

INDIANA MANUFACTURING CO. *v.* SMITH.

Patent for invention—Pneumatic straw stackers—Combination —Assignment—Right of assignor to impeach validity of patent—Right to limit construction—Estoppel.

Held, that the assignor of a patent, sued as an infringer by his assignees is estopped from saying that the patent is not good; but he is not estopped from shewing what it is good for, *i.e.*, he can shew the state of the art or manufacture at the time of the invention with a view to limiting the construction of the patent.

In an action for infringement against the assignor of a patent for improvements in pneumatic straw stackers, it appeared that an earlier patent assigned by the defendant to the plaintiff excluded everything but the narrowest possible construction of the claims of the second patent. In the latter speaking generally, the combination was old, each element was old, and on new result was produced; but in respect of one of the elements of the combination there was a change of form that was said to possess some merit. Beyond that there was no substantial difference between the earlier and later patents.

Held, that while as between the plaintiff and anyone at liberty to dispute the validity of the later patent, it might be impossible on these facts to sustain the patent, as against the assignor who was estopped from impeaching it, it must be taken to

be good for a combination of which the element mentioned was a feature.

W. Cassels, K.C., and *W. D. Hogg*, K.C. for plaintiffs. *Lynch-Staunton*, K.C., and *Masten*, for defendant.

Burbidge, J.] [Oct. 25, 1905.

THE ACTIESELSKABET BORGESTAD *v.* THE THRIFT.

Shipping—Collision—Interlocutory application for consolidation of two actions—Appeal from local judge.

An action for damages against the defendant ship for collision was taken in the Nova Scotia Admiralty District by the owner of the injured ship on the 15th of September, 1905. The following day a similar action was taken by the charterer and owner of the cargo of such injured ship. On the 28th of September an application was made by the defendant to the local judge for an order to consolidate the two actions, or in the alternative for an order that the defendant ship be released upon tendering bail to the amount of her appraised value, and that a commission of appraisement be issued, to ascertain her value in her then condition. On the 3rd of October the local judge made an order that a commission of appraisement issue, and that upon bail being given for the amount of such appraised value in each of the actions, the ship be discharged from arrest, and that the two actions be tried together. An appeal from such order was taken to the Exchequer Court. Upon the appeal no objection was taken to the order, so far as it directed an appraisement or to the direction that the two actions be tried together except so far as that direction might be held to affect the question of the amount of bail to be given—it only being necessary to give bail to the amount of her appraised value to secure the release of the ship if the actions were consolidated. It was however urged that the local judge should have ordered the consolidation of the two actions, and that the ship should be released in respect of both upon giving bail to the amount of her appraised value.

Held, 1. It was a matter within the discretion of the local judge to grant or refuse an order for consolidation, and as such, ought not to be interfered with on appeal.

2. The order should be varied to allow in the alternative the ship to be released in respect of both actions and claims

made upon payment into Court of her appraised value and the amount of her freight, if any.

3. This relief not having been asked before the local judge, the Court on appeal declined to allow the costs of appeal to either party.

Newcombe, K.C., for appellant. *Borden,* K.C., for respondent.

Burbidge, J.] THE KING *v.* DUGAS. [Dec. 9, 1905.

Public officer—Judge of Yukon Court—Living expenses—"Appointee of Dominion"—Recovery of money paid.

The defendant was appointed a judge of the Supreme Court of the Yukon Territory, Sept. 12th, 1898. By s. 5 of the Yukon Territorial Act, 1898, 61 Vict. c. 6, s. 5 (3), he became as such judge a member of the council constituted to aid the commissioner in his administration of the territory. An order-in-council was passed Oct. 7, 1898, appointing him "to aid the commissioner in the administration of the territory," and since that time up to action brought he had continued to act as a member of the council. In addition to the salary paid to him as such judge, certain provision for living expenses was made from time to time by Parliament in his behalf. By orders-in-council of July 7, 1898, and Sept. 5, 1899, relating to officers for the administration of the Yukon District, it was provided that such officers were, in addition to their salaries, to be furnished with "quarters and such living allowance as may from time to time be fixed by the Minister of the Interior;" and it was further provided therein that the provision mentioned should apply to "all appointees of the Dominion" who had been or might be appointed to the staff for the administration of the Yukon Territory.

From Oct. 19, 1900, until June 30, 1902, the defendant was furnished with a residence at Dawson City and supplied with light and fuel, the bills for rent and for light and fuel, and for certain other domestic requirements being paid by or under the authority of the commissioner of the Yukon Territory. The payments so made were fully reported to the Minister of Public Works, who was responsible for the administraton of the appropriation, and vouchers, shewing on the face of them the service for which the moneys were expended and giving full

particulars were forwarded to the Department of Public Works at Ottawa, and no objection was taken thereto at the time by any one in that department. The commissioner, whose duty it was to administer the government of the territory under instructions from the Governor-in-Council or the Minister of the Interior, stated that he had directions from the latter that in addition to payment for the services of the officers employed in the administration of public affairs "all the public employees were to be sheltered and fed," and that it was in pursuance of these instructions that he made the arrangements and provisions mentioned on behalf of the defendants. Furthermore, a letter was produced in evidence written by the Deputy Minister of Justice to the Deputy Minister of Public Works by which it appeared that at that time the Minister of Justice considered it desirable and necessary that residences should be provided for the judges of the territory.

Held, 1. The defendant was an "appointee of the Dominion" on the staff for the administration of the Yukon Territory within the meaning of the order-in-council of 5th September, 1899, and so entitled to the quarters and a "living allowance" provided thereunder.

2. The circumstances disclosed approval and ratification by the Minister of the Interior and the Minister of Public Works of the action of the commissioner in making the expenditures in question for the benefit of the defendant.

D. J. McDougal, and *A. Greene*, for Crown. *Belcourt*, K.C., for defendant.

Burbidge, J.] SPENCER *v.* THE KING. [Jan 9.

Customs—Infringement by importation of cattle without payment of duty.—Intention to infringe—Exercise of ownership in Canada.

Where cattle are liable to the payment of duty upon importation into Canada, the bringing of such cattle to a point within two or three miles south of the boundary line between Canada and the United States constitutes an element in the offence of smuggling.

2. That where cattle are brought to Canada for pasturage, or to a point from which they themselves may drift into Canada for pasturage, if the owner in Canada exercises any control

over them, a contravention of the Customs Act is complete, more especially where the control exercised is that of putting Canadian brands upon such cattle.

Philip and *Kilgour*, for suppliants. *Mitchell* and *Johnston*, for respondent.

Burbidge, J.] PRICE v. THE KING. [Jan 25.

Public work—Injury to adjoining property by fire—Liability of Crown under Exchequer Court Act, s. 16 (c)—Injury not actually happening on the public work.

It is sufficient to bring a case within the provisions of s. 16 (c) of the Exchequer Court Act to shew that the injury complained of arose from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment on a public work. It is not necessary to shew that the injury was actually done or suffered upon the public work itself. *Letourneux* v. *The Queen*, 7 Ex. C.R. 1; 33 S.C.R. 335, followed.

G. F. Henderson, and *L. A. Cannon*, for plaintiff. *Dorion*, K.C., for respondent.

Burbidge, J.] PIGOTT v. THE KING. [April 9.

Public work—Contract for widening canal—Change of plans—Extra work—Quantum meruit—Waiver.

The suppliants were contractors for widening and deepening the lower part of the Grenville Canal. Some portions of the work described in the specifications could not be done without unwatering the canal; other portions of it could not be very well done in the winter season; and nearly all of it could have been done more cheaply and conveniently during the open season. There was, however, nothing to prevent the work being done in the way the contractors did it, that is, by doing during the season of navigation such work as they could do with the water in the canal, by making the best use possible of the time in the spring after the frost was out of the ground and before the water was let into the canal for the purposes of navigation, and also by using in the same way any time that might be available after the water was let out of the canal in the autumn

and before the severe weather set in, and with regard to the rest, by work done in the winter season. It was also a term of the specifications that "parties tendering should consider in submitting their prices for the various items of work, that they must include the cost of removing snow and ice off dams, troughs, etc., and everything necessary to unwater the canal and weir pit during the progress of the work.

A large part of the work was done either in the winter season or with the water in the canal.

Held, There was no such change in the conditions under which the contract was to be performed as to make its provisions inapplicable to the work that was done, and that the case was not one in which the contractors were entitled to treat the contract as at an end and to recover upon a quantum meruit, as was done in the case of *Bush* v. *Trustees of the Port and Town of Whitehaven*, Hudson on Building Contracts, vol. II., p. 121.

By s. 33 of the Exchequer Court Act it is provided that "In adjudicating upon any claim arising out of any contract in writing, the Court shall decide in accordance with the stipulations in such contract, and shall not allow compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the amount stipulated for therein, nor shall it allow interest on any sum of money which it considers to be due to such claimant, in the absence of any contract in writing stipulating for payment of such interest or of a statute providing in such a case for the payment of interest by the Crown (R.S.C., c. 40, s. 17)." In this case an order-in-council was passed waiving certain clauses of the within contract.

Held, that the words in the first clause of the above section "the Court shall decide in accordance with the stipulations in the Court, are directory only, and that effect might be given to the waiver so far as such clauses of the contract were concerned as would constitute a defence to the action if pleaded by the Crown, such as the absence of any written direction or certificate by the engineer concerning the extra work done; but that the remaining clauses of the section were imperative, and there could be no valid waiver the effect of which would be to enable a contractor to obtain compensation for a larger sum than the amounts stipulated for in his contract, *i.e.*, the contract prices for the different classes of work done must be applied to such work.

Where a contract has been entered into for the construction of certain works at schedule rates, and the work has been completed in accordance with the contract, the contract prices cannot be increased so as to give the contractor a larger claim without a new agreement made with authority for a good consideration.

Watson, K.C., and *Sinclair*, for suppliants. *Chrysler*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX *v.* BANK OF MONTREAL. [April 23.

Crown*—*Estoppel* — *Negligence* — *Banks and banking*—*Forged paper*—*Militia department.

Appeal from the judgment of ANGLIN, J., (see 41 C.L.J. 650; 10. O.L.R. 117), in favour of the Crown. This was an action by Dominion Government to recover from the Bank of Montreal the amount of twelve forged cheques issued between December, 1901, and October, 1902. The forgeries were committed by a clerk in the Militia Department, who forged the names of the two officers authorized to sign departmental cheques. The forger so managed that the forgeries were not discovered until February, 1903. It was the custom of the Bank of Montreal to enter all cheques on the account of the Militia Department on pass-book sheets sent to the department day by day with the vouchers; and at the end of every month a complete statement shewing all cheques paid during the month was sent and accompanying these statements, a receipt to be signed by the accountant of the department acknowledging that he had received the cheques entered in the statement, and that he had examined them and found the balance to be correct. It was the duty of the forger to check over these statements, and on his reporting them correct the accountant or his assistant, would sign the receipt and return it to the bank. The forger destroyed the forged cheques when he received them, but included them in the pass-book sheets with the genuine cheques, and they had been receipted for to the bank

by the accountant. The trial judge acquitted the Bank of Montreal of any negligence except as to one comparatively small cheque. At the end of each month the Militia Department sent a list of all cheques issued during the month, to the Receiver-General and another to the Auditor-General. After the latter had satisfied himself as to its correctness the Receiver-General issued to the bank his cheque for the amount, countersigned by the Auditor-General. This was called the reimbursement cheque, and was placed to the credit of the Receiver-General's account in the bank, and all cheques of the Militia Department which had been on their payment charged only against the Letter of Credit Account, were thereupon charged against the account of the Receiver-General.

Held, that the judgment in favour of the plaintiff was correct and ought to be affirmed on the broad ground that the King is not bound by estoppel, and that the Crown is not responsible for the negligence, laches, or torts of his servants.

The bank further appealed against that part of the judgment, which dismissed its claim for indemnity against the three banks which had presented the forged cheques for payment. The trial judge found that there was no negligence with respect to these cheques on the part of any of the banks. There was direct evidence as to one of the banks, and it was a fair inference from the facts as to the other two, that while they placed the face value of the respective cheques to the credit of the forger who had deposited them to accounts of his own which he had opened with them (though not in his own name), they had not allowed the money to be checked out until the cheques had reached the Bank of Montreal and been signed by it. Moreover, they had not endorsed the cheques themselves but only stamped their names upon them for the purpose of identification and for indicating that they were their property.

Held, that the appeal from this part of the judgment should also be dismissed. The other banks were justified in assuming that the Bank of Montreal could best determine whether the signatures were genuine or not, and it was a fair inference that the Bank of Montreal would know from bank usage that the collecting banks would rely on such knowledge, and take the fact of payment by the Bank of Montreal as equivalent to a representation that the cheques were genuine and would be likely to act upon it. The Bank of Montreal might properly therefore be held liable on the ground of estoppel.

The collecting banks could not be held to have v .nted the genuineness of the forged cheques merely by der ling payment of them without endorsing them.

Barwick, K.C., and *J. H. Moss*, for the Crown. *Shepley*, K.C., and *Orde*, for defendants. *Riddell*, K.C., and *Matheson*, for Quebec Bank. *J. A. Ritchie*, for Sovereign Bank. *G. F. Henderson*, for Royal Bank.

HIGH COURT OF JUSTICE.

Boyd, C., Magee, J., Mabee, J.] [March 28.

COBEAN *v.* ELLIOTT.

Limitation of actions—Real Property Limitation Act—Tenant at will—Devise for life to tenant upon condition—Violation of condition.

A testator, dying in 1873 devised land of which his brother had been in possession since 1848 to his (the testator's) son after the death of his brother, to whom he devised a life estate, "on condition that he neither sells nor rents the same without consent in writing of my son." The brother continued in possession, and on the 1st April, 1895, leased the land (without consent) for one year. The plaintiffs, claiming under the son, sought to recover possession from the devisee of the brother, by an action begun on the 29th May, 1905.

Held, that the brother, having openly set at naught the condition of the will, should not be presumed to have accepted the devise, and the Real Property Limitation Act was a bar to the action.

Semble, upon the evidence, that the brother went into possession as tenant at will, and that the statute had run in his favour before the death of the testator.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

W. T. J. Lee, for plaintiffs. *T. J. Blain*, for defendants.

Mulock, C.J., Ex., Clute, J., Anglin, J.] [April 2.

IN RE VILLAGE OF BEAMSVILLE *v.* FIELD-MARSHALL.

Municipalities—Waterworks — Arbitration — Including matters not under Act—Appeal.

Certain parties having commenced proceedings under the Municipal Act and Waterworks Act and appointed arbitrators in respect to certain lands taken by the municipality in connection with their waterworks system, afterwards entered into an agreement under seal defining the scope of the arbitration, and included a claim for breach of contract and other matters not within the said Acts. They did not provide in this agreement for an appeal under s. 14 of the Arbitration Act, R.S.O. 1897, c. 62. The arbitrators in their award, awarded one sum both for the claim "under the Acts and in respect to all matters referred in the said submission."

Held, affirming the judgment of TEETZEL, J., that as the matters not under the Municipal Act and Waterworks Act could not be distinguished in the amount found from the questions referred under the Acts, the award being one and indivisible in its present form, and as the agreement come to by the parties defining the scope of the arbitration did not provide for an appeal under the Arbitration Act, no appeal on the merits lay, or was possible.

Lynch-Staunton, K.C., and *A. W. Marquis*, for municipality, appellant. *Armour*, K.C., for Field-Marshall.

Meredith, C.J.C.P., Teetzel, J., Clute, J.] [April 19.

REX *v.* WOOLLATT.

Municipal law—By-law for sale of goods within limits.

Held, that the provision in s. 580, sub-s. 9, of the Con. Mun. Act, 3 Edw. VII. c. 19, whereby municipalities are empowered to pass by-laws "for regulating, measuring or weighing (as the case may be) of lime, shingles, laths, cord-wood, coal, and other fuel," must be read as limited to such articles as are marketed or exposed for sale within the limits of the municipality. It cannot have been intended by the Legislature that where such arti-

cles have been the subject of a complete contract of sale made beyond the limits of the municipality, and the only act done within it is the delivery, there should be the right to impose what is practically a tax upon the vendor of the articles.

Douglas, K.C., for informant. *W. H. Blake*, K.C., for defendant.

Meredith, C.J.C.P., Britton, J., Teetzel, J.] [April 28.

MASSEY-HARRIS *v.* DELAVAL SEPARATOR CO.

Defamation.

Judgment of MABEE, J., reported ante, p. 112, and 11 O.L.R. 227, affirmed.

MacInnes, for defendants, appellants. *Grayson Smith*, for plaintiffs.

Mulock, C.J. Ex., Anglin, J., Clute, J.] [May 3.

BROHM *v.* TOWNSHIP OF SOMMERVILLE.

Municipal corporation—Snow fences—By-law—Conditional undertaking by municipality to pay for fences—Compulsory arbitration.

The defendants' council passed a by-law enacting:—"That where the road is liable to be blocked with snow in winter and where in the opinion of the council such drifts would be prevented by the removal of any rail, board, or other fence and replacing the same by wire or other fence, the council may order the removal of such fence, . . . and in the removal of such fence or fences by the owners and the erection of such wire or other fences as the council shall direct, the parties erecting such wire or other fences shall be paid out of the general funds of the municipality a sum not exceeding 35 cents per rod of fence." The plaintiff before erecting certain wire fencing submitted his contract for its construction to the council through the medium of a neighbour; at a session of the council, and in presence of the township clerk and several councillors, the reeve expressed to this neighbour the opinion and order of the council that the plaintiff's existing fence should be removed, and its direction

for or approval of, the erection of the wire fence proposed by the plaintiff; the neighbour communicated this order and direction to the plaintiff, and pursuant thereto and in reliance on the by-law, and the sanction of the council, the plaintiff removed his existing fence, and had the wire fencing in question erected.

Held, that defendants were liable to pay for the wire fencing The by-law was a conditional undertaking by them to pay, and the plaintiff had fulfilled the required conditions.

By the Act respecting Snow Fences, R.S.O. 1897, c. 240, s. 1:—"If the council and the owner cannot agree in respect to compensation to be paid by the council, then the same shall be settled by arbitration in the manner provided in the Municipal Act and the award so made shall be binding upon all parties."

Semble, that this did not preclude the jurisdiction of the Court where, as here, the parties were not merely unable to agree as to the amount of compensation, but the municipal corporation wholly repudiated liability.

McDiarmid, for plaintiff. *F. D. Moore*, for defendants.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] LOGGIE *v.* MONTGOMERY. [Oct. 13, 1905.

Easement—Origin in grant—Prescriptive title—Evidence—Referee's deed—Proof of decree.

In 1854, R. B. owner of lot 8 conveyed the northern part thereof to M., together with the privilege of taking water thereto through a pipe, which M. was empowered to build, from a spring on the southern part of the lot. By mesne assignments M.'s lot, with the water privilege, became vested in T. B. In 1871 he executed to S. for 21 years, with covenant for renewal, a lease of the spring, with a right to lay pipe therefrom through the southern part of lot 8 to lot 9. The ownership of the southern part of lot 8 was then in H., and in 1905 became vested in the defendant. In 1872 S. built a pipe from the spring across

H.'s land to lot 9, and it has been in uninterrupted use ever since, a period exceeding 20 years. In 1904 lot 9 with the lease was assigned to the plaintiffs. The plaintiffs' predecessors in title always rested their right to the easement on the lease and not upon adverse user.

Held, that prescriptive title to the easement could not be set up.

A deed of a Referee in Equity, though purporting to have been made under a decree of the Court, is not admissible in evidence without proof of the decree.

Pugsley, K.C., A.-G., *Tweedie*, K.C., for plaintiffs. *Allen*, K.C., *Teed*, K.C., and *Lawlor*, for defendant.

Barker, J.] [Dec. 19, 1905.

DUNCAN *v.* TOWN OF CAMPBELLTON.

Arbitration—Injunction—Jurisdiction.

An injunction will not be granted to restrain a party from proceeding with an arbitration where the result of the arbitration will be merely futile and of no injury to the party seeking the injunction.

An arbitration to determine the value of land of the plaintiff taken by the defendants will not be restrained because a condition precedent to the taking of the land may not have been complied with.

Mott, for plaintiff. *White*, K.C., and *McLatchy*, for defendants.

Barker, J.] [March 9.

IN RE CUSHING SULPHITE FIBRE CO.

Practice—Order—Variation—Mistake.

A company against which a winding-up order had been made obtained at the instance of the large majority of its shareholders and holders of its bonds an order in an action by it against C. granting leave to appeal to the Supreme Court of Canada from a judgment of the Supreme Court of this Province confirming a judgment of the Supreme Court in Equity, and entrusting the conduct of the appeal to the company's solicitors. Subsequently the liquidators of the company moved to vary the order by add-

ing a direction that the case on appeal should not be settled until an appeal to the Supreme Court of Canada from the judgment of the Supreme Court of this Province refusing to set aside the winding-up order was determined, and that the company's solicitors on the company's appeal in the action against C. should act therein only on instructions of the liquidators, or their solicitor.

Held, that as there was no error or omission in the order resulting from mistake or inadvertence, the motion should be refused.

Hazen, K.C., for application. *Teed,* K.C., contra.

Province of Manitoba.

KING'S BENCH.

Richards, J.] [April 16.

TAIT v. CANADIAN PACIFIC RY. CO.

Railways—Negligence—Fire started by sparks from locomotive Joinder of plaintiffs having separate causes of action arising out of the same transaction—Evidence of cause of fire.

Action for damages for loss of hay destroyed by a prairie fire alleged to have been started by sparks from a locomotive running on defendants' railway. It was found to the satisfaction of the trial judge that the fire started during or immediately after the passing of the locomotive and that there was no other possible cause for the starting of the fire.

Held, that the proper conclusion to be drawn was that the defendants were liable, notwithstanding that the sparks must have carried the fire a distance of 127 feet and that there was no evidence as to the condition of the smokestack and netting at the time.

A number of plaintiffs were joined in the action, each having a separate claim for losses by the same fire; and, at the trial, defendants' counsel claimed that they could only proceed by separate actions, and that their counsel must elect for which one he would proceed and strike out the other names from his pleadings. The separate claims of the respective plaintiffs plainly ap-

peared on the face of the statement of claim, and the defendants had taken no steps to have it amended, but filed a statement of defence.

Held, without deciding whether Rule 218 of "The King's Bench Act" justified the joining of the plaintiffs in this case, that defendants, if they thought it did not, should have moved to strike out all but one of the claims before filing a statement of defence, and had lost the right to take such objection afterwards.

Hoskin, for plaintiffs. *Aikins*, K.C., and *Coyne*, for defendants.

Richards, J.] [April 16.

CARRUTHERS *v.* CANADIAN PACIFIC RY. CO.

Railways—Obligation to fence—Railway Act, 1903 (D.), *c.* 58, *s.* 237(4)—*Animals at large.*

The plaintiff's claim was for damages for the killing, by one of defendants' trains, of his four horses which got on to the right of way through an opening in the fence dividing the right of way from a neighbour's field. Plaintiff kept his horses in a fenced field, the entrance to which was secured by bars, but, some person having without the knowledge or permission of the plaintiff let down the bars, the horses strayed through the opening to a highway, thence through another opening into the field from which they got on to the right of way. The killing of the horses did not occur at any point of intersection of the railway with a highway. The opening in the defendants' fence through which the horses got on to the right of way had been left unprovided with a gate by defendants' negligence for about two years.

Held, that the proved facts brought the case within sub-s. 4 of s. 237 of the Railway Act, 1903 (D.), that there was nothing to shew that the animals got at large through the negligence or wilful act or omission of the owner or his agent or of the custodian of such animal or his agent, and therefore the plaintiff was entitled to recover the amount of his loss from the defendant company.

Under said sub-s. 4, it is immaterial so far as the company's liability is concerned, whether the animals killed or injured were or were not lawfully on the land from which they got on to the right of way.

Quære, whether sub-s. 4 would not apply even if the animals

had been struck at a point of intersection of the railway with a highway.

Barrett, for plaintiff. *Robson*, for defendants.

Richards, J.] [April 23.

BANK OF OTTAWA *v.* NEWTON.

Valuation of security held by creditor—Revaluation after partial realization of security—Title to property covered by security after consent of assignee to its retention by creditor.

A trading firm owed the plaintiffs and had given security for the debt. They afterwards made an assignment under the Assignments Act, R.S.M. 1902, c. 8, to the defendant, who is an official assignee. The plaintiffs proved their claim at $5,390, valued the security at $3,612 and claimed to rank on the estate for $1,778. The defendant neither consented to their right to rank for that sum nor required them to assign the security to him. The plaintiffs realized, from part of the security, the net amount of $4,090 after which defendant served plaintiffs with a notice disputing their claim to rank for the $1,778. Plaintiffs then brought this action for a declaration that they were entitled to rank for that sum under s. 29.

Held, 1. The assignee was not entitled to the balance of the securities.

2. The plaintiffs must revalue that balance if they desired to rank on the estate at all.

3. After such revaluation, the amount for which the plaintiffs would be entitled to rank would be the balance of their original claim after deducting the sum already realized and the amount of such revaluation.

The plaintiffs' counsel argued, on the authority of *Bell* v. *Ross*, 11 A.R. 458, that the defendant, having delayed an unreasonable time to exercise the option given by s. 29, should be held to have thereby assented to the retention of the securities by the plaintiffs, and that such assent vested in them an absolute title to the assets, and that they were entitled to realize what they could out of the balance without accounting to the estate and to rank for the amount of their whole claim reduced only by the amount at which they had valued the securities.

Held, however, that that case was distinguishable, as it was decided on the special provisions of the Insolvent Act of 1875 which were quite different from those of the Assignments Act, also on the ground that under the latter Act a debtor cannot get a discharge without payment of all claims in full, whereas he might under the former.

Robson, for plaintiffs. *Hoskin*, for defendant.

Dubuc, C.J.] [April 24, 1903.

SCHELLENBURG *v.* CANADIAN PACIFIC RY. CO.

Railways—Obligation to fence.

The meaning of the words "not improved or settled, and inclosed" in sub-s. 3 of s. 199, of the Railway Act, 1903 (D.) describing lands on either side of the railway which a railway company is not required to fence off, came again under consideration in this case The chief justice held that the plain meaning was the same as if the words were, "not improved and inclosed, or not settled and inclosed," so that if the lands are not inclosed, there is no obligation to fence, though they may be both improved and settled or occupied.

Dreger v. *Canadian Northern Ry. Co.*, 15 M.R. 386, 41 C.L.J. 341, not followed.

Lemon, for plaintiff. *Bond*, for defendants.

Perdue, J.] McKENZIE *v.* McMULLEN. [April 25.

Evidence—Proof of verbal agreement collateral to written contract—Warranty—Representation on condition, when treated as ground for rescission, and when as warranty only.

To an action by the plaintiffs on a lien note or agreement whereby the defendants promised to pay the plaintiffs $465 and interest and acknowledged that it was given for a pair of horses and agreed that the title, ownership and right of possession of the horses should remain in the plaintiffs until the note should be paid, with power to retake possession and sell on default of payment or on the happening of other events mentioned, the defendants pleaded that the horses had been sold to them with a verbal warranty that they were young and sound and free from

bad habits, that such warranty had been broken and that the defendants had suffered damages to the full amount of the plaintiffs' claim.

Plaintiffs claimed that evidence to prove such defence could not be admitted to contradict or add to the written contract on which they relied.

Held, that the lien note had been given simply for the purpose of securing payment to the plaintiffs and it was not intended to include in writing all the terms of the agreement between the parties, and that evidence to prove the alleged warranty and the breach of it was admissible. *De Lasalle* v. *Guildford* (1901) 2 K.B. 215, and *Erskine* v. *Adeane*, L.R. 8 Ch. 756, followed.

The judge, having found on the facts in favour of the defendants, allowed them $265 as damages for the breach of warranty, and gave plaintiffs the option of taking judgment for the balance, without costs, or of accepting defendants' offer to return the horses on the cancellation of the lien note.

The defendants having kept the horses for a considerable time and made a payment on account, it was held that the contract must be treated as executed and that any representation or condition as to the quality of the goods must now be regarded only as a warranty, for the breach of which compensation must be sought in damages and not by rescission of the contract.

Haggart, K.C., and *Sullivan*, for plaintiffs. *Hoskin*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] [Jan. 25.

STONE *v.* ROSSLAND ICE & FUEL CO.

Promissory notes—Extension of time for payment—Release of co-maker—Surety—Notice—Collateral security—Credit for sums realized—Appeal—Ground not distinctly raised at trial—Question of fact.

D. who was with others jointly indebted to the plaintiff on certain promissory notes in relation to the transfer of a business as a going concern, did not in his pleadings, nor at the trial, until

the close of the evidence in the case for both sides, raise the point that he claimed a lien on certain merchandise in stock, which was sold by the plaintiff, the proceeds of which ought to have been, but were not, applied in reduction of the debt.

Held, that where a point is one of fact, or of mixed law and fact, it cannot be raised in the Court of Appeal for the first time unless the Court is satisfied that by no possibility could evidence have been given which would affect the decision upon it; but where the point is wholly one of law, such for instance, as the construction of a statute, it may be raised for the first time in appeal subject to such terms, if any, as the Court may see fit to impose.

Decision of Irving, J., affirmed.

Hamilton, K.C., for plaintiff. *C. B. MacNeill*, K.C., for defendant Stone.

Hunter, C.J.] CIZOWSKI *v.* WEST KOOTNAY. [April 23.

Practice—Workmen's Compensation Rules, 1904 — Object of Rule 34—Security for costs.

On an application by respondents in proceedings under Workmen's Compensation Act, 1902, for security for costs of such proceedings, it appeared that a request for arbitration, with particulars annexed, had been filed with the District Registrar of the Supreme Court at Nelson, on behalf of the father and mother of the deceased workman. Both parents resided in Austria, out of the jurisdiction.

Held, that the object of Rule 34 is to make the proceedings subject to the same rules as an action in this regard.

W. S. Deacon, for respondents. *S. S. Taylor*, K.C., for applicants.

Full Court.] [April 26.

YOUDALL *v.* TORONTO AND BRITISH COLUMBIA LUMBER CO.

Practice—Writ against extra-provincial, unlicensed company—Time for entering appearance—Application for leave to serve ex juris—Rules of Court, application of to proceedings under Part VII.

Section 146 of the Companies Act, R.S.B.C. 1897, c. 44, defines an unlicensed and unregistered extra-provincial company.

Section 147 provides that any writ or summons . . . . may be served as against the company by delivering the same at Victoria to the registrar of the Supreme Court. Section 148 enacts that it shall be the duty of such registrar to cause to be inserted in four regular issues of the British Columbia *Gazette*, consecutively following the delivery of such writ or summons to him, a notice of such writ or summons with a memorandum of the date of delivery, stating generally the nature of the relief sought, the time limited and the place mentioned for entering an appearance. Section 149 enacts that after such four issues the delivery of such process to the registrar as aforesaid shall be deemed, as against the defendant company to be good and valid service of such writ or summons.

Held, in the case of an issue of an ordinary eight day writ under Part VII., that it is the duty of the Registrar to notify the defendant in the publication in the *Gazette* that the time for appearance is eight days after the fourth publication.

Per IRVING, J.:—As the writ is a writ for service on a foreign corporation, without the jurisdiction, application to a judge for leave to issue the writ and proceed under the Act is necessary before any writ is issued. The judge in giving leave would limit the time within which appearance should be entered.

Wilson, K.C., and *Bloomfield*, for appellants (defendants). *Sir C. H. Tupper*, K.C., and *David Grant*, for respondent.

North-West Territories.

JUDICIAL DISTRICT OF NORTHERN ALBERTA.

SUPREME COURT.

Sifton, C.J.] IN RE WILLIAM HENRY LATIMER. [April 21.

Extradition—Discharge.

In the matter of William Henry Latimer held in custody in the Royal North-West Mounted Police Barracks, at the City of Calgary under three warrants for committal for extradition.

SIFTON, C.J.—On Jan. 25, 1906, William H. Latimer was, after an examination lasting over several days, held at the instance of the State of Pennsylvania, which was represented by counsel resident in Calgary and Philadelphia, committed by me for extradition on three several charges of theft. On Feb. 5, an

application was made before the Hon. Mr. Justice Harvey for his release on a writ of habeas corpus, which was refused.

A report of the evidence and proceedings was sent to the Department at Justice, at Ottawa, and a warrant returned authorizing the delivery of said William H. Latimer to an officer appointed by the State of Pennsylvania to receive him and convey him from Canada. Notice of this was sent to the representative of the State of Pennsylvania who declined to send for him, upon which an application was made under s. 19, of the Extradition Act for his release. Notice of this application was given to the Minister of Justice for Canada, and the representative of the State of Pennsylvania, but no action was taken by the latter except apparently a reiteration of their intention not to take any further part in the matter, and such intention is expressed by their counsel now present.

Although it is apparent that the provisions of the Extradition Act have been utilized with some ulterior motive by the representatives of the State of Pennsylvania, and their anxiety for the prosecution of alleged criminals has very materially cooled since the orders for extradition were made, these are matters into which I have no authority to enquire, and the time having expired for which the accused can be lawfully held in custody without action and no objection being raised by any one to his release, I have no option but to order his discharge from custody.

JUDICIAL DISTRICT OF WESTERN ASSINIBOIA.

SUPREME COURT.

Newlands, J.] SHORT *v.* CANADIAN PACIFIC RY. CO. [April 5.

Negligence—Contributory—Volenti non fit injuria.

The plaintiff was in the employ of the defendant company, working on a pile driver. The hammer slipped from its fastening and crushed his arm. He claimed that the pile driver was defective to the knowledge of the defendant's officials, but that the existence of the defect was unknown to him. The defendants denied this and claimed contributory negligence on the part of the plaintiff. The trial judge found that the pile driver was defective, but that the plaintiff could have avoided the injury by waiting until the hammer was chocked before going under it to fix the pile driver in its place; that no one was supposed to be

under the pile driver until it *was* chocked, when it could not fall; that plaintiff had sufficient knowledge to know the dangers incidental to pile driving and that he was warned by his fellow workmen to look out for the hammer.

Held, that there was no necessity for plaintiff to go below the hammer until it was chocked, and that by so doing, he voluntarily assumed all risk of injury. *Canadian and American Coal Co.*, 7 W.L.J., p. 66, followed. See also *Wood* v. *C.P. Ry. Co.; Smith* v. *Baker* (1891), A.C. 334; *Yarmouth* v. *France*, 19 Q.B. D. 647; *Thrussel* v. *Handyside*, 20 Q.B.D. 359.

Trant and *W. M. Martin*, for plaintiff. *Robson*, for defendants.

Book Reviews.

The Law of Municipal Negligence respecting Highways, by JAMES HERBERT DENTON, LL.B., of Osgoode Hall, Barrister-at-law. Toronto: The Carswell Company, Limited, 1906. 431 pp.

This is pre-eminently the age of specialization, and the author has done wisely in limiting the range of his investigation in connection with subjects so vast and complete as municipal law, and the law of negligence. He has thus been enabled to collect and discuss within moderate compass the leading English, Canadian and United States decisions bearing upon the liability of municipal corporations, both at common law and under statutory provisions in the various Provinces of the Dominion, with respect to streets, roads and bridges, sidewalks, etc. We note that Mr. Denton has not forgotten to deal with the rights and duties of such comparatively recent users of the King's highway as the owners of bicycles and automobiles, but what is his authority for such an orthographic novelty as "chaffeur," which has not even phonetic propriety to recommend it? While referring to niceties of this kind, he might also remark that it would have been well if the publishers had followed the time-honoured practice of printing the names of cases in italics, as being more agreeable and helpful to the eye than the ordinary Roman type.

The author has further dealt in separate chapters with proceedings by indictment and mandamus, the doctrine of respondeat superior, the statement of the law as to municipal know-

ledge of the defect, notice of the accident, proximate cause, and contributory negligence, and in his concluding chapter has given a useful discussion of the important matters of evidence and damages.

The Law of Repairs and Improvements. by J. H. JACKSON, M.A., Inner Temple, Barrister-at-law. London: Butterworth & Co., 11 and 12 Bell Yard, Temple Bar, Law Publishers, 1905.

This is a very useful book and eminently practical. It is well to have the law on this subject set forth in a volume devoted to that purpose; and it is, at the author remarks, somewhat curious that this is the first attempt in that direction. The collection of authorities on this subject is a good beginning and is well done. In a second edition, which we trust the author will soon be called upon for, he will take courage to deal more fully with some cases which seem irreconcilable and so help to eventually put the law t .erein referred to in a more intelligent shape.

Part I. refers to repairs and improvements as regards limited owners, part owners and persons under disability such as tenants for life, trustees, infants, etc., under certain statutes; the latter of no special interest to us.

Part II. deals with repairs as between landlord and tenant. Part III. as between vendor and purchaser.

Hints for Forensic Practice, by THEODORE F. C. DEMAREST, LL.B., Columbia: The Banks Publishing Co., N.Y., 1906.

This is a cleverly written monograph of certain rules appertaining to the subject of judicial proof. It deals with objections to the reception of evidence, with special reference to an expression all too common to certain members of the profession who, in season and out of season, object to evidence as "irrelevant, incompetent and immaterial." Students as well as the younger practitioners would do well to read it, and the older they grow the more they will see the excellence of the hints given by the author.