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# TABLE OF CASES

## REPORTED AND NOTED IN THIS VOLUME

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## *SCHOOL RESERVES IN BRITISH COLUMBIA.*

A very interesting question arose recently in the Supreme Court of British Columbia as to the exact legal import of the action of a Provincial Government in placing a "reserve" on certain lands within the province.

The question arose in this way. In 1872 a proclamation was gazetted reserving two half sections of land in the Comiaken district of Vancouver Island for school purposes; in 1884 a grant was made by Act of the Legislature of British Columbia to the Esquimalt and Nanaimo Railway of a large tract of land, geographically including these two half sections, the Act containing a section, exempting from the scope of the grant "any lands now held under Crown grant, lease, agreement for sale, or other alienation by the Crown." The railway company maintained that the two half sections reserved for school purposes fell within the grant and did not fall within the words of the exception.

An Act passed in 1882 had enacted that "no public school reserve should be alienated without the consent of the trustees of the school district in which such reserve is situate."

The Attorney-General of the province sued for a declaration that the two half sections had not passed to the railway company. It was contended on behalf of the Government that (1) the school reserves could not pass under the general words of the grant, (2) if they could so pass they clearly fell within the scope of the exception.

In support of the first submission it was pointed out that the principal act, making the grant, must be either a public or a private act (no distinction having been drawn in the days when the act was passed between these two classes); that if it were a public act, the maxim generalia specialibus non devogant would apply, as exemplified in the cases *Williams* v. *Pritchard*, and

*Eddington* v. *Boorman*, 4 I.R. 2 and 4; *London & Blackwall Ry. Co.* v. *Limehouse Board*, 3 K. & J. 123; *Goldson* v. *Ruck*, 15 East 372, and *Fitzgerald* v. *Champneys*, 3 Jo. & H. 54 (per Page-Wood, V.-C.); that if it were a private act, the Interpretation Act of the province had expressly provided that "no act of a private nature shall affect the right of any person or body . . such only excepted as are therein mentioned or referred to:" and that in view of the meticulous manner in which the Legislature had regulated the creation, disposition, and extinction of these reserves, it could not be presumed that they were intended to pass sub silentio.

The principal interest in the case centres in the argument adduced in support of the second submission in order to bring the reserve in question within the words of the exception it was necessary to establish that there had been an alienation, and as a preliminary step to ascertain the exact operation in law of a governmental act "reserving" a piece of land.

It was contended on behalf of the government that the Legislature having delegated to the executive the power of creating reserves, the act of creation by proclamation was an act of the sovereign power and must therefore have legal efficacy attributed to it; the only possible effect that could be ascribed to it was that of the creation by declaration of a trust. The force of this contention was strengthened by the passing of the Act, 1882, forbidding alienation of such reserves without the consent of the school trustees of the district, and by the consideration that such a mode of alienation was strictly ejusdem generis with an "agreement for sale" mentioned in the exception clause; an agreement for sale having the effect of passing the equitable interest to the prospective purchaser while leaving the legal estate in the owner of the property; the declaration of trust thus contended for would consequently fall within the words "other alienation" of the exception clause of the principal Act, to which effect must be given, and harmonize with the modes of alienation already specifically enumerated.

Having thus shewn that to regard the creation of a reserve as a declaration of trust was in precise analogy with the opera-

tion of an agreement for sale, it followed that if the latter were an alienation, so, too, must be the former; moreover, it is clear from such cases as *Milroy* v. *Lord*, 4 DeG. F. & F. 273. and *Richards* v. *Delbridge*, L.R. 18 Eq. 14, and other cases defining the conditions necessary to the validity of a voluntary conveyance that a declaration of trust is a form of alienation legally recognized.

It follows logically from the argument that upon an alienation of such reserves without the requisite assent, the school trustees would have a cause of action against the government for breach of trust, of course by petition of right.

Counsel for the railway company contended that there could be no declaration of trust or breach of trust, inasmuch as the sovereign power in a state is uncontrollable and may, therefore, violate its engagements with impunity; but this was to misconceive the argument of the other side. The sovereign power may refuse to perform its contracts or to pay compensation for its torts; but in fact it does not do so, and although its liabilities are not, strictly speaking, legal liabilities, it is none the less correct to speak of the sovereign power having contracted or having become answerable for a tort. So likewise may it be said to have created a trust, and, until by an act of overriding power it repudiates its obligations, it may be said to be bound by the trust so created.

The learned judge who tried the case accepted the proposition advanced by the Attorney-General, and held that the act of the Executive, reserving, under statutory powers, a piece of land, was equivalent to a declaration by the Legislature of a trust of the particular piece of land for the purposes of the reservation.

Thus what at first sight appears a very anomalous method of dealing with land has been brought within the ordinary legal classifications of dispositions of property, and its essential similarity to a declaration of trust by a private individual affirmed.

E. C. MAYERS,

Victoria, B.C. (of Inner Temple, Barrister-at-law.)

## *THE CASE OF THE McNAMARAS.*

The case of the McNamara brothers which resulted, as our readers are aware, in their conviction, upon their own confession, of one of them for blowing up a printing office, causing the death of twenty-one persons, and the other of a similar crime, though not attended with fatal consequences, presents some features which to our ideas of criminal procedure are very remarkable. After the prisoners had been arraigned and pleaded not guilty, and after weeks had been spent in obtaining a jury, a delay which is one of the peculiarities of criminal trials in the United States to the astonishment of every one the accused withdrew their pleas of not guilty, and confessed their crimes.

In the meantime, relying as they say upon the declaration by the prisoners of their innocence, their fellow trade unionists had raised a fund of nearly $200,000 for their defence. Now if these men were innocent what possible legitimate occasion was there for such a sum, either to prove their innocence or disprove their guilt. The idea seems so preposterous as to raise grave doubts as to the belief in the innocency of the accused, so confidently asserted.

Next we have the astonishing fact of the counsel for the defence, after great efforts, in the face of damning evidence against them, to induce his clients to plead guilty, arranging with the prosecuting counsel what the punishment was to be; the public being informed in the most public manner possible, that the chief criminal was to be imprisoned for life, and the second for fourteen years. This usurpation of the functions of judge and jury (the jury not being even complete) does seem to us very remarkable.

The conduct of the counsel for the defence in this remarkable case has again raised the oft-considered question as to the duty of counsel, who before trial become aware of the guilt of their client, and of the fact that the plea of not guilty is a false one. The position of a counsel who realises his honour as well as his responsibilities is in such a case a very trying one. We all remember the instance of Mr. Phillips, of the English Bar, to

whom a client confessed his guilt before his trial for murder, Mr. Phillips, in doubt as to what his course should be, consulted the judge, by whom he was advised that the duty of counsel is simply to see that his client has a fair trial upon the evidence adduced, which is his right; that it was the duty of counsel to comment as to its validity from a legal point of view; but, if he, knowing the guilt of the prisoner, should go beyond that and appeal to the jury as believing himself in the innocence of the prisoner he would be guilty of unprofessional conduct. Mr. Phillips, it will be remembered, was severely criticized and cruelly dealt with, but the judge who knew all the facts upheld him, especially noting that in conducting the defence he was careful to avoid saying anything to indicate any personal opinion in favour of his client.

In the case before us the prisoners' counsel took a very peculiar course. Knowing long before the trial the guilt of the prisoners, and that the evidence against them could not be withstood, he made a bargain with the prosecuting attorney that if the prisoners would confess their guilt, their lives would be spared.

The judge appears to have had nothing to do with this amicable arrangement, but sat complacently by until the counsel for the prosecution and for the defence had settled their plan, and then carried it into effect. And so the curtain fell upon one of the strangest of modern tragedy-comedies. The result was, apparently, considered very satisfactory for (to use a phrase common with a certain class of sporting men) the arrangement was a "square deal" all round—the lawyers get their fees, the ends of justice are (said to be) served by the conviction, and much mitigated punishment of the guilty; the prisoners go jauntily off to prison, relying upon the pretty certain hope of their speedy release, and every one is happy, except, comically enough, the trade unionists, who put up their money on the faith of the innocence of their ill-used comrades; but who now see that they have been "fooled" and their cause discredited.

That the administration of justice is brought into contempt, and that ruffians who deserved more than mere painless electro-

cution will soon be let loose again upon society (for probably this is part of the bargain) apparently does not seem to trouble either those in authority or those for whom a due administration of justice is a national necessity.

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## *THE COLLECTED PAPERS OF F. W. MAITLAND.**

The three volumes under the above title contain papers which for the most part have been contributed to magazines and reviews, and cover the whole period of Maitland's life. They represent fairly well his work and opinions. Philosophy, History and Law form the subject-matter of those papers, some of which are familiar to readers of current legal literature like the *Law Quarterly Review*, whilst probably few readers of this journal have read, before they saw it in volume 3 of the Collected Papers, the paper on "Trust and Corporation" which originally appeared in a German magazine.

The chief interest which the lawyer will take in these volumes, is to be found in the treatment of two topics of English law—Equity and Corporations. Only second to these comes the subject of seisin, to which three papers are devoted in vol. 1. Then there are the more discursive papers on English law in general, and the good-natured gibes at Real Property Law. The famous paper on the "Corporation Sole" comes in vol. 3, as do the other papers on corporations and their philosophy. The most attractive papers (to the writer of this notice at any rate) are "Trust and Corporation" in vol. 3, and "The Origin of Uses" in vol. 2, the latter published originally in the *Harvard Review*. These two papers contain Maitland's views on the nature of the equitable estate, a subject alike interesting and important to those who care for legal history, and those who must grapple with very practical everyday problems of legal right. The whole theory of the English trust will become simpler and clearer to

*The Collected Papers of Frederic William Maitland, Downing Professor of the Laws of England. Edited by H. A. L. Fisher. Cambridge, at the University Press. 1911. 3 vols. 30s. net.

everyone who will read Maitland's account of the origin of uses and the ultimate work done by the trust. After shewing that the English use has nothing to do with the Roman usus, but is really an Anglicized form of opus—ad opus, for the benefit of—Maitland gives, in the paper on "Trust and Corporation," a masterly analysis of the trust or equitable estate as it now exists in English law. A trust reposes for its ultimate security on the doctrine of notice. The vital question is: "Against whom can the destinatory's rights be enforced?" "A true ownership, a truly dinglische Recht, the destinatory cannot have. In the common case a full and free and unconditioned ownership has been given to the trustees. Were the Chancellor to attempt to give the destinatory a truly dinglische Recht, the new court would not be supplementing the work of the old courts, but undoing it." This is the principle as it existed when the Court of Chancery was first beginning to exercise jurisdiction, and Maitland's view is that this is still the principle which should guide the investigation of the rights of the cestui que trust. He will not have it, that the trustee—the legal owner—has a merely nominal ownership. As he says elsewhere, the interest of a cestui que trust is a quis in personam in its ultimate analysis, though it has come to look very like, and to be treated very like, a quis in rem.

Then one peculiarly English function of the trust is brought forward, one which continental lawyers have great difficulty in understanding. The legal ownership of the trustee, separated as it has been from the equitable quasi-ownership of the beneficiary, is made to do the work of corporations. A number of persons possessing a common stock of property, instead of forming themselves into a corporate body as would be done under the civil law, vest their property in trustees. They thus have all the advantages of corporate existence without its real or imagined disadvantages. Maitland uses several metaphors to convey the position in jurisprudence of these beneficiaries. They sit in safety behind their hedge of trustees, or their wall of trustees; they are the tender body of the shellfish, the trustees

being the hard shell that comes in contact with the rough handling of the world outside. Whatever metaphor be employed, the fact is that the English trust does frequently serve the purpose of the continental corporation. This paper on "Trust and Corporation" is the crowning piece of work of these Collected Papers. But the lawyer in his lighter moments should by no means omit to make himself acquainted with even the purely historical and antiquarian essays, if they are not known to him.

Those who have read "A Conveyancer in the Thirteenth Century," which first appeared in the *Law Quarterly Review* in 1891, will hardly fail to turn to it again. Those who see it now for the first time will read with perhaps greater pleasure in its new environment.

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## *LESSEE'S COVENANTS TO REPAIR.*

An article which appears in a recent issue of the *Law Quarterly Review*, discusses the law relating to covenants in leases as to repairs. The writer (Mr. Walter Strachan), expresses the hope that his attempt to codify the law under discussion might prove useful to lawyers, as well as to surveyors who have to schedule dilapidations according to the terms of the lease. We are quite sure it will, and the profession is much indebted to him for his valuable paper. He states the leading principles of the law relating to repairing covenants in the following rules:—

I. A covenant "to repair," or "keep in repair,"[1] obliges the covenantor to restore by renewal, or replacement, such parts of the subject-matter of the covenant as are defective.[2]

*Illustrations.*—(*a*) A floor is worn out, woodwork lacks

1. *Payne* v. *Haine*, 73 R.R. 629; *Proudfoot* v. *Hart*, 25 Q.B. Div. p. 50.
2. *Luroott* v. *Wakely*, [1911] 1 K.B. p. 924.

paint,[3] a skylight leaks, a roof is decayed, a garden wall falls through perishing of mortar, an earthenware pipe is broken, a window-frame becomes rotton[4]; (*b*) a well is condemned as a dangerous structure, and is only repairable by rebuilding. In illustration (*a*) if patching is impossible, the covenantor must replace the defective parts by putting sound wood into the floor, skylight, roof, and window-frame, repaint where paint is necessary to prevent decay, replace with a new pipe, and rebuild the walls in illustrations (*a*) and (*b*).[5]

II. But a repairing covenant does not oblige the covenantor to repair by rebuilding the whole subject-matter of the covenant if the court holds that the necessity to rebuild arises from circumstances not contemplated by the parties when the covenant was entered into.[6]

*Illustration.*—1. (*a*) An old house, built on timber which has rotted, is only repairable by "underpining" (*i.e.* rebuilding on walls carried down 17 feet to the subjacent gravel; (*b*) a house is destroyed by an underground mining explosion, another by the combined effect of earthquake and irruption of the sea, and a third by oceanic erosion; and (*c*) a house is destroyed by fire. In illustration (*a*)[7] and [it is submitted] in illustration (*b*) (assuming that the events described are held not to have been in the contemplation of the parties), the covenantor is excused from rebuilding the whole of the premises, but in illustration (*c*) he is liable, fire being a presumable contingency.[8]

III. Unless the terms of the lease are repugnant, the surrounding circumstances may (as in the case of other documents) be regarded in construing repairing covenants therein. There-

3. *Proudfoot* v. *Hart* (supra), p. 54.

4. *Lurcott* v. *Wakely* (supra), pp. 912, 924.

5. *Lurcott* v. *Wakely* (supra).

6. *Lister* v. *Lane*, [1893] 2 Q.B. 212; *Wright* v. *Lawson*, 19 T.L.R. 203; *Torrens* v. *Walker*, [1906] 2 Ch. 166; as to the last case see *Lurcott* v. *Wakely*, [1911] 1 K.B. pp. 913, 923, 926; and see *Hugall* v. *McKean*, 1 C. & E. 391, where a lessor's covenant to repair drains was held to apply to drains existing at the date of the lease and not to mean reconstruction of the whole drainage system.

7. *Lister* v. *Lane* (supra).

8. *Bullock* v. *Dommitt*, 3 R.R. 300.

fore the age, class, and locality[9] of the premises may be taken into account in order to measure the extent of the repairs.[10]

IV. "Good tenantable repair" and similar expressions[11] mean such state of repair, having regard to the age, character, and locality of the premises, as would make them reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take them.

V. The words "reasonable wear and tear excepted" and clauses of similar import qualifying repairing covenants mean that if the covenantor has performed those covenants at the times specified, or as usage[12] prescribes, he will not be liable for dilapidations arising from (*a*) the ordinary[13] action of the elements or (*b*) wear and tear caused by reasonable user of the premises by persons using them.[14]

*Illustrations.*—(*a*) Lease to A of a public-house for ten years, covenants by him to repair every fifth year, qualified by a "wear and tear" clause. At the end of fifth year A does the necessary repairs, and during the eighth year determines the lease; (*b*) B enters into repairing covenants qualified as above. It is proved to be usual to repair the inside of similar houses every seventh

9. *Proudfoot* v. *Hart*, 25 Q.B. Div. p. 52. It is submitted that the rule as stated in the case cited has a general application unless repugnant to the lease. Cp. *Payne* v. *Haine*, 73 R.R. p. 631.

10. As to also implying the test of what a reasonable incoming tenant would require (Rule IV.), except where repugnant, see p. 433 ante.

11. Query, e.g. "habitable repair," *Proudfoot* v. *Hart* (supra, p. 51), *Belcher* v. *McIntosh* (56 R.R. 867); "thorough repair," "good condition," *Lurcott* v. *Wakely*, [1911] 1 K.B. p. 918.

12. If this has not been done the surveyor would have to estimate when each item of dilapidation requiring repair was previously done. The covenantor cannot contend that if he had done the repairs at the proper times the benefit would have been subsequently lost and that the exception clause excuses him, he must fulfil his covenants to repair and at the proper times irrespective of other events (*Joyner* v. *Weeks*, [1891] 2 Q.B. 31, C.A.). Possibly he is also liable for damages caused by not repairing earlier, see Foa's Land. and Ten. (1907), p. 225.

13. i.e. "dilapidations caused by the friction of the air, dilapidations caused by exposure," *Terrell* v. *Murray* (45 S.I. 579). Dilapidation arising from extraordinary causes, e.g., tempest, or snow-storm, would not appear to come within the exception.

14. *Davies* v. *Davies*, 38 Ch.D. 505: *Terrell* v. *Murray* (supra); Foa, p. 224, Ency. Laws of Eng., vol vii, p. 669.

and the outside every third year. B has done this. A and B[15] having repaired at the proper times will not be liable for such dilapidations afterwards occurring as are caused by the ordinary action of the elements, or by wear and tear arising from reasonable user of the premises.

VI. (*a*) The measure of damages for breach of covenants to repair in an action commenced during the continuance of the lease is usually the amount by which the reversion[16] of the premises is injured by the non-repair.[17]

(*b*) The measure of damages for breach of covenant to deliver up the premises in repair, is the cost of putting them into the state of repair required by the covenant.[18]

(*c*) Where a sub-lease contains repairing covenants similar to those in the head lease (with notice thereof to the sub-lessee) and the sub-lessor sues the sub-lessee for breach of his covenant to repair, the liability of the sub-lessor under his head lease must be taken into account in assessing the damages against the sub-lessee.[19]

The Court of Appeal, in *Lurcott* v. *Wakely, Proudfoot* v. *Hart,* and *Lister* v. *Lane* (all of which have been referred to, but cases like the last must be rare), has done much to lighten the task of legal advisers, as also presumably that of surveyors, but it could be wished in dealing with questions concerning repairing covenants that the embarrassing "wear and tear" exception had reached the same tribunal. The writer has stated his notions of the law on that subject with much diffidence. Notwithstanding the advice of eminent and experienced convey-

15. *Scales* v. *Lawrence,* 121 R.R. 791.

16. The soundness of the rule is apparent from the circumstance that were it otherwise a freeholder entitled to a small ground-rent incident to a lease for ten thousand years could harass the lessee with continual actions for repairs.

17. *Doe d. Worcester Trustees* v. *Rowlands,* 62 R.R. 766; *Conquest* v. *Ebbetts,* [1896] A.C. p. 494.

18. *Joyner* v. *Weeks,* [1891] 2 Q.B. 31, C.A.; *Ebbetts* v. *Conquest,* [1895] 2 Ch. p. 384, C.A.

19. *Conquest* v. *Ebbetts,* [1896] A.C. 490. Damages for loss to the lessor of the premises whilst being repaired are recoverable, see Foa's Land. and Ten. (1907), p. 231; Mayne on Damages (1903), p. 287.

ancers[20] this disputation clause still finds its way into leases, and until it is finally relegated to the limbo of forgotten things it is destined to remain a perpetual cause of perplexity and trouble to all concerned.

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Commissions for various public purposes when properly constituted are an efficient means of gathering information, making enquiries, redressing grievances and performing various public functions. In this connection we have had occasion to protest against the too common practice of taking judges from their proper duties to act on boards of this character. This objection does not apply to the commissioners who have been appointed, under the Inquiries Act, R.S.C. 1906, c. 104, Part 1, to inquire into, investigate and report upon all matters connected with or affecting the administration of the various duties of the government of the Dominion and the conduct of the public business therein. These commissioners are as follows: Mr. A. B. Morine, K.C., of Toronto, Mr. G. N. Ducharme, of Montreal, and Mr. R. S. Lake, of Saskatchewan. Mr. Morine is the chairman of the commission, and a better selection could not have been made. He is not only a lawyer of eminence, but a man of large experience in public affairs. The other members are also well qualified to do good work in connection with the important matters that have been entrusted to them.

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20. K. & E. Conveyancing (1909), p. 775.

## *REVIEW OF CURRENT ENGLISH CASES.*



WILL—CONSTRUCTION—GIFT OF CAPITAL AND ACCUMULATIONS OF INCOME AT TWENTY-SIX—GIFT WHETHER VESTED OR CONTINGENT.

*In re Nunburnholme, Wilson* v. *Nunburnholme* (1911) 2 Ch. 510. The question in this case was whether a legacy was vested or contingent. By the will in question the testator bequeathed certain shares in a company to trustees upon trust out of the income thereof to pay the testator's son £3,000 per annum until he should atain twenty-six, and as soon as he should attain that age to hold the shares and the accumulations of interest upon trust for his son absolutely. There was no gift over. The son survived the testator, but died at the age of twenty-three. In these circumstances Neville, J., held that the gift was vested, as it was intended, as a whole, to be solely for the son's benefit. He approved the dictum of Wood, V.-C., in *Pearson* v. *Dolman* (1866), L.R. 3 Eq. 315, 321, and distinguished the case from *Vandry* v. *Geddes* (1830), 1 Russ. & My. 203, where a gift to a class was in question.

EXECUTOR—TESTATOR'S LEASEHOLDS—ASSIGNMENT BY EXECUTOR TO A "PURCHASER"—PAYMENT TO ASSIGNEE TO TAKE ASSIGNMENT—COVENANT BY ASSIGNEE TO INDEMNIFY—LAW OF PROPERTY AMENDMENT ACT, 1859 (22-23 VICT. C. 35) S. 27—1 GEO. V. C. 26, S. 53 (ONT.)).

*In re Lawley, Jackson* v. *Leighton* (1911), 2 Ch. 530, Eady, J., following *Dodson* v. *Sammell* (1861), 1 Dr. & Sm. 575, 579, and other cases, determined that where an executor pays a person to take an assignment of a leasehold belonging to his testator's estate, and give a covenant of indemnity against the covenants in the lease, such an assignee is not a "purchaser" within the meaning of 22-23 Vict. c. 35, s. 27 (1 Geo. V. c. 26, s. 53 (Ont.)), so as to enable the executor to distribute his testator's estate without making provision thereout to meet future liabilities under the lease. According to the learned judge's ruling a "purchaser" in that section means a person who buys a lease and pays a price in money for it.

COMPANY—DEBENTURES—REMUNERATION OF TRUSTEES—REALIZATION OF TRUST PROPERTY BY PRIOR ENCUMBRANCER—LIEN ON PROCEEDS.

*In re Piccadilly Hotel* (1911) 2 Ch. 534. In this case a limited company issued debentures secured by a trust deed which provided that the trust property was subject to a primary trust for conversion in case the security became enforceable. It also provided that the trustees should hold the proceeds arising from conversion first to pay their own remuneration, costs and expenses and apply the residue in payment of the stockholders and the balance, if any, to the company. The deed also fixed the remuneration of the trustees at a specific sum per annum until the trusts should be wound up. The security became enforceable and a receiver was appointed in a stockholder's action; but this receiver was subsequently superseded by a receiver appointed in an action at the suit of prior lien holders, in which action the trust property was realized and the surplus, after satisfying the prior lien, was paid into court, and the question Eady, J., was called on to decide was as to the proper application of the fund, and he held that the trustees were entitled, first, to be paid their remuneration at the rate agreed on up to the final winding up of the trust, and that they had a prior lien therefor on the fund as against the stockholders.

VENDOR AND PURCHASER — SPECIFIC PERFORMANCE — DEPOSIT — STAKEHOLDER—NO STIPULATION AS TO FORFEITURE OF DEPOSIT —IMPLIED TERM—DEFAULT OF PURCHASER—RESCISSION OF CONTRACT—FORFEITURE OF DEPOSIT.

*Hall* v. *Burnell* (1911) 2 Ch. 551. This was an action for specific performance of a contract for the sale of lands by a vendor in which judgment had been given for specific performance as prayed, and the defendant having made default in payment of the purchase money the plaintiff moved to rescind the contract and for forfeiture of the deposit. The defendant did not appear on the motion. It appeared that the contract provided that the deposit should be, and had been, paid to a stakeholder, and the contract did not expressly provide for its forfeiture in case of default by the purchaser. Eve, J., however, held that a deposit paid upon a contract between a vendor and purchaser is in the nature of an earnest or guarantee for the fulfilment of the contract as well as a part payment of the purchase money, and, in the absence of a stipulation to the contrary,

it is an implied term of the contract that the deposit shall be forfeited in case the purchaser makes default, and the fact that the deposit is in the hands of a stakeholder can not affect the respective rights of the vendor and purchaser thereto. He, therefore, made the order as asked.

SOLICITOR—LIEN—PROPERTY RECOVERED — COMPROMISE WINDING UP—COSTS OF ESTABLISHING SOLICITOR'S RETAINER.

*In re Meter Cabs* (1911) 2 Ch. 557. This is a decision concerning the lien of solicitors. The facts being that a solicitor was employed by a limited company to establish a claim in an arbitration. Pending the arbitration the company went into liquidation. On the instructions of the liquidators the solicitor continued the prosecution of the arbitration proceedings and ultimately, with the consent of the liquidators, compromised the claim for £29, which was paid to him and credited by him to the liquidators. The solicitor subsequently delivered his bill of costs for £23, of which £20 was incurred before liquidation. The liquidators took the ground that the solicitor had not been retained by them, and as to the costs incurred before liquidation he was only entitled to prove as creditor. The solicitor, on the other hand, claimed a lien on the £29 for all of his costs incurred before or after the liquidation; and Eady, J., held that the £29 was property recovered by the solicitor on which he had a lien at common law, not only for his costs incurred for the recovery of the money, but also for establishing his retainer as against the liquidators, who disputed it.

WILL—CONSTRUCTION—DEVISE OF HOUSE AND PREMISES "WHERE I NOW RESIDE"—PURCHASE OF ADJOINING PLOTS SUBSEQUENT TO DATE OF WILL—WILLS ACT, 1837 (1 VICT. C. 26) S. 24—CONTRARY INTENTION—POWER TO INVEST IN PREFERENCE STOCK—FULLY PAID PREFERENCE SHARES NOT WITHIN POWER.

*In re Willis, Spencer* v. *Willis* (1911) 2 Ch. 563. In this case the will of a testator was in question, whereby the testator had devised his freehold house and premises, situate at Oakleigh Park, Whitstone, known as "Aukerwyke," and "in which I now reside." After the date of the will the testator had purchased some adjoining plots which at his decease were used and enjoyed by him as part of or in connection with, the property

known as "Aukerwyke." Eve, J., held that the words "and in which I now reside," were a mere additional description of the property, and were not indicative of any intention that the whole of the property known as "Aukerwyke" at the time of the testator's death should not pass, but only that so known at the date of the will. He, therefore, held that the will must be construed as speaking at the time of the death of the testator, there not being any contrary intention manifested therein, and that under the devise the whole of the property known as "Aukerwyke" at the testator's death passed to the devisee. He also held that a power to trustees to invest in "preference stock" did not authorize an investment in preference shares, though the difference between the two is minute.

TRADE MARK—RECTIFICATION OF REGISTER—TRADE MARK NOT CALCULATED TO DECEIVE—USER OF MARK IN CONNECTION WITH DECEPTIVE GET-UP OF GOODS — APPEAL — STAY OF ACCOUNT PENDING APPEAL.

In *Coleman* v. *Smith* (1911) 2 Chy. 572, two points are decided by Eady, J.; first, that were a trade mark unobjectionable in itself is used in connection with goods so got up as to be calculated to deceive, though an injunction be granted against the deceptive get-up, that is no reason why the trade mark should be removed from the register. And second, that an account of profits in a passing off action, will not be stayed pending an appeal, unless it is shewn that irreparable injury is likely to ensue by proceeding therewith. On the merits, however, the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) reversed the decision of Eady, J., holding that there was no intention to deceive and no evidence of any actual deception in the get-up of the defendants' goods.

GAMING DEBT—ILLEGAL CONSIDERATION—GUARANTY TO BANK TO ENABLE PRINCIPAL TO PAY A LOST BET—GAMING ACT, 1845 (8-9 VICT. C. 109)—GAMING ACT, 1892 (55-56 VICT. C. 9) S. 1—(R.S.O. C. 329) SS. 1, 2.

*In re O'Shea* (1911) 2 K.B. 981. In this case the point in controversy was whether a debt in respect of which a creditor presented a petition in bankruptcy, was void under the gaming Acts. The facts were that in 1903 the creditor had lent the debtor £1,000 for the purpose of betting on horse races, any profits resulting to be equally divided. In the same year the

creditor guaranteed an overdraft to the extent of £1,000 at the debtor's bank. There were no profits and all the money having been lost in September, 1903, the creditor guaranteed a further overdraft of £500 in order to enable the debtor to pay bets to that amount which he had lost. In 1906 the creditor paid the bank £1,633 under his guarantees and recovered judgment against the debtor, in default of defence, for £3,000, and it was in respect of this debt the petition was presented. The registrar dismissed the petition on the ground that there was no valid debt to support it, having regard to the gaming Acts, but the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) held that as to the guarantee of £500 the transaction was not invalid, the debt arising out of the loan for the purpose of enabling the debtor to pay a bet which he had lost not being for an illegal consideration; and as to the balance of the guaranty of £1,633 the court held that inasmuch as the guaranty was given in 1903 and not paid until 1906 and in the meantime the bank account had been current, that having regard to the rule in *Clayton's case,* 1 Mer. 385, the original transaction, even if tainted with vice under the gaming Acts, must be taken to have been wiped out by subsequent payments, and, therefore, no question could arise with regard to it.

BANK—ACCOUNT OPENED BY PRINCIPAL IN NAME OF AGENT—REVOCATION OF AGENT'S AUTHORITY—RIGHT OF PRINCIPAL TO UNDRAWN BALANCE OF ACCOUNT OPENED IN AGENT'S NAME.

*Societé Coloniale Anversoise* v. *London and Brazilian Bank* (1911) 2 K.B. 1024. In this case the facts were that the plaintiffs had opened an account in the defendants' bank in the name of their agent and gave the agent authority to draw on it. Subsequently they revoked the agent's authority and claimed the undrawn balance; but on the agent's objecting to the money being paid to the plaintiffs the defendants declined to pay it to them. Scrutton, J., however, held that the plaintiffs were entitled to the money and gave judgment in their favour therefor; but on the case being subsequently carried to the Court of Appeal, the case went off on another point, viz., that on the instructions given by the plaintiffs to the defendants they were not justified in opening the account in the agent's name, and that the plaintiffs were entitled to succeed on the ground that it ought to have been opened in the plaintiffs' own name. The Court of Appeal (Williams, Buckley and Kennedy, L.JJ.) therefore expressed no opinion on the point decided by Scrutton, J.

SALE OF GOODS—MARKET OVERT—CUSTOM OF CITY OF LONDON—SHOP—AUCTION ROOM—TROVER—DEMAND AND REFUSAL BEFORE WRIT.

In *Clayton* v. *Le Roy* (1911) 2 K.B. 1031, the facts were somewhat strange and peculiar. The defendants had sold to the plaintiff a watch, which was subsequently stolen and the defendant was informed of the theft. Later the watch was sold at auction with a number of other unredeemed pawnbroker's pledges. The sale took place on the first floor of a building in the city of London in a room used solely for auction sales of all classes of goods. Shortly afterwards the watch was purchased at a jeweller's shop in the country by a Mr. Burnett, who sent it to the defendant for an opinion as to whether it was a genuine antique watch. The defendant wrote to Burnett informing him that the watch had been stolen, and also to the plaintiff, and inquired as to their wishes in the matter. No answer was sent by the plaintiff, but a few days afterwards the plaintiff's solicitors' clerk called on the defendant, and on being shewn the watch demanded that it should be then and there given up to him for the plaintiff, and on the defendant's refusal to give it up, served him with the writ of summons in the action in detinue which had been issued two hours previously. Scrutton, J., who tried the action held that the auction room was not a market overt within the meaning of the custom of the city of London whereby each shop where goods are usually sold in the city is deemed a market overt; and he gave judgment for the plaintiff But the Court of Appeal (Williams, Moulton, and Farwell, L.JJ.), without deciding the question of market overt, held (Williams, L.J., dissenting) that there had been no wrongful refusal on the part of the defendant to return the watch before the issue of the writ, and consequently the plaintiff had no cause of action either in detinue or trover.

CONTRACT FOR SERVICE FOR PERIOD EXCEEDING A YEAR—PROVISION FOR DETERMINATION OF CONTRACT WITHIN A YEAR ON NOTICE—STATUTE OF FRAUDS (29 CAR. II. C. 3), S. 4—(R.S.O. C. 338, S. 5).

*Hanau* v. *Ehrlich* (1911) 2 K.B. 1056. This was a case stated by an arbitrator and the question for decision was whether a contract of service or employment for two years, subject to a provision enabling either party to terminate it at any time on giving six months' notice, was one that was required to be in writing

under the Statute of Frauds, s. 4 (R.S.O. c. 338, s. 5), and Laurence, J., held that it was, and the Court of Appeal (Williams, Moulton, and Buckley, L.JJ.) affirmed his decision.

CRIMINAL LAW—PLEADING—AUTREFOIS ACQUIT—NOT GUILTY—DOUBLE PLEA.

*The King* v. *Banks* (1911) 2 K.B. 1095. This is a case in which a technicality was made to serve the purpose of effecting justice. The appellant and another person were charged upon a coroner's inquisition with the murder of a child; and the appellant was also charged alone upon an indictment with the manslaughter of the same child, to both of which the accused pleaded not guilty. Counsel for the prosecution offered no evidence on the charge of murder, and the jury, by the direction of the judge, found a verdict of not guilty upon that charge. Before the jury were sworn on the charge of manslaughter, the prisoner's counsel tendered a plea of autrefois acquit, which was received and on which the appellant was first tried, and by direction of the judge the jury found against the appellant on that plea; he was then tried on the plea of not guilty and was convicted. On appeal from this conviction counsel for the prisoner contended that as under the charge of murder his client could have been convicted of manslaughter, his acquittal on that charge was in effect an acquittal on the charge of manslaughter; but the Court of Criminal Appeal (Lord Alverstone, C.J., and Lawrance, Phillimore, Pickford and Hamilton, JJ.) rejected this argument and held that according to the rules of criminal appeal, a plea of autrefois acquit was not admissible after a plea of not guilty, and the Court doubted whether in any circumstances double pleas are admissible in criminal proceedings except by statutory authority. And it expressed no opinion as to whether the appellant was ever in peril of being convicted of manslaughter, inasmuch as there had been no trial of the facts, but this point was expressly left open for further consideration, should it arise hereafter.

ESTOPPEL—RES JUDICATA—ACTION UNDER AGREEMENT FOR RENT—RECOVERY UNDER AGREEMENT—SECOND ACTION UNDER AGREEMENT—DEFENCE NO CONSIDERATION.

*Cooke* v. *Rickman* (1911) 2 K.B. 1125. In this case the principle laid down in *Humphries* v. *Humphries* (1910), 2 K.B. 531 (noted ante, vol. 46, pp. 443, 616), was invoked successfully. The plaintiff had sued the defendant in the High Court for rent due

under an agreement and had recovered judgment in that action for a part of the sum claimed, which the defendant admitted that she owed. Subsequently the present action was brought in the County Court to recover a further instalment of rent due under the same agreement, and in this action the defendant set up that the agreement was without consideration, and the county judge gave judgment for the defendant; but the Divisional Court (Bray and Bankes, JJ.) held that the defendant was estopped by the recovery in the former action from setting up in this action the plea of want of consideration.

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The departure of His Majesty the King for India reminds us that by the Act of Settlement "no person who shall hereafter come to the possession of this Crown shall go out of the dominions of England, Scotland, or Ireland without the consent of Parliament." This article was, however, repealed very soon after the accession of George I. (1 Geo. I. c. 51) as it was held to impose an ungracious restriction on the personal liberty of the Sovereign. On the 10th inst., at a meeting of the Privy Council held by the King for the purpose of making provision for his temporary absence by appointing a commission to act for him in certain matters, including the summoning of a Privy Council should there be urgent need, Prince Arthur of Connaught, the Archbishop of Canterbury, the Lord Chancellor, and Lord Morley were approved by the King as commissioners, and appointed by letters patent under the Great Seal. The constitution of the personnel of the commission was based on ancient and approved precedent. Prince Arthur of Connaught, as a Prince of the Blood and the nearest male relative of the King of full age in the kingdom, was named in a commission which partook of the nature, however remotely, of a regency in accordance with well-established usage; the Archbishop of Canterbury and the Lord Chancellor were named therein as the holders of the highest offices in Church and State, the inclusion of the Archbishop of Canterbury reminding us of the time when Churchmen were likewise, in temporal matters, Ministers of the Crown till the Reformation period; while Viscount Morley found a place on the commission as Lord President of the Council—an officer of the highest dignity, who ranks next after the Chancellor and the Lord High Treasurer, whose office has long been in commission, and now by custom, the commencement of which is uncertain, takes the first place at the council table on the King's right hand.

# REPORTS AND NOTES OF CASES.

## Dominion of Canada.

### SUPREME COURT.

Alta.] [Oct. 3, 1911.

CALGARY & EDMONTON LAND CO. *v.* ATTORNEY-GENERAL OF ALBERTA.

*Leave to appeal—Public interest—Construction of statute—Assessment—Railway—Land subsidy—Transfer of beneficial interest.*

Leave was granted for an appeal from a judgment of the Supreme Court of Alberta (2 Alta. L.R. 446), holding that lands in the province, the legal title to which was in the Government of Canada, but the beneficial interest had passed to a local company, were liable to taxation under the Alberta Local Improvement Act.

By a statute of Canada a land subsidy to a railway company was authorized. The subsidy was earned and the land applied for was, by order in council, reserved and set apart.

*Held,* that the company could be taxed in respect to this land though the patent had not issued.

The Act granting the subsidy provided that the grants were to be "free grants" subject only to payment of ten cents per acre for cost of surveys.

*Held,* that the lands were only to be free as against the grantors and such provision did not exempt them from local taxation. Under the Alberta Local Improvement Act the beneficial interest in lands, the legal title to which is in the Crown, is taxable.

Appeal dismissed with costs.

*Ewart,* K.C., and *Laird,* for appellants. *S. B. Woods,* K.C., for respondent.

B.C.] [Nov. 6, 1911.

CITY OF VANCOUVER *v.* MCPHELAN.

*Municipal corporation—Obligation to repair highway—Statutory duty—Liability for breach.*

By the Vancouver Incorporation Act (B.C. Stats. 1900, c. 54, s. 219) the duty is imposed on the city corporation of keeping its highways in repair.

*Held*, that a person injured in consequence of omission to perform such duty has a right of action against the corporation, though none is expressly given by statute. Judgment appealed against (15 B.C. Rep. 367) affirmed.

*W. A. McDonald*, K.C., and *J. Travers Lewis*, K.C., for appellants. *Lafleur*, K.C., for respondent.

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Ont.] [Nov. 6, 1911.

MACKENZIE *v.* MONARCH LIFE ASSURANCE CO.

*Company—Issue of shares—Officials authorized to sign certificate—Bonâ fide holder—Estoppel.*

M. brought action against a company and O., its managing director, for an injunction to restrain the former from using matter in the copyright of which he was part owner with O. The action was settled by O. undertaking to deliver to M. twenty-five shares of the company's stock and certificates representing that number of shares signed by the proper persons and bearing the seal of the company were given to M., who brought action to be registered as owner thereof. The defence of the company was that they did not issue the certificates, nor consent to the issue, and that M. never paid them the value. On the trial it was proved that O. never had shares of his own to transfer to M. and there was some evidence that no resolution of the directors was passed authorizing the issue.

*Held*, reversing the judgment of the Court of Appeal (23 O.L.R. 342), DAVIES and IDINGTON, JJ., dissenting, that M. was entitled to be registered.

*Held*, per FITZPATRICK, C.J., and DUFF, J.—The company having authorized certain of its officers to sign such certificates could not dispute the validity of certificates signed by those officers.

Per ANGLIN, J.—The certificates were primâ facie evidence of title to the shares which the company had failed to displace.

Appeal allowed with costs.

*Bain*, K.C., and *Gordon*, for appellant. *Matthew Wilson*, K.C., for respondents.

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# Province of Ontario.

## HIGH COURT OF JUSTICE.

Divisional Court, Ch.D.] [Dec. 2, 1911.

BURNS *v.* HALL.

*Mining Act—Time for performance of work—Meaning of "immediately following."*

Appeal and cross-appeal from a decision of a mining commissioner.

*Held*, that the words "immediately following" in 8 Edw. VII. c. 21, s. 78, which provides "that the recorded holder of a mining claim shall perform work thereon during the three months immediately following the recording," are synonymous with the words "next after," so that the time begins to run on the next day after the recording.

*Cowan*, K.C., for plaintiff. *J. J. Gray*, for defendants.

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Boyd, C.] [Dec. 7, 1911.

RE STURMER AND TOWN OF BEAVERTON.

*Costs—Power of court to make real litigant to pay.*

An application was made by one Sturmer to quash a local option by-law. The application was really on behalf of one Alexander Hamilton, an hotelkeeper, but he, fearing a liability for costs got Sturmer to act.

*Held*, that there is inherent power in the court to make a person who has set the court in motion pay the costs of his unsuccessful application, and this though the person be not formally a party, but one who is the instigator of the movement: see *In re Bombay Civil Fund Act*, 33 Sol. J. 107; *Attorney-General* v. *Skinners Co.*, C.P. Coop. 1; Judicature Act, s. 119; *In re Appleton* (1905), 1 Ch. 749; *Corporation of Burford* v. *Lenthall*, 2 Atk. 553; *Hutchinson* v. *Greenwood*, 4 E. & B. 326.

*Raney*, K.C., for the corporation. *Lynch-Staunton*, for Hamilton.

B ,d, C.] [Dec. 12, 1911.

REX *v.* MUNROE.

*Criminal law—Vagrancy—"Visible means of maintaining himself"—Money derived from begging—Previous conviction for begging.*

Motion by the defendant, on the return of a habeas corpus, for an order for his discharge from custody under a conviction for vagrancy.

BOYD, C.:—The vagrancy clauses of the Canadian Criminal Code are derived from the English general Vagrancy Act (still in force, 5 Geo. IV. c. 83, ss. 3 and 4), and in small part from the later Act 1 & 2 Vict. c. 38, s. 2: see marginal note to Dominion statute 49 Vict. c. 157, s. 8; *Rex* v. *Johnson*, [1909] 1 K.M. 439. . . . .

It is inherently evident from this legislation that the man who makes a living by begging or by gambling or by trickery is not regarded as a person who maintains himself by honest work or other lawful means. Begging is stamped as being a disreputable mode of life and an offence against the good order of society. Our Code declares a man to be a vagrant who, not having any visible means of maintaining himself, lives without employment. The maintaining himself by means of begging and the gathering of such gains to the extent of a few dollars would not seem reasonably sufficient to exonerate him from punishment because with the dollars he might be said to have visible means of maintaining himself for a few days or weeks. . . . As said by Mr. Justice Osler in *Regina* v. *Bassett*, 10 P.R. 306, it is the general tend of his life that is to be looked at, the sort of character he is exhibiting. The true meaning of the section in the Code 238(*a*), that every one is a vagrant "who . . . not having any visible means of maintaining himself, lives without employment," is, visible *lawful* means of support. This word "lawful" is explained in the criminal laws of Australia relating to idle and disorderly persons or vagrants: *Appleby* v. *Armstrong*, 27 Vict. L.R. 136, and *Le Fan* v. *Dempsey*, 5 Com. L.R. 316. . . .

The defendant moves for his discharge, on the ground that, as he had $28 in his possession at the time of his arrest, he was not "without visible means of maintaining himself," and so is wrongly convicted as being a loose, idle vagrant under the Criminal Code of Canada, s. 238(*a*).

The sole authority relied on is a decision of Hunter, Chief Justice of British Columbia, *The King* v. *Sheehan*, 14 Can. Crim. Cas. 119, 120 (1908), which, however, I am not disposed to follow. In the present case, the money found on the defendant was derived from begging on the cars and in the streets, and he has also been convicted, under a by-law of the town of Kenora, of the offence of begging in the streets, and sentenced to 20 days' imprisonment (now expired). The argument is, that he has been punished for begging, has expiated his offence by serving his time, and is now lawfully in possession of the money. A conviction for both offences, *i.e.*, that of begging in the streets against a by-law, and that of being a vagrant under the Criminal Code, is not inconsistent. The one is addressed to a particular act; the other, to a manner of life. If the defendant has no visible means of maintaining himself, in the ordinary sense of the phrase (except by begging), and if he leads an idle, wandering life in that employment, and is not able to give a good account of himself, one cannot but feel that he is within the mischief against which the statute is directed. Begging is one of the ingredients of vagabondage—the old time collocation was, "rogues, vagabonds, and sturdy beggars." I would not give effect to such a reading of the Act as this: that a man unlawfully engaged in gambling or begging, who is possessed of a few dollars collected from that source, is to be treated as meeting the requirements of the statute as one who has an employment and is in possession of visible means of maintaining himself. His means and his employment and his maintenance are all attributable to his disreputable life, and the more he bestirs himself in this pursuit the greater nuisance he becomes.

*M. Lockhart Gordon*, for defendant. *J. R. Cartwright*, K.C., for the Crown.

## DISTRICT COURT OF KENORA.

### WHITE *v.* SANDY LAKE LUMBER CO.

*Woodman's Lien for Wages Act.*

*Held*, that railroad ties sawn in a sawmill out of logs do not come within the provisions of the above Act.

[KENORA, Dec. 14, 1911—Chapple, D.C.J.

Action brought to recover the sum of $259.24, being the amount due by defendants to plaintiff for "work manufactur-

ing ties at the defendants' mill, and to enforce the plaintiff's claim of lien for that amount dated the 23rd day of August, A.D. 1911, and filed under the provisions of the Woodmen's Lien for Wages Act, 10 Edw. VII. c. 70."

It was admitted that the plaintiff was engaged by defendants as foreman in their sawmill, and had been so employed for one hundred and seven days at $4.50 per day, between April 1st and July 24th, 1911, and for said work defendants were indebted to him in the said sum, being the balance due to him on the said 24th day of July, and for which he filed a claim for a lien under the Woodmen's Lien for Wages Act upon certain railroad ties manufactured in said mill.

It was also admitted that the ties upon which the labour had been performed and the lien was claimed were now in the possession of the Imperial Bank of Canada, to whom they had been assigned by the defendants as security for money advanced. It was also admitted there was a claim or lien of the Crown for dues on said ties amounting to $3,504.50, which had precedence under said Act over all other claims.

CHAPPLE, DIST. CT. JUDGE:—It was contended on behalf of the plaintiff that he having performed labour on the logs or timber out of which these railroad ties were manufactured that under s. 6 of the Woodmen's Lien for Wages Act he was entitled to a lien thereon for the amount due for such labour. The Woodmen's Lien Act was passed for the special benefit of woodmen to enable them to secure their wages in a summary way. It is not in force in any of the counties of Ontario, but only in the districts. It is an exception to the common law, and, therefore, must be construed strictly. See *Dallaire* v. *Gauthier*, 24 S.C.R. 495.

The words "logs or timber" are interpreted by s. 3 of the Act "to mean and include logs, cordwood, timber, cedar posts, telegraph poles, railroad ties, tan bark, pulpwood, shingle bolts and staves, or any of them."

It is quite clear by the above interpretation that "railroad ties" are intended to be within the Act, and if it were not for the authorities I hereinafter refer to, there could not be any doubt, but we must bear in mind that this Act was first passed in 1891 when "railroad ties" were, I think, altogether manufactured or hewn in the wood by the use of the axe, the same as logs and posts, etc., and the plaintiff's claim is "for work manufacturing ties at the defendants' sawmill." The evidence

shewed that part of each log was sawn into lumber and the balance made into a railroad tie of the size required.

In *Baxter* v. *Kennedy*, 35 N.B. 179, it was held that "logs and timber" were not intended to include deals or other manufactured lumber.

In *Rogers* v. *Dinsmore* (Canada Law Journal, Vol. 43, at page 627), Judge O'Connor, of the district of Algoma, decided that "no lien attaches on 'lumber' that is "logs or timber' sawn into boards, scantlings, etc., under the Woodmen's Lien Act."

Now, while neither of these cases deal directly with "railroad ties" still, in my opinion, logs partly sawn into lumber and ties differ very slightly from logs sawn into lumber and deals or scantlings, etc. And the judgment of Chief Justice Hunter of British Columbia in *Davidson* v. *Frayne*, 9 B.C. 369, makes it much clearer that labour performed in a sawmill was not intended to come within the Act. He held in that case that "a lien is not given to sawmill men by the Woodmen's Lien for Wages Act, but only to those engaged in getting the timber out of the forest."

While none of the decisions I have referred to may be binding upon me, still they are of great assistance in arriving at a conclusion that it was the intention of the Act to make a distinction as to a lien attaching on "logs or timber" before being sawn and after being sawn.

Sec. 17, sub-s. (*c*) gives rights of attachment on "logs or timber *about to be cut* into lumber or other timber so that the same cannot be identified," thereby inferring that the right of a lien will cease when so cut, and also the "labour" to be done is interpreted by s. 3, sub-s. (*b*) of the Act to mean and include "cutting skidding, felling, hauling, scaling, banking, driving, running, rafting or booming any logs or timber," being work which is done by parties engaged in getting the timber out of the forest and before the logs arrive at the sawmill.

I am, therefore, of the opinion that the plaintiff is not entitled to a lien upon the logs or timber sawn in the mill either into lumber or ties and none attaches and cannot be enforced against the "railroad ties" now in the possession of the Imperial Bank. He, however, will be entitled to judgment against the defendants for $259.24 and costs of signing judgment as if by default of appearance, but not to include costs occasioned by making claim for lien, which he must vacate, and I also find that said lien was not filed within the time required by s. 8,

sub-s. 4, of the Act. I do not allow any costs to the Imperial Bank, as my conclusions have not been arrived at by anything in their defence.

I find, however, that Patrick Villeneuve, who filed a lien for towing the logs to the mill, including not only those sawn, but others now in the booms, is entitled to a lien thereon subject to the prior lien of the Crown, and to judgment against defendants for $370.95, with costs, including the costs of enforcing his lien.

*McGillivray*, K.C., for plaintiff. *Apjohn*, for defendants.

## Province of Manitoba.

### COURT OF APPEAL.

Full Court.] [Nov. 6, 1911.

REX *v.* TOY MOON.

*Criminal law—Conviction for playing or looking on in a common gaming house—Charging offence in the alternative—Amendment of conviction—Joinder of several persons charged with offence.*

*Held*, 1. Sec. 725 of the Criminal Code, which permits the statement in an information or conviction that an offence has been committed in different modes, etc., does not apply so as to warrant a conviction under s. 229 for playing or looking on while others are playing in a common gaming house, as these are separate and distinct offences.

*King* v. *Ah Yin*, 6 Can. Cr. Cas. 63, followed.

2. Such conviction may, however, be amended under s. 1124, on being brought before the court by certiorari, so as to make it a conviction for playing in a common gaming house if the evidence shews the commission of that offence, and, when there is the statement of a witness that the accused were all playing on the occasion in question, and it is shewn that gaming instruments were found in the room at the time of the arrest, which fact furnishes primâ facie evidence under ss. 985 and 986, the proof is sufficient. *King* v. *Meikleman*, 10 Can. Cr. Cas. 782, followed.

3. Any number of person may be charged and convicted jointly with the offence of playing in a common gaming house, if they were all actually present and taking part in the same game.

*Graham*, D.A.-G., for the Crown. *Phillipps* and *Whitla*, for defendants.

Full Court.] [Nov. 6, 1911.

REX *v.* MCCOLL.

*Ticket of Leave Act—Forfeiture of license to be at large by subsequent conviction—Place where prisoner must serve balance of term of first sentence — Prisoner arrested in province other than that in which first sentence imposed.*

Under ss. 7 and 8 of the Ticket of Leave Act, R.S.C. 1906, c. 150, when a prisoner, who has obtained a license to be at large after undergoing part of a gaol sentence in one province and who has afterwards been confined in a penitentiary in another province for a subsequent offence, thus forfeiting his license, is arrested upon the expiration of such later sentence for the purpose of his completing the term of his first sentence, he should, notwithstanding sub-s. 3, of s. 8, be confined in a gaol in such other province and not in the penitentiary where he was last confined.

*Whitla* and *Phillipps*, for prisoner. *Anderson*, K.C., for the Minister of Justice. *Graham*, D.A.-G., for Attorney-General of Manitoba.

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Full Court.] [Dec. 1, 1911.

SMITH *v.* DUN.

*Libel—Mercantile agency reports to subscribers—Privilege—Publication of true extracts from a public record—Innuendo—Words not libellous per se—Special damages.*

Appeal from judgment of MATHERS, C.J., noted ante, vol. 47, p. 624, dismised with costs on the following grounds:—

1. To say that a man has given a chattel mortgage is not libellous per se without an innuendo shewing that the words were defamatory by reason of their having to certain persons a defamatory meaning, setting out such defamatory meaning: Odger, pp. 110, 123.

2. The statement of claim continued no allegation of any special damage suffered by the plaintiff and none was proved: *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 527, followed.

The court refrained from expressing an opinion on the question of privilege dealt with by the judgment appealed from.

*Hugg*, for plaintiff. *Coyur*, for defendants.

## KING'S BENCH.

Metcalfe, J.] [Nov. 28, 1911.

ROSE *v.* CLARK.

*Negligence—Motor vehicle—Duty of driver with regard to pedestrians—Damages—Costs—Recovery of amount within jurisdiction of the County Court—King's Bench Act, Rule* 933.

The plaintiff, when on his way to board a street car which had stopped at a switch point at a place where it was usual for passengers to get on the cars, was knocked down and injured by a motor vehicle driven by the defendant's chauffeur past the street car. It appeared that the chauffeur was driving at a moderate rate of speed on the proper side of the road behind a team going in the same direction, that the team, when just opposite the street car, turned to the right to avoid hitting the plaintiff, that the chauffeur then proceeded, thinking the road was clear, when suddenly the plaintiff appeared before him on the pavement, that he blew his horn and applied the brakes and did all he could to avoid hitting the plaintiff, but that the latter appeared confused, took a step backward and was struck, although not run over.

*Held*, 1. The circumstances and the situation were such as to require the chauffeur to exercise a more than ordinary degree of care for the safety of pedestrians and to anticipate the possibility of being confronted at any time in such a situation by pedestrians who for the moment lose control of their mental faculties, and are overcome by a sudden panic, although at other times of healthy and rational intellect, and that under the circumstances the chauffeur was guilty of such negligence that the defendants were liable for the damages suffered by the plaintiff.

2. The trial judge assessed the plaintiff's damages at $344, an amount within the jurisdiction of the County Court; but, being satisfied that the plaintiff's solicitor honestly believed that the plaintiff would recover an amount beyond that jurisdiction, while giving him no costs, he gave the statutory certificate, under Rule 933 of the King's Bench Act, to prevent the defendant setting off any costs.

*Howell*, for plaintiff. *Anderson*, K.C., for defendants.

Macdonald, J.] [Dec. 4, 1911.

CARRUTHERS *v.* CARRUTHERS.

*Will—Power of executors to sell real estate when no debts—Postponement of division of residuary estate specifically devised—Annuities charged upon whole estate.*

Under a will making provision for the wife and sister of the testator to be secured on the estate and giving the residue both real and personal to his three children in equal shares, the executors have no power to sell the real estate without the consent of the residuary legatees, there being no express power to sell conferred and no debts necessitating a sale.

Such power in the executors should not be inferred from a direction in the will that "no division of the said residue, or payment of their respective shares to my said children shall be made by my executors until five years after the date of my death," or from the further direction that the executors should have power to delay and postpone the payment of the share or shares of the children until such time as in their judgment and opinion it would be advisable to pay such share or shares, as these directions must be read in connection with the clause in the will requiring the executors, during the said five years, to "annually pay to my said children their respective shares of the income arising from the said residue of my estate," and the further clause providing that "if, during the said five years, my executors should have on hand any surplus funds from the residue of my estate, such surplus shall be invested in safe and legal securities," and it should be held that the "payment" mentioned in those directions referred merely to such surplus funds. The intention of the testator can be further arrived at by his direction that the annuities provided for his wife and sister are to be a charge upon his entire estate, and in the event of the period of division arriving before their deaths the executors are directed to set aside from such division sufficient of his estate to secure such annuities. If it was his intention to confer a power of sale upon his executors he would have made a provision for the security of such annuities in the event of a sale and, had he done so, the power of sale would be readily implied.

*Galt*, K.C., for plaintiff. *Taylor*, K.C., for defendant.

Robson, J.] [Dec. 5, 1911.

HICKS *v.* LAIDLAW.

*Vendor and purchaser—Cancellation of agreement of sale by vendor for default by purchaser—Abandonment of purchase —Specific performance—Removal of caveat registered by purchaser—Laches—Costs—Purchaser's right to return of money paid.*

Action by vendor of land under an agreement of sale for a declaration that the purchaser was in default and had abandoned his purchase and for the removal of a caveat registered by the purchaser. The defendant denied abandonment and asked for specific performance of the agreement. The defendant had made the initial payment on the land, but failed to pay the next instalment when due, whereupon the plaintiff purported to cancel the sale, although there was no valid power to do so in the agreement. Defendant afterwards sent plaintiff the money for the overdue instalment and interest, but the plaintiff returned it to the defendant, saying that his claim on the lot "became void some months ago." Defendant then registered his caveat. Nothing further was done in the matter until the commencement of this action over four years later.

*Held*, following *Cornwall* v. *Henson*, 69 L.J. Ch. 583, that the plaintiff could not get a declaration that there was an abandonment of his contract by the defendant, but that the defendant had, by his delay and laches, lost the right to specific performance and the plaintiff was entitled to a declaration by the court to that effect.

*Mills* v. *Haywood*, 6 Ch. D. 202, followed.

*Whitla* v. *Riverview Realty Co.*, 19 M.R. 746, referred to.

As far as appeared from anything brought forward at the trial, the plaintiff was not the registered owner of the land.

*Held*, that for this reason she was not entitled to an order for the removal of the defendant's caveat from the register in the land titles office.

As to costs, following the view of Anglin, J., in *Labelle* v. *O'Connor*, 15 O.R. 519, it was ordered that the plaintiff have costs on condition of crediting thereon the cash paid by defendant on the contract, less any money paid for commission on the sale and expenses incident to the agreement.

*Blake*, for plaintiff. *Haggart*, K.C., for defendant.

Mathers, C.J.] [Dec. 9, 1911.

IN RE ALICIA BURGER.

*Lunatic—Declaration of lunacy—Personal service on lunatic—Service out of jurisdiction—Order—No presumption against supposed lunatic from fact of confinement in a lunatic asylum.*

Before a declaration of lunacy will be made on a summary inquiry under s. 11 of the Lunacy Act, R.S.M., 1902, c. 103, the following rules must be strictly complied with. (1) The petition must be indorsed as required by rule 772 of the King's Bench Act, and should be signed by the petitioner. (2) It must be personally served upon the supposed lunatic: *Re Miller*, 1 Ch. Ch. 215, unless service has been dispensed with. (3) Personal service will only be dispensed with when it would be dangerous to the lunatic to serve him and, to prove that, the affidavit of the medical superintendent of the asylum in which the party is confined is not sufficient without corroboration: *Re Newman*, 2 Ch. Ch. 390; *Re Mein*, 2 Ch. Ch. 429. (4) The petition should be presented by the nearest relative and, where the petitioner is out of the jurisdiction, some person within the jurisdiction should be joined as co-petitioner: Heywood & Massey's Lunacy Practice, 20. (5) It should be supported by the affidavits of at least two medical men: *Re Patton*, 1 Ch. Ch. 192, and such affidavits must shew all the facts evidencing the lunacy from which the court may judge for itself whether or not the prisoner is of unsound mind: *McIntyre* v. *Kingsley*, 1 Ch. Ch. 281; *Ex parte Persse*, 1 Moll. 219. (6) There should also be affidavits from members of the family of the alleged lunatic and other persons who know him, not merely giving their opinions, but stating with particularity the material facts pointing to unsoundness of mind and incapacity to manage himself and his affairs: Renton on Lunacy, 259.

Nothing can be inferred against the supposed lunatic from the fact that he is confined in a lunatic asylum. He may be there improperly. If, however, proper evidence is produced that the person has been found a lunatic by a foreign tribunal having jurisdiction to so find, the court would generally act upon such finding, though not binding upon it.

It is doubtful whether there is any power to serve the petition out of the jurisdiction. Leave to do so was given in *Re Webb*, 12 O.L.R. 194, but that was under the Ontario rules, which are not the same as those in force here.

*David*, for petitioner.

Mathers, C.J.] [Dec. 9, 1911.

WINNIPEG GRANITE, ETC., CO. *v.* BENNETTO.

*Discovery—Pleading—Statement of claim shewing no right to relief claimed against party examined—Refusal to answer questions—Assignment by A. to B. in trust for C.*

If the statement of claim does not state a case entitling the plaintiff to any relief against one of two defendants, an order should not be made compelling him to answer, on his examination for discovery, questions which would be relevant if a good cause of action had been disclosed.

The case alleged against the defendant McLaws was simply that the plaintiff company had assigned to him certain accounts and securities to be held by him as trustee for his co-defendant Bennetto as collateral security to a chattel mortgage which the plaintiff had given to Bennetto, and that Bennetto had collected through McLaws large sums of money upon such accounts and securities for which Bennetto had not accounted to the plaintiff. It was not alleged that McLaws had retained any of the moneys collected in his hands, or that the amount collected exceeded the amount necessary to discharge the mortgage.

*Held*, that, as the case was stated, McLaws was not a trustee for the plaintiff company and was not liable to account to them, and they had no right to complain because he had not done so, and no right to any relief against McLaws was disclosed. If it had been alleged in the statement of claim that McLaws had collected more than enough to satisfy the chattel mortgage and that the surplus was in his hands and that he had refused to pay it over, even though he had collected it as trustee for Bennetto, he would be a proper party to the action and the plaintiff would be entitled to relief against him: *Cooper* v. *Stoneman*, 68 L.T. 18.

*Stacpoole*, for plaintiff. *MacNeil*, for McLaws.

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Robson, J.] [Dec. 12, 1911.

SVEINSSON *v.* JENKINS AND WALLACE.

*Vendor and purchaser—Specific performance—Action by sub-purchaser against original vendor—Privity of contract.*

A purchaser of land from A., whose only title to the land is under an agreement of purchase from B., the owner, may, after default of A. in carrying out his contract with B., on notifying B., of his interest and tendering the full amount owing to him

by A., if it be refused, maintain an action against both A. and B. for specific performance and for an order that B. convey to him on payment of the amount due under his agreement with A.

*Smith* v. *Hughes*, 5 O.L.R., at p. 245; *Dyer* v. *Whiteney*, *Barnardiston's*, (Ch.), 160, and *Fenwick* v. *Bulman*, L.R. 9 Eq. 165, followed. Dictum of Perdue, J.A., in *Hartt* v. *Wishard Langan Co.*, 18 M.R. at p. 387, not followed.

*J. K. Sparling*, for plaintiff *Blake*, for defendants.

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Robson, J.] [Dec. 12, 1911.

CRANE & ORDWAY CO. *v.* LAVOIE AND FOURNIER.

*Bills and notes—Promissory notes signed in name of a proposed company by defendants as president and manager—Liability of as makers of the notes or for breach of warranty of existence and capacity of company — Persons signing as agents for others without authority—Bills of Exchange Act, R.S.C.*, 1906, *c.* 119, *s.* 52—*Implied warranty of the existence of the principal—Consideration—Forbearance to sue —Presentment for payment—Measure of damages.*

The defendant Fournier and one Laplante, a firm of plumbers, being indebted to the plaintiffs in the sum of about $1,500, it was proposed that the plaintiffs should accept the promissory notes of a company about to be formed by Fournier, the defendant Lavoie and others to be called "The Fournier Company" in discharge of the account against Fournier and Laplante.

The plaintiffs agreed to the proposal and shortly afterwards received the notes sued on which were signed "The Fournier Co., Ltd., F. X. Lavoie, President, D. Fournier, Manager." The proposed company was not incorporated until about three weeks afterwards, but the plaintiffs, at the time they received the notes, did not know that the incorporation had not yet taken place. If there was not an actual release of Laplante and Fournier's original debt, there was at least a request for forbearance in consideration of the notes being given and forbearance in fact was granted.

*Held*, 1. These facts shewed a sufficient consideration for the notes: *Crears* v. *Hunter*, 19 Q.B.D. 341, followed.

2. The defendants were liable for a breach of the implied

warranty of the existence and capacity of the company, and that the proper measure of damages was the amount of the notes and interest without taking into account any possible liability over of Laplante and Fournier to the plaintiff: *West London Commercial Bank* v. *Kitson*, 13 Q.B.D. 360, and *Simmons* v. *Liberal Opinion*, [1911] 1 K.B. 966, followed.

*Semble*, the defendants might also be held liable as makers of the notes and that the case was not within that class in which personal liability is excluded by words indicating that the maker is merely signing in a representative capacity or as agent: Story on Agency, par. 280, 281; Bills of Exchange Act, R.S.C. 1906, c. 119, s. 52, and Russell on Bills, p. 176, referred to.

The notes purported to be payable at the Northern Crown Bank, St. Boniface. The defendants respectively pleaded that the notes had not been presented for payment to them.

*Held*, that they could not succeed on an objection taken at the trial that the notes had not been presented for payment according to their tenor, and that there was no obligation on plaintiffs to present the notes in order to recover against defendants on their breach of warranty of the existence of their pretended principal.

*Craig* and *Ross*, for plaintiffs. *Dennistoun*, K.C., and *Dubuc*, for defendants.

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## Province of British Columbia.

### SUPREME COURT.

Morrison, J.] [Dec. 15, 1911.

WILLIAMS *v.* SUN LIFE ASSURANCE COMPANY OF CANADA AND DAVID SPENCER, LIMITED.

*Mortgage — Foreclosure — Power of sale—Order nisi for foreclosure—Order absolute never taken out—Sale of property —Knowledge of by mortgagor.*

A mortgagee having obtained an order nisi for foreclosure never took out the order absolute. Negotiations were entered into and completed for the sale of the property to a third party in 1906. The mortgagor had knowledge of the sale. In 1911 he brought action to redeem the property.

*Held*, that he had agreed to and did in fact abandon his rights, and by his conduct and delay had induced the mortgagees to alter their position on the faith that he had done so: *Jones* v. *North Vancouver Land & Improvement Co.* (1909), 14 B.C. 285, (1910), A.C. 317, followed.

*Moresby, Walls, Wilson*, K.C., *McCrossan* and *Harper*, for various parties.

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Full Court.] [Dec. 16, 1911.

IN RE LEVY.

*Statute—Construction—Liquor Act*, 1910—*Liquor licenses—Regulation of by by-law.*

By s. 74 of the Liquor License Act, 1910, the Legislature intended that the sale of liquor to travellers, to guests at hotels and restaurants, and for medical purposes should apply to all municipal by-laws restricting the sale of liquor, as well as to the Liquor Act itself, and that, too, whether the municipality had dealt with the matter of restricted hours.

IRVING, J.A., dissented.

*Luxton*, K.C., for appellant. *McDiarmid*, for corporation.

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Full Court.] [Dec. 16, 1911.

MOFFET *v.* RUTTAN.

*Municipal law—Plan of subdivision—Refusal of mayor to approve—Discretion.*

The court will not grant a writ of mandamus to compel a municipal authority to approve a plan of subdivision, where the authority has refused its sanction on the ground that the subdivision did not comply with the law, and has not exercised unreasonably the discretion allowed by the statute. *Reg. on Prosecution of Wright* v. *Eastbourne Corporation* (1900), 83 L.T. N.S. 333, followed.

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

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Full Court.] [Dec. 18, 1911.

TURNER *v.* MUNICIPALITY OF SURREY.

*Practice—Particulars—Interrogatories.*

Where a party had asked for and obtained particulars, and the order was reversed on appeal, and then applied for dis-

covery by interrogatories, the judge at Chambers dismissed the application on the ground that the application was an attempt to gain by another means that which had already been refused.

*Held,* that the judge was right.

*Davis,* K.C., and *McQuarrie,* for appellant. *Kapelle,* for respondent (not called upon).

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Full Court.] [Dec. 18, 1911.

CLARK *v.* FORD-MCCONNELL.

*Practice—Libel—Trial by jury—Nature of—Extension of time—Discretion.*

In an action for libel, notice of trial without a jury was served on defendants on the 11th of May, and on the 6th of June defendants gave notice under Order XXXVI., r. 2, of an application for an order extending the time for giving notice of trial before a judge and a common jury. The cause of the delay in giving this latter notice was due to an oversight of the solicitors' clerk.

*Held,* on appeal, that the time should have been extended in the circumstances.

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

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## Book Reviews.

*The Elements of Criminal Law and Procedure* with a Chapter on Summary Convictions. By A. M. WILSHERE, M.A., Grays Inn, Barrister-at-law. Second edition. London: Sweet & Maxwell, Limited. 3 Chancery Lane. 1911.

This book has been considerably enlarged since the previous edition; remaining, however, an analysis of the elements of criminal law and procedure. It is intended primarily for the use of students, but a perusal of its pages by practitioners would be a very helpful exercise, and a remembrancer of many things, which may have been forgotten. Its value to the student is well known.

*A Primer of Roman Law.* By W. H. HASTINGS KELKE, M.A., of Lincoln's Inn, Barrister-at-law. Author of "An Epitome of Roman Law," etc. London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1912.

It is unnecessary for us to enlarge on the proposition that no legal education can be complete without the study, more or less, of Roman law. This book does not pretend to be an epitome of Roman Law, but is confined to the simpler system of Justinian's Institutes, the learning of which is elucidated with full explanations and copious illustrations. This is also a student's book.

## Obituary.

MR. JAMES HENDERSON, M.A., D.C.L.

The many friends of Mr. Henderson heard with deep regret that he died suddenly on the 28th ult., as the result of an operation.

This esteemed member of the profession was the son of Mr. James Henderson, formerly of Yorkville, adjoining this city. He continuously resided in Toronto since his birth in 1839. In 1858, Mr. Henderson took his first university degree at Trinity College, Toronto, and was made a D.C.L. in 1900. He was admitted to the Bar in 1859 and practised in that city until his death. He was at one time a partner of Sir Thomas Galt, subsequently Chief Justice of the Common Pleas, but for many years past, he was in partnership with Mr. John T. Small, K.C., their firm having a large practise in the city of Toronto. Mr. Henderson was perhaps better known in business circles, and as a trusted solicitor and business man, rather than as an advocate in the courts. He was on the boards of many financial institutions; and devoted much time and attention to the affairs of Trinity College, to which he was a large contributor. He took an active part in the negotiations which led to the federation of that college with the University of Toronto. Courteous, genial, generous, and of the highest honour, he was loved and respected by all who knew him.

## Mr. J. Herbert Mason.

It is not usual in the columns of this journal to record the demise of persons unconnected with the legal profession, but an exception, we think, may well be made in the case of the gentleman whose name heads this paragraph.

Mr. Mason, though not a member of the profession, had for most of his life much to do with lawyers, and it was owing to this fact that he was induced to become an energetic advocate of an important reform in the laws relating to land transfer. This claim to remembrance in our columns rests on the fact that he was one of those who took a practical interest in the introduction into Canada of what is called the "Torrens' system of land transfer." It was largely due to the influential support which he was able to give the movement, both as a speaker, and a writer, that it succeeded in securing the necessary public attention to warrant its parliamentary adoption in the great north-western provinces of the Dominion.

Mr. Mason had an eminently practical turn of mind, and having thoroughly satisfied himself of the feasibility of the scheme he gave to its furtherance a most energetic support, and liberally contributed to the expenses which its advocacy involved. As one of the original organizers and President of the Canada Land Law Amendment Association, he devoted himself with his usual energy and perseverance to promoting the object of the Association, and had the satisfaction of seeing the system he advocated widely adopted.

Mr. Mason was a native of Devonshire. He came to Canada in 1842, and in 1855 organized the Canada Permanent Loan and Savings Society, of which, until he closed his business career, he was the chief executive officer. Untiring energy and tenacity of purpose characterized all Mr. Mason's labours, with the result that success usually crowned his efforts. He died at Toronto on the 9th December last, having attained the great age of eighty-four years and having during his long life earned and retained the sincere respect and esteem of all who knew him.