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PATERNAL GOVERNMENT OR TRUE FREEDOM.

The difference between nations in the administration of laws is an interesting study. In some countries, such as Germany, it takes a paternal form, whilst among our Anglo-Saxon people it rests upon a broader and safer basis.

The *National Review* for last month contains an article on "Germany and Ourselves" from the pen of Captain Bertrand Stewart, who was for two years an inmate of a German prison, and whose trial raised a storm at the time that will be remembered by many. Writing, as he does, from a personal experience his views are entitled to the greater weight. In the article referred to he compares our system with the German and enlarges upon the freedom and right to justice on all occasions which we enjoy.

The writer gives many details confirmatory of his views, and amongst others he tells us that in Germany "a prisoner may be kept six months in a cell waiting for a trial timed to suit the political exigencies of the moment. A penniless agent provocateur, the creature of the Government—and already convicted of every sort of crime—may try, but fail, to provoke the commission of some act against the law and yet be the only witness against the prisoner. This man's perjury, admitted in the secrecy of the magistrate's room—as the prosecution is careful to arrange—counts for nothing. Then, worst of all, a prisoner may be tried behind closed doors despite all his protests; lying statements, which the prisoner is given no chance to deny in public, may be published for political purposes; and a judgment given absolutely contrary to the evidence and the admissions of the prosecution because it may be politically useful, or an agitation may be in progress for more ships. All this, according to their

standard, is justice, and according to their view is right. Is this, and the Sabre law exemplified at Zabern, and the treatment of their conquered provinces, a system which the most callous amongst us would wish to see imposed on any of our people, whatever their race?"

The writer naturally enough branches off to a subject which has been much written about and which, though kept in the background, looms up from time to time. We allude to what is popularly termed the German menace. And it may be remarked that this branching off is not inopportune, for no free people can see without regret the advancement of a nation so careless of true freedom and the proper administration of justice.

"Germany has learnt that the policy of open hostility to England at all times does not pay, because it keeps us too much on the qui vive, and because it strengthens the hands of those who urge that full preparations should be made to meet any German act of aggression. Hence a shew of friendliness has been assumed in the hope that she may obtain concessions from us, and that the British nation, with its proverbially short memory, will be lulled into a feeling of false security. But what is really her present position as regards ourselves? There have been pleasant speeches by the German Ambassador. But has there been a reduction of one soldier or one sailor as a proof of this friendliness? On the contrary! If the change of attitude indicated a real change of feeling towards England, it should have been accompanied by at least a decrease in the German navy."

Germany's hunger for more land is, of course, at the bottom of the German menace. The condition of things in reference to the overflow of population and the need of territory for colonization purposes was taken up recently by a writer in one of the reviews and discussed in relation to the position of eight nations, four of whom, England, the United States, Russia and France, have no such need, whilst four others, Germany, Austria, Italy and Japan have. Past centuries have seen the remodelling of national boundaries caused by the overflow of population into

other countries. The great danger so far between any of these countries is not so much national antagonism which might arise in a variety of various ways as from the law of supply and demand in relation to increase of population and decrease of available territory whereon to locate the overflow.

The article in the *National Review* concludes with a warning, which may possibly be more important than many are disposed to think, especially at a time when England is in the throes of an internal conflict, which such a man as Field-Marshal Roberts asserts may, under certain conditions, seriously endanger the discipline and efficiency of our army and so invite attacks:—

"We must realize that the preservation of the priceless blessings of freedom and justice depend on our keeping ourselves strong enough to prevent Germany defeating us and forcing her system and her 'justice' on our people. When Germany increases her armaments, we must do likewise. When Germany reduces her armaments, we can think of doing likewise, but not till then. Never must we by any shew of friendliness or by any soft words, whoever may be the spokesman, be lulled into a feeling of security. The methods of the ruling class in Germany change, but behind it all, with their ever-increasing naval and military forces, they always pursue their unaltered aim. Co-operation throughout the Empire, real efficiency in all branches of our defensive services, and the readiness of everyone to take his share in the defence of the Mother Country and the great Dominions can alone bring us security."

ADMINISTRATION OF THE CRIMINAL LAW.

The remarks of the Chief Justice of the Common Pleas, Ontario Supreme Court, will be good reading for magistrates in this Province as well as in others. He well and forcibly expresses the requirements of British justice in the administration of the criminal law. It is that spirit of fair play and justice which has made England what it is. It is that spirit which has so impressed the nations which have come under the sway of

Great Britain; so much so that the law of England is synonymous in their minds with fair play and justice, and this has largely reconciled them to English dominion. We quote from the judgment in the case of *Rex* v. *Roach*, 6 O.W.N. p. 630:—

"There was no real trial, in a legal sense, of the applicant, though he was found guilty of a crime for which he might have been imprisoned with hard labour, for six months, and fined $50, on a summary conviction. By the term "real trial" I mean that unprejudiced, full, and fair trial which every one charged with a crime is entitled to, and which the Criminal Code of Canada explicitly requires: see secs. 721, 714, 715, 942, 943, 944, 686, and 682; a trial none the less, but sometimes the more, necessary where preconceived notions of guilt exist, even though they may be well-founded. Such a trial does not necessarily involve any waste of time, nor need more be expended in it than is somtimes spent in trials which have to be gone over again because not real trials. Waste of time is often the result of superfluous words, and things not pertinent. No information was laid against the accused; no specific charge was made against him; only a general one of indecent exposure. Neither the shorthand notes of the trial, nor the magistrate's full report of the case, shews that there was any arraignment of the prisoner; see sec. 721 of the Criminal Code; nor that he was otherwise informed, in any formal way, of the charge against him. The school-girl witnesses were not sworn, although there does not appear to have been good reason for not taking their testimony under oath. According to the testimony of a bystander, who is described as a clergyman, the testimony of the girl-witnesses was whispered into the magistrate's ear; and the prisoner's request for an adjournment of the trial so that he could procure counsel to conduct his defence was refused, the magistrate telling him that a lawyer could do him no good. The only reason suggested for the whispered evidence is modesty; but modesty, whether properly described or false or not, cannot justly be permitted to deprive any person upon trial for a crime of his right to hear all the evidence adduced against

him. And after the prisoner was represented by counsel, he was not permitted—as the shorthand notes of the trial clearly shew—to make his full defence, as, whether strictly regular or not, he ought to have been; but was restricted to evidence of his good character. It ought not, and may not, be necessary, even if excusable, to repeat again the oft-quoted words of the Lord Chief Justice of England, upon this subject, so forcibly expressed in the case of *Martin* v. *Mackonachie* (1878), 3 Q.B.D. 730, 775, but I do so lest we Justices, whether of superior or inferior courts, forget; and because that case is in point upon the main question involved in this case, as the first words I intend reading shew: 'It seems to me, I must say, a strange argument in a court of justice, to say that when, as the law stands, formal proceedings are in strict law required, yet if no substantial injustice has been done by dealing summarily with a defendant, the proceeding should be upheld. In a court of law such an argument â convenienti is surely inadmissible. In a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings in pœnam are, it need scarcely be observed, strictissimi juris; nor should it be forgotten that the formalities of the law, though here and there they may lead to the escape of an offender, are intended on the whole to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has a right to insist upon them as a matter of right, of which he cannot be deprived against his will; and the Judge must see that they are followed. He cannot set himself above the law which he has to administer, or make or mould it to suit the exigencies of a particular occasion. Though a murderer should be taken red-handed in the act, if there is a flaw in the indictment the criminal must have the benefit of it. If the law is imperfect, it is for the Legislature to amend. The Judge must administer it as he finds it. And the procedure by which an offender is to be tried, though but ancillary to the application of the sub-

stantive law and to the ends of justice, is as much part of the law as the substantive law itself.'

Amendments, by the Legislature, from time to time, to the law have made escapes from substantial justice on mere technicality few and far between, if they ever need occur. And I may add that, as the provisions of the law exist for the purpose of making a case so plain that substantial justice can be done, how is it possible to assert that justice had been done when some of the means the Legislature has deemed necessary in reaching that end have been disregarded?''

REFUSAL OF ROYAL ASSENT TO BILLS.

The Home Rule question and the refusal of Ulster to leave the shelter of the Parliament of Great Britain and come under the powers of a provincial government which would necessarily be controlled by the Irish Nationalist party (we call them Fenians in this country since their attempt to control Canada in 1866) naturally suggests an enquiry as to the right of the King to refuse assent to the bill which has recently become law, subject to such assent. Whilst the King would have the legal right to refuse such assent, it is not likely that he would take such an unusual course. The law on the subject is thus referred to in Hansell's Precedents:—

''The refusal of the Royal Assent, though it is now almost a century since it has been exercised, is and always has been an inherent and constitutional prerogative of the Crown. It ought, however, to be exercised with great discretion, as the King is never supposed to act in his political capacity, but by the advice of counsellors. The refusing of the Royal Assent to a bill agreed upon and offered to the King by both Houses of Parliament is, in fact, preferring the advice of his Privy Council or of some other person to the advice of the Great Council of the Nation assembled in Parliament. There was a very long debate upon the refusal of King William [III.] of the Royal Assent to the bill 'touching free and impartial proceedings in Parlia-

ment,' in which, however angry the House of Commons might be with the persons who had advised the measure and whom, as appears from their resolutions, they voted to be 'enemies to Their Majesties and the kingdom,' nobody presumed to question 'the right' of doing it, and the representation drawn up on that occasion puts this matter upon the proper and constitutional ground in praying His Majesty 'that for the future he will be graciously pleased to listen to the voice of Parliament and not to the secret advice of particular persons who may have private interests of their own separate from the true interest of the King and the people.' ''

DUTY OF TRAVELLER ON HIGHWAY WHEN APPROACHING RAILROAD CROSSING.

The law on this subject as found in the courts of the United States appears in the following article copied from *Case and Comment* for July. The authorities are given there in footnotes:—

"The deadly grade crossing will doubtless be with us for many years to come, even on the more important lines of railroad, so that, unfortunately, it will be a long time before the numerous decisions relative to the respective rights and duties of railroad companies and highway travellers toward each other will be out of date.

The inequality of the conflict between a train and an ordinary road vehicle or pedestrian when both attempt to occupy the same place at the same time would seem to be sufficient to impress upon those about to cross railroads with the necessity for extreme caution, but, judging from the numerous cases involving such a state of facts, crossing a railroad is one situation where self-preservation ceases to be the first law of nature.

The admonition so commonly seen, and seldom regarded in its entirety, to "stop, look and listen," has some support in law, though but few cases insist upon the doing of all three things

as a prerequisite to drawing consolation from the treasury of the railroad in case of injury resulting from a failure of the railroad's servants to take precautions required of them in approaching a highway, but, ordinarily, the traveller is required to look and listen for trains, to free himself from contributory negligence.

A traveller on a highway is required to use ordinary care in selecting the time and place for looking and listening before going upon a railway crossing, and, while it is not necessarily negligence to fail to look at the most advantageous point, the place selected must be such that the observation will be reasonably effective.

The traveller should bear in mind that trains ordinarily move much faster than horses, and not be content with an observation made at a considerable distance from the crossing, but should look for danger at a point near enough to enable him to cross in safety, at the speed he is going, before a train, going at the usual speed of fast trains, could cover the track which is observable.

The fact that the public customarily looks for trains at a particular place is an indication that it is a place which would be selected by a person of ordinary care, and one who looks at such a place cannot be declared negligent as matter of law.

A traveller is not called upon to stop and look for trains at a point so near the track that it is dangerous in itself. But as a general rule the duty to look for danger is not discharged by looking once merely, but is a continuing one which must be observed until danger is past, under ordinary circumstances, though the lookout need not be constant at all points in his passage.

When there are obstructions of the view of approaching trains, a traveller should look again after passing them, and failure to do so will, ordinarily, be held to be contributory negligence, though there may be circumstances under which one will not be considered negligent in not looking again after pass-

ing an obstruction; as, where it is so near the track that the traveller or his team will be nearly upon it before a view is afforded.

One of the favorite methods of getting hit by a train, as is shown by the analysis of a large number of crossing accidents, is by starting to cross behind a train which is going in one direction, after waiting for it to pass, without waiting until it has passed far enough to enable the traveller to see a train approaching from the opposite direction on another track. Under such circumstances the courts are inclined to refuse to make the railroad company pay the traveller or his executors for the damage resulting, such action not being considered ordinary care, especially where trains are to be expected at any moment, though it is not necessary to constitute such care, to wait until the passing train no longer obstructs the view; and the circumstances may be such that the question of negligence will be left to the jury, especially where the traveller has waited till the first train has passed some considerable distance. When smoke from a passing train obscures the view of the other tracks it is negligence per se to attempt to cross without waiting for a clear view, unless there is a conflict in the evidence as to the extent to which the view is obscured when the question of contributory negligence will be left for the jury to decide.

While the Pennsylvania courts have promulgated a rule that if the view of the track is obstructed the driver must get down from his vehicle and go forward to a point where the view is unobstructed, the seed of those decisions, so pregnant with economy for the railroads, has fallen upon barren ground elsewhere, the courts of other states holding that no such duty is imposed upon the traveller, such precaution being extraordinary care, which is more than is required. Even in Pennsylvania this rule is not strictly enforced unless a view of the track can be had in no other way. Some cases in other states recognize the Pennsylvania rule to the extent of holding that there may be circumstances under which ordinary prudence might require that

a driver go ahead of his team to look for a train, as where he could neither see nor hear an approaching train; but whether this extra precaution is required is a question of fact for the jury. And mere inability to hear the ordinary noises of a train is not sufficient to require that such precaution be taken, if signals are required or ordinarily given at that crossing, and, if given, could be heard.

It would seem to go without saying that a traveller is not guilty of contributory negligence in failing to look for trains when to look would be useless, but nevertheless the courts have been called upon to say so in numerous cases, examples of which are cited in the foot-note.

As a part of the general rule that a traveller should look and listen upon approaching a railroad crossing, it is laid down that he should look in both directions. But when greater danger is to be anticipated from one direction than the other, he may be justified in paying most attention to that direction, though this cannot be said to be a general rule.

Running one train or detached cars closely behind another train creates a situation which is peculiarly liable to result in catching a traveller off his guard, and the fact that a train has just passed is regarded as some excuse at least for a traveller who neglects to look in the direction from which it came.

A traveller on a highway has a right to rely somewhat upon the performance of a custom or duty of a railroad company to give signals upon approaching a crossing; but its failure to do so does not excuse want of care on his part. He has no right to assume that no train is approaching, if his view is obstructed, from the mere fact that no whistle is sounded. But failure of a driver to stop, look, and listen is excused where his team is beyond his control.

And while the cases are not entirely harmonious the weight of authority, as well as the better reasoning, is that where a road which crosses a railroad is apparently open to the public, and is used by it with the assent or acquiescence of the railroad

company, it should give signals upon approaching it though it is not a legally established highway.

Where a railway crosses a highway on a trestle it owes a duty to travellers on the highway to give warning of its approach so that the traveller may take precautions to prevent his horses from becoming frightened.

The fact that safety gates are open is sometimes regarded as an implied invitation to cross, and an assurance of safety; but the weight to be given to such implied invitation depends upon the circumstances. And the fact that safety gates at a crossing are open is not such an absolute assurance of safety that a traveller can, without negligence, proceed to cross without any precautions—though the law will not hold him to the same degree of vigilance as to looking and listening as when he approaches an unguarded crossing; and whether he exercised the care necessary under the circumstances is for the jury, unless the evidence conclusively shews that he rashly went in front of the train.

Likewise while the signal of a flagman to cross will not relieve one from the duty to look and listen before driving upon a railroad crossing, he will not be expected to use the same amount of care in these respects as if no such signal had been given; and it is for the jury to say whether in a particular case a traveller is justified in relying solely upon the signal of the flagman or should take additional precautions. In one case an ingenious reason is given for requiring a traveller to look and listen for trains, though there is a flagman at the crossing, the argument being that flagmen are placed at extra-hazardous crossings, not to relieve travellers from taking ordinary precautions, but to offset the increased danger so that the precautions required of a traveller at ordinary crossings will be, together with the assistance of the flagman, effective for his protection at the more hazardous one.

The endless number of cases involving crossing accidents leave no hope for an end of them under present conditions. Safety gates, automatic signals, and flagmen, reduce the danger

considerably, and also increase it somewhat in other ways by leading the public to rely upon them to their greater danger when they fail to work. The only sure way to end the slaughter is to eliminate both the human and mechanical elements absolutely, by separating the grades of the highways and railroads at all crossings which are dangerous, either because of physical conditions or the large amount of travel. This is a step in progress which, like other safety devices, will probably have to be forced upon the railroads, but which, as was the case with the air brake, will in the end doubtless prove to be a real economy for them as well as the public."—*Case and Comment.*

PART PERFORMANCE.

The recent case of *Daniels* v. *Trefusis*, 109 L.T. Rep. 922, (1914) 1 Ch. 788, adds another authority to the long list of decisions on the question of what does, and what does not, amount to part performance of a contract in order to take the case out of the Statute of Frauds. The decision is an important one. It is proposed in this article to bring to the reader's attention the present state of this branch of the law, so that the significance of the recent case may be the better appreciated.

The doctrine of part performance is, of course, an equitable one. It is chiefly remarkable because of its having been called into being to frustrate the express and unequivocal provisions of an Act of Parliament. Most equitable doctrines were the outcome of hardship resulting from common law rules. But this doctrine grew out of, and because of, a seventeenth century statute designed to prevent fraud. It made its first recorded appearance only ten years after the Act was passed. The case of *Lester* v. *Foxcroft* (1701), Colles 108, is generally reputed to have been the first occasion on which the court gave relief against the statute. But, in point of fact, in 1685 Lord Guilford in the case of *Butcher* v. *Stapely* (1685), 1 Vern. 364, decreed performance of a contract which had not been signed; while two years previously a case (*Hollis* v. *Edwards* (1683), 1 Vern. 159)

had been before the same Lord Keeper in which relief, grounded on part performance, was sought but refused.

Nothing could be clearer than the provisions of the fourth section of the Statute of Frauds. "No action," runs the section, "shall be brought . . . to charge any person . . . upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the person to be charged therewith or some other person thereunder by him lawfully authorized." But the courts of equity would not allow a man, who had engaged with another to purchase or to sell land, to use the provisions of the statute as a defence, where that other had expended money on the faith of the engagement. In such a case the court would not allow the mere fact that the contract had not been reduced into writing in accordance with the Act to stand as a bar to the enforcement of the contract by the court. Pithily put, courts of equity would not permit the statute to be made an instrument of fraud.

Lord Justice Brett in *Britain* v. *Rossiter*, 40 L.T. Rep. 240, 11 Q.B.D. 123, at p. 129, described the cases in the courts of equity which built up the doctrine of part performance as bold decisions on the words of a statute. Yet, logically, there was ground for the development of the doctrine notwithstanding anything contained in the Act. For, as it will be observed, the statute does not expressly and immediately vacate contracts if made by parol or if unsigned. It only precludes the bringing of actions to enforce them by charging the contracting party: see per Lord Ellenborough in *Crosby* v. *Wadsworth* (1805), 6 East 602, at p. 611. Where, however, a suit was brought on the ground that the plaintiff had, on the faith of a parol or unsigned contract, expended moneys and prejudiced himself with the knowledge and acquiescence of the other party to the contract, such a suit was not brought on the contract, but on the equities.

This point was lucidly illustrated by Lord Selborne as Lord Chancellor in the more modern case of *Maddison* v. *Alderson*,

49 L.T. Rep. 303, 8 App. Cas. 467, where his Lordship shewed clearly the distinction between bringing an action on a contract and bringing an action on equities arising out of the conduct of the parties. The learned Lord Chancellor supposed the case of a parol contract to sell land completely performed on both sides as to everything but the conveyance, and where the whole of the purchase money had been paid and the purchaser put in possession, and where he had expended money on costly buildings upon the land and had granted leases to tenants. "The contract," said his Lordship, "is not a nullity. There is nothing in the statute to estop any court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences." His Lordship then proceeded to point out that if, in such a case as he had supposed, a conveyance were refused and an action for ejectment brought by the vendor against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties without taking into consideration the contract itself. The matter would have advanced beyond the stage of contract, and the equities which would have arisen out of the stage which it had reached could not be administered unless recourse was had to the contract. There would be a choice, therefore, between undoing what had been done—which might often be impossible, and, even if possible, often manifestly unjust—and completing what had been undone. "It is not arbitrary or unreasonable to hold," continued his Lordship, "that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from res gestæ subsequent to and arising out of the contract."

The question is often asked, Does the doctrine of part performance only apply to contracts in respect of land? Why does it not also apply, for instance, to the case of a contract not to be

performed within a year? Sec. 4 of the Statute of Frauds puts contracts of that kind in precisely the same position as contracts affecting interests in land. Why, then, should the courts of equity relieve in the one case and refuse to relieve in the other? The answer to these questions appears to be as follows: Where a contract is such that it falls within the requirements of the Statute of Frauds, the doctrine of part performance will apply if the circumstances are such that a court of equity would, prior to the Judicature Act, have decreed specific performance of the contract. This answer appears to beg the question, and so a little further explanation is necessary.

It is not every contract that the Court of Chancery had power to enforce. It could not, for instance, enforce a contract of service: see *Britain* v. *Rossiter,* 40 L.T. Rep. 240, 11 Q.B.D. 123, at p. 129. There would, therefore, be no enforceable equities in such a case. But it might well be that there were enforceable equities in cases arising out of contracts required to be in writing under the statute, other than contracts concerning land. Thus, a court of equity would enforce an agreement by a parent to settle money on the marriage of his child, where a suitor has been induced thereby to celebrate the marriage. An instance of this occurred in the case of *Hammersley* v. *De Biel* (1845), 12 Cl. & F. 45, where the suitor subsequently sued his father-in-law's estate. In that case Lord Cottenham clearly intimated an opinion that the doctrine of part performance did apply to such a case: Ibid., at p. 65*n*. The same Lord Chancellor subsequently expressed the same view in the case of *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551, at pp. 571, 572. Nor is there anything in the judgments delivered in the House of Lords in the case of *Maddison* v. *Alderson,* supra, to the contrary. Further, Mr. Justice Kay in an elaborate judgment in *McManus* v. *Cooke,* 56 L.T. Rep. 900, 35 Ch. Div. 681, at p. 687, after reviewing the authorities, said that those authorities seemed to him to establish, amongst others, the following propositions: (1) That the doctrine of part performance, though principally applied in cases of contracts for the sale or purchase of land or for the acquisi-

tion of an interest in land, has not been confined to those cases; and (2) probably it would be more accurate to say that the doctrine applies to all cases in which a court of equity would entertain a suit for specific performance if the alleged contract had been in writing.

Turning now to the nature of the doctrine, there must, of course, be a contract, and this contract must be clearly established. Again, as already intimated, the contract must be one which the court would enforce—that is to say, the contract must be one of which the Court of Chancery would have decreed specific performance.

Now, what acts amount to such a part performance of the contract that the court will adopt the doctrine? As was laid down by Lord Hardwicke in *Gunter* v. *Halsey* (1739), Amb. 586, the acts must be such as could be done with no other view or design than to perform the agreement. "All the authorities shew," said Lord Selborne in *Maddison* v. *Alderson*, sup., at p. 479, 'that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged." "An act," said Sir James Wigram in *Dale* v. *Hamilton* (1846), 5 Hare 381, "which, though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance taking the case out of the Statute of Frauds."

It is undoubtedly somewhat surprising to find that the payment of purchase money is not an act of part performance within the meaning of the doctrine. Lord Hardwicke appears to have been of opinion that such a payment would be part performance, but it is now well established that it is not. Lord Justice Knight Bruce in *Hughes* v. *Morris* (1852), 3 DeG. M. & G. 349, at p. 356, laid it down that the payment of money is no part performance. "It is well established," said Lord Justice Cotton in *Britain* v. *Rossiter*, sup., at p. 131, "and cannot be denied that the receipt of any sum, however large, by one party under the contract, will

not entitle the other to enforce a contract which comes within the fourth section."

The reasons which are given for the rule that payment of a part or the whole of the purchase money does not constitute a sufficient act of part performance are not satisfactory; but probably the most logical reason is that put forward by Lord Selborne in *Maddison* v. *Alderson*, sup., viz., that the payment of money is an equivocal act, not in itself, until the connection is established by parol testimony, indicative of a contract concerning land.

The act usually relied on as part performance is the letting of the purchaser into possession of the land. "Admission into possession," said Sir Thomas Plumer in *Morphett* v. *Jones* (1818), 1 Swan. 172, at p. 181, "having unequivocal reference to the contract, has always been considered an act of part performance. The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has, therefore, constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms; the court regarding what has been done as a consequence of contract or tenure."

Where the letting into possession is followed by acts done on the land by the party so let in, the case of part performance is all the easier to establish. In *Lester* v. *Foxcroft*, sup., the party seeking specific performance of the parol contract entered the land which the other party had agreed to let to him, and at his own expense pulled down the house and built several new ones, and he had actually granted leases of some of these houses to some third parties. All that had been done with the knowledge and consent of the other party to the contract.

In *Cook* v. *Corporation of Seaford*, L. Rep. 6 Ch. App. 551, a municipal corporation passed a resolution agreeing to grant a lease for a term of three hundred years to the plaintiff of a part of the beach opposite a field of the latter. The plaintiff built a wall and terrace on part of the beach, and the court held that the corporation were obliged to grant the lease. Again,

in *Morphett* v. *Jones* (1818), 1 Swan. 172, specific performance was decreed where the plaintiff had been let into possession and expended large sums of money on repairs and improvements. In *Pain* v. *Coombs* (1857), 3 Sm. & G. 449, a decree for specific performance was made of a verbal agreement to grant a lease of a farm. The plaintiff had in this case also been let into possession, and had expended moneys in cultivating and managing the farm in accordance with the terms of the verbal agreement. In that case Vice-Chancellor Stuart pointed out the difficulty of treating acts of cultivation as referable to the contract. "Where there is an uncertainty," said the Vice-Chancellor, "as to the terms of the contract, there is a great danger in attempting to stretch the law of those cases in which part performance is held to take a parol agreement out of the operation of the Statute of Frauds. On the other hand, where there is a reasonable degree of certainty as to the terms of a parol agreement for a lease, and where the tenant has been let into possession and has expended money on the faith of the agreement, it is the duty of the court to find grounds, if it can, for preventing the possession from being disturbed by a strict adherence to the letter of the Statute of Frauds." Letting into possession, followed by acquiescence in improvements made by the party so let in, were also the grounds for decreeing specific performance in the case of *Stockley* v. *Stockley* (1812), 1 V. & B. 23. But that case was one of a family arrangement.

But mere possession of itself is not necessarily part performance. Thus, suppose a tenant in possession of land under a lease just expired sets up a new agreement, his retaining possession is just as referable to a mere holding-over as to any such alleged agreement. His continuance in possession is not, therefore, an act of part performance: see *Wills* v. *Stradling* (1797), 3 Ves. 381.

But it is equally clear that because a man is in possession under a prior title he is not debarred from setting up part performance in support of a new agreement to extend his interest or enlarge his interest in the premises. But in such a case the

fact of continued possession is not of itself conclusive. He must rely on something more. In *Nunn* v. *Fabian*, 13 L.T. Rep. 303, L. Rep. 1 Ch. 35, a yearly tenant in possession of certain premises claimed specific performance of an agreement between himself and his landlord, whereby the latter agreed to grant him a lease for twenty-one years at an increased rent, and an option to purchase the freehold. In pursuance of this agreement the tenant paid some rent at the increased price, but before the lease was granted the landlord died. The executors refused to execute the lease, and proceeded to advertise the premises for sale. They set up the Statute of Frauds as a defence to the tenant's suit. The Lord Chancellor (Lord Cranworth) found that there was clear evidence of the alleged agreement, and held that the payment of rent at the increased rate fixed by the agreement was a sufficient part performance to take the case out of the statute. Specific performance was, therefore, decreed. Another case of continued possession ought to be mentioned. In *Williams* v. *Evans*, 32 L.T. Rep. 359, L. Rep. 19 Eq. 547, a tenant in possession filed a bill against his landlord for specific performance of a parol agreement for a lease of thirty years. On the faith of this agreement the tenant had agreed to sublet the premises, and had allowed his sub-tenant to execute certain works in the nature of alterations and repairs to buildings. These works had been done with the knowlege and approval of the landlord. Vice-Chancellor Mains held that the doing of these works was just as much a part performance as if they had been done by the tenant, and he decreed specific performance.

The next class of cases to be considered is where possession has not been given under the contract, and where the party seeking specific performance is not in possession under a previous title—in other words, where there is no continuance in possession. As we shall shew later, it is to this class that the recent case before Mr. Justice Sargant belongs.

The best example of this class of case is furnished by the case of *Dickinson* v. *Barrow*, 91 L.T. Rep. 161, (1904). 2 Ch. 339.

In that case the plaintiffs had acquired a building estate which they laid out, and on which they erected houses. They sold the houses when erected. The defendant desired a house and chose its position. The plans of the originally intended house on the site chosen by her required a variation in order to accord with her wishes. The altered plans were criticized, altered, and approved by the defendant, and the price was fixed accordingly. The plaintiffs submitted the new plans to the local authority, who passed them. A deposit was paid and the house was erected. While the house was in the course of erection the defendant visited it from time to time. She called attention to the fact that in building there was some deviation being made from the plans as finally settled. This required some alteration in the half-finished work—particularly the raising of the joists of a floor, which had already been fixed. On these facts Mr. Justice Kekewich decided that there had been a sufficient act of part performance to take the case out of the Statute of Frauds, and his Lordship gave the usual judgment for specific performance.

The judgment of Mr. Justice Kekewich in the last-mentioned case is particularly instructive, as his Lordship traced step by step the various stages of the case, stating after each successive act or event the reason why that act or event was not a sufficient act of part performance. It was not wholly the alterations in the half-finished work made at the instance of the defendant that constituted, in his Lordship's opinion, the necessary part performance, but rather the fact that she was not regarded as a mere trespasser when inspecting the building. "When a lady goes again and again," said his Lordship, "and insists on having alterations with a right—whether legal or moral does not matter—to be there, then it seems to me that I have an unequivocal act, and that she was not a mere trespasser, but was interested in the matter on the footing of a legal contract."

In the recent case of *Daniels* v. *Trefusis*, sup., mentioned in the opening lines of this article, the facts were both peculiar and involved. Mr. Justice Sargant, however, expressed the view that, in the facts of the case, the giving of notice by the vendor

at the instance of the purchaser to certain tenants in occupation of the premises, in order to obtain early possession, constituted an act of part performance as unequivocally referable to the contract as if the purchaser had taken possession of part of the property.—*Law Times.*

What Irish Courts of Equity call "the doctrine of graft" —a branch of the ordinary doctrine of constructive trust— applies most strictly to a person who enters upon the lands of an infant with knowledge of the infant's rights. Such an one becomes a bailiff or a trustee for the infant, and on acquiring by virtue of his position any new or enlarged interest in the lands, is bound to hold that interest for the infant's benefit. *Smyth* v. *Byrne* ([1914], 1 Ir. R. 53), is possibly an extension of this well-known doctrine: at all events, it is the first decision that exactly the same principles apply to entry on the lands of a lunatic. A person so entered with notice of the lunacy and of the lunatic's rights to the land: the lunatic had held under a contract of tenancy: a new letting was made to the person who had entered, and the Court of Appeal decided that this was "a graft" on the old tenancy. "We must take the basis of the doctrine to be that the minor is helpless, and therefore cannot assent." The same state of incapacity to defend his rights existed in the case of a lunatic; he likewise could give no valid authority to anyone; and, therefore, the Court thought that the same equitable doctrine should apply for his protection.—*Law Magazine.*

REVIEW OF CURRENT ENGLISH CASES.

APPEAL—NON-APPEARANCE OF RESPONDENT—ORDER IN APPEAL MADE IN ABSENCE OF RESPONDENT—APPLICATION TO REOPEN AND RESTORE APPEAL—JURISDICTION—ORDER PASSED AND ENTERED.

In Hession v. *Jones* (1914) 2 K.B. 421, the plaintiff recovered judgment in the County Court from which the defendant appealed. On the appeal coming on to be heard, counsel appeared for the appellant but no one for the plaintiff, and the appeal was heard and disposed of in his absence. After the order allowing the appeal had been drawn up and issued, the plaintiff applied to reopen the appeal and to restore it to the list for argument on the ground that owing to his solicitor's oversight he had not been represented. The Divisional Court (Bankes and Avory, JJ.) held that they had no jurisdiction so to do.

JURY ACTION—DISAGREEMENT OF JURY—MOTION FOR JUDGMENT —JURISDICTION.

Skeate v. *Slaters* (1914) 2 K.B. 429. This action was tried by a jury and at the conclusion of the plaintiff's case the defendant moved for judgment. The Judge refused the application and witnesses were called for the defence and the case submitted to the jury who disagreed. The defendant then again moved for judgment on the ground that upon all the evidence the jury could not reasonably find a verdict for the plaintiff. This motion being refused the defendant appealed and the Court of Appeal (Lord Reading, C.J., and Buckley and Phillimore, L.JJ.) held that in the circumstances it had jurisdiction under Ord. lviii r. 4, to enter judgment for the defendant if the evidence as a whole was so weak that a verdict for the plaintiff would be set aside as unreasonable; yet considered, that in the present case the evidence was not so weak as to justify that course. Their Lordships express the view that the Judge at the trial might have given judgment for the defendant if the whole evidence failed to disclose any cause of action against the defendant, notwithstanding he had previously refused a motion for judgment at the close of the plaintiff's case. In Ontario where the jury disagree the case may be retried at the same or any subsequent sittings. See Ont. Rule 500.

LANDLORD AND TENANT—SURRENDER OF TENANCY—TENANT REMAINING IN POSSESSION AFTER TERMINATION OF LEASE—EXECUTION AGAINST TENANT—CLAIM OF LANDLORD FOR RENT—8 ANNE c. 14, ss. 1, 6, 7—(R.S.O. c. 155, ss. 40, 55, 56).

Lewis v. *Davies* (1914) 2 K.B. 469. In this case judgment had been recovered by the plaintiff against the defendant and execution issued thereon under which the defendant's goods were seized, in July, 1912. The defendant had been tenant of the premises on which the goods were seized, but had surrendered his lease in March 1912, and had been permitted by the landlord to remain in possession. The landlord claimed under a statute to be paid a year's rent in arrear in priority to the execution creditor, but the Court of Appeal, following *Cox* v. *Leigh*, L.R. 9, Q.B. 333, held that the Statute of 8 Anne, c. 14, ss. 6, 7, (R.S.O., c. 155, ss. 55, 56) authorizing distress within six months after the determination of a tenancy, did not have the effect of giving the landlord any priority for the rent distrained for under s. 1, as against an execution creditor, and that priority only existed under s. 1 when the relationship of landlord and tenant was still subsisting.

WILL—TENANT FOR LIFE—GIFT OF DEER IN PARK—CONSUMABLE THINGS—VALIDITY OF GIFT OVER.

Paine v. *Warwick* (1914) 2 K.B. 486. At present deer parks cannot be said to be very common in Ontario or any other part of Canada, but they may possibly in the future be considered a proper adjunct to a family mansion, and it may be therefore useful to remember that Pickford, J., decided in this case that the gift of deer in a park for life with remainder over is a good gift in favour of the remainderman; and that deer so bequeathed do not come within the class of things, *quæ usu consumuntur*, and that the tenant for life is *prima facie* bound to keep up the herd and that any additions he may make for keeping it up become subject to the provisions of the will.

INTERPLEADER—FIRE INSURANCE—INSURANCE IN NAMES OF LESSOR AND LESSEE—INSURANCE MONEY—CLAIM BY LESSOR TO INSURANCE MONEY—CLAIM BY LESSEE THAT INSURANCE MONEY SHOULD BE EXPENDED IN REBUILDING—ADVERSE CLAIM.

Sun Insurance Co. v. *Galinsky* (1914) 2 K.B. 545. This was an application for an interpleader order in the following circum-

stances. The applicants had insured certain premises against fire in favour of the lessors and lessees thereof. The premises had been destroyed and the insurance moneys had become payable. The lessors claimed the money, the lessees contended that it should be applied in rebuilding on the demised premises as provided by 14 Geo. 3, c. 78, s. 83; and the Court of Appeal (Williams, Buckley and Kennedy, L.JJ.) held, overruling Bucknill, J., that the case was not proper for interpleader, as the claims of lessors and lessees were not adverse claims to the money within the meaning of the Rules.

LANDLORD AND TENANT—LEASE—COVENANT TO REPAIR—DEATH OF LESSEE—EXECUTOR DE SON TORT.

Stratford-upon-Avon v. *Parker* (1914) 2 K.B. 562. This was an attempt to make the defendant liable as executor *de son tort* of a deceased lessee for breach of covenant to repair. The facts of the case were that an assignee of the lease in question had died intestate, leaving no estate except the lease. During her lifetime her son, the defendant, had collected the rents for her. After her death in 1910 he continued to collect them, and after paying the ground rent in his mother's name to the plaintiffs, paid the balance to his sister. The sister died in 1912 and the plaintiffs shortly afterward became aware of the death of the mother and after some correspondence with the defendant they entered into possession of the demised premises. The plaintiffs contended that the defendant, by intermeddling with the leasehold, had made himself personally liable on the covenant to repair. The County Court Judge who tried the case held that the defendant had merely acted as the agent for his sister after his mother's death, that there was no evidence that the defendant had ever taken possession of the term as his own, or intended to act for himself, and he therefore dismissed the action. On appeal to the Divisional Court (Lush and Atkin, JJ.) the judgment was affirmed on the ground that the defendant was not liable by reason of privity of estate as the lease had never vested in him, and that he had not so acted as to make himself liable by estoppel. The case was distinguished from *Williams* v. *Heales*, L.R. 9, C.P. 117, because there the defendant had entered and taken possession and paid the ground rent in his own name, whereby he was held to be estopped from denying that he was lessee; but in the present case what had been done by the defendant was held not to amount to an estoppel.

CRIMINAL LAW—AUTREFOIS ACQUIT—PERIL OF CONVICTION ON PREVIOUS CHARGE—TWO OFFENCES SUBSTANTIALLY THE SAME.

The King v. *Barron* (1914) 2 K.B. 570. The defendant in this case had been previously indicted for sodomy and acquitted. He was charged in the present case with committing an act of gross indecency with another male person. The facts proved were admittedly the same as those on which the previous charge was based; the defendant pleaded *autrefois acquit* and gave the former charge and acquittal in evidence, but it was held by Ridley, J., that the plea was not proved, and the defendant was convicted. The Court of Criminal Appeal (Lord Reading, C.J., and Lawrence and Lush, JJ.) affirmed the conviction, holding that to establish a plea of *autrefois acquit*, it must be shown either that the defendant had been previously acquitted for the same offence, or could have been convicted at the previous trial of the offence with which he is subsequently charged. Here the Court held that on the charge of sodomy the defendant could not have been convicted of gross indecency and, although the prior charge necessarily involved gross indecency, yet the acquittal for the graver offence did not necessarily involve an acquittal for the minor offence.

PRACTICE — COSTS — TAXATION — PLAINTIFF'S TRAVELLING EXPENSES—CONDITION OF ALLOWANCE—JURISDICTION OF TAXING MASTER.

Harbin v. *Gordon* (1914) 2 K.B. 577. This case turns on a simple question of practice. On a taxation between party and party a charge was made for the travelling expenses of the plaintiff which the taxing officer allowed, subject to the condition that the plaintiff's solicitors should produce to him either a receipt by the plaintiff of the said sum from his solicitors or a letter from the plaintiff showing that he knew that the amount had been allowed to him. The plaintiff appealed, but the Court of Appeal (Williams, Buckley and Kennedy, L.JJ.) held that the taxing officer had jurisdiction to impose the condition. Williams, L.J., however, dissented, thinking the taxing master's condition had the effect of casting an uncalled-for slur on solicitors as a profession.

PRINCIPAL AND AGENT—HOUSE AGENT—LEASE OF HOUSE—SUBSEQUENT SALE TO TENANT—COMMISSION ON SALE—"EFFICIENT CAUSE OF SALE."

Nightingale v. *Parsons* (1914) 2 K.B. 621. This was an action by a house agent to recover a commission on the sale of a house in

the following circumstances. The plaintiff was employed by the defendant to find a tenant of a house at a rent of £120 a year, or a purchaser therefor at £2500. The plaintiff procured a tenant at £110 a year rent, and he was paid a commission. At the end of the term the tenant as a condition of continuing as tenant, required the defendant to build an addition to the house, which he refused to do, whereupon negotiations for sale took place between the defendant and the tenant, which resulted in the defendant selling the house to the tenant's wife for £1,900. The County Court Judge who tried the action held that, although the plaintiff introduced the property to the tenant and his wife, that introduction was not the effective cause of the subsequent sale and he gave judgment for the defendant which was affirmed by the Court of Appeal (Lord Reading, C.J., and Kennedy and Eady, L.JJ.)

INSURANCE (MARINE)—PASSAGE MONEY—LOSS — DISBURSEMENT FOR TRANSHIPMENT OF PASSENGERS—SUBSEQUENT EARNING OF OTHER PASSAGE MONEY—SALVAGE.

New Zealand Shipping Co. v. *Duke* (1914) 2 K.B. 682. This was an action on a policy insuring the plaintiffs against the loss of passage money of a specified amount to Australia and New Zealand, the policy being worded, "to cover any disbursements that may be made by the assured arising from accident or loss on account of passengers for conveyance to intended destination." The ship, having a number of emigrant passengers on board who had paid their passage, met with an accident, and in consequence the plaintiffs were put to expense in transferring the passengers to other ships, and paying their passage to their destination as provided by the Merchant Shipping Act, 1894. The plaintiffs' ship was repaired and subsequently proceeded on the voyage with a fresh lot of passengers. The plaintiffs claimed to recover under the policy the expenses incurred in transhipping and paying the passage of the first lot of passengers, and Pickford, J., who tried the action, held that they were entitled to recover and that the passage money of the second lot of passengers could not be regarded as salvage.

BANKRUPTCY — LIFE POLICY — PREMIUM PAID BY BANKRUPT — SECOND BANKRUPTCY—SALVAGE.

In re Phillips (1914) 2 K.B. 689, although a bankruptcy case is deserving of attention. A bankrupt before his discharge ef-

fected a policy of insurance on his life and pledged it with his bank to secure a loan. He paid six premiums and again became bankrupt, and having died, it was conceded that the policy belonged to the trustee under the first bankruptcy, and the only question was whether in the circumstances there was any legal, equitable or moral obligation on the part of the trustee under the first bankruptcy out of the policy moneys to pay to the trustee under the second bankruptcy the six premiums which had been paid by the deceased bankrupt, and Horridge, J., held that there was not.

FRAUDULENT CONVEYANCE—TRANSFER OF PRIVATE BUSINESS TO A COMPANY—BONA FIDES—DEFEATING OR DELAYING CREDITORS —13 ELIZ., c. 5 (R.S.O. c. 105, ss. 3-6—c. 134, s. 5).

In re David (1914) 2 K.B. 694. This is also a bankruptcy case and as it deals with a question arising under the Statute of Elizabeth (13 Eliz. c. 5), see R.S.O. c. 105, it is worth notice. The facts were that two debtors carrying on business in partnership, whose liabilities amounted to £20,000 and who were unable to meet their engagements as they fell due, assigned their business as a going concern to a limited company with the approval of the majority of their creditors for £5,000 in fully paid-up shares and £20,000 in debentures. By the articles of association of the company the two debtors were made permanent directors at fixed salaries and did not vacate office if they became bankrupt. The debentures were a floating charge in common form and enforceable on the usual terms. Most of the creditors accepted debentures as security for their debts. Within three months after this arrangement had been made the debtors became bankrupt and the trustees in bankruptcy claimed that the transfer to the company was void under the Statute of Elizabeth, and also as an act of bankruptcy under the Bankruptcy Act, 1883. Horridge, J., was of the opinion that the transaction was not impeachable under the statute because it was both bonâ fide and for valuable consideration, but he held that it was an act of bankruptcy and as such invalid as having the effect of defeating or delaying creditors.

CRIMINAL LAW—INDICTMENT—JOINDER OF COUNTS FOR SEPARATE FELONIES—ELECTION ON WHICH COUNT TO PROCEED—DISCRETION.

The King v. *Lockett* (1914) 2 K.B. 720. This is a prosecution arising out of the great pearl necklace robbery. The four

persons accused were indicted under the Post Office Act (1) for stealing chattels in a postal packet, and (2) or receiving property knowing it to be stolen, and to have been sent by post, and (3) under the Larceny Act or receiving property knowing it to be stolen. They were convicted, and a motion on their behalf was made to the Court of Criminal Appeal (Isaacs, C.J., and Bray and Lush, JJ.) to quash the conviction, on the ground that the judge who tried the case should either have put the prosecutor to elect on which count he would proceed, or in default of his so electing, to have quashed the indictment. The Court of Appeal held that although as a matter of practice and procedure the judge at the trial has a discretion to quash an indictment or call on the prosecutor to elect upon which count he will proceed in order to safeguard the interests of the prisoner and to prevent his being embarrassed; yet the court held that there is no rule of law to prevent two or more separate and distinct felonies being tried together on one indictment. In exercising the discretion above referred to the court held that the material thing to be considered is whether or not the overt acts relied on as proving the different offences charged are the same in substance. In the present case the court found that the overt acts were substantially the same, and, therefore, the judge at the trial had properly exercised his discretion and the appeal was accordingly dismissed. It appears from this report that the way in which the robbery was committed was not discovered. One of the culprits was proved to have forged the seal with which the packet was sealed.

PRACTICE—JUDGMENT AGAINST MARRIED WOMAN—AMENDMENT—ACCIDENTAL SLIP—RULE 319—(ONT. RULE 183).

Oxley v. *Link* (1914) 2 K.B. 734. This was an action against a married woman on a contract in which the plaintiff signed judgment in absolute form against the defendant in default of appearance. The judgment was signed in 1903, but no steps to enforce it were taken till 1913, when the plaintiff applied to examine the defendant as to her means. On this an objection was taken on 21 October, 1913, that the judgment was wrong. On 28 October, 1913, the plaintiff applied to amend the judgment and to make it conform to the form given in *Scott* v. *Morley*, 20 Q.B.D. 120. The plaintiff relied on the accidental slip Rule 319 (Ont. Rule 183). The Master refused the application and his

decision was affirmed by Bucknill, J., and the Court of Appeal (Williams, Buckley and Kennedy, L.JJ.) dismissed the appeal, Williams and Buckley, L.JJ., holding the "slip" Rule did not apply to such a case and did not authorize the court to change a judgment entered in in the wrong form. Kennedy, L.J., on the other hand, though thinking the court had a discretion to act under the "slip" Rule yet was of the opinion that it would be improper to do so in the present case owing to the length of time which had elapsed since the judgment was signed. See *Re Hamilton* v. *Perry*, 24 O.L.R. 38, a similar decision.

PRACTICE—PARTIES—JOINDER OF DEFENDANTS' SEPARATE CAUSES OF ACTION — POLICY UNDERWRITTEN BY DEFENDANTS FOR SEPARATE AMOUNTS—SERVICE OUT OF JURISDICTION—"NECESSARY OR PROPER PARTY"—RULES 64(G), 126 (ONT. RULES 25(1) (G), 67).

Œsterreichische, etc. v. *British Indemnity Insurance Co.* (1914) 2 K.B. 747. The plaintiffs in this case carried on business in Vienna and insured certain goods by two policies, one made by an English company, and the other by a Scotch company. The policies were drawn up in Antwerp and were signed by a common agent of the two companies. The companies had a common office and a common secretary in London and this office was described in letters of the secretary to the plaintiffs' solicitors as the head office of the companies. The action was brought against both companies and the plaintiff having served the English company obtained leave to issue a concurrent writ for service on the Scotch company as being a necessary or proper party to the action against the English company. The Scotch company having been served applied to set aside the order allowing service and the service. Coleridge, J., refused the motion, and the Court of Appeal (Kennedy and Eady, L.JJ.) held that the Scotch company were proper parties to the action within Rule 648 (Ont. Rule 25(1) (*g*)) and that the order allowing service was rightly made.

SOLICITOR AND CLIENT—RETAINER—AUTHORITY TO SOLICITOR TO COMPROMISE—COMPROMISE AFTER JUDGMENT.

In re A Debtor (1914) 2 K.B. 758. In this case a solicitor had been retained to conduct an action, which he did and recovered judgment in favour of his client. After judgment he

assented to the judgment debtor making an assignment to a trustee for the benefit of his creditors, and the question was whether he had an implied authority to do so and whether his client was bound thereby. Horridge and Atkin, JJ., answered that question in the negative. The client not having expressly authorized the solicitor to give the consent, the court held that the solicitor's authority to compromise is limited to a compromise between the plaintiff and defendant, and does not extend to a compromise affecting the client's rights as against other persons as, for instance, other creditors. Whether there is any right for a solicitor to compromise his client's case after judgment at all, the court does not determine.

CORPORATION—BY-LAW—WILFUL OBSTRUCTION OF CORPORATION'S SERVANTS IN DISCHARGE OF THEIR DUTY—REGULATION PROHIBITING PASSENGERS RIDING ON TOP OF MOTOR OMNIBUS.

Baker v. *Ellison* (1914) 2 K.B. 762. The defendant in this case was prosecuted for obstructing a municipal corporation's servants in the discharge of their duty contrary to a by-law. The corporation owned motor omnibuses and had made a regulation prohibiting passengers at a certain part of the road from riding on the top, as it was considered dangerous to do so. The defendant became a passenger and got on top, but when the omnibus arrived at the dangerous part of the road he refused to descend, though requested so to do, and in consequence of the altercation the omnibus was detained twenty minutes. On behalf of the defendant it was contended that the corporation were common carriers and had no right to limit their obligations as such, and that the regulation was unenforceable, not being a by-law. The defendant was convicted, and on a case stated by the justices the conviction was affirmed by the Divisional Court (Bray, Avory and Rowlatt, JJ.), that court being of the opinion that the regulation was reasonable and the defendant's refusal to observe it amounted to an obstruction of the corporation's servants in the discharge of their duty within the meaning of the by-law.

COMPANY—BOARD OF DIRECTORS—ARTICLES OF ASSOCIATION—APPOINTMENT OF MANAGING DIRECTOR—POWER TO REVOKE APPOINTMENT.

Nelson v. *Nelson* (1914) 2 K.B. 770. This was an appeal from the decision of Scrutton, J. (1913) 2 K.B. 471 (noted ante vol. 49,

p. 583). By an agreement entered into between the plaintiff and defendants, a limited company, it was agreed that the plaintiff should be the managing director of the company so long as he should retain the necessary qualification and efficiently discharge his duties. The articles of association provided that the board of directors might appoint a managing director and might from time to time revoke any such appointment. Assuming to act under the latter power the board of directors revoked the plaintiff's appointment; but the plaintiff still had the necessary qualification and was efficiently discharging his duties. Scrutton, J., held that they had no power to revoke the plaintiff's appointment contrary to the terms of the agreement they had made with him; and the Court of Appeal (Lord Reading, C.J., and Kennedy and Eady, L.JJ.) have now affirmed his decision, and have negatived the contention of the defendants that the agreement was ultra vires of the directors; and they held that the power to revoke the appointment of a managing director could only be exercised subject to the terms of the agreement they had made with the plaintiff.

SEDUCTION — MASTER AND SERVANT — SEDUCTION OF WIFE'S ADOPTED DAUGHTER — HOUSEHOLD SERVICES RENDERED BY ADOPTED DAUGHTER — ACTION BY WIFE FOR SEDUCTION OF ADOPTED DAUGHTER.

Peters v. *Jones* (1914) 2 K.B. 781. This was an action by a wife, residing with her husband, for the seduction of the plaintiff's adopted daughter. The adopted daughter was living as a member of the husband's household, and was supplied with clothes and money with the husband's money. The question was whether in these circumstances the plaintiff could maintain the action; and Avory, J., who tried it, held that as the action was founded on the legal fiction that a child living with the parent was a servant, so in the present case the adopted daughter while living as a member of the household of the husband must be deemed to be his servant and not the servant of his wife. The action therefore failed.

DOCK—CONTRACT FOR USE OF DOCK—EXEMPTION CLAUSE—DAMAGE TO SHIP ARISING FROM UNFITNESS OF BLOCKS PROVIDED BY DOCK OWNER—LIABILITY OF DOCK OWNER.

Pyman S.S. Co. v. *Hull & Barnsley Ry.* (1914) 2 K.B. 788. This was an action by ship owners against a dock company for

damages to plaintiffs' ship while in the defendants' dock. The contract expressly provided that the owner of the vessel using the dock must do so at his own risk, and it was expressly provided "that the company are not to be responsible for any accident or damage to a vessel going into, or out of, or whilst in the dock" whatsoever may be the nature of such accident or damage, or howsoever arising. The defendants were by the agreement to provide blocks on which the keel of the vessel rested. These blocks proved to be uneven, owing to the defendants' negligence, and the vessel was consequently damaged; it was contended by the plaintiffs that the exemption clause did not relieve the defendants, as the damage was caused by their negligence, and the cases in which it has been held that such clauses do not exempt a shipowner from liability for unseaworthiness were relied on; but Bailhache, J., who tried the action, held that, although general words in a contract exempting the contractor from liability for damage caused by a breach of contractual duty may be inoperative where the duty is a primâ facie absolute duty such as that of a shipowner under a contract of affreightment to provide a seaworthy ship, it is otherwise where the contractor's duty is only to exercise due care; that under the contract in question there was not an absolute duty to provide blocks fit for the purpose for which they were to be used, but only to take care that they were reasonably fit; and that, therefore, the exemption clause in the contract in this case, though expressed in general words operated to exempt the defendants from liability for the damage though caused by their negligence.

GAMING—BETTING HOUSE—USING A HOUSE—PERSONS RESORTING TO BETTING HOUSE—BETTING ACT, 1853 (16 & 17 VICT. C. 119), S. 1—(R.S.C. c. 146, ss. 227, 228; 10 EDW. VII. c. 10, s. 1(D.)).

Taylor v. *Monk* (1914) 2 K.B. 817. This was a prosecution for keeping a betting house contrary to the statute, Betting Act, 1853. The defendant used a house in the following way. He employed two servants to stand respectively close to the doorway, one inside and the other outside. Persons passing along the street handed betting slips to the man outside, who handed them on to the man inside without moving from his position, who subsequently sent them to the defendant at another address. The slips related to bets on horse races. The defendant was convicted and on a case stated by the justices the Divisional Court (Channell, Scrutton and Bailhache, JJ.) affirmed the conviction.

CONTEMPT OF COURT—CONTEMPT BY LIMITED COMPANY—PUNISHMENT OF CONTEMPT—FINE.

The King v. *Hammond*, (1914), 2 K.B. 866. This was an application against two limited companies and the managing directors for an attachment for contempt of court in printing and publishing comments calculated to prejudice the fair trial of a certain indictment at the Central Criminal Court. It was contended on the part of the companies that the motion was misconceived because an attachment cannot issue against a limited company; but the Divisional Court (Darling, Avory, and Rowlatt, JJ.) held that notwithstanding the form of the application it was competent for the court to punish the contempt in question by inflicting a fine on the companies, which was accordingly done.

LOTTERY—PRIZE COMPETITION—EXERCISE OF SKILL—LOTTERIES ACT, 1823 (4 GEO. IV. c. 60), s. 41—(R.S.C. c. 146, s. 236).

Scott v. *Director of Public Prosecutions* (1914) 2 K.B. 868. This was a case stated by a justice, an information was laid under the Lotteries Act, 1823 (4 Geo. IV. c. 60), against the appellant Scott for breach of the Act. The appellant was the publisher of a newspaper in which he advertised a competition called Bounties. A list of forty-two words was given and competitors were to chose any of these words, and opposite the word chosen were to write two or three other words bearing on the meaning of the word chosen, and each of the two or three words must begin with one of the letters in the word chosen and the same letter might not be used twice unless it also appeared twice in the word chosen. The question was whether this was a lottery within the meaning of the Act and the Divisional Court (Lush, Atkin and Channell, JJ.) held that it was not because the competition called for the exercise of skill on the part of the competitors, and there was no evidence that the number of competitors was so large as to make it impossible for the sentences to be considered on their merits, and they, therefore, concluded that the competition was not one the result of which depended entirely on chance. See R.S.C. c. 146, s. 236.

MORTGAGE OF BOOK DEBTS — CHOSE IN ACTION — ASSIGNMENT — NOTICE OF ASSIGNMENT—"ORDER AND DISPOSITION."

In re Neal (1914) 2 K.B. 910, although a bankruptcy case deserves a brief mention for the fact that it is determined by

Horridge, J., that where a person assigns a chose in action and subsequently becomes bankrupt, the chose in action remains in the "order and disposition" of the assignor until the assignee gives notice to the debtor of the assignment.

PRACTICE—PARTIES—ACTION OF DEBT AGAINST UNINCORPORATED SOCIETY—"PERSONS HAVING THE SAME INTEREST IN ONE CAUSE OR MATTER"—ORDER AUTHORIZING ONE OR MORE TO DEFEND ON BEHALF OF ALL—RULE 131—(ONT. RULE 75).

Walker v. *Sur* (1914) 2 K.B. 930. This was an action of debt against certain members of an unincorporated society whom the plaintiff claimed to sue on behalf of themselves and all other members of the Society. Bucknill, J., on the application of the plaintiff, made an order under Rule 131 (Ont. Rule 75) authorizing the defendants to defend on behalf of themselves and all other members of the society, the plaintiff undertaking in the event of his getting judgment not to take any proceedings on it out of the jurisdiction. On appeal by the defendants the Court of Appeal (Williams, Buckley, and Kennedy, L.JJ.) reversed the order of Williams, L.J., on the ground that it did not appear that the defendants selected to represent the body, which numbered 1,800, were in any way managers of the society, or persons who should reasonably be selected to represent it. The other members of the court seem to base their decision on the ground that an effective judgment for debt could not be properly granted against the defendants so as to bind all the members of the society, which was a fluctuating body.

PROBATE—WILL LEAVING LEGACY TO SOLICITOR BY WHOM IT WAS DRAWN—LEGACY TO EXECUTOR—CONDUCT LEADING TO INVESTIGATION—COSTS.

Re Osment, Child v. *Osment* (1914) P. 129. This was a probate action in which the defendants impeached the will propounded which contained legacies of large amounts to the executors, one of whom drew the will, and for which no explicit written instructions were produced. The will was upheld, but the court (Evans, P.P.D.) being of the opinion that the circumstances justified an investigation, ordered that the costs of all parties should be paid pro rata out of the legacies to the executors.

ADMIRALTY—COLLISION BETWEEN STEAMSHIP AND LADEN BARGE IN TOW OF TUG—BOTH VESSELS TO BLAME FOR COLLISION—APPORTIONMENT OF DAMAGES—CLAIM BY OWNER OF CARGO.

The Umona (1914) P. 141. In this case the facts were that a steamship had come into collision with a barge while in the tow of a tug whereby the owners of the cargo on the barge suffered loss. It was found that both steamship and tug were to blame and the damages were apportioned to be borne according to the Maritime Conventions Act, 1911, ss. 1, 9(4), three-fourths by the steamship and one fourth by the tug. The owners of the cargo claimed as innocent parties to recover their whole loss from the steamship. But Evans, P.P.D., held that as the barge was in part to blame the principle laid down in *The Milan* (1861), Lush. 388, applied, and the owners of the cargo could only recover three-fourths of their loss from the steamship.

ACTION FOR INJUNCTION TO RESTRAIN INTERFERENCE WITH FERRY —DISMISSAL OF ACTION—DECLARATION OF RIGHT—RULE 289 —(ONT. JUD. ACT, S. 16(*b*)).

Dysart v. *Hammerton* (1914) 1 Ch. 822. This was an action for an injunction to restrain interference with plaintiff's ferry. The action failed because no interference was proved; but Warrington, J., though dismissing the action, made a declaration that the plaintiff was entitled to the ferry as claimed. The Court of Appeal (Cozens-Hardy, M.R., and Buckley and Phillimore, L.JJ.) reversed his judgment on the merits and held the plaintiffs entitled to the relief claimed, and express the opinion that if Warrington, J., were right in his view of the merits his judgment would be wrong in making any declaration of right while dismissing the action.

WILL—GIFT OF SPECIFIC PROPERTY "FREE OF LEGACY DUTY"—FRENCH MUTATION DUTY—DUTY WHETHER PAYABLE BY LEGATEE OR EXECUTORS.

In re Scott, Scott v. *Scott* (1914), 1 Ch. 847. Under the will in question in this case the testator bequeathed to a legatee "free of legacy duty" all his pictures, engravings, furniture, etc., and "works of art" of every description, wherever situate with certain exceptions. Part of the property thus bequeathed was in France and subject to a mutation duty, and the question Warrington, J. had to decide, was whether this French mutation

duty was payable by the legatee or the executors, and he held that "legacy duty" meant legacy duty payable under English statute law, and did not include duty payable under French law.

TRADE MARK—COLOURED LINES WOVEN IN ARTICLE.

In re Reddaway (1914) 2 Ch. 856. The applicants in this case were manufacturers of fire hose and they proposed to register as a trade-mark three lines, two blue and one red, which they wove into the hose in the course of manufacture. But Warrington, J., held that the proposed marks are not "adapted to distinguish" the applicants' goods, unless the lines were so woven throughout the whole length of the fabric and of a certain defined width; but subject to that condition it might be registered.

WILL—CONSTRUCTION—LIFE TENANT—POWER TO TENANT FOR LIFE TO APPLY CORPUS FOR HIS OWN USE—APPOINTMENT BY DEED POLL.

In re Ryder, Burton v. *Kearsley* (1914), 2 Ch. 865. By the will in question in this case the testatrix devised and bequeathed her real and personal estate to her husband until he should marry again or die: and she authorized her husband so long as he was entitled to the income to apply such portion of the corpus of estate as he should think fit for his own use and benefit and subject as aforesaid gave her estate for charitable purposes. The testatrix died in 1910. Her husband did not marry again, and died having by a deed poll appointed the whole corpus of the testatrix's estate to himself for his own benefit. Warrington, J., held that under the will the husband had, during his life, power to appoint the corpus of the whole estate to himself absolutely, and that under the joint effect of the will and deed poll, he was absolutely entitled to the estate.

WILL—LEGACY AT TWENTY-THREE—AGE ATTAINED BY LEGATEE IN LIFETIME OF TESTATOR—INTEREST ON LEGACY FROM WHAT DATE PAYABLE.

In re Palfreeman Public Trustee v. *Palfreeman* (1914) 1 Ch. 877, a testator gave his residuary estate to trustees upon trust to pay £2,000 to each of his three sons and £1,000 to each of his

four daughters on their respectively attaining twenty-three years. The eldest son and daughter both attained twenty-three in the testator's lifetime: and the question was from what date did their legacies bear interest. Sargant, J., held that the legacies to the eldest son and daughter became ordinary immediate legacies, and carried interest not from the testator's death, but from the expiration of one year from his death.

COMPANY—DIRECTORS—RETIREMENT AT ORDINARY MEETING—FAILURE TO HOLD ORDINARY MEETING—NON-ELECTION OF DIRECTORS—DIRECTORS ACTING AS SUCH AFTER RETIREMENT—REMUNERATION OF DIRECTORS—SALE OF UNDERTAKING.

In re Consolidated Nickel Mines (1914) 1 Ch. 883. In this case, the right of directors of a limited company to remuneration was in question. By the articles of association of the company it was provided that general meetings should be held once in every year; that at the ordinary meeting in 1906 all the directors should retire from office; and that the directors should be remunerated at a certain fixed rate per annum. The Companies Act then in force also provided that a general meeting should be held once a year. No general meeting was called in the years 1906, and 1907, but the directors previously in office continued to act. Sargant, J., held that the directors vacated office on 31 December, 1906 (being the last day on which a general meeting could have been held in that year), and were thereafter not entitled to any remuneration until re-elected. In February, 1906, the directors passed a resolution that they should not accept fees for their services rendered thereafter; but in January, 1907, they passed another resolution that thereafter the directors should be entitled to their fees and Sargant, J., held that directors thereafter appointed were entitled to remuneration under the articles which would not be diminished in amount on a subsequent sale of the company's undertaking.

REPORTS AND NOTES OF CASES.

Province of Alberta.

SUPREME COURT.

Harvey, C.J., Scott, Stuart, Beck, Simmons, and Walsh, JJ.] [16 D.L.R. 203.

REX *v.* ANDERSON.

1. *Criminal law—Insanity as a defence—Degree of proof.*

It is misdirection to instruct the jury in a murder trial in which the defence is insanity, that such defence must be made out so as to satisfy the jury "beyond a reasonable doubt," the latter expression having, by long judicial usage, become associated with the idea that more is required than merely being "satisfied" that the fact of insanity is proved.

McNaghten's Case, 10 Cl. & F. 200, considered; *R.* v. *Myshrall,* 8 Can. Cr. Cas. 474, referred to.

2. *Evidence—Presumption as to sanity—Preponderance of evidence to rebut.*

The rule as to presumption of sanity "until the contrary is proved" (Cr. Code, 1906, sec. 19), as applied to a defence of insanity in a criminal case merely requires proof of insanity by a preponderance of evidence to the satisfaction of the jury.

R. v. *Jefferson,* 72 J.P. 467, 1 Cr. App. Cas. 95, 24 Times L.R. 877, considered.

3. *Evidence—Medical books—Oral proof of their authority.*

If a witness called to give expert testimony is asked about a text book (ex. gr., as to mental diseases) and expresses ignorance of it, or denies its authority, no further use of it can be made by reading extracts from it, for that would be in effect making it evidence; but, if he admits its authority, he then, in a sense, confirms it by his own testimony, and then may quite properly be asked for an explanation of any apparent differences between its opinion and that stated by him.

4. *Trial—Statement of counsel—Murder trial—Reference to possible commutation of sentence.*

It is not error entitling the accused to a new trial that the Crown counsel in addressing the jury in a murder case stated, as was the law, that the Crown through the Department of Justice might reduce a sentence of death, if the accused were convicted, by substituting a term of imprisonment, where such statement was elicited by a reference made by counsel for the accused in his address to the jury to the disgrace which would fall on the family of the accused were he convicted, and where the trial judge afterwards instructed the jury that they should pay no attention to what the punishment should be.

5. *Evidence—Criminal law—Police physician questioning prisoner to determine on sanity.*

Answers to questions put to a prisoner in custody by a police physician who put the questions merely for the purpose of forming an opinion upon his mental condition are admissible to prove him sane where they were not in the nature of admissions or confessions as regards the charge against him, although no warning was given the accused that what he might say could be used in evidence against him.

L. F. Clarry, Deputy Attorney-General, and *W. A. Begg*, K.C., for the Crown. *A. A. McGillivray*, K.C., and *A. Barron*, for the defendant.

Province of Manitoba.

COURT OF APPEAL.

Howell, C.J.M., Richards, Perdue and Cameron, JJ.A.] [16 D.L.R. 406.

WEILGOSZ v. MCGREGOR.

Evidence — Statutory presumption — Automobile accident — Negligence.

Section 63 of the Motor Vehicles Act, R.S.M. 1913, c. 131, places the onus of proof upon the automobile owner or driver in respect of damage done by collision with a bicycle; and the effect

of the statute is that negligence in the operation of the automobile is primâ facie presumed because of the collision.

Toronto General Trust Co. v. *Dunn*, 20 Man. L.R. 412, followed.

C. Blake, for plaintiff, appellant. *J. F. Kilgour*, for defendant, respondent.

Flotsam and Jetsam.

A curious point was raised in the Court of Criminal Appeal recently. William Cruxton (who was convicted at Stafford for shooting with intent to murder) applied for leave to appeal. The court decided that a finding of guilty but insane was a special verdict, and was really an acquittal and not a conviction. Consequently, said the Lord Chief Justice, the prisoner was not a person convicted on indictment and had no right to appeal. The court, he added, had no jurisdiction to hear the case.—*Ex.*

The Living Age, Boston, U.S.A. This excellent (monthly) collection of interesting literature keeps up its ancient standard. There is no end of interesting matter in these days, but we find the best of it in the *Living Age*. The number for July 4, has as a leading article a searching analysis of the characteristics of the political career of President Wilson, and a subsequent number again refers to him, and tells some home truths about Mexico and the President's connection with the present complications. The conclusion arrived at is unfavourable to the government of the United States, indicating that this condition has been brought about by the selfish interests of the American capitalists. Other articles are Sketches in War Time, Dramas of Bird Life, Self-defence in the Human Body, etc.