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As we go to press the sad news comes of the sudden death of Lord Herschell, ex-Lord Chancellor of England, and president of the International Commission sitting at Washington. The cause of his death is said to have been heart failure, resulting from a fractured thigh from a fall on a slippery sidewalk. Lord Herschell was born in 1837 and called to the bar in 1860. In 1880 he was, as Sir Farrer Herschell, appointed Solicitor General, and in 1886 was raised to the peerage and made Lord Chancellor of England. His eminence as a lawyer goes without saying. His appointment to the position he held in Washington, and as the British member of the Venezuela and British Guiana arbitration boundary case are a sufficient indication of the estimate of his countrymen as to his ability and knowledge of international law. He was a great favourite with all who knew him, and we in Canada, who had the benefit of his loyal support to our interests, will join in heartfelt sorrow with our kinsmen in the United States who, with us, appreciated to the full his great ability and unfailing courtesy in the somewhat difficult position in which he was placed.

No appointment has as yet been announced of a successor to Sir Thomas Wardlaw Taylor, Chief Justice of Manitoba. It will be difficult to find one who will fill the position more worthily than did the ex-Chief Justice. His capacity and learning were well-known to the profession in Ontario, and he discharged the duties of his high office in Manitoba with credit to himself and advantage to the country. He was appointed to the Manitoba Bench in 1886, becoming Chief Justice in the year following.

Legal exchanges report the sudden death of Lord Justice Chitty, one of the best judges on the English Bench. He was as well known and as successful as an athlete as he afterwards proved to be as counsel and subsequently as a judge. Sportsmen will remember him as being captain of the Eton eleven, head of his

foot ball team, stroke of the Oxford eight, when, in 1851, it easily vanquished Cambridge, and for twenty-four years afterwards as the umpire in the annual Oxford and Cambridge boat race. He was a man of great versatility of intellect, and his large natural gifts were so combined with industry, that he soon took a leading position at the Bar. He was, as has been said, "an impersonation of abundant courtesy with everyone with whom he came in contact." His death will be a great loss to the Bench.

Mr. Wright is much commended by the profession in England for his action in postponing the trial of a prisoner committed by Mr. Justice Ridley on a charge of perjury in his evidence given under the Criminal Evidence Act, 1898, until the question of the prosecution of prisoners under such circumstances had been considered by the Judges, thus bringing to the consciences of magistrates and judges the importance of exercising great caution in ordering the prosecution of prisoner witnesses. The same learned judge, speaking at the Worcester Assizes, after referring to the evils of perjury said, "On the other hand, Parliament could not have intended that a man charged with some trifling offence should incur a greater penalty because on oath he had denied his guilt. Prisoners, unless utterly blameless, would not give evidence at all, and their omission would be regarded as evidence of guilt. A prisoner was often afraid to give evidence of material facts because he had to admit immaterial facts."

BICYCLE LAW.

1. **Introductory**—Among the minor heads of law which the progress of invention in recent years has created, none is of more practical importance than that which deals with the rights and liabilities arising out of the use of the cycle in its various forms. A review of the authorities on this subject, therefore, can scarcely fail to be of deep interest to our readers. All the available sources of information, English, Colonial and American have been consulted, and it is hoped that no ruling made prior to the compilation of this article has escaped notice. As several of the cases, owing to the novelty of the questions discussed, are in a certain sense

"leading," and not a few of them are derived from reports and periodicals which are to be found only in the large libraries, we have taken special pains to state the substance of each decision with sufficient fullness to shew the precise grounds upon which it was based.

2. **Right of bicyclists to use highways, generally**—For a considerable period after cycles first came into common use, attempts were occasionally made to have them placed, for judicial purposes, on a different footing from other vehicles. For example, so recently as 1889, it was still regarded as a debatable question in the United States whether the riding of a bicycle upon a public highway ought not to be pronounced a nuisance in such a sense as to make the rider absolutely liable if a horse took fright at the machine, and damage ensued. (*a*) But this inclination to treat a cyclist as a sort of "*caput lupinum*," who was entitled to very scant indulgence in case of an accident upon the highway, has nearly, if not altogether, ceased to exercise any influence upon the Courts, and the doctrine is now firmly established that a bicycle, so far as the use of the highways is concerned, is to be classed in the same category as horse-drawn vehicles. It follows, therefore, that to ride one in the usual manner, as is now done upon the public highway, for convenience, recreation, pleasure or business, is not unlawful; (*b*) and that the rights of bicyclists are referred to the simple principle that they are upon an equality with and governed by the same rules as persons riding or driving any other vehicle or carriage. (*c*) "Bicycles are not an obstruction to, or an unreasonable use of, the public streets of a city, but rather a new and improved method of using the same, and germane to their principal object as a passage-way." (*d*)

That bicycles must also be subject to the same restrictions and disabilities as other vehicles follows readily enough from general

(*a*) *Holland* v. *Bartch* (1889) 120 Ind. 46.

(*b*) *Thompson* v. *Dodge* (1894) 58 Minn. 555. The Court said: "A highway is intended for public use, and a person riding or driving a horse has no rights superior to those of a person riding a bicycle."

(*c*) *Holland* v. *Bartch* (1889) 120 Ind. 46. *City of Emporia* v. *Wagner* (1897) 6 Kan. App. 659; 49 Pac. 741. It may be mentioned in passing that for the purpose of assessing a tariff, bicycles have been declared by the United States Government to be "carriages"; see Adams' U.S. Tariff (ed. 1890), p. 99.

(*d*) *Swift* v. *Topeka* (1890) 43 Kan. 671; 8 L.R.A. 772.

principles. (*e*) Thus a bicycle is a "vehicle" within the meaning of sec. 12 of the Liverpool Corporation Act of 1889, which forbids the use of "any vehicle exclusively or principally for the purpose of displaying advertisements" without the consent of the Corporation. (*f*) [See also secs. 4, 5, post.]

The conclusions at which the Courts, reasoning upon purely common law principles, have thus arrived are in many States embodied in statutory provisions, which declare that bicycles and their riders are entitled to the same rights and subject to the same restrictions in the use of the highways as are prescribed in the case of carriages drawn by horses. (*g*)

The doctrine which places cycles on the same footing as horse-drawn vehicles is really a particular application of the wider principle that it is the essential character of the vehicle itself, and not the motive power, which determines the rights and liabilities of the person using it. To this principle would seem to be referable the English decision that a motor tricycle capable of being propelled either by foot-power or by steam is within the purview of sec. 38 of the English Locomotives' Act of 1878, which prescribes certain regulations for the working of "any locomotive propelled by steam or any other than animal power," and that a conviction for a breach either of those regulations, or of any others prescribed by the earlier Locomotives Acts (24 & 25 Vict., c. 70, and 28 & 29 Vict. c. 83), should be sustained, although the person travelling on the tricycle was propelling it with his feet at the place where he was arrested. Pollock, B., who wrote the opinion of the Court, pointed out that the tricycle could not be less within this description because it was capable of propulsion in the ordinary way by the foot of the rider, and that it had been expressly found in the case that

(*e*) *Swift* v. *City of Topeka* (1890) 43 Kan. 671; 8 L.R.A. 77.

(*f*) *Ellis* v. *Nott-Brown* (Q.B.D., 1896) 60 J.P. 760.

(*g*) Louisiana Acts, 1890, No. 13, p. 10; Rev. Stat. p. 860. Pennsylvania Act of 1889, P.L. 44. New York Rev. Stat., Highway Law, sec. 162. The last two of these enactments cover not only bicycles, but also tricycles and all other vehicles propelled by hand or foot. That the Ontario Act prescribing the relative obligations of cyclists and the drivers of other vehicles in the use of roads is a practical recognition of the same principle is sufficiently obvious (see sec. 4 *post*). So far as turnpike companies are concerned, the Pennsylvania Act just referred to has, it is held, had the effect of establishing, out of reach of the discretion of the company, the bicyclist's right upon the highway, and of placing a peremptory limitation upon the power of the company to exact excessive tolls: *Geiger* v. *Perkiomen Turnpike Road* (1895) 167, Pa. 582; 28 L.R.A. 458 (see sec. 11, post).

the steam power was sufficiently powerful to move it, if desired, without the foot motion. The argument that such a machine could not have been within the contemplation of the statutes, as these were apparently intended to be directed against the use of locomotives larger in size and heavier in weight, and therefore more dangerous to persons using the public highway than the locomotive in question, was thus disposed of:

"It is probable that the statutes in question were not pointed against the specific form of locomotives which is described in this case. Indeed, such a locomotive was not known when they were passed, and possibly not contemplated. As, however, it comes within the very words of the statutes, it seems to us that we cannot, upon any true ground of construction, exclude it from their operations; and it may be observed that, even if the fullest scope be given to this argument, Mr. Bateman's [one of the witnesses] explanation that the principle of the invention was capable of extension to larger carriages, would shew that a locomotive similar in construction and principle to that which is the subject-matter of this case might, by reason of its size and power, become much more dangerous; and, if this be so, the question to be considered in each case would be whether, by reason of the size or weight of the particular machine, it came within the mischief contemplated, which shews that such an argument is vicious." (*h*)

3. Validity of enactments restricting the use of highways by cyclists—The earlier cases dealing with the extent of the power of legislative bodies to place restrictions upon the use of highways by cycles reflect, as might be expected, the tendency, already noticed, to treat the new vehicle as a mere interloper. Thus we find it laid down that an ordinance providing that no bicycle or tricycle should be allowed in the public parks of New York City was within the discretionary power of a board of commissioners vested by statute with "the full and exclusive power to govern, manage and direct the said parks" and "pass ordinances for the regulation and government thereof." (*a*) Four years later the Supreme Court

(*h*) *Parkyns* v. *Priest* (1881) 7 Q.B.D. 313.

(*a*) *Re Wright* (1883) 29 Hun. (N.Y.) 357. It was thought that there was no force in the argument that, because bicycles were admitted in the parks of other large cities like London, Philadelphia and Boston, the Court were entitled to say, as a matter of law, that the ordinance was unreasonable. The full power to govern the parks being vested in the commissioners, the Courts could not interfere, in the absence of evidence going to prove fraud or collusion. By sec. 162 of the Highway Law of New York the authorities having charge of highways are expressly deprived of power to exclude cycles from the use of such highways at any time when they are open to the persons using other pleasure carriages.

of Carolina declared that a statute (Pr. Acts of N.C. ch. 14) which forbade any person "to use upon the road of the A. company a bicycle, tricycle, or other non-horse vehicle, without the express permission of the superintendent of the road" was not unconstitutional, as destroying the property of citizens or depriving them of the reasonable use of it. The argument was that, as a man has no right to use his property so as to injure another in the just use of his, there was no reason why the owner of a particular kind of vehicle should be allowed to use it on a certain road, when, on account of its peculiar form or appearance, or from the unusual manner of its use, it was apt to frighten horses or otherwise to imperil passengers over the road. An enactment which had simply the effect of regulating the use of property was always a lawful exercise of the general police power of a legislature. Nor could such a statute be objected to on the ground that it left an arbitrary discretion to the superintendent of the road, since the true import of the provision was that the power vested in him should be honestly, fairly and reasonable exercised for the purpose of giving effect to the law, and that it was his duty to grant permission to cyclists to use the road, or any occasions when such use is safe for others. (*b*) So recently as six years ago the Supreme Court of Maryland laid down the rigid rule that the onus of shewing that a rule or by-law of a municipality, prohibiting persons from riding bicycles across a public bridge is invalid, as being unreasonable, rests upon the party who denies its validity, a very significant shifting of the presumption that would ordinarily be entertained in view of the fact that the use of highways by the citizen is a matter of common right. (*c*)

(*b*) *State* v. *Yopp* (1887) 97 N.C. 477.

(*c*) *Twilley* v. *Perkins* (1893) 26 Atl. Rep. 286; 77 Md. 252; 19 L.R.A. 632. [A case in which the plaintiff was suing the commissioners of the highway for assault and battery, and unlawful imprisonment.] The particular conclusion arrived at was that, as some horses, ordinarily gentle, are apt to take fright at bicycles, when ridden along the public highways, and many never become accustomed to them, the discretionary powers of county commissioners who have full authority to make reasonable rules and regulations for the use of a certain bridge were not exceeded by the promulgation of a rule forbidding any person to "ride" a bicycle or tricycle over the bridge. The Court emphasized the fact that it was only the "riding" of the bicycle that was prohibited, and said that a bicyclist had no right to insist upon the use of his property or vehicle on the public highway in a manner that might produce danger or injury to others who were lawfully exercising their rights in the ordinary use of their property.

It is extremely questionable whether these decisions would now be followed if similar questions of construction were presented in any jurisdiction outside that in which they were rendered. At present the position would doubtless be taken everywhere that a legislative body which possesses a merely limited authority, not extending to the impairment of the fundamental rights of citizens, is not entitled to restrict the use of cycles by any laws which would place cyclists in a less favoured position than persons using other vehicles. That the power of such a body is of sufficient extent to enforce upon cyclists an observance of such rules and regulations as are reasonably necessary to secure the safety of other travellers is undeniable, but that their authority goes no further than this would seem to be an unavoidable corollary from the doctrine which places cycles in the same legal category as other vehicles.

This view is supported by two recent cases, one of which laid it down that, where a statute gives a municipal council the power to regulate the riding of bicycles over the sidewalks of a city, a Court will not pronounce invalid, as being unreasonable, an ordinance providing that bicyclists must have an alarm bell and a lamp on their wheels, and ring the former on approaching all crossings and sidewalks, whether there are any pedestrians on them or not; (*d*) while in the other it is held that, as a citizen has the absolute right to choose for himself the mode of conveyance he desires, subject to the sole condition that he will observe all those requirements which are known as the law of the road, a municipal ordinance which attempts to forbid bicyclists to use that part of the street which is devoted to the use of vehicles, is void as against common right. (*e*)

4. Reciprocal duties of cyclists and other persons travelling upon highways—The cases dealing with the right of action for injuries inflicted or received by cyclists, as the result of the wilful or careless

(*d*) *City of Emporia* v. *Wagner* (1897) 6 Kan. App. 659; 49 Pac. Rep. 701.

(*e*) *Swift* v. *Topeka* (1890) 43 Kan. 671; 8 L.R.A. 772, where the Court, for the purpose of sustaining the validity of an ordinance declaring it to be unlawful to ride a bicycle within the limits of the municipality, or "across a bridge" specified by name, construed this provision as being merely a prohibition directed against the use of a bicycle on the sidewalks of the bridge, and not as a prohibition against riding it on any part of the bridge, including that which is used by vehicles generally.

acts of himself or other travellers, may be treated most conveniently by classifying them under several heads, indicating the nature of the accident from which the injury results.

(*a*) *Duty of cyclists to pedestrians.*—A bicyclist is within the purview of the statute 5 & 6 William 4, c. 50, sec. 78, imposing a penalty upon any person who "rides any horse or beast, or drives any sort of carriage . . . furiously, so as to endanger the life or limb of any passenger" (*a*). Similarly, a bicyclist is within the provision of c. 100, sec. 35, of the English Highway Act of 24 & 25 Vict., declaring that anyone who, "having the charge of any carriage or vehicle, shall, by wanton or furious driving or racing, or other wilful misconduct, or wilful neglect," do any bodily harm to any person, is guilty of a misdemeanour (*b*).

It is error to non-suit a plaintiff in an action for negligence, where the evidence is that the defendant, while riding his bicycle at the rate of five or six miles an hour down a narrow, sloping path, came up, without giving any warning, behind the plaintiff, who, with many other persons, was walking along the footpath in the same direction as the bicyclist, and ran the wheel against him. In such a case the defendant is not relieved from liability by the fact that the immediate cause of the accident was the striking of the wheel against an obstruction, unless, at all events, it appears that the exercise of due care would not have enabled him to avoid that obstruction. (*c*)

A verdict has been upheld which found the accident to be wholly attributable to the fault of the bicyclist, where he was riding

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(*a*) *Taylor* v. *Goodwin* (1879) 4 Q. B. D. 228. Lush, J., said: "The mischief intended to be guarded against was the propulsion of any vehicle so as to endanger the lives or limbs of the passers by. It is quite immaterial what the motive power may be. Although bicycles were unknown at the time when the Act was passed, it is clear than the intention was to use words large enough to comprehend any kind of vehicle which might be propelled at such a speed as to be dangerous"

(*b*) *Reg.* v. *Parker* (1895) 59 J. P. 793. There the cyclist was riding down a hill without a brake, at a rate variously computed by the witnesses at 12 or 16 miles an hour, and knocked a man down, inflicting fatal injuries. Hawkins, J., said: "Cyclists seem to think that, so long as they ring the bell or give a warning, people are bound to get out of the way. That is not the law, and they must learn that they have no greater rights than other persons using the highway, either on horseback or driving. If people do not get out of the way they must turn aside or stop. They must know that their liability is not only a criminal one, as they are also liable to make compensation for their wrongful acts."

(*c*) *Myers* v. *Hinds* (1896) 110 Mich. 300; 33 L.R.A. 356.

at the rate of six or seven miles an hour through a narrow village street in which there were a number of the inhabitants standing or walking slowly about, and, after having narrowly escaped running into a group of people which scattered at his approach, came into collision with a little girl who just then ran out of a side street, but whom he was unable to see until the other persons had got out of the way of his bicycle. The Court laid down the general rule that the duty of a bicyclist to pedestrians demands that, when he is riding along and his view becomes obstructed so that he cannot see what may be in front of him, he ought either to get off altogether, or to travel at a much less rapid speed than that which he was in this case maintaining. (*d*)

A girl of six years of age is not negligent in failing to take measures to protect herself against the occurrence of a contingency so improbable as that, when she has just emerged from a cross street, a bicyclist will suddenly scatter a group of people which had previously rendered him invisible, and dash down upon her at a rapid pace. (*e*)

(*b*) *Bicyclists entitled to benefits and subject to burdens of the rules of the road.*—The most important practical consequence of the doctrine which places cycles on the same footing as horse-drawn vehicles is that cyclists, whether specifically mentioned or not in the enactments which define the rules of the road, are everywhere held to be subject to the burdens, and entitled to the advantages, incident to the observance of those rules. (*f*) Thus we find it laid down that a bicycle is a "carriage or vehicle" within the meaning of Publ. Stat., R.I., ch. 66, sec. 1, which requires any person travelling on a highway with a "carriage or vehicle" to turn out to the right on meeting another person so travelling. (*g*)

(*d*) *Foster* v. *Rintoul* (1891) 28 Scotch L. Rep. 636.

(*e*) *Foster* v. *Rintoul* (1891) 28 Scotch L. Rep. 636.

(*f*) The relative rights of bicyclists and persons driving other vehicles are defined at considerable length in Rev. Stat. Ont., p. 2922. It is perhaps not amiss here to remind the reader that the rules of the road which prescribe the side upon which vehicles shall pass are, on very nearly the whole of the American Continent, different from those observed in the British Isles and the English colonies generally, these being defined by the old rhyme which runs:

"'Tis a law of the road,
Though a paradox quite,
If you keep to the left
You will always be right."

(*g*) *State* v. *Collins* (1888) 16 R.I., 371; 3 L.R.A. 394.

So also the fact that the driver of a vehicle does not turn to the right as he approaches a bicyclist riding in the opposite direction is prima facie evidence of negligence. (*h*)

The extent to which a bicyclist meeting a horse-drawn vehicle is entitled to rely upon its driver's observance of the rules of the road is a question which must be determined by the special facts of each case. On the one hand there is no difficulty in admitting that, if the circumstances shew positive heedlessness on the part of a bicyclist who rides into the pole of a wagon, it is immaterial whether the wagon was or was not on the proper side of the road. (*i*)

So, too, there is no reason why bicycles should not, in a general sense, be regarded as within the scope of the doctrine laid down in an American case, that, "while a statute may prescribe general rules as to the use of the road, it does not undertake to define what may be the duties and liabilities of travellers under all possible circumstances, and that a man may not remain stubbornly and doggedly upon the right side of the travelled part of the highway, and wantonly produce a collision which a slight change of position would have avoided." (*j*) But it is sufficiently obvious that a rigid application of this doctrine might easily be productive of great injustice to wheelmen. In cases where it becomes necessary to determine the relative culpability of bicyclists and the drivers of horse-drawn vehicles, the fact that the manner in which the latter will commonly act, when an emergency presents itself, must be largely influenced by the fact that, if a collision does take place, the bicyclist will certainly be the principal, if not the only sufferer.

(*h*) *Cook* v. *Fogarty* (Iowa Sup. Ct. 1897) 72 N.W. 677; 39 L.R.A. 488. A declaration which alleges that the plaintiff, while riding his bicycle along a certain street, in the exercise of due care, was run over by the defendant's horse and carriage, negligently driven by a servant of the defendant while acting in the scope of his employment, and was severely injured and his bicycle demolished, is not demurable, where the grounds assigned for the demurrer are merely that it neither avers specifically that the injuries were incurred by reason of any fault or negligence of the defendant; nor that the alleged servant of the defendant was engaged at the time on the defendant's business; and that, if it states any cause of action, it joins in one count two separate causes of action, viz., the injury to the rider and to the bicycle: *Braithwaite* v. *Hall* (1897) 168 Mass. 38.

(*i*) *Rowland* v. *Wanamaker* (Penna. C.P., 1897) 7 Pa. Distr. Rep., 249.

(*j*) *O'Malley* v. *Dorn* (1859), 7 Wis. 236, holding that an instruction implying that, if a vehicle had been driven to the right-hand side of the travelled strip of the highway, at the time it came into collision with another, the driver was necessarily free from negligence, is rightly refused.

Any view of relative duties of the parties which does not take into account the tendency to recklessness which a consciousness of such a fact is apt to induce in the average human being would be altogether too optimistic for a practical science like the law. A fairer and less one-sided principle, we think, is indicated by a New York case which holds that a bicyclist riding along his own side of a road is not negligent in acting upon the assumption that the driver of a buggy which is coming towards him on the same side of the road will obey the law and turn out before they meet, and that, if a collision occurs, owing to his misplaced confidence in this regard, he may recover damages from the driver of the buggy, although he might have escaped injury if at the last moment he had turned out towards the centre of the road; the result being the same, although he did not act with good judgment in the matter, since he is entitled to the benefit of the principle that, when a party is placed by the negligence of another in a position of danger, and compelled to act suddenly, the law does not demand that accuracy of judgment which is exacted under normal circumstances. (*k*)

A statute declaring that bicycles and like vehicles are entitled to the same rights and subject to the same restrictions in their use as are prescribed in the case of persons using carriages drawn by horses, has the effect of imposing upon a wheelman the duty of turning out for a heavy vehicle where that has previously been established as the rule of a road by earlier decisions in the country where the statute was enacted. (*l*)

Under a statute requiring a driver to turn to the right when a vehicle is met and give it half the road, there is no obligation to turn out for a bicyclist until he knows, or with reasonable care could have known that the bicyclist is approaching. And in such a case a jury is justified in finding that the driver of a vehicle used due care to ascertain the approach of a bicyclist at night, where both the driver himself and a companion testify that they were both watching the road in front of them for the purpose of seeing anyone who might be on it and were not expecting to meet anyone, and did not see or hear the bicyclist until the vehicle ran against him. (*m*)

(*k*) *Schlimpf* v. *Sliter* (1892) 64 Hun, 463.

(*l*) *Taylor* v. *Union Traction Co.* (1898) 184 Pa. 465, applying the general rule laid down in *Beach* v. *Parmeter* (1854) 23 Pa. 196; *Grier* v. *Sampson* (1856) 27 Pa. 183.

(*m*) *Cook* v. *Fogarty* (Iowa Sup. Ct. 1897) 72 N.W. 677; 39 L.R.A. 488.

Where the statute prescribing what side of the road shall be taken by vehicles cannot be construed so as to cover bicycles, the question whether the driver of a freight wagon shall turn to the right when meeting a bicyclist is one to be determined with reference to the consideration whether it is reasonably necessary, and this depends solely on what should be conduct in such a case of a driver of ordinary skill and prudence. The driver of such a wagon, therefore, who takes the wrong side of a road, preparatory to stopping at a house, is not bound to exercise the highest degree of care, but merely ordinary and reasonable care, to avoid collision with a bicyclist coming in the opposite direction. On the other hand, the fact that there is no statute defining the duties of the parties prevents the bicyclist from asserting that he has any absolute right to pass between the wagon and the curb on his own side of the street, or to assume that the driver will turn out for him towards the other side. (*n*)

The negligence of the bicyclist himself has been held to be the proximate cause of a collision with a wagon, where the evidence shewed that he undertook to ride through a space of three or four feet between that wagon and another which it was passing, rather than turn to the left and ride over a strip of road covered with fresh laid macadam, although it also appeared that the accident would probably not have happened if the defendant, noticing what the bicyclist was trying to do had not pulled his horse to the left so as to give more room, the first effect of the movement being that the space between the wagons was somewhat narrowed. (*o*)

One who drives so recklessly as to run into a bicyclist going in the same direction and injure him and his bicycle may be convicted of assault. (*p*)

(c) Liability for frightening horses (Compare also sec. 2, ante).—In cases where a bicyclist is charged with negligently frightening horses by the use of his wheel, his responsibility is measured by the general principle that a person cannot be made to suffer for his acts, unless they were done in such a manner and at such a time as to shew that he was acting in disregard of the rights of

(*n*) *Peltier* v. *Bradley &c. Co.* (1895) 67 Conn. 42; 32 L.R.A. 651.

(*o*) *Rolland* v. *Dawes* (1898) 13 Que. Rep. Jud. 52.

(*p*) *Comm* v. *Dooley* (Penna. C.P.) 6 Pa. Dist. Rep. 381.

other persons. Hence, in the absence of any apparent reason for supposing that the sight of his wheel will frighten the horses of a carriage which he sees approaching, a bicyclist lawfully travelling in the ordinary manner along a public highway, cannot be charged with negligence because he does not stop and inquire whether the horses will be frightened, or because he does not anticipate the contingency of their taking fright. (*q*)

Similarly, and in reliance upon the same principle, it has been held that a complaint is demurrable which simply alleges that the defendant rode his bicycle in the centre of the road, at the rate of fifteen miles an hour, to and within twenty-five feet of the heads of the horses driven by the plaintiff, the consequence being that they took fright and ran away and upset the plaintiff's carriage. (*r*)

(d) Duty of bicyclists to carry bells and lamps.—Upon general principles it would seem that, where there is no statute or ordinance prescribing the use of bells and lights, the omission of a cyclist to carry them is, in case of a collision, some evidence, at least, of negligence, the inference of a want of care being more or less peremptory according to the circumstances, such as the degree of obscurity, the number of foot passengers likely to be met upon the highway, and so forth. The Supreme Court of Iowa has recently laid it down, in a case where the bicyclist was injured through a collision with a bicycle, that "a person who rides a bicycle without a light or other signal of warning in a public thoroughfare, when he is liable to meet moving vehicles or pedestrians, at a time when objects can be descerned readily at a distance of but a few feet is, as matter of law, guilty of negligence." (*s*)

Section 85 of the English Local Government Act of 1888, declaring that a bicycle is a carriage within the Highway Acts, and subjecting to a penalty persons who ride a bicycle without a light at certain hours, merely has the effect of making the offences created by the Highway Acts susceptible of being committed by bicyclists as well as the drivers of other vehicles. It does not operate so as to bring the new offence of omitting to carry a light within the purview of the clauses in the earlier statutes which give

(*q*) *Thompson* v. *Dodge* (1894) 58 Minn. 555; 28 L.R.A. 608. But by the Virginia Laws, 1896, the obligation is imposed upon bicyclists of dismounting if an approaching team appears to be frightened.

(*r*) *Holland* v. *Bartch* (1889) 120 Ind. 46.

(*s*) *Cook* v. *Fogarty* (1897) 72 N.W. 677; 39 L.R.A. 488.

a constable or other person witnessing an infringement of these provisions to detain the offender without a warrant. The Court said that to construe the later statute in this manner would virtually be equivalent to drafting a new section. (*t*)

The consequences of having no lamp, in cases where the bicyclist is seeking to hold the authorities responsible for maintaining a defective roadway are adverted to in sec. 6, post.

5. Use of footpaths by cyclists—(*a*) *Under the Common Law*—Apart from statute or ordinance there is plainly no ground upon which it can be pronounced that any right is violated simply by taking a cycle, or indeed any vehicle along a footpath. This strip is as much a part of the highway as that which is specially laid out to be used by horse-drawn carriages. The only obligation, therefore, imposed by the common law upon a cyclist in respect to the use of a footpath would seem to be that he shall exercise that increased measure of care which is suggested by the fact that he is travelling where foot-passengers do not ordinarily expect to encounter vehicles.

Thus in *Purple* v. *Greenfield* (*a*) we find the Court declining to lay it down as a universal proposition that any and every use of any kind of velocipede upon a sidewalk is unlawful, and expressing its approval of the trial judge's refusal to instruct the jury that, if the use of the sidewalk by the rider of a velocipede caused the plaintiff, while she was standing on the sidewalk, engaged in conversation,

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(*t*) *Hatton* v. *Treeby* (1897) 2 Q.B. 452. [Action for assault by constable who stopped bicyclist.]

(*a*) (1884) 138 Mass. 1. The trial judge told the jury that the unlawfulness of such use of the sidewalk might be established by shewing the existence of a municipal ordinance forbidding it; but, as there was no evidence of any such specific prohibition, it was for them to say whether such use should be pronounced unlawful for the reason that it obstructed public travel, and was therefore a nuisance. So in *Reg.* v. *Mathias* (1861) 2 F. & F. 570, Byles, J., left to the jury the questions whether a perambulator was a vehicle which prevented the convenient use of a footway by passengers, and was in that sense a nuisance which one of the public has a right to remove, and whether, supposing the right to the use of the footway to be a mere easement, the owner of the soil was justified in removing it, on the ground that its presence was not justified by the nature of the easement. His statement of the law was that "the owner of the soil may remove anything which encumbers his close except such things as are the usual accompaniments of a large class of foot-passengers, being so small and light as neither to be a nuisance to other passengers or injurious to the soil." The jury found that the perambulator was a "usual accompaniment" of foot-passengers, but could not agree on the propositions submitted to it in the latter part of the direction as to size and weight and injury to the soil.

to step back to avoid being hit by such velocipede, and so fall into an opening negligently left without a railing near the outer line of the sidewalk, the defendant municipality was not liable for the resulting injuries.

The Supreme Court of Indiana, applying the familiar principle that a specific design or intention at the time the act of violence is done, is not a necessary element of an assault (see 4 Blackst. Comm. 182; Addison on Torts, p. 142), and that a malicious and criminal intent may be inferred from a wanton and reckless disregard of human life and safety, has held that, even in a case where a bicyclist would be justified in riding on a footpath, he is liable for an assault if he runs the bicycle recklessly against a person standing with his back to him, when, by the exercise of the slightest care, he might have passed such person without touching him. (*b*)

(*b*) *Under Statutes and Ordinances.*—But cases in which the consequences of riding or driving a vehicle on a footpath are left to be determined by common law rules must necessarily be very rare, as the matter is almost universally regulated by statutes or ordinances. (*c*) Some few of the cases relate to enactments dealing specifically with cycles, and these are, as might be expected, usually prohibitory in their terms. Under such circumstances the duty to keep off the footpaths is of course peremptory. Hence the fact that a person who is prosecuted for contravening the provisions of a statute prohibiting the use of a sidewalk by bicyclists, was riding on it with the consent of the turnpike company upon whose land it was laid, is no defence. Such a sidewalk is as much within the purview of the statute as any other, and it is not within the power of any individual or corporation to license a violation of law. (*d*) Similarly, the fact that a street is obstructed is no excuse for violating a municipal ordinance forbidding cyclists to ride upon a sidewalk, for such an ordinance leaves a bicyclist free to dismount and walk with his bicycle past the obstruction. It is error, therefore, in an action by a bicyclist for false arrest under such an ordinance, to admit evidence that he rode on the sidewalk because the street was obstructed. The consequence of the receipt of such

(*b*) *Mercer* v. *Corbin* (1889) 117 Ind. 450; 3 L.R.A. 221.

(*c*) By sec. 560 of the Ontario Rev. Stat., p. 2572, municipal councils are specially empowered to prohibit, by by-laws, the use of sidewalks by bicycles.

(*d*) *Commonwealth* v. *Forrest* (1895) 170 Pa. 40; 29 L.R.A. 365.

evidence is that the jury are allowed to find that the bicyclist was justified in riding on the sidewalk, and that this fact was known to the defendant, and to consider such evidence as bearing on the motive of the defendant in causing the arrest of the plaintiff. (*e*) So the fact that bicyclists have for a considerable time been riding on a sidewalk in contravention of a statute, without complaint on the part of those inconvenienced by the practice, avails nothing, as a defence to a suit brought for the purpose of exacting the fine imposed by the statute. (*f*)

In some places the officials controlling the highways have passed ordinances permitting the use of footpaths for cycling upon payment of a certain license fee, and it has lately been held in New York that, where such an enactment is within their discretionary power, and the conditions resulting from the use of the footpath do not amount to a public nuisance, they cannot be compelled to respond in damages to a person with whom a cyclist comes into collision while availing himself of the right conferred by the ordinance, unless negligence on their part is affirmatively established. (*g*)

Statutes in which cycles are not specifically mentioned have been construed in the following decisions:

The English Highway Act (5 & 6 Will. IV., sec. 72), in specifying the offences which authorize the infliction of the penalty prescribed, begins with the words: "If any person shall wilfully ride upon any footpath . . . . . or shall wilfully lead or drive any horse, etc., or carriage of any description . . . . . upon such footpath," and after enumerating several other misfeasances uses the words: "to the injury, interruption, or personal danger of any person travelling thereon." This qualifying expression, it is held, refers only to certain misfeasances mentioned in that part of the section which immediately precedes it. Hence it is not necessary, in order to justify the arrest and conviction of a bicyclist under the opening clauses of the section, that evidence

(*e*) *Fuller* v. *Redding* (1897), 13 App. Div. (N.Y.) 61. It was there held that evidence of a conversation in which the defendant, a trustee of a village, directed a police officer to watch the plaintiff and arrest him if found violating an ordinance which forbade the riding of a bicycle on a sidewalk, was not admissible in the action, as the trustee's desire to enforce the observance of the ordinance was not evidence of malice.

(*f*) *Commonwealth* v. *Forrest* (1895) 170 Pa. 40; 29 L.R.A. 365.

(*g*) *Lechner* v. *Newark* (N.Y. Sup. Ct., 1896), 44 N.Y. Supp. 556.

should be given shewing that the use of the footpath had the effect of injuring, etc., persons travelling thereon. (*h*)

A bicycle being a vehicle in the eye of the law, a person who rides one longitudinally along a footpath is deemed to be guilty of a violation of a statute providing that "it shall be unlawful for any person to ride or drive upon" any kind of "sidewalk for the use of foot passengers, unless in the necessary act of crossing the same." (*i*)

The effect of the Pennsylvania Act (April 23, 1889, P L. 110), giving cyclists the same rights and subjecting them to the same restrictions in regard to the use of public highways as the drivers of vehicles drawn by horses, is to bring cyclists within the purview of a later Act (May 7, 1889, P.L. 44), imposing a penalty upon anyone who "wilfully or maliciously rides or drives any horse or other animal upon any footway laid along a highway." The Court said:

"It will scarcely be disputed that a bicycle is within the spirit of the Act; it is wholly improbable that the legislature intended to exempt him. The sidewalk is for travellers, men, women, and children. A very few years of observation in the new mode of travelling by bicycle has resulted in the conclusion that this vehicle is fully as dangerous to those walking on the same road as a carriage drawn by a horse. . . . . No bicycler, with due regards to the safety and rights of his fellows, should demand the use, in common with foot-travellers, of a walk with such a vehicle." (*j*)

A municipal by-law which provides that "no person shall by any animal, vehicle, lumber, building, fence, or other material, goods, wares, merchandize, or chattels, in any way encumber, obstruct or foul any street . . . . sidewalk," etc., is infringed by the use of a velocipede on a sidewalk, even though no one is near it. (*k*) Under the Ontario Consolidated Municipal Act of 1892, s. 496, s-s. 27, empowering a municipality to "prevent the encumbering, injuring, fouling, by animals, vehicles, vessels or other means, of any road, street . . . . or other communication," it is competent for a municipal council to pass a by-law prohibiting any

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(*h*) *Brotherton* v. *Titterson* (Q.B.D. 1896) 60 J.P. 72. [Action for assault against constable].

(*i*) *Mercer* v. *Corbin* (1889) 117 Ind. 450; 3 L.R.A. 221.

(*j*) *Commonwealth* v. *Forrest* (1895) 170 Pa. 40; 29 L.R.A. 365.

(*k*) *Reg.* v. *Plummer* (1871) 30 U.C.R. 41.

person from "driving, leading, riding, or backing any horse or any other animal or wagon or other vehicle along any sidewalk," and it has been held that a bicycle is a vehicle and the use of a bicycle is "encumbering" a sidewalk within the purview of such a by-law. (*l*)

The word "road" in a statute is for some purposes regarded as comprehending footpaths. Thus it has been held that the offence of "wilfully preventing or interrupting the free passage" of persons on a "public road" (Irish Summary Jurisdiction Act, s. 35, s-s. 3) is committed by a bicyclist who rides along a footpath beside a country road, even though no one is in sight, and he does not intend to interfere with anyone. The Court took the ground that the act was done upon a part of the road, and was clearly calculated to "prevent or interrupt" the free passage of those persons for whom a footpath is specially intended, viz., foot-passengers. To this conclusion it is not a sufficient answer that if the rider sees anyone coming he may get out of his way by leaving the footpath, for there may be times and circumstances when it is impossible even for the most skilled rider to avoid coming into contact with people. (*m*)

6. Right of cyclists to recover for injuries caused by defective highways—*(a) Liability of highway authorities, generally.*—For the purposes of the present article it will be sufficient to remind the reader that, according to the doctrine accepted in all common law jurisdictions, a statute transferring to a public corporation the obligation to repair does not of itself render such corporation liable to an action in respect to mere non-feasance. To produce that effect language must be used by the legislature which indicates its intention that this liability shall be imposed. (*n*)

Usually, however, the question in cases where a traveller seeks to recover damages for a breach of the duty to keep a highway in

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(*l*) *Reg.* v. *Justin* (1893) 24 O.R. 327, approving *Reg.* v. *Plummer* (1871), *supr.*

(*m*) *M'Kee* v. *M'Grath* (1891) 30 L.R.I. 41.

(*n*) *Picton* v. *Geldert* (1893) A.C. 524; *Cowley* v. *Newmarket Local Board* (1892), A.C. 343; *Municipal Council etc.* v. *Bourke* (1895) A.C. 433. The comments in the first two of these cases upon *Bathurst* v. *Macpherson* (1879) 4 App. Cas. 256, shew that the ground of the decision was that the municipality had been guilty not of a mere non-feasance, but of the maintenance of a nuisance. For other authorities upon the general rule stated in the text see Shearm and Redf. on Negl., sec. 337.

good repair is not whether such a duty exists, but whether it has been performed, or, in other words, whether the parties admitted to be responsible for the condition of the highway have exercised that degree of care which the law requires. Upon this question, so far as it concerns the drivers of horse-drawn vehicles, much light has been thrown by a large number of decisions, especially in the United States, but up to the present time very little progress has been made towards defining the principles upon which the Courts should be guided in determining whether a cyclist, under a given set of circumstances, can or cannot hold the authorities responsible for an injury caused by a defect in a road. In fact, so far as our researches extend only one Court of review has so far had an opportunity of dealing with the subject. In 1894 it was laid down by the Supreme Court of New York that, under the Highway Laws of that State, the commissioners of highways are not subject to any higher obligations by reason of the fact that a bicycle rider on an ordinary country road is exposed to greater danger than a person in a vehicle drawn by horses, and are, therefore, only bound to maintain such a road in a condition which makes it reasonably safe for general traffic. (*b*) The circumstances in this case, however, did not call for the enunciation of any such sweeping principle, for the road was twenty-five feet in width, and the accident was due to the fact that the bicyclist, finding the centre of the roadway to be too soft for easy riding, undertook to ride close to the edge of a gutter, with a vertical side and about eighteen inches in depth, and that the soft soil gave way under the wheel and allowed it to drop into the excavation. The Court remarked that "the accident was unusual and incidental to the character of the vehicle he was riding," and, therefore, "not one which was within the anticipation of a prudent man," or which called for "extraordinary precautions to prevent." But this point of view seems to be erroneous. Such an accident, it is clear, would he more likely to happen to the wheels on one side of a heavy wagon than to a bicycle, and the mere fact that, by reason of the different construction of the two types of vehicles, the results of the subsidence of the soil at the edge of the ditch would not be exactly the same is not a sufficient reason for maintaining that a different rule of responsibility rests upon the highway authorities in the two cases. Plainly the ground upon which

(*b*) *Sutphen* v. *North Hempstead* (1894) 80 Hun. 409.

the defendant's non-liability should have been rested was that, as the roadway was amply wide enough for safe, if not comfortable, travelling, a bicyclist who, merely for his own convenience, left the strip commonly used, and rode along the edge of the excavation like the one described, did so at his own risk. Security not ease is clearly all that the bicyclist has a legal right to demand.

That the broad rule laid down by the Court, arguendo, virtually amounting to a declaration that a cyclist must take a road as he finds it, provided it would be safe for an ordinary horse-drawn vehicle, is inconsistent with sound principles, we have very little doubt. The difference between the requirements of a cyclist and of persons travelling in other vehicles, as respects the condition of a highway, is sufficiently great to invalidate any conclusion which rests upon the assumption that a condition which, in the case of ordinary vehicles, would justify the inference of a performance or non-performance of their duty by the road-officers, would necessarily justify the same inference in the case of a cycle. The fact that cycles, considered as vehicles, possess certain special characteristics of their own, involves the corollary that the conduct of such officers must often wear a wholly different complexion according as the sufferer is travelling on a horse-carriage or a cycle. So much is manifest. But the precise effect which should be attributed to these essential differences between cycles and other vehicles is not easily defined. Starting from the rather vague principle that "the object to be secured is the reasonable safety of travellers, considering the amount and kind of travel which may fairly be expected on the particular road," (*c*) we have to solve the problem whether, in view of the peculiarities of the cycle, the result of this principle is to cast upon the road-officers more onerous or lighter obligations. At first sight it might appear that the standard of care thus

(*c*) *Kelsey* v. *Glover* (1843) 15 Vt. 708. *Cf.* Shearm. & Redf. on Negl., sec. 367. "It may not always be an easy matter to define the precise duty of a municipality under the statute with regard to highways, but it may be laid down generally that it has done its duty when it has prepared a roadway of suitable width in such a manner that it can be conveniently and safely travelled:" *Walton* v. *Corporation of York* (1881) 6 Ont. App. 181, per Burton, J.A. Commissioners of highways "must exercise proper care in their maintenance in a reasonably safe condition for all ordinary travel:" *Embler* v. *Wallkill*, 57 Hun. 384, cited with approval in *Ferguson* v. *Southwold* (1895), 27 Ont. Rep. 66. The extent of the duties of cities and towns is, "not that all parts of all highways shall be kept in like repair and alike smooth and free from obstruction, but that all parts of all highways shall be kept in such a condition as shall be reasonably safe and convenient, having reference to the character of the way and the amount of travel over it:" *Street* v. *Holyoke* (1870) 105 Mass. 82.

imposed must be higher. But a little consideration will shew that this conclusion by no means follows as a matter of course. On the one hand it is undeniable that defects which are quite innocuous to a horse-drawn vehicle are often such as to be exceedingly dangerous to a cycle. But, on the other hand, it is equally undeniable that, in fixing the measure of care incumbent upon the road-officers, it would be unjust not to give them the benefit of such inferences as may reasonably be drawn from the fact that a cycle occupies a much smaller space and can be turned in any direction much more readily than other vehicles. It is impossible to contend with any shew of reason that the formulation of an absolutely rigid doctrine which would bind such officials to provide a roadway which should be safe for a vehicle the construction of which renders it peculiarly susceptible of injury is logically defensible, when a comparison of the same vehicle with others also shews that, owing to its compactness and mobility, its rider is often much more favourably situated than the drivers of those vehicles for avoiding a dangerous place.

The practical difficulties raised by these opposing considerations are extremely embarrassing. On the one hand, it is clear that the effect of fixing the attention too exclusively on the greater fragility and instability of the cycle will be, in most instances, to lay upon highway officials a far higher standard of care than they are now obliged to satisfy, and that an enormous additional expenditure of money would be required if every public highway is to be maintained in such a condition that a cyclist might always rely on escaping injury while holding as straight a course and exercising no greater vigilance than the driver of a horse-drawn vehicle commonly exercises. On the other hand, if an exaggerated importance should be ascribed to the small size of the cycle and its capacity for being readily guided, there will be no little danger of drifting towards a doctrine which would virtually make a cyclist the insurer of his own safety. The only course, therefore, which would seem to be open at present, in cases involving the question under discussion, is to leave the jury to settle the liability of the highway officials under instructions which will indicate clearly the various considerations which enure to the advantage or disadvantage of the cyclist, as contrasted with other travellers. (*d*)

(*d*) That this is conformable to the ordinary practice in the case of ordinary vehicles need scarcely be said. It must be a question of fact altogether for the

Cases of this type may also be considered from another point of view which will often be assistance in determining the rights of the parties. According to a familiar principle of the law of negligence, one who is under a duty to keep some material substance, like the surface of a road, in good condition for the use of another person is entitled to the benefit of the assumption that such person will, in using it, exercise ordinary care in observing and avoiding dangers. It is true that, in practice, a jury is likely to solve the problem, whether road officers have provided a road reasonably safe for a prudent cyclist, considered in the abstract, by inquiring whether the concrete specimen of the cyclist, who may happen to be the plaintiff, was guilty of negligence at the time the injury in suit was received. But as the issue of contributory negligence is invariably raised, in some form or other, in actions where the defendant is charged with a want of care, it would seem that no great inconvenience, and certainly no injustice, can result from submitting the case under both aspects to the jury.

To cases in which the accident in suit would probably not have happened if the cyclist had not been travelling when the light was dim, the test of liability here suggested would seem to be specially appropriate. It is certainly open to serious doubt whether a cyclist is justified in expecting that he will be provided with a roadway so smooth that he can safely travel over it without a lamp, and in darkness so profound that a defect does not become visible until it is too late for him to take measures for his protection. Even the generality of such a practice in any given locality ought scarcely, it would seem, to negative the inference that, even if the want of a lamp was not contributory negligence on the part of a cyclist, he must be at least charged with the consequences of an election to take all the risks which he may incur from the want of the light.

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jury to say whether the place alleged to have been out of order was dangerous, and, if so, from what cause, and, if from a natural cause or process, whether the persons liable to repair the road could reasonably and conveniently, as regarded expenditure and labour, have made it safe for use: *Caswell* v. *St. Marys' Road Co.*, 28 U.C.R. 247. A rule adopted as correct in *Walton* v. *Corporation of York* (1881), 6 Ont. App. 181, where it was held that it was an error to non-suit the plaintiff on an issue of negligence *vel non* in regard to maintaining a ditch four feet in depth with sides cut down perpendicularly and without any railing beside it. That the liability of the highway authorities is almost always a question for the jury, see also *Kelsey* v. *Glover* (1843) 15 Vt. 708.

The liability of highway authorities for injuries received on strips at the side of a road deliberately left in a worse condition than the strip prepared specially for the accommodation of traffic, has as yet been very little considered with reference to the requirements of cyclists (*e*). In this dearth of strictly relevant authorities we shall content ourselves with collecting in the subjoined note some cases in which this point has been discussed in connection with horse-drawn vehicles. It will be observed that they are not quite harmonious. (*f*)

(*b*) *Violation of the rule of the road no defence to an action for injuries caused by defective highway.*—A statute which renders the driver of a vehicle liable to be mulcted in a fine and damages if he fails to turn to the right of a highway when he meets with another vehicle, but expressly declares that "no complaint for its violation shall be sustained unless made by the person injured," merely amounts to this: that, if a traveller meeting another turns to the left, he does so at the peril of being treated as a criminal in case injury is thereby occasioned to another person; but that, if no one is harmed, he is not to be regarded as the doer of an illegal act. Hence, his having turned out to the left will not debar him from

(*e*) See *Sutphen* v. *North Hempstead* (1894) 80 Hun. 409, the substance of which has been stated in this section, *ante*. The effect of this case is that a cyclist, who turns out of the strip of a road which is usually travelled, takes upon himself the obligation of exercising greater vigilance, the plaintiff being held guilty of negligence in failing to realize the danger of the occurrence of the accident which actually took place.

(*f*) In one the trial judge was held to have rightly refused an instruction to the effect that the duty of a municipality "to keep its streets in a reasonably safe condition for the passage of pedestrians and vehicles, extends to the whole width of the street." This duty, it was said, could not be predicated regardless of the location of the street, the amount of travel and other circumstances: *Fulliam* v. *Muscatine* (1886) 70 Iowa 436. An earlier decision by the same Court seems to imply that a municipality has the right to leave a strip of a highway unimproved, but that it is liable for a defect existing anywhere between the sidewalks of a city which has once been opened to the public over its whole width: *Stafford* v. *Oskaloosa* (1882) 57 Iowa 748. Other authorities seem to exclude this qualification by laying it down that in one of the public thoroughfares of a city a traveller has the right to assume that he can drive or walk over all parts of the roadway with safety: *Buck* v. *Biddeford* (1889) 82 Me. 433: *Durant* v. *Palmer*, 29 N.J.L. 544: *Raymond* v. *Lowell*, 6 Cush. 524. With respect to country roads there is apparently no controversy as to the correctness of the principles laid down by the Ontario Court of Appeal in the following passage: "There is no absolute right to have the whole space in a country road from fence to fence in a fit state for travelling. It is all highway by legal definition; but the duty of the corporation is only to have so much of it fit for the use of vehicles as will make a reasonably safe and convenient road for the requirements of the locality and the ordinary traffic expected to pass over it:" *Walton* v. *Corporation of York* (1881) 6 Ont. App. 181, per Patterson, J.A. To the same effect see Shearman & Redf. Negl., sec. 353, and authorities cited.

recovering damages from the parties responsible for the condition of the highway for injuries received through the overturning of his vehicle by an obstruction negligently left on the road. (*g*)

7. Special enactments for the protection and convenience of cyclists—In one State an attempt has recently been made to check, by a penal statute, the detestable practice of dropping upon highways substances calculated to injure cycles, (*a*) and it is to be hoped that all legislatures will shortly recognize the futility of leaving a person who suffers from malicious acts of this sort to exact satisfaction by a civil action.

The fact that, in some places, legislative bodies are even willing to accord special privileges to bicycles, as against other vehicles, is a very significant token of the change which, as already remarked (sec. 2, *ante*), public opinion has undergone in regard to their position among the appliances of transportation. For example, the Ontario Municipal Act, sec. 640 (Rev. Stat. Ont., p. 2633), empowers municipal councils to set apart for the exclusive use of bicyclists a portion of the highway, which cannot thereafter be used by riders of horses or drivers of vehicles drawn by horses without incurring a certain penalty.

8. Injuries to cyclists at railway crossings—When approaching a railway track a bicyclist must dismount, or at least bring his wheel to such a stop as will enable him to look up and down the track and listen, in the manner required of a pedestrian. What may be called a "bicyclist's stop," viz., circling a wheel round and round at a distance of five or ten yards from the track, is not a sufficient compliance with the requirements of the law under such circumstances, a full stop being demanded not merely to the end that he may have time and opportunity for observation, but in order that undivided attention may be secured. (*a*)

(*g*) *Gale* v. *Lisbon* (1872) 52 N.H. 174.

(*a*) See N.Y. Laws (1896) c. 333, p. 273.

(*a*) *Robertson* v. *Penna R. Co.* (1897) 180 Pa. 43. Here the bicyclist had waited, without dismounting, for one train to pass, and while on the crossing was caught by another, the evidence being that there was a space of seven feet clear between the nearest track and the adjacent building which intercepted his view of the approaching train.

The fact that a railway company has provided an electric gong at a crossing, designed to warn travellers that a train is coming, will not justify a bicyclist in relying entirely upon the action of the gong when he is approaching the crossing through a deep cut. He must still exercise reasonable care to ascertain whether a train may not, in spite of the silence of the gong, be so near the crossing as to render it proper for him to stop. Whether he has exercised such care is a question to be determined by the jury in view of this circumstance, as well as of the rest of the evidence. (*b*)

9. **Injuries to cyclists caused by street cars**—The contingency that a bicyclist may attempt to turn into a side street in front of a horse-car which is approaching the intersection of the streets from the opposite direction is not one which the driver of the car is bound to provide for by slackening his speed, in the absence of some intimation of the rider's intention. Under such circumstances the responsibility of determining whether he shall cross the track in front of or behind the car rests upon the bicyclist. Hence there can be no recovery for injuries caused by the collision of a street car with a tandem bicycle where it appears from the testimony of the riders themselves that, when the car was approaching them rapidly, they undertook, suddenly and without any timely warning, to turn into an intersecting street in front of the car, and when it was so close that the front rider was the one struck by the horses. (*a*)

A bicyclist's use of the slot of a cable road is not negligence per se. The sole obligation incumbent upon him is that he shall exercise the care required of one who puts himself in a place of danger. Nor is a bicyclist under such circumstances guilty of negligence, as a matter of law, because he fails to look back. He is entitled to proceed on the assumption that he is exposed to no danger through the approach of a car from behind until he receives some warning, after which he is bound to protect himself by getting off the track. Where he testifies that the first notice which reached his ears was the rumble of the car just before it struck him, it is for the jury to say whether his failure to avoid it shewed, under the circumstances, a want of due care. (*b*)

(*b*) *Kimball* v. *Friend* (1897) 95 Va. 125.

(*a*) *Lurie* v. *Metropolitan, &c., R. Co.* (N.Y. Sup. Ct., 1896) 75 N.Y.S.R. 447; 40 N.Y. Supp. 1129.

(*b*) *Rooks* v. *Houston* (1896) 10 App. Div. (N.Y.) 98.

The liability of a cable-car company for injuries received by a bicyclist at a place rendered peculiarly dangerous by the fact that there was a turn-out curve leading to a cross street as well as a continuation of the main line was quite lately discussed in New York. (*c*) The evidence was to the effect that just north of a curve which turned to the west, a flagman was stationed between the main and branch lines to flag the cars round the curve, and that another flagman was stationed on the cross-walk of the street into which the curve led to warn persons who might attempt to cross that street while a car was rounding the curve. The plaintiff's intestate had been riding at a brisk pace behind a southwest bound car, on the main line north of the curve, and when the car stopped according to the regulations of the company, which required it to wait for a signal that the curve was clear before proceeding southward, he turned off the track towards the west, and, while attempting to cross the curve, was struck by a northbound car which was just then rounding it. The Court held that there was no evidence sufficient to charge the defendant with negligence, as great care had manifestly been observed in the management of the cars, so far as the employment of persons stationed on the street was concerned, and that there was nothing to shew that either of the signalmen could, in the exercise of reasonable care, have seen the bicyclist before he turned out or in time to warn him, or that the motorman of the car which struck him was guilty of any neglect as regards looking out for the bicyclist, or stopping the car when he finally observed him.

Where the character of the roadway is not such as to constitute any apparent reason why a bicyclist should not get out of the way of a trolley-car which, as he can ascertain by simply looking behind him, is rapidly overtaking him, the motorman is justified is assuming that the bicyclist, after being warned by the shouts of the passengers of a car coming up on the other track, will either increase his speed or leave the track to avoid a collision, and is, therefore, not bound to regulate the motion of his car on the supposition that he will defer leaving the track until the car is within a few feet of him. (*d*)

(*c*) *Cardonner* v. *Metropolitan, &c., R. Co.* (1898) 26 App. Div. 8.

(*d*) *Everett* v. *Los Angeles, &c., R. Co.* (1896) 115 Cal. 105. Temple, J. dissented, holding that, upon the evidence adduced, the motorman should have inferred from the wheelman's persistent disregard of the warnings he received

10. Injuries to bicycles left standing in streets—It is not negligence for the owner of a bicycle to leave it standing in a driveway alongside a curbstone, placed in a proper manner so as not to interfere unduly with the rights of others, and the driver of a wagon who negligently runs it against a bicycle so placed must respond in damages for the injury. (*a*)

Whether a bicyclist who leaves his wheel standing against the curbstone in front of a wagon is negligent in failing to ascertain whether the horse was unattended and unfastened is a question of fact for the jury. (*b*)

11. Payment of tolls, liability of cycles to—Whether tolls can be exacted from wheelmen is, of course, a question which must be determined, as a matter of construction, from the provisions of the statute which in the given case creates the right to collect the tolls. Upon the whole the inclination of the Courts is against extending the operation of such statutes to cycles, and very properly so, for it is obvious that the cost of maintaining a roadway is not increased in any appreciable degree by their passage. Thus a Turnpike Act, which contains one provision allowing the collection of a toll of a certain amount for horses or other beasts drawing various kinds of carriages, cycles not being included, and the specific enumeration being followed by the words "or other such carriage," and also another provision allowing the collection of a toll of different amount for "every carriage of whatever description, ... drawn or impelled, or set, or kept in motion by steam, or other power or agency than being drawn by any horse, etc.," does not authorize the collection of a toll on a bicycle, as it is presumed that the carriages referred to in the second provision must be car-

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that he was not paying proper heed to his safety, and that this knowledge was obtained soon enough to have enabled him to slacken speed sufficiently to have prevented a collision. The majority of the Court also held that contributory negligence was conclusively established by the evidence, the duty of a wheelman under such circumstances being to keep his faculties of sight and hearing on the alert for the purpose of ascertaining whether he is in danger of a collision.

(*a*) *Lindsay* v. *Winn* (Penna. C.P.), 3 Pa. Distr. Rep. 811: *Lacy* v. *Winn* (Penna. C.P.), 4 Pa. Distr. Rep. 409. In the latter case the trial judge said in his charge: "The defendant had no more right to drive into the bicycle there than he would have a right to drive over another man's wagon standing there."

(*b*) *Wagner* v. *New York, &c., Co.* (N.Y. Supr. Ct., 1897) 46 N.Y. Supp. 939, where a finding of the jury that the driver of the wagon was bound to indemnify the owner of the bicycle was held to be sufficiently supported by evidence, that his horse, being thus left unattended and unfastened, started forward of its own accord and drew the wagon against the bicycle.

riages *ejusdem generis* with the carriages specified in the first. (*a*) So also a statute declaring a bicycle to be a carriage, so far as regards the obligation of the rider to observe the rule of the road, (3 Gen. Stat. N.J., p. 2940, sec. 570), does not make it a carriage within the purview of a statute empowering a turnpike company to collect tolls from "carriages of burthen or pleasure," where it is apparent from another portion of the statute that the carriages meant are those drawn by beasts. (*b*) Nor can a bicyclist be charged tolls for the use of a road under Howard's Mich. Stat. sec. 3582, permitting a charge of two cents per mile for "any vehicle or carriage drawn by two animals," and one cent per mile for "every vehicle or carriage drawn by one animal," as well as for "every horse and rider or led horse." The Court "hesitated to say" that a motor cycle could with propriety escape tolls under this statute, but considered "that a distinction might be made between vehicles propelled by man, and those depending upon animal power for propulsion, and that this would not do violence to the Act, which had always been construed to permit the use of highways by persons who did not depend upon some means of conveyance besides their own power of locomotion." This view, it was thought, received a strong support from the fact that the bicycle had been used for nearly a quarter of a century, and that it was difficult to conceive of riders submitting to a general practice of charging toll without a protest which would have led to a settlement of the question in the Courts. The distinction thus drawn between carriages propelled by human agency and by motors would, it was believed, "protect the road companies from a use of their roads by substitutes for those vehicles which the law contemplated should be charged for, and at the same time protect the pedestrian in his increased power of locomotion by the aid of the wheel. (*c*)

On the other hand a recent Pennsylvania decision has construed a general clause in a statute very strictly against bicyclists, and, as the present writer ventures to think, in a sense not easily reconcilable with the tenor of the statute as a whole. Tolls, it was held, might be exacted from a bicyclist under a statute authorizing the collection of tolls from the drivers of certain specified vehicles "or

(*a*) *Williams* v. *Ellis* (1880) 5 Q.B.D. 175.

(*b*) *Gloucester, &c., Co.* v. *Leppee* (N.J. 1898) 40 Atl. Rep. 681.

(*c*) *Murfin* v. *Detroit, &c., Co.* (Mich., 1897) 38 L.R.A. 198; 71 N.W. 1108.

other carriage of burthen of pleasure" Counsel for the bicyclist argued that the effect of these words, though they were undeniably comprehensive enough to include bicycles, was cut down by a subsequent clause which declared that the basis of the computation of the amounts payable as tolls was to be "the number of wheels and horses drawing the same." The Court, however, considered that the designation of this special method of computation did not negative the power expressly given to collect the tolls from persons travelling by carriage, but merely introduced a limitation on that power, in such a sense that the amount demanded must be a reasonable one, not, in any event, exceeding the sums specified for the animals and vehicles actually enumerated. (*d*)

12. Cycles as a subject of taxation by municipalities—The decisions relating to the validity of taxes imposed by municipalities upon bicycles are difficult, if not impossible, to reconcile, but as it would appear that no court of review has yet had an opportunity of expressing its opinion upon the subject, it will be sufficient for our present purposes if we note the substance of the rulings which have appeared in the reports. These rulings are all those of American judges, the question, so far as we have been able to ascertain, not having been raised at all in England or Canada.

In a recent Maryland nisi prius case, it was held that the commissioners of a town were not authorized to pass an ordinance imposing a license tax of one dollar upon bicycles, the judge taking the position that, while the commissioners could undoubtedly regulate the use of bicycles in any reasonable manner, the ordinance in question was unreasonable, the reverse of beneficial to the town, and inconsistent with the policy of the State, which was that the residents of a town and all strangers who might happen to pass through it should enjoy the right of free passage over its streets, whether on foot or in private vehicles. (*a*)

Under a constitutional provision that taxes shall be uniform on the same class of subjects, a license tax imposed on bicycles alone is not invalid, as discriminating between bicycles and other vehicles. (*b*)

Nor is a license tax of one dollar per year, imposed by a borough upon each bicycle owned by a resident, invalid because limited to resident owners (*c*)

(*d*) *Geiger* v. *Perkiomen Tpke. Rd. Co.* (1895) 167 Pa. 582; 28 L.R.A. 458.
(*a*) See Am. and Eng. Encycl. of Law, vol. 4, p. 31.
(*b*) *Green* v. *Erie* (Penna. C.P.) 6 Pa. Dist. Rep. 697.
(*c*) *Green* v. *Erie* (Penna. C.P.) 6 Pa. Dist. Rep. 697.

On the other hand a municipal ordinance requiring every owner of a bicycle resident in the city to pay an annual sum of one dollar, and be furnished with a tag placed upon the upright underneath the handlebar, is not a proper exercise of the police power, and is illegal as a revenue measure, where there are about 7,000 resident bicycle owners in the city, and the streets are used by many non-resident bicyclists, and the cost of the tags is less than four cents apiece. (*d*)

An Illinois Court has granted an injunction to restrain the enforcement of an ordinance requiring the payment of a license fee, and the procuring of a license for all vehicles and bicycles in public and private use. (*e*)

13. Cycles as a subject of contracts of sale or lease—One who sells a bicycle on the instalment plan, retaining the title to it until the purchase price is paid, and takes it back for repairs while some instalments remain unpaid, loses his lien for such repairs when it is returned, and if he subsequently obtains possession of the wheel against the will of the purchaser, he has no right to hold it until he is paid the price of the repairs in addition to the balance of the purchase price. (*a*) The special rights which the vendor acquires under such a contract of sale, as a result of a default in one of the payments, are not waived by an offer of the vendor's agent to return a portion of the bicycle which has been placed in his hands for repairs, if the vendee will pay the defaulted instalment and the one next due. Such an offer is merely the tender of a new agree-

(*d*) *Densmore* v. *Erie* (Penna. C. P.) 7 Pa. Dist. Rep. 355.

(*e*) *Collins* v. *Chicago*, Chicago Legal News, 1897, p. 426. The grounds upon which the very lengthy and elaborate judgment of the Court was based were in brief as follows: (1) That, as the City of Chicago was only empowered by its charter to license certain specified occupations, the principle, expressio unius est exclusio alterius, negatived the existence of this power as regards anyone who was not pursuing one of these occupations; (2) that the validity of the ordinance could not be sustained under the power conferred in the charter to regulate the use of the streets, for the question to be decided was not one of the power of the city to exact a license fee from persons using the streets for business purposes; (3) that the exercise of the power claimed could not be sustained under the article of the general Act relating to the incorporation of cities, which allowed the laying of special assessments for street improvements; (4) that the ordinance, on its face, was clearly an attempt to raise a special fund for the improvement of the streets, and a license fee exacted for a general or special revenue purpose was void as an exercise of the licensing power; (5) that the license fee was essentially a tax on specific articles of personal property, which were conceded to have been already assessed for general taxation at their value, and that a second taxation of such property by declaring that it should not be used until it paid another tax levied, as in the ordinance, without regard to values, was open to the two-fold constitutional objection of being double taxation and of violating the principle of equality and uniformity.

(*a*) *Block* v. *Dowd* (1897) 120 N.C. 402.

ment based upon a fresh consideration, and the consequences of the default are left unaffected. (*b*)

Where a bicycle is rented to an expert wheelman with a thorough knowledge of bicycles for a certain number of months at so much per month, and is to become the property of the lessee upon the payment of a specified number of these sums, the doctrine of caveat emptor applies, in the absence of an express warranty, whether the transaction be regarded as a lease or as a conditional sale. Hence the purchaser, if he discovers it to be defective after using it for a portion of the five months, cannot rely on this defect as a defence to an action by the vendor for the residue of purchase price, or as a basis for a counter-claim for return of the rent already paid. (*c*)

14. The cycle as a subject of carriage—The general obligations of a carrier to forward goods with reasonable promptitude are illustrated, in respect to bicycles, by the recent New York decision, that a contract, by which a carrier agrees to deliver in the month of June, at a point in New Brunswick, a bicycle which the shipper, a resident in New York, intends to use during his vacation, is not complied with by an offer to forward it to him two months after the specified date. The carrier is liable, as for conversion, at any time before he actually tenders the bicycle to the shipper, the measure of damages being the cost price, where it is shewn to have been purchased just before delivery to the carrier and to have never been used. (*a*) To wheelmen, however, the most interesting aspect of a carrier's duties is that which involves the question whether they are entitled to have their bicycles transported on the same terms as the ordinary baggage of a passenger. Before the Courts had an opportunity of handling this question, two writers in legal periodicals discussed it upon general principles, and offered some plausible reasons why it should be answered in a sense favourable to the bicyclist. (See 12 Harvard L. Rev. 119; 43 Centr. L.J. 363). Some legislation has also been enacted, embody-

(*b*) *Equitable, &c., Co.* v. *Stern* (N.Y. Supr. Ct., 1896) 38 N.Y. Supp. 774.

(*c*) *Smadback* v. *Wolfe* (N.Y. Supr. Ct., 1897) 26 N.Y. Supp. 968. The lessee of a bicycle is entitled to recover damages from the lessor upon proof of averments that it collapsed, while in ordinary use, by reason of defective materials or faulty construction, although he also alleges and fails to prove that he received a warranty from the lessor. The responsibility being fixed by proof of the former averments, evidence in support of the warranty becomes unnecessary and immaterial. *Moriarty* v. *Porter* (New York City Ct., 1898) 49 N.Y. Supp. 1107.

(*a*) *Mitchell* v. *Weir* (1897) 19 App. Div. 183.

ing this view, and doubtless the controversy will ultimately be terminated everywhere by the same means. (*b*)

Meantime it must be admitted that the weight of such judicial authority as we have at present is decidedly against the view that a bicycle falls into the category of baggage.

In a case in an English County Court the judge ruled that a bicycle could not be treated as ordinary passenger's luggage, but his reasons are not reported. (*c*)

In 1897 at one of the London Police Courts a magistrate held that a bicycle is not luggage which a cabman is bound to carry free. (*d*)

The same conclusion was arrived at last year in a nisi prius case in which it was necessary to determine the meaning of the expression "ordinary luggage" in a Railway Act limiting the amount which a passenger might take free of charge. (*e*)

Counsel for plaintiff argued that the bicycle was as much for a man's personal use as his walking-stick or umbrella, that the expression "ordinary luggage" was not limited to clothes, but would clearly cover, for example, such articles as roller skates, between which and a bicycle there was no essential distinction, and that the arguments based on the fact of the large space occupied by a wheel was equally applicable to things which were unquestionably luggage, such as a lady's trunk. Counsel for defendant, on the other hand, laid stress upon the fact that the statute, as it only mentioned limits of weight and not of size, could not mean that passengers could take anything of any size. He put the case of boating men, demanding that their skiffs should be carried as luggage. Channell, J., in delivering judgment said:

"I am clearly of opinion that a bicycle cannot be considered as ordinary baggage within the meaning of the statute. . . . . I think there are certain requirements which articles must meet in order that they may be ordinary luggage. First, they must be for the personal use of the passenger; secondly, they must be for use in connection with the journey, i.e., must be something habitually taken by a person when travelling for his own use, not necessarily during the actual journey, but for use while he

(*b*) For example, by the N.Y. Laws of 1896, c. 333, p. 273, bicycles are declared to be baggage, and the passenger is not required to cover them.

(*c*) *Great Western R. Co.* v. *Edwards*, noticed in the Solicitor's Journal, Nov 7, 1896, by a writer who doubts the correctness of the ruling next referred to regarding the obligations of cabmen, for the reason that the Act prescribing their duties contains no words justifying the inference that the load which they are obliged to carry free must consist of "ordinary luggage."

(*d*) See Law Journal (Eng.). Oct. 9, p. 484.

(*e*) *Britten* v. *Great Northern R. Co.* (Nov. 1898) 15 Times L.R. 71 [an action to recover back a sum paid for the bicycle under protest].

is away from home. . . . . It is not necessary to say that the expression 'ordinary luggage' includes everything which is taken by the passenger for his personal use. I think that in the word 'luggage' is involved the idea of a package or something of that sort. A bicycle requires special care, and is not packed in that way, and I think that a thing taken loose like a bicycle is subject to rather different considerations. I do not think that a passenger could require a gun apart from the case to be taken as ordinary luggage, although, if packed up, it might be ordinary luggage. The things must be those kind of things usually treated as luggage in addition to being for personal use. . . . In one sense I do not think that the date of the Act of Parliament is very material. The habits of people alter. But when it is considered that a bicycle is an article of a totally different character from any of those which could have been included in the expression 'ordinary luggage' at the date of the passing of the Act, it becomes clear that it is excluded."

Similarly, in an American case, it has been held that a bicycle of thirty pounds in weight was not ordinary baggage within the meaning of a statute requiring railway companies to carry such baggage free up to the weight of one hundred pounds, and that a rule of the defendants fixing a special charge for bicycles was therefore valid. (*f*)

The Court took the ground that the mere circumstance of a bicycle's being useful and convenient at the end of the journey (*g*) was not of itself a differentiating factor sufficiently precise for the purpose of determining whether a vehicle of this description was or was not baggage. The acceptance of this test, it was said, would involve the result that a light buggy within the statutory limit of weight, would often fall into the category of baggage. To the argument that the lesser size of the bicycle might fairly be allowed to distinguish it from other vehicles, it was deemed a sufficient answer to say that, owing to its delicate construction, exceptional care and skill were demanded in handling it, as well as ample space to preserve it from injury by contact with other articles. The Court also thought that, as to the case before it, in which the bicycle had been presented for transportation without any boxing, another special consideration was applicable, viz. that the law did not recognize as baggage the things contained, as discerpted from the receptacle which contained them, and did not cast any duty on a carrier to receive personal baggage until it had been placed in a position of reasonable security for handling and transportation. Much stress was also laid on the fact that many bills had been introduced in the legislatures of the various States requiring the carriers to transport bicycles as ordinary baggage.

(*f*) *State* v. *Missouri Pac. R. Co.* (1897) 71 Mo. App. 385.

(*g*) See the well-known opinion of Cockburn, C.J., in *Macrow* v. *Great Western R. Co.*, 6 Q.B. 612.

15. The cycle as a subject of insurance—A person who is injured while riding in a bicycle race cannot be said, as a matter of law, to be disabled from recovering under a policy of accident insurance which provides that it "shall not extend to or cover . . . . injury resulting from . . . . voluntary over-exertion, either voluntary or unnecessary exposure to danger, or to obvious risk of injury." (*a*)

In a Scotch case, briefly referred to in the Law Times, July 11, 1896, p. 252, the payment of a policy of insurance upon the life of a bicyclist who was killed while riding, was successfully resisted, the trial judge holding the terms "passenger train, passenger steamer, omnibus, tramcar, dog-cart, waggonette, coach, carriage or other passenger vehicle" did not cover a bicycle any more than a pair of skates.

A corporation which is chartered "for the purpose of the accumulation of a fund by assessments for the protection of its members from loss by reason of injury to or the losing of bicycles," and which does not agree to pay money for any loss, but merely to clean and repair the wheels, and replace them, if lost or stolen, is not an insurance company. Hence the fact that it was not chartered under the provisions of a statute under which alone the business of insurance can lawfully be carried on is not a ground for forfeiting its charter. (*b*)

16. When a bicycle is a necessary for a minor—A judge sitting both as court and jury may properly find that a racing bicycle worth £12 10. 0. is a necessary for the infant apprentice of a scientific instrument maker, earning 21s. a week and boarding with his parents, where it is in evidence that the use of bicycles by persons in his position was common in the neighbourhood. (*a*)

(*a*) *Keeffe* v. *Nat. Acc. Soc.* (1896) 4 App. Div. (N.Y.) 392. Non-suit held to have been properly denied.

(*b*) *Comm.* v. *Provident, &c., Ass'n* (1897) 178 Pa. 636. The Court relied both upon the general consideration that the prevailing feature of insurance policies, as they exist in practice, is that, for a certain specified premium, the insurer undertakes to pay a certain sum on the happening of a definite event, and on the particular consideration that this was the aspect of insurance which was emphasized in the Insurance Statute of Pennsylvania. It was regarded as manifest that, in view of the terms of this legislation, an association which did not specify any amount in its policy could not successfully ask for a charter thereunder, the necessary consequence being that the defendant was not obliged to have a charter which it could not obtain.

(*a*) *The Clyde Cycle Co.* v. *Hargreaves* (1898) 78 L.T. Rep. 296.

C. B. LABATT.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT OF CANADA.

Que.] EASTERN TOWNSHIPS BANK *v.* SWAN. [Nov. 21, 1898.

Appeal—Question of practice—Hearing—Peremptory order—Notice.

Where a grave injustice has been inflicted upon a party to a suit the Supreme Court of Canada will interfere for the purpose of granting appropriate relief, although the question involved upon the appeal may be one of local practice only. *Lambe* v. *Armstrong*, 27 Can. S.C.R., 390, followed.

Under a local practice prevailing in the Superior Court in the District of Montreal, the plaintiff obtained an order from a judge fixing a day peremptorily for the adduction of evidence and hearing on the merits of a case by precedence over other cases previously inscribed on the roll, and without notice to the defendants. The defendants did not appear, and judgment by default was entered in favour of the plaintiffs.

Held, reversing the decision of both Courts below, that the order was improperly made for want of notice to the adverse party, as required by the Rules of Practice of the Superior Court, and that the defendants were entitled to have the judgment revoked and set aside upon a requete civile.

Atwater, Q.C., and *Duclos* (*Brown*, Q.C., with them), for appellants. *Brosseau*, for respondents.

N. B.] [Nov. 21, 1898.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION *v.* TAYLOR.

Accident Assurance—Condition in policy—Notice—Condition precedent.

A policy of insurance against accidents contained the following condition: "In the event of any accident within the meaning of this policy happening to the insured, written notice containing full name and address of the insured, with full particulars of the accident, shall be given within thirty days of its occurrence to the manager for the United States at Boston, Mass., or the agent of the Corporation whose name is endorsed hereon." The insured having died from an accident, his widow, as beneficiary, brought an action on the policy, to which the company pleaded want of notice under the above condition. The plaintiff demurred to this plea, and her demurrer was allowed by the Supreme Court of New Brunswick. On appeal to the Supreme Court of Canada,

Held, reversing the judgment appealed from, GWYNNE, J., dissenting, that the giving of the notice was a condition precedent to a right of action on the policy, and that the demurrer to the plea must be overruled.

Owen Ritchie, for appellant. *Pugsley*, Q.C., and *Blair*, for respondent.

Ont.] McCUAIG *v.* BARBER. [Nov. 21, 1898.

Mortgage—Assignment of equity—Covenant of indemnity—Assignment of covenant—Right of mortgagee on covenant in mortgage.

C. executed a mortgage on his lands in favour of B. with the usual covenant for payment. He afterwards sold the equity of redemption to D., who covenanted to pay off the mortgage and indemnify C. against all costs and damages in connection therewith. This covenant of D. was assigned to the mortgagee. D. then sold the lands, subject to the mortgage, in three parcels, each of the purchasers assuming payment of his proportion of the mortgage debt, and he assigned the three respective covenants to the mortgagee, who agreed not to make any claim for the said mortgage money against D. until he had exhausted his remedies against the said three purchasers and against the lands. The mortgagee having brought an action against C. on his covenant in the mortgage,

Held, reversing the judgment of the Court of Appeal (24 Ont. App. R. 492), that the mortgagee, being the sole owner of the covenant of D., which the mortgagor assigned to him as collateral security, had so dealt with it as to divest herself of power to restore it to the mortgagor unimpaired, and the extent to which it was impaired could only be determined by exhaustion of the remedies provided for in the agreement between the mortgagee and D. The mortgagee, therefore, had no present right of action on the covenant in the mortgage.

Aylesworth, Q.C., for appellant. *W. H. Irving*, for respondent.

Que.] ROBERTS *v.* HAWKINS. [Dec. 14, 1898.

Negligence—Trespasser—Dangerous way—Warning—Imprudence.

A cow-boy aboard a ship on the eve of departure from the Port of Montreal was injured by the falling of a derrick then in use which had been insecurely fastened. He was not at the time engaged in the performance of any duty, and, although he had been warned to "stand from under," he had not moved away from the dangerous position he was occupying.

Held, reversing the decisions of both Courts below, that the boy's imprudence was not merely contributory negligence, but constituted the principal and immediate cause of the accident, and that, under the circumstances, neither the master nor the owners of the ship could be held responsible for damages on account of the injuries he received.

Macmaster, Q.C., and *Peers Davidson*, for appellants. *Geoffrion*, Q.C., and *J. M. Ferguson*, for respondents.

Province of Ontario.

COURT OF APPEAL.

From Rose, J.] [Jan. 24.

GOLD MEDAL FURNITURE COMPANY *v.* LUMBERS.

Landlord and tenant—Notice to quit—"Disposing" of premises—Covenant for quiet enjoyment.

A lease provided that in the event of the lessor "disposing" of the building the lessees should give up possession on certain notice; and soon after the lease was made notice was given by the lessor in assumed compliance with this proviso, and possession was given up by the lessees by consent but under protest before the expiration of the time limited by the notice. The alleged "disposal" of the building consisted of the making of an agreement by the lessor with a person who was to have the superintendence of the building, to obtain tenants for the lessor, and to collect rents, with the right to take a sublease himself in certain events with an option to purchase:—

Held, per BURTON, C.J.O., and MOSS, J.A., That this was not a disposal of the building within the meaning of the proviso, and that the lessor was liable in damages, he having misled the lessee to the latter's prejudice in reference to a fact within his own knowledge and in reference to which there was a legal obligation upon him to state the truth.

Per OSLER, J.A., That (on the evidence) the plaintiffs were not deceived or misled by the notice and were not entitled to damages.

Per MACLENNAN, J.A., That there was a disposal of the building within the meaning of the proviso, but that even if there was not there was no right of action in the nature of an action of deceit, the notice having been given in good faith; and no right of action for breach of the covenant for quiet enjoyment, the notice, if bad, not affecting the lessee's rights.

In the result the judgment of ROSE, J., 34 C.L.J. 90; 29 O.R. 75, was affirmed.

Watson, Q.C., and *Smoke* for the appellant. *S. H. Blake*, Q.C., and *F. C. Cooke* for the respondents.

From Divisional Court.] [Jan. 24.

CASTON *v.* CONSOLIDATED PLATE GLASS COMPANY.

Master and servant—Hired waggon—Negligence of driver—New trial—Adding parties.

When a man is the general servant of one person and at the same time the servant of another person in relation to a particular matter, the question

of which of these two persons is liable for his negligence must be decided by ascertaining which of them was exercising control over him at the time of the negligent act or omission, and if, in an action for damages against the alleged master, there is any evidence of exercise of control the case must go to the jury. In this case, where the defendants had hired from another company a horse and waggon and driver at a certain rate per day, it was held by the majority of the Court that there was some evidence from which exercise of control might be inferred.

Judgment of a Divisional Court affirmed, BURTON, C.J.O., and MACLENNAN, J.A., dissenting.

A Divisional Court in ordering a new trial in an action for damages against the alleged master on the plaintiff's application may properly add as a party defendant a person against whom relief is then for the first time claimed in the alternative.

Judgment of a Divisional Court affirmed.

Kitchie, Q.C., for the appellants the Consolidated Plate Glass Co. *Shepley*, Q.C., for the appellants the Cobban Manufacturing Co. *McCullough* and *Lobb* for the respondent.

From Rose, J.] ATTORNEY-GENERAL *v.* CAMERON. [Jan. 24.

Revenue—Succession Duty Act—Forum—55 Vict., c. 6 (O.), R.S.C., c. 24.

When the Provincial Treasurer and the parties interested do not agree as to the succession duty payable the question must be settled by the tribunal appointed by the Act, namely, the Surrogate Registrar, with the right of appeal given by the Act. The High Court has no jurisdiction to decide the question in a stated case. The Court of Appeal refused therefore to entertain an appeal from the judgment of ROSE, J., 27 O.R. 380 and 28 O.R. 571.

Armour, Q.C., for appellants. *Aylesworth*, Q.C., for respondent.

From Rose, J.] COCKBURN *v.* IMPERIAL LUMBER COMPANY. [Jan. 24.

Water and water courses — Timber — Saw logs driving Act—R.S.O. (1887) c. 121—Arbitration and award.

When a person floating logs down a stream fails to break jams of such logs, as directed by section 3 of The Saw logs driving Act, another person whose logs are obstructed by the jam has no right of action for damages but is limited to the remedy given by the Act, namely, the breaking of the jam at the expense of the person whose logs have formed it. When an arbitrator awards one sum in respect of matters, some of which are within and some without his jurisdiction, the award must be set aside.

Judgment of ROSE, J., reversed.

Aylesworth, Q.C., for appellants. *H. D. Gamble* and *H. L. Dunn* for respondents.

From Divisional Court.] ELGIE *v.* BUTT. [Jan. 24.

Arrest—Foreigrer—Staying temporarily in Ontario.

A foreigner who contracts a debt in the country of his domicile and then comes to this province to stay temporarily cannot be arrested here in respect of that debt when in good faith about to leave this province to return home. Judgment of Divisional Court reversed.

W. M. Douglas for appellant. *Garrow*, Q.C., for respondent.

From Divisional Court.] [Jan. 24.

LEIZERT *v.* TOWNSHIP OF MATILDA.

Municipal corporation—Damages—Non-repair of highway—Notice of accident.

The notice in writing of the accident and the cause thereof, referred to in the Con. Municipal Act, 1892, s. 531, s-s. 1, as amended by 57 Vict., c. 50, s. 13, O., and 59 Vict., c. 51, s. 20, O., is not necessary when the accident is the result of non-repair of a highway which two or more municipalities are jointly liable to keep in repair. Judgment of Divisional Court, 34 C.L.J. 87; 9 O.R. 98, affirmed, MACLENNAN, J.A., dissenting.

Adam Johnston for appellants. *Irwin Hilliard* for respondent.

From Divl. Court.] [Jan. 24.

FOLEY *v.* TOWNSHIP OF EAST FLAMBOROUGH.

Municipal corporation—Damages—Highway—Want of repair—Negligence of driver.

A highway in a thickly settled district, over which there is much traffic, is out of repair, within the meaning of the statute, when a large stump is allowed to stand in the highway, just at the edge of the travelled way.

Where horses are running away because of no fault of the driver, and while he is still endeavouring to recover control of them, he sustains injury owing to such defect in the highway, he is entitled to damages.

The contributory negligence of the driver of the vehicle in such a case is not an answer to an action for injuries sustained by an occupant thereof, who has in good faith entrusted himself to the driver's care.

Judgment of a Divisional Court, 34 C. L. J., 123; 29 O R. 139, reversed.

Staunton, for appellants. *Evans*, for respondents.

From Divl. Court.] O'CONNOR *v.* GEMMILL. [Jan. 24.

Solicitor—Agreement for compensation—Champerty—Exchequer Court—Taxation.

An agreement by a solicitor to prosecute a claim to judgment at his own expense in consideration of his receiving one-fourth of the amount which should be recovered is champertous and void.

A solicitor of the Supreme Court of Judicature for Ontario, who carries on proceedings for a client in the Exchequer Court of Canada is subject to the provisions of the Solicitors Act, and may be compelled to deliver a bill of costs for taxation.

Judgment of the Divisional Court, 34 C. L. J. 88; 29 O. R. 47, reversed in part, OSLER, J.A., dissenting.

F. A. Anglin, for appellant. *Arnoldi*, Q.C., for respondents.

From Falconbridge, J.] RIELLE *v.* REID. [Jan. 24.

Fraudulent conveyance--Company--Fictitious incorporation—Election of remedies.

When an insolvent trader forms, in accordance with requirements of the Ontario Companies Act, a limited liability company and conveys his assets to it, it cannot, in an action by his creditors, be treated as his mere alias and agent and the conveyance set aside. *Salomon* v. *Salomon* (1897) A. C. 22, applied.

A creditor cannot take the benefit of the consideration for a conveyance and at the same time attack the conveyance as fraudulent, and therefore where creditors seized shares in a company allotted to their debtor in consideration of the conveyance by him of his assets to the company it was held that they could not attack the conveyance.

Judgment of FALCONBRIDGE, J., 28 O. R. 497, reversed.

Coatsworth, for appellant, the liquidator. *F. E. Hodgins*, for appellant, M. Reid. *S. H. Blake*, Q. C., and *T. C. Thomson*, for the respondents.

From Divl. Court.] MINHINNICK *v.* JOLLY. [Jan. 27.

Fixtures—Sale—Severance.

An appeal by the plaintiff from the judgment of a Divisional Court, 34 C. L. J. 238 was argued before BURTON, C. J. O., OSLER, MACLENNAN, Moss, and LISTER, JJ.A., on the 27th of January, 1899, and was dismissed with costs, the Court agreeing with the judgment below.

Robinson, Q.C., and *J. P. Moore*, for appellant. *Aylesworth*, Q.C., for respondent.

From Divl. Court.] DOUGLAS *v.* STEPHENSON. [Feb. 3.

Defamation--Libel—Newspaper—Fair comment.

An appeal by defendant from the judgment of a Divisional Court, reported 29 O. R. 616, was argued before BURTON, C. J. O., OSLER, MACLENNAN, Moss, and LISTER, JJ.A., on the 1st and 2nd of February, 1899, and on the 3rd of February, 1899, was dismissed with costs, the Court agreeing with the judgment of the majority in the Court below.

King, Q.C., for appellant. *Shepley*, Q.C., for respondent.

HIGH COURT OF JUSTICE.

Meredith, C.J., Rose and MacMahon, JJ.] [Dec. 23, 1898.

REGINA *v.* COLEMAN.

Criminal Law—Committal for one offence—Change of venue—Trial for two offences—Administering oath—Validity of—Comment by judge on prisoner not testifying—Canada Evidence Act, 1893, s. 4, s-s. 2—Recalling jury—Comment withdrawn—Prisoner's right—New trial.

The prisoner was committed for trial in one county upon a charge of perjury alleging an offence committed in that county. The venue was changed to another county, where he was tried upon an indictment with two counts, alleging two offences arising out of the same matter, and found guilty on both. The facts relating to both of the charges appeared in the deposition taken by the committing magistrate.

Held, there was jurisdiction to try for both offences in the county to which the venue had been changed.

On the occasion when the perjury was alleged to have been committed the oath was administered to prisoner in open Court by the Clerk of the County Court sitting in General Sessions of the Peace for and at the verbal request of the Clerk of the Peace.

Held, that the witness was properly sworn.

At the trial, the prisoner did not testify on his own behalf, and the trial judge in his charge to the jury, contrary to the provisions of the Canada Evidence Act, s 4, s-s. 2, commented upon that fact, although when his attention was drawn to it he recalled the jury and withdrew his comment.

Held, that the prisoner had a right to have his case submitted to the jury without comment, and being deprived of that right, there was a substantial wrong done to him, which could not be undone by calling back the jury and withdrawing the comment, and a new trial was ordered.

Cartwright, Q.C., Deputy Attorney General, for the Crown.

E. F. B. Johnston, Q.C., for the prisoner.

Falconbridge, J., Street, J.] [Dec. 29, 1898.

TRUST CORPORATION OF ONTARIO *v.* CITY OF TORONTO.

Money paid under mistake of fact—Payment of taxes—Recovery back—Action.

The plaintiffs having been appointed in 1896 new trustees of a marriage settlement, received from the agent of the former trustee, now deceased, a list of lands belonging to the estate, and certain notices of assessment of taxes upon them. Finding such a notice in regard to one of the lots of land for taxes for 1895, they paid these taxes to the collector in August 1896. As a fact the land had been sold for taxes accrued prior to 1896, in the previous March, which the plaintiffs first became aware of in January

1897. The arrears exceeded the value of the land, and the plaintiffs did not redeem, but brought this action to recover back the money paid, as paid under a mistake of fact.

Held, affirming the decision of MORGAN, Co. J., that the action must be dismissed, for there was never any liability on the plaintiffs to make the payment in question; and even if there had been no arrears, and no sale for taxes, they would not have been any the more liable to pay; and therefore the mistake was not such as entitled them to recover the money back.

Aylesworth, Q.C., and *G. Heward*, for the plaintiffs.

Fullerton, Q.C., for the defendants.

Meredith, C.J., Rose, J., MacMahon, J.] [Jan. 7.

SMITH *v.* ROGERS.

Company—Shares—Blank transfer—Fraud—Usage of Stock Exchange—Bona fide holder for value—Validity.

According to the usage of the stock exchanges of Ontario a share certificate, endorsed with a transfer and power of attorney, signed by the person named in the certificate as the owner of the shares, having a blank left for the name of the transferee, passes from hand to hand, and is recognized as entitling the holder to deal with the shares as owner of them, and pass the property in them by delivery, or fill in the blank in his own name, and have the shares so registered in the books of the company.

Held, that a bank which had received share certificates (so endorsed by the owner and left with a firm of brokers) from the brokers in the ordinary course of business for value and without notice of the owner's rights, was entitled to hold them against the owner, although the dealing with the certificates by the brokers was as between them and the owner an unauthorized dealing with and fraudulent appropriation to their own use of the owner's property. *France* v. *Clark* (1884) 26 Ch. D. 257 distinguished.

Judgment of FALCONBRIDGE, J., reversed.

Geo. F. Henderson, for the appeal. *Aylesworth*, Q.C., contra.

Falconbridge, J., Street, J.] [Jan. 30.

IN RE CENTRAL BANK OF CANADA.

Winding up—Balance left in hands of liquidator—Payment out to Receiver-General—R.S.C. c. 129—R.S.C. c. 41—52 Vict. c. 32, s. 20 (D.).

This was an appeal from the ruling of the Master in Ordinary as to the proper definition of the monies repaid into Court by the executors of the Hogaboom estate, pursuant to the order of the Court of Appeal herein (24 A.R. 470), confirmed by the Supreme Court (28 S.C.R. 192), being the balance in the hands of the liquidators of an insolvent bank after passing their final accounts, which had been erroneously paid to the said executors.

Held, 1. Under 52 Vict. c. 32, s. 20 (D)., the Court has jurisdiction to entertain the appeal.

2. The above judgments of the Court of Appeal, and the Supreme Court, were conclusiue on the point that the money was the property of the Receiver-General of Canada, under R.S.C. c. 129, s. 41, subject to the liability of paying it over to the persons entitled thereto.

F. E. Hodgins, for Receiver-General. *J. K. Kerr*, Q.C., for creditors. *Harcourt*, for liquidator.

Boyd, C., Ferguson, J.] QUEEN *v.* GUITHARD. [Feb. 2.

Liquor License Act—Dominion licenses—Wholesale license—Sale in license district to unlicensed persons—R.S.O. c. 245, ss. 34, 51.

Motion to quash conviction. A brewing company held the Dominion license referred to in s. 51, s-s. 1, of the Liquor License Act, R.S.O. c. 245, and also a provincial wholesale license, as defined by s-s. 4 of s. 2 of that Act. They sold, through their manager, liquor in wholesale quantities to an unlicensed person in the district in which they had obtained their provincial wholesale license.

Held, that the sale was authorized under s-s. 3 of s. 51, and it was not requisite for the company to take out another wholesale license in the form issuable under s. 34.

Haverson, for defendant. *Cartwright*, Q.C., for Crown. *Langton*, Q.C., for prosecutor.

Meredith, C. J.] RE LAZIER. [Feb. 4.

Extradition—Private prosecutor—Authority of foreign government.

Held, that it is not necessary that it should appear on the face of extradition proceedings under R.S.C. c. 142, that the informations or complaints against the prisoner were laid or made by or under the authority of the foreign government; but the extradition judge may receive the complaint of anyone who, if the alleged offence had been committed in Canada, might have made it.

Canadian enactments and practice in this regard contracted with those of the United States.

R. G. Smyth, for prisoner. *J. W. Curry*, for the Crown.

Armour, C. J., Falconbridge, J., Street, J.] [Feb. 7.

LEGGATT *v.* BROWN.

Contract—Consideration in part illegal—Stifling prosecution.

Held, affirming the judgment of MACMAHON, J., 29 O.R. 530, that the promissory notes sued upon in this action were given on an illegal agreement, of which the plaintiff must be taken to have had knowledge; that the whole agreement, being based upon the understanding that one of the defendants was to be discharged from custody, was illegal and void · and

the plaintiff could not properly litigate the right to certain other promissory notes transferred by one of the defendants to another.

Aylesworth, Q.C., and *George Kerr*, for plaintiff. *Wyld*, for defendants A. A. Brown and Baker. *Fripp*, for defendant W. E. Brown.

Robertson, J.] IN RE HARRISON. [Feb. 8.

Money in Court—Infants—Payment out—Surrogate guardian.

Money paid into Court to the credit of infants will not be paid out to their guardian appointed by a Surrogate Court, upon his application, as a matter of right; though, in a proper case, an allowance for their maintenance and education may be made to him out of such monies. *In re Smith's Trusts*, 18 O.R. 329, followed; *Huggins* v. *Law*, 14 A.R. 383, and *Hanrahan* v. *Hanrahan*, 19 O.R. 396, distinguished.

W. Davidson, for the guardian. *J. Hoskin*, Q.C., for the infants.

Boyd, C., Ferguson, J.] QUEEN *v.* LEVI [Feb. 8.

Municipal corporations—Police commissioner—Second-hand stores and junk shops—By-law prohibiting dealing with minors.

Held, that R.S.O., c. 148, s. 436, which provides that "The Board of Commissioners of Police shall in cities license and regulate second-hand stores and junk stores," does not authorize a by-law to the effect that "no keeper of a second-hand store or junk store shall receive, purchase or exchange any goods, articles or things from any person who appears to be under the age of eighteen years."

Such a by-law is bad, as partial and unequal in its operation as between different classes, and involving oppressive or gratuitous interference with the rights of those subject to it without reasonable justification.

Du Vernet, for defendant. *Guthrie*, for prosecutor.

Boyd, C., Ferguson, J.] MACDONALD *v.* GAUNT. [Feb. 8.

Bills of sale and chattel mortgages—Antedated chattel mortgage—Date of execution—Invalidity.

Interpleader issue: *Held*, that a chattel mortgage was not invalid because dated March 16th, though not in fact executed until ten days later, it having been duly registered within five days from the date of actual execution.

The nominal date of a chattel mortgage is immaterial. It takes effect from and after the date and time of actual execution: nor is there any requirement that it shall be executed within so many days of the actual sale of the goods comprised in it.

C. J. Holman, for defendant. *Morrison*, for plaintiff.

Armour, C.J., Falconbridge, J., Street, J.] [Feb. 9.

JOHNSTON *v.* DULMAGE.

Bankruptcy and insolvency — Assignee for benefit of creditors—Costs of action brought by—Remuneration and disbursements of—Liability of creditors—Indemnity.

An assignee for the benefit of creditors, under the Assignments Act, cannot charge creditors personally with the costs of an action brought by him on behalf of the insolvent estate, unless upon a direct or implied promise of indemnity, but must look to the assets of the estate; and so, too, with regard to his remuneration for and disbursements in winding up the estate.

Walkem, Q.C., for plaintiff. *Aylesworth*, Q.C., and *Deroche*, Q.C., for defendants.

Rose, J.] RANDALL *v.* ATKINSON. [Feb. 13.

Evidence—Admissibility—Death of witness before cross-examination.

Held, upon a review of the authorities, that the depositions of the defendant taken on his own behalf upon a reference were admissible in evidence, notwitstanding that he had died, pending an adjournment of the reference, prior to cross-examination, so that the plaintiff had been deprived of the opportunity of cross-examining him.

Wallace Nesbitt, for defendant by revivor. *W. M. Douglas*, for plaintiff.

Meredith, C.J., MacMahon, J.] [Feb. 20.

CLIFTON *v.* CRAWFORD.

Parties — Action against executor for legacy—Person to whom legacy paid.

A testator gave legacies to three grandchildren, to be paid at majority or marriage, and provided: "In case of the death of any one of my said grandchildren, the bequests . . . shall be divided among and go to the survivor or survivors of them, share and share alike." All three survived the testator, but two died before marriage or majority, and the executor paid all three legacies to the survivor. The plaintiff, the personal representative of the grandchild who was the second to die, brought this action against the executor to recover one-half of the legacy of the grandchild who died first.

Held, that, as a determination of the proper construction of the will was necessary to entitle the plaintiff to succeed, it was not an improper exercise of discretion to require the surviving grandchild, or his representative, to be added as a party, so as to prevent an adjudication being had as to his rights under the will, behind his back, and to have the question decided in one action. *Cornell* v. *Smith*, 14 P.R. 275, referred to.

J. E. Cook, for plaintiff. *Justin*, for defendant.

New Brunswick.

SUPREME COURT.

McLeod, J.] QUEEN *v.* PERRY. [Dec. 23, 1898.

Conviction—Bawdy house—Fine—Costs—Cr. Code, ss. 783 (f); 788.

The prisoner was convicted of keeping a house of ill-fame under s. 783 (*f*) of the Criminal Code, and was condemned under s. 788 to pay a fine of $100. Upon a motion on the return of a writ of habeas corpus to discharge the prisoner.

Held, following *Reg.* v. *Cyr*, 12 P.R. 24, that the conviction was bad, as, under s. 788, a fine must not be in the full sum allowed for fine and costs; and also that the conviction should have disclosed that there were no costs.

W. B. Wallace, for the prisoner.

McLeod, J.] FERGUSON *v.* HOURIHAN. [Dec. 30, 1898.

Criminal information—Constable's fees—Liability of informant—Title of proceedings on review.

A constable cannot recover, in an action of debt against an informant laying a criminal information, expenses incurred in arresting and delivering to gaol persons charged under the information. Proceedings on review were entitled "In a Parish Court Commissioner's Court," and were certified by the "Commissioners of the Parish of Harcourt Civil Court."

Held, that the improper title of the proceedings was not a ground for refusing a review, but rather should be construed as a want of jurisdiction in the party trying the cause, and therefore affording a ground of non-suit.

A. A. Wilson, for the defendant. *L. P. D. Tilley*, for the plaintiff.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] DAY *v.* RUTLEDGE. [Dec. 23, 1898.

Security for costs—Retainer of money paid into Court as security pending appeal to the Supreme Court.

The plaintiff, residing out of the jurisdiction, had paid money into Court as security for the defendant's costs of the action; and having succeeded at the trial, and on appeal to the Full Court, now applied for

payment out notwithstanding the defendant's appeal to the Supreme Court of Canada.

Held, following *Re Donovan*, 10 P.R. 74; *Marsh* v. *Webb*, 15 P.R. 64; and *Honsell* v. *Lilley*, 56 L.T.N.S. 620, that the plaintiff was entitled to the order asked for.

Mulock, Q.C., for plaintiff. *Ewart*, Q.C., for defendant.

Full Court.] BRAND *v.* GREEN. [Dec. 23, 1898.

Practice—Procedure—Foreign insolvent corporation—Garnishment.

The plaintiffs residing in the State of Massachusetts brought this action against an incorporated company organized under the laws of the State of New York, and domiciled therein; a cause of action arising wholly outside of Manitoba. They then obtained an order attaching money alleged to be owing by a resident of Manitoba to the defendant company to answer the judgment to be recovered in the action, and served the order on the garnishee.

Before the commencement of the action an order had been made by the proper court in the State of New York, appointing a temporary receiver of the assets of the company, and restraining the company and its officers from exercising its franchises or collecting its assets, and its creditors from bringing actions against it. Subsequently, but after the service of the attaching order the New York Court made a decree dissolving the company and appointing a permanent receiver of its assets.

The defendant company and the receiver then obtained from the Referee in Chambers an order staying proceedings in the action and setting aside the attaching order. The Referee's order was affirmed on appeal by BAIN, J. On appeal to the Full Court,

Held, 1. If, as was claimed, the company was absolutely defunct, so that the action could not be carried to judgment, then it could not make any application, and the receiver had no locus standi to be heard on that ground.

2. Proceedings in bankruptcy, and even a discharge under the insolvency laws of one state or country, are not necessarily a bar to an action by a resident of another state or country who has not voluntarily made himself a party to the insolvency proceedings, and if they are a bar they should be pleaded.

3. That the question whether any judgment obtained could be collected here out of the attached money is one which should be determined in some more formal proceeding than a chamber application to set aside the attaching order.

Appeal allowed, and order in chambers discharged with costs.

Perdue, for plaintiffs. *Haggart*, Q.C., for defendant.

Full Court.] QUEEN *v.* HAMILTON. [Dec. 23, 1898.

Depositions, admissibility of—Evidence—Criminal Code, ss. 590 and 687.

The principal evidence on which the prisoner was convicted was that contained in two depositions of a witness who had died before the trial.

One of the depositions objected to contained the evidence of the witness written down on a separate sheet of paper headed "Martha Louisa Walker, sworn, saith," and on several successive sheets with the signatures "K. Campbell, P.M.' and "Louisa Walker" at the end. These sheets were attached to three others the first of which had the heading "Canada, Province of Manitoba, Western Judicial District," and then continued, "The depositions of Matthew Hamilton, etc., and others taken on the 25th day of March, etc., at Brandon, etc., before the undersigned one of Her Majesty's Justices of the Peace for the said province, in the presence and hearing of Alexander Hamilton who stands charged, etc." The depositions of Matthew Hamilton and Florentine Hamilton appeared on these three sheets which concluded with the statement, "Prisoner is remanded until Tuesday, March 29th at 10.30. March 25th, 1898. K. Campbell."

Held, that the deposition in question did not purport to have been taken before a justice of the peace or to be signed by a justice of the peace and so was not admissible under section 687 of the Criminal Code.

Semble. If it had been proved that section 590 of the Code had been complied with, by reading over the deposition to the witness by the latter, and the magistrate signing it, all three, magistrate, witness and accused, being present together, and that the evidence had been given in the presence of the accused, and that the latter had had an opportunity of cross-examining the witness, the deposition would have been admissible independently of s. 687, but it was not shewn that all three were present when the witness and magistrate signed, nor was it clearly shewn that the particular deposition had been read over to the witness.

The other deposition was objected to because the witness was described in the heading as "Martha Louisa Walker," whilst the signature was "Louisa Walker," and because the signature "K. Campbell" had not the letters "J.P." or "P.M." after it.

Held, that the document sufficiently purported to be signed by the justice before whom the deposition purported to have been taken, and was therefore admissible under section 687 of the Code.

In the result, as the jury might have been influenced by the evidence how held inadmissible, the conviction was set aside and a new trial ordered.

Perdue, for the Crown. *Howell*, Q.C., for the prisoner.