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# TABLE OF CASES

## REPORTED AND NOTED IN THIS VOLUME

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## *SHOULD CAPITAL PUNISHMENT BE ABOLISHED?*

How to punish crime, and, at the same time, reform the criminal, is a problem demanding the most earnest consideration by the statesman, the philanthropist, and the social reformer. Towards the solution of this problem some progress has been made, but, so far, with very trifling results. What has chiefly been accomplished is the arousing of public interest in this important question which has caused the abolition of the death penalty for all minor offences, and of the abuses which so long disgraced the treatment of criminals, whether awaiting trial, or after conviction. In fact, we are now in danger of going to the other extreme, and allowing sentiment to usurp the place of justice.

This error is almost as bad as the first; for if, instead of treating the criminal with such harshness and severity as only to have the effect of hardening his heart and confirming his evil propensities, we lead him to think lightly of his crime, and to fancy himself a victim to oppression, we are as far as ever from arriving at the end in view. What we should strive for is, of course, while punishing the criminal for his offence, not at the same time to condemn him as well to infamy for the rest of his life, and so leave him little recourse but continuance in crime. Our object should be to take care to open a door by which he may, after punishment, enter upon a new career—not of crime, but of good conduct. We should give him a ray of hope, not the blackness of despair, and hold out a hand to help, not to crush down.

To effect this the penalty must be justly proportioned to the offence; it must be certain, and be strictly carried out; no mere sentimentality must be permitted to interfere with, or mitigate it, at the same time it must not be aggravated by unkindly

treatment; all tendencies to right feeling must be encouraged, but not be accepted as giving a claim for commutation of sentence. Then, when once the punishment is over, reformation must begin, or, at least, a way for reformation must be given. There must be offered a means of escape from the dangers which beset the path of the man or woman, and still more the boy or girl, when they emerge from the prison gates, and are at once exposed to the temptations of their former life and former associates, and to the frowns of a censorious world, so ready to prove its righteousness by refusing forgiveness to those who have erred. How to bring this about is the task before us, and so far the effort has not been successful, not from the want of desire but from the failure to find any efficient method of operation.

With such ideas in view how are we to approach the subject of capital punishment? Clearly we cannot hang a man first, and then proceed to reform him, any more than we could first hang him, either literally or metaphorically, and then go on with his trial. The strongest argument against capital punishment is that by the punishment we close the door against reformation. How dare we, erring mortals, assume such responsibility? The reply is that there are crimes of such a character that he who, not in the heat of passion but of intent, commits them, puts himself out of the pale of human sympathy, or human indulgence. By Divine law the murderer is condemned to death, and by his fellow man shall the condemnation be carried out. "He that sheddeth man's blood by man shall his blood be shed." Was this law set aside by the new dispensation? Has it more authority now than the law which decreed "an eye for an eye, a tooth for a tooth"? We venture to suggest by the way that such punishments for such offences would perhaps be more deterrent than that now awarded of the usual formula—a fine of so much or so many months in jail. How far the Mosaic law should prevail with us is a fair question for argument, though we have a judicial dictum to the effect that our Provincial Assembly is not bound by the Ten Command-

ments. But whether in regard to capital punishment for the crime of murder we are bound by the Mosaic law or not, we certainly have its authority in support of the penalty of death, and, as a matter of expediency, our experience supports it also as the most effective safeguard against the commission of the crime.

It has been said that the worst use to which you can put a man is to hang him, but this is a very materialistic view of the case, and not more to be regarded that the modern sentimentalist who, like Tolstoi in his latest utterances, inveighs against the brutality of capital punishment, and uses every effort to prevent its infliction. Such people move heaven and earth to save the life of a Crippen, but do not spend a thought upon the brutality, the fiendish cruelty of his crime, or the effect upon the public mind of such a monster in human form being regarded as a fit subject for merciful consideration.

But putting aside for the present the question as to our right to inflict the death penalty, and the views of those who regard with abhorrence the idea of deliberately putting a criminal to death, no matter what his offence may have been, we turn to the practical question—Is the death penalty the most effective form of punishment as a prevention of the crime of murder, not to speak of other crimes of which there are some equally deserving of such a penalty?

In a pamphlet recently published by Mr. Arthur Macdonald of Washington, D.C., a well-known criminologist, we find this subject very fully dealt with in the light of the most recent and reliable figures taken from the criminal records of all countries from which such are obtainable. The conclusion at which the writer arrives is that "viewing the world as a whole the official statistics of leading countries shew a general increase of crime in the last thirty years, while severe punishments have become less and less in number," "but there are not as yet sufficient data to determine the influence of the death penalty." On the other hand he says, "In an extensive visitation of prisons both here (in America) and in Europe,

living in the institutions, talking freely with the most intelligent wardens, keepers and criminals, I do not remember one who did not believe in the utility of the death penalty in its effect upon certain classes of criminals, especially the professional criminal."

It is with the professional criminal, in whose case murder is as it were something incidental to his main object, a means to an end not the end itself; with the man who deliberately commits murder from motives of revenge, or to gain some ulterior object; or with the man of low and debased nature, for whom the sanctity of life of any kind has no meaning, who will beat to death his wife or his mother, or any one who angers him, that we have to do in considering this question. In all these cases it is the certainty of the punishment that has the effect desired. To such persons life penalty has comparatively no terror. They are prepared to risk it, for there is always the chance of escape, or of commutation, but from the gallows there is no escape. Again they are but human, and being human they fear death. Being criminals they fear for the future, for which they have no hope, and they would put off the evil day as long as possible.

In cases such as those above described the death penalty has been found by the experience of all countries, as shewn by the writer referred to, to have been at times necessary for public security, and in many countries where it had been abolished it was found advisable to restore it.

The writer referred to is very guarded in his conclusions, and hesitates in making a positive pronouncement, but from all he says, and for the reasons above adduced, we may safely conclude that while the infliction of capital punishment should be watched with care, no trifling considerations should be allowed to take away the certainty of that penalty following the sentence of death to be pronounced upon those who have been convicted of murder.

Shanty Bay. W. E. O'Brien.

## *THE STATUTE OF LIMITATIONS AND THE LAND TITLES ACT.*

Section 32 of the Land Titles Act provides that "*a title to any land* adverse to or in derogation of the title of the registered owner shall not be acquired by any length of possession."

Prima facie the meaning of this would seem to be that a registered owner's title cannot be affected by an adverse possession of the land in question. The object of the Act is undoubtedly to make the register such conclusive evidence of ownership that it cannot (except in cases of fraud) be controverted by any extrinsic fact. It is, however, not explicitly stated that as to registered land the Statute of Limitations is altogether abrogated. The section is dealing only with the title of land and even as regards land it may possibly be found that the section is not quite so far-reaching as it at first sight appears to be. For while it may be true that possession per se may not be sufficient to give any title to land no matter for how long it may have been held, as against any one dealing with the registered owner, non constat, that it may not give to an adverse possessor for ten years or upwards, a right to apply to be registered as owner in the place of the registered owner who for the statutory period has made no claim. The main and principal object of the Land Titles Act is to make the register conclusive evidence of ownership to all persons dealing with registered owners. But it may be doubted whether it is the purpose of the Act to allow registered owners to slumber on their rights, and permit others to enter into possession and acquire such a possession that under the Statute of Limitations the owner cannot evict them. The Statute of Limitations does not profess to confer any title on a possessor, but it bars the rightful owner from bringing an action to disturb the possessor unless he brings it within the specified time—and the legal result of this is to vest the title in the possessor for the statutory period. The Land Titles Act does not expressly repeal that enactment as regards registered land—but it is certain that un-

less a person who has had possession for the statutory period has got himself registered as owner, he cannot deal with the land as owner, so as to give a good title. But as we have said, it may be, that possession, though of itself insufficient to give title, may yet be found to give the possessor a right to apply to be registered as owner. Under the English Act, it is now made clear that it does. Originally, there was a section in the English Act corresponding to s. 32 in the Ontario Act, but that section has been now amended so as to read as follows (the words in brackets indicate the amendments): "12. A title to registered land adverse to or in derogation of the title of the registered proprietor shall not be acquired by any length of possession [*and the registered proprietor may at any time make an entry or bring an action to recover possession of the land accordingly.* Provided that where a person would but for the principal Act, or of this section, have acquired a title by possession to registered land he may apply for an order for rectification of the register under section 95 of the principal Act, and on such application the court may, subject to any estates or rights acquired by registration for valuable consideration in pursuance of the principal Act or of this Act, order the register to be rectified accordingly.] And provided also that this section shall not prejudice as against any person registered as first proprietor of land, with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place."

This amendment seems to make it clear that a title may now be acquired in England by possession even under the Land Titles Act, but such a title is not complete until the person who acquires it gets himself registered as owner.

Having regard to the purpose of our Land Titles Act, and to the fact that our Act does not contain any words enabling a registered owner to sue for the recovery of registered land after the expiration of the statutory period, and also the fact that the Land Titles Act does not expressly repeal the Statute

of Limitations in respect to land registered under the Act, it would seem that the court will in some way have to harmonize apparently conflicting enactments, and in order to do so it may be found that the only way to do it is to read section 32 as if it were in fact worded in accordance with the amendment made to the English Act.

The absolute security of all persons dealing with a registered owner, does not require that the registered owner should himself be protected against the results of his own laches. The purpose of the Act would be sufficiently answered, if all persons dealing with a registered owner shall be protected against unregistered possessory claims. What in such circumstances would be the rights of a purchaser from a registered owner as against a person in possession, whom the registered owner had lost his right to evict? It would seem that, in order to give due effect to the Land Titles Act, that as to the purchaser a new start must be taken to be given to the Statute of Limitations on his registration as owner, for as to him the right of entry would not accrue until he became the registered owner. With regard to persons acquiring rights to charges on registered land the proper view would seem to be that the register cannot be relied on as guaranteeing in any way the amount due, and anyone dealing with the registered owner of a charge does so subject to the state of accounts between the owner of the land and the chargee, and a transferee of a charge does not thereby acquire any fresh starting point for the Statute of Limitations but will take subject to any rights which the owner may have acquired or be acquiring under the statute. But as regards the ownership of the land itself, in order to work out the Land Titles Act each registered owner must be held to have an independent right and is not to be treated as claiming under or through any predecessor in title as under the common law system, nor is he to be affected by any claims or rights acquired by other persons by possession, or otherwise, which do not appear on the register. At least that appears to us, the only way in which reasonable effect can be given both to

the Land Titles Act and to the Statute of Limitations, unless it can be held that as to land registered under the Land Titles Act the Statute of Limitations has no application—until that has been actually determined it would seem to be the part of prudence for registered owners not to assume that the Statute of Limitations is repealed as to registered land. The Statute of Limitations has been recently revised and it makes no exception in favour of registered land.

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## *THE ONTARIO RAILWAY AND MUNICIPAL BOARD.*

All respectable people must be disgusted with the abuse which certain irresponsible journalists "of the baser sort" have heaped upon the members of the Ontario Railway and Municipal Board for their action in connection with some local grievance, or alleged grievance, in the city of Toronto. It is of course, useless to attempt by any protest to check such intemperate and uncalled for language; but, all the same, a protest should be made, and those who have any regard for their country's welfare should in every possible way seek to shew their reprobation of such unworthy and cowardly literature. Cowardly it certainly is, for not one but a coward would think of striking a man whose hands are tied; but this is exactly what these journalists have done. The Board being a quasi-judicial body cannot take any notice of such attacks; and even should they desire to do so, it has recently been held by Mr. Justice Garrow that the Board is not a "court" and cannot, therefore, commit for contempt. Such attacks as those we refer to are not criticisms but simply vulgar abuse, and must arouse, or at least tend to feed, the passions of unthinking and ignorant people. Perhaps the most objectionable feature of such literature is that it tends to break down that respect for authority and confidence in the courts of justice, the decadence of which marks the road to anarchy.

The Ontario Railway Board has recently been very much in the limelight, but it may safely be said, without fear of contra-

diction, that its decisions have been markedly fair, judicial and impartial, as well as shewing that independence of popular clamour and the broadness of mind to review, if thought well, their own decisions necessary to secure the impartial administration of the many important matters of a public nature which come before it. This is not the first time that writers of the class above referred to have sought to hamper and unduly influence the members of this Board; but they have gone on in the even tenor of their way without fear, favour or affection, and are as much entitled to respect as any Court in the land.

Whilst speaking of the above matters it is not inappropriate in connection with them to refer to the riotous scenes which have recently disgraced the fair name of the city of Toronto. These were largely due to language of the character above referred to, aggravated by the fact that those seeking municipal honours in that city are in the habit of courting the assistance of these sensational journals, in the belief that it will be of service to them in catching the vote of those who are supposed to be, and too often are, influenced by the clap-trap arguments and socialistic utterances of those objectionable developments of modern newspaper enterprise.

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## *BRITISH AND AMERICAN CONSTITUTIONS COMPARED.*

Nothing human is perfect; which threadbare statement is as true in matters national as in matters municipal or individual.

Recent events have brought into prominence some of the imperfections of the constitution of the United States. We have formerly alluded to a serious defect in the constitution of the Dominion of Canada, in respect of which that of the United States is certainly superior. We may refer to that subject again, but, at present, an ardent representative of the much "tail-twisted lion" must be permitted without offence to contravene the French exhortation, "Melez vous de vos affaires."

We are not prepared, however, to accept all his conclusions. The argument is as follows:—

By the recent elections in the United States it has been made perfectly manifest that the House of Representatives no longer represents the majority of the people of the United States, and yet for another year this House will continue to legislate, although it has ceased to enjoy the confidence of the people. Compare this with the British system. The House of Commons is dissolved and a new House is elected. As soon as the political complexion of the new House is manifest, the government, if it is in a minority, resigns and a new government enjoying the confidence of a majority in the House of Commons, takes its place. The popular will thus finds an immediate response. But under the United States system it takes many months before real effect can be given to the popular will. The President and his advisers who at the time of their election, represent the political views of the electors and who in some measure control legislation, may, before their term of office expires, cease to command confidence, but whether they do, or not, they practically hold office for a term certain and until it has expired the will of the people practically cannot be carried into effect, whereas, under the British system, almost immediate effect is given to it. We have reason to feel satisfied that in Canada we have followed British, rather than American, precedent in forming our constitutional system.

But there is also another difficulty arising from the limited legislative powers of both Congress and the States legislatures. According to the British system, Parliament is supreme, its powers are unlimited and bounded only by the impossible. But both in the United States and Canada, the Federal and Local Acts are subject to judicial construction as to whether or not they are ultra vires; and this produces a very serious difficulty in the United States, though not so in Canada, and instead of being a protection to the rights of the people, it may prove, on the contrary, a means of really thwarting their will.

This aspect of the case has been shewn in more than one episode of the political history of the United States, and it is even now at the present time threatening the cause of true progress and enlightened legislation, as is very forcibly pointed out by ex-president Roosevelt in the recent issue of the *Outlook*. He refers to the New York bakeshop case, where the New York legislature had passed an Act to compel the carrying on of the business of bakeshops in the State in a manner and under conditions that would promote the health and comfort of the employees, and the Supreme Court by a majority of five to four declared the Act to be ultra vires, because it interfered with the liberty of men to work under conditions hurtful to their health. If this decision holds, and there is no appeal from it, except to the court itself in some other case, then the will of the people to provide better conditions for this class of work-people is practically frustrated for all time, or until some amendment can be made to the constitution. Because it is not as if some other legislative body, federal or local, had power to legislate in the direction aimed at, so long as the decision stands, it means that no legislature, federal or state, has jurisdiction to deal with the matter. Such a condition of things, however, could not arise in Canada, because the question for judicial decision would be which of two legislatures has the legislative power in the matter in question, and though the Act of the Federal or a local legislature might be held ultra vires, that would not mean that there was no legislative control over the subject-matter in question, but merely that the wrong legislature had assumed to deal with it, and it would still be competent to the proper legislature to legislate regarding it, without any constitutional amendment. This seems to indicate a further point of superiority of the British idea of constitutional government, to that by which the American system is governed.

## *CRIMINAL RECKLESSNESS.*

Mr. Lewis has again introduced in the House of Commons of Canada, his amendment to the Criminal Code, whereby he seeks to provide that—"Every one is guilty of an indictable offence and liable to two years' imprisonment who injures by shooting any person, although the person charged believed the object he was aiming at was a deer, moose, or other animal." Any one who is either so idiotic or so reckless as to shoot (as so many have done lately) a man instead of a beast of the field, would get nothing more under the above provision than what is due to him.

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The Criminal Code should also be amended by making a similar provision for reckless drivers of automobiles. Punishment by the infliction of a fine is admittedly inadequate and useless as a preventive. Any person owning an automobile is well enough off to pay a small sum of money for the pleasure of rapid driving, or for the pleasurable excitement of seeing how narrowly he can escape killing some one. Very large sums have been paid as fines without any marked dimunition of such offences, and the police authorities say that something more drastic is necessary. The regulations on this subject in England are much more stringent than here, and some Canadian legislator would do well for his country if he were to take this matter up and introduce that system here, or, in some way, insist upon more stringent provisions than the present entirely insufficient ones. If we happily lived in the "wild and woolly west," there would soon be an end of this sort of legalized brutality, for it would simply be a case of "shooting on sight."

## *REVIEW OF CURRENT ENGLISH CASES.*



VETERINARY SURGEON—ONE MAN VETERINARY COMPANY—UNQUALIFIED PERSON MANAGING DIRECTOR—MANAGING DIRECTOR DESCRIBED AS "SPECIALIST"—INJUNCTION—VETERINARY SURGEONS ACT, 1881, (44-45 VICT. C. 62) S. 17—(R.S.O. C. 184, S. 3).

*Attorney-General* v. *Churchill's Veterinary Sanatorium* (1910) 2 Ch. 401 was an action to restrain a breach of the Veterinary Surgeons Act, 1881 (44-45 Vict. c. 62), s. 27; (R.S.O. c. 184, s. 3). The defendant company, a limited company, was organized by an individual who was the sole member and managing director, and claimed to be a school of veterinary art, in which, the anatomical structure of horses, cattle, sheep, dogs and other domesticated animals, the diseases to which they are subject and the remedies proper to be applied are investigated," and on the window of the business premises of the company was inscribed "James Churchill, managing director, M.D., U.S.A., specialist." The action was brought to restrain the company and the managing director from holding out the company as being conducted by persons qualified to practise the art of veterinary surgeons. Neville, J., who tried the action, held that though the company was not a "person" within the meaning of s. 17 or liable to prosecution under the Act, yet it might nevertheless be restrained as prayed from falsely holding out to the public that the individuals who comprise or are employed by it are legally qualified veterinary surgeons; and he accordingly granted the injunction. It may be remembered that according to the Interpretation Act "person" in Ontario Acts includes a "corporation": 7 Edw. VII. c. 2, s. 7(13).

PRINCIPAL AND AGENT—LIMITED COMPANY EMPLOYED AS AGENT—COMPANY EMPLOYING ITS OFFICIALS—PROFITS OF OFFICIALS NOT RECOVERABLE AGAINST PRINCIPAL.

In *Bath* v. *Standard Land Co.* (1910) 2 Ch. 408, the principle that an agent cannot make a profit for himself beyond the remuneration fixed by the contract was held to preclude a corporation employed as agent from recovering from its principal remuneration paid to its own officials. The facts of the case were, that the plaintiff had employed the defendant company to

manage and develop his estate, and the company, having power by its articles of association so to do, employed one of its directors to act as solicitor, and another to act as an estate agent, and another to act as auctioneer, at the usual rates of remuneration for such services. These charges the company sought to charge against the plaintiff in addition to the remuneration contracted for, as necessary disbursements; but Neville, J., held that, as regards all profit charges paid to the directors, the company had no right to recover them as against the plaintiff, the directors as he said being but the "brains" of the company itself.

WILL—TESTAMENTARY PAPER—EFFECT OF PROBATE—LIST OF NAMES AND PECUNIARY AMOUNTS ADMITTED TO PROBATE AS CODICIL.

*In re Barrance, Barrance* v. *Ellis* (1910) 2 Chy. 419, Parker, J., was called on to consider the effect of a document setting out a list of names with sums of money opposite to each, which had been admitted to probate as a codicil; and he came to the conclusion that he was bound to regard every document admitted to probate as a testamentary document, and, so treating the list in question, it must be deemed to be a list of legatees for the amount of legacies set opposite to their respective names, and he declined to follow *Re Campshill,* 128 L.T. Jour. 548.

TRADE MARK—NAME OF ARTICLE—"GRAMOPHONE"—DISTINCTIVE WORD.

*In re Gramophone Co.* (1910) 2 Ch. 423. In this matter the applicants had for many years sold talking machines, which had been advertised and sold by the name of "gramophones." Although by the trade the word "gramophone" was understood to apply exclusively to talking machines made by the applicants, the word was by the public generally used as denoting any talking machine operated by a disc by whomsoever made. In these circumstances it was held by Parker, J., that the word having acquired a use as the name of all instruments of the class in question, without reference to the manufacture of the applicants, it could not be registered as a trade mark by the applicants.

WILL—SETTING APART FUND TO ANSWER LEGACIES—DISTRIBUTION OF RESIDUE OF ESTATE—RIGHT OF LEGATEE TO FOLLOW RESIDUE IN EVENT OF DEFICIENCY.

*In re Evans* v. *Bettell* (1910) 2 Ch. 438. This was an application under the Vendors and Purchasers Act made in the following circumstances. By the will of a testator certain annuities and legacies were given which formed a charge on the residuary estate of the testator. Under an order of the Court the executors were authorized to set apart sufficient funds to answer the annuities and legacies and to distribute the residue among the beneficiaries. A certain sum of consols was accordingly lodged in court and the rest of the estate was distributed. The residuary devisees having sold part of the residuary estate, the vendors took the objection that in the absence of any release from the annuitants and legatees or any order of the court declaring the residue, the residuary estate was still liable to be called on by the legatees and annuitants in case the sum set apart should prove insufficient, and Parker, J., upheld the objection.

RECEIVER AND MANAGER—BOND—SURETIES—DEFAULT OF RECEIVER—RIGHTS OF TRADE CREDITORS AS AGAINST ESTATE.

*In re British Power Traction and Lighting Co.* (1910) 2 Ch. 470. This was a debenture holders action, in which a receiver and manager had been appointed and given the usual security by bond with sureties. He incurred debts in carrying on the business of the company to the amount of £900, for which he was entitled to be indemnified out of the assets of the company, he was, however, indebted for moneys in his hands £400 which he had failed to pay. The creditors in these circumstances claimed to be entitled to be paid £900 out of the assets, contending that the loss of £400 should be made good by the receiver's sureties: but Eady, J., was of the opinion that before the receiver could claim the full indemnity of £900 he must first make good the £400; and that the creditors were in no better position, and that as the bond had not been given for their protection they had no right to enforce it as against the sureties, nor could they require the company to do so: which serves to shew that a receiver's bond may not be a very adequate protection to those interested.

PAYMENT OUT OF COURT—PAYMENT OUT UNDER ERRONEOUS ORDER—LIABILITY OF CROWN FOR ERRONEOUS PAYMENT OUT OF COURT.

*In re Williams* (1910) 2 Ch. 481. In this matter on incorrect, though not fraudulent, allegations and evidence, Kay, J., in 1889, made an order for payment of moneys out of court to two persons not really entitled. The payments having been duly made, the applicant who was then an infant and had since attained majority and claimed to be the person rightfully entitled, applied to discharge the order of Kay, J., and for an order for payment to her, so that she might on non-payment be in a position to claim payment out of the Consolidated Fund of the United Kingdom. Eady, J., held that the Paymaster-General having obeyed the order of court was in no default, and that in such circumstances, the Consolidated Fund could not be made liable. It would, therefore, seem that the only remedy in such a case would be against the persons who had obtained the erroneous order to compel them to refund.

VENDOR AND PURCHASER—SALE BY PLAN—CONTRACT—DISCREPANCY BETWEEN PLAN AND PARTICULARS.

*Gordon-Cumming* v. *Houldsworth* (1910) A.C. 537 was an appeal from the Scotch Court of Session. The estate of Dallas was offered for sale according to a plan, but in the course of negotiations, particulars were furnished of the acreage, names of tenants, etc., which included other property than that shewn on the plan. The vendor claimed that under the contract he was entitled to get all the land included in the particulars. The Lord Ordinary, who tried the action held that the plan governed. The Court of Session held that the particulars governed and the House of Lords (Lords Halsbury, Kinnear, and Shaw) agreed with the Lord Ordinary and reversed the judgment of the Court of Session.

ARBITRATION—PRACTICE—SERVICE OF NOTICE OF MOTION TO SET ASIDE AWARD OUT OF JURISDICTION—RULES, 1883, ORD. XI. R. 8a—(ONT. RULE 162).

*In re Aktiebolaget* v. *Societé Anonyme de Papeteries* (1910) 2 K.B. 727. In this case it was held that under the English Rules, 1883, ord. xi., r. 8a, there is no jurisdiction to allow service of a notice of motion to set aside an award on a foreign corpora-

tion out of the jurisdiction. There is no counterpart of ord. xi., r. 8a, in Ontario, but according to the definition in 3 Edw. VII. c. 8, s. 13, the word "writ" in that rule includes any document by which a matter or proceeding is commenced. The English rule expressly enables the court to authorize service out of the jurisdiction of "any summons order or notice" but in the interpretation of this rule the Divisional Court (Lord Alverstone, C.J., and Pickford and Coleridge, L.JJ.) held that the matter in respect of which the notice is to be served must come within some one or other of the grounds on which service of a writ is authorized to be made out of the jurisdiction, and it is probable that the same interpretation will be given to Ont. Rule 162.

ARBITRATION—DELIVERY OF PLEADINGS IN ARBITRATION PROCEEDINGS—POWER OF ARBITRATOR TO ALLOW AMENDMENTS.

*In re Crighton and the Law, Car and General Insurance Co.* (1910) 2 K.B. 738. A Divisional Court (Coleridge and Scrutton, JJ.), held that where in arbitration proceedings, an arbitrator orders the parties to deliver pleadings, he has power to authorize such pleadings to be amended.

CRIMINAL LAW—FALSE PRETENCE—EVIDENCE OF OTHER FRAUDS.

*The King* v. *Ellis* (1910) 2 K.B. 746. This was a prosecution for obtaining money under false pretences. The indictment alleged that he sold various articles of virtu to the complainant under an agreement that he was to charge only the cost price plus ten per cent. and that the accused represented to the complainant that the objects cost more than they actually did and thereby obtained larger sums than he was entitled to. The accused gave evidence on his own behalf and was asked in cross-examination if he had not in other transactions obtained money from the complainant for certain china figures which he alleged were old Dresden china when he knew they were not. The questions were objected to, but the objection was overruled and the examination proceeded with the object of shewing that the accused had been guilty of fraud in respect to such china. The accused having been convicted it was held on appeal by the Court of Criminal Appeal (Lord Alverstone, C.J., and Jelf, Bray, Lawrance and Coleridge, JJ.), that the evidence was irrelevant and inadmissible as being a violation of the Evidence

Act, 1898, s. 1*f*, and that the conviction must be quashed, as the jury would probably have been influenced by the improper evidence.

PHARMACY ACT, 1868 (31-32 VICT. c. 121), s. 17—(R.S.O. c. 179, s. 28)—SALE OF POISON—NAME OF VENDOR—TRADE NAME.

*Edwards* v. *Pharmaceutical Society* (1910) 2 K.B. 766. The appellant Edwards had been charged under the Pharmaceutical Act (31 & 32 Vict. c. 121), s. 17, (R.S.O. c. 179, s. 28) with selling poison without having placed his name on the package. It appeared that he had bought out the business of a chemist and druggist which had been previously carried on under the name of "Godfrey" and after his purchase he continued to carry on the business in that name. The poison in question had been sold by him and the package bore the name "Godfrey, Chemist," giving the address where the business was carried on. On a case stated by magistrates it was held by the Divisional Court (Lord Alverstone, C.J., and Bray and Pickford, JJ.), that the placing of the trade name of the vendor on the package was a sufficient compliance with the Act.

SALE OF GOODS—CONTRACT NOT TO BE PERFORMED WITHIN A YEAR—WRITING SIGNED BY PARTY TO BE CHARGED—STATUTE OF FRAUDS (29 CAR II. c. 3), s. 4—SALE OF GOODS ACT, 1893 (56-57) VICT. c. 71), s. 4—(R.S.O. c. 338, ss. 5, 12).

*Prested Miners Co.* v. *Garner* (1910) 2 K.B. 776. Notwithstanding all the decisions on the Statute of Frauds new points still occasionally arise, of which this case is an instance. The question for decision in this case being whether a contract for the sale of goods, though valid under what was formerly s. 17 of the Statute of Frauds, but is now s. 4 of the Sale of Goods Act, 1893 (R.S.O. c. 338, s. 12) may not nevertheless be bad under s. 4 of the Statute of Frauds (R.S.O. c. 338, s. 5) where it is not to be performed within a year and is not in writing signed by the party to be charged. Walton, J., found that there was no express authority on the point, but the text-writers of authority having always assumed that s. 4 applied to agreements for the sale of goods, he so held.

# Correspondence

## *APPEALS TO PRIVY COUNCIL.*

*To the Editor,* CANADA LAW JOURNAL:

SIR,—Referring to the editorial which appeared in your issue of the 15th November last respecting my letter which appeared in the same issue I regret very much if the letter bears the construction the opening paragraph of your editorial places upon it. I did not intend to refer in "tones of severe condemnation" to the action of the Privy Council in not accepting as credible the evidence of the defendants in the action of *Gordon* v. *Horne*, the trial judge and the Supreme Court of Canada having given credit to it. The object of the letter was to direct attention to the extent to which Privy Council intervention in our everyday litigation has of late been carried. *Gordon* v. *Horne* was only mentioned as a very recent example of it. Other instances might have been given, for example, *Blue* v. *Red Mountain Railway*, 39 S.C.R. 390 and (1909), 78 L.J.P.C. 107, where the Supreme Court of Canada by a unanimous judgment thought the justice of the case called for a new trial between the parties. The Privy Council granted leave to appeal even upon such a matter as this and ultimately reversed the decision. Or take the case of *Cumberland Railway and Coal Co.* v. *St. John Pilot Commissioners*, Canadian Reports (1910), A.C. 31, where the trial Judge, the Supreme Court of New Brunswick and the Supreme Court of Canada all agreed upon the meaning to be ascribed to certain language in a Canadian statute, yet the Privy Council granted leave to appeal and ultimately reversed the decision of all three Canadian courts. I wrote the letter referred to under a strong feeling that three appeals in litigation of this class is totally unnecessary and not in the interest of the public; that if we in Canada go to the expense of maintaining a Supreme Court at Ottawa litigation of this description if taken there ought to end there; that the expense of getting through the fourth tribunal sitting in London is equal to or greater than that of getting through all three Canadian tribunals put together; that a rich corporation or well-off individual is given a great advantage over a person of moderate means so long as the risk of being taken over to London with litigation of this character is allowed to remain. I did not mean to institute a comparison between the ability of the Canadian judiciary and that of the Judicial Committee of the

Privy Council and quite agree that comparisons are generally odious. I meant to assert that as litigation of this class calls for no great legal ability, learning or acumen, it is fallacious to assume that there is less liability to error in a judgment thereon obtained in England than in one obtained in Canada, and I meant to assert that sufficient ability is to be found on this side of the Atlantic for the satisfactory disposition of such litigation. I agree with all you say as to the great capacity and unfailing rectitude of the Privy Council. Every Canadian does that. But that is not to say that such qualities are not to be found in Canada. They are not peculiarly indigenous to the Island of Britain. As to the constitutional right to interfere with the judgments of our courts no one disputes that. England refuses to her colonies the right to settle their own lawsuits although in name they are styled "self-governing." Australia asked for the privilege and was refused and Canada cannot expect to fare better. The question is not as to the existence of the right but as to the manner of exercising it. If the Supreme Court of Canada cannot settle for us finally such questions as were involved in the cases above referred to, then it would appear to be a mere hurdle to be taken by litigants en route to the Privy Council and its usefulness to the people of Canada somewhat questionable.

I thank you for publishing my letter although you differ from my conclusions. Quot homines tot sententiæ.

Vancouver, B.C. W. S. DEACON.

[We have already expressed our views on this subject, which are not on the main issues in accord with those of our correspondent. We have not examined the other cases he refers to and cannot express any opinion as to whether they support his contentions; certainly *Gordon* v. *Horne* cannot be said to do so.—Ed. C.L.J.]

*To the Editor*, CANADA LAW JOURNAL:

SIR,—In Mr. Deacon's letter in your issue of 15th November last (Vol. 46, p. 692) he draws pointed attention to the fact that the solicitor and counsel for the appellants in the case of *Gordon* v. *Horne* which he refers to were persons named "Macnaghten" and that the Judicial Committee also included Lord Macnaghten. The insinuation is obvious and reminds one of the old days at Kingston, when Mr. "Archie John" Macdonell, a well-known and popular lawyer, was in partner-

ship with Mr. George Draper (a son of the late Sir William Draper) and Mr. Macdonell was occasionally asked by the County Court judge to act as a judge of a Division Court. At a court so held, Mr. Draper appeared for a litigant and was successful. The defeated litigant was afterwards asked by a friend how he accounted for his want of success, to whom he replied that his opponent "had Draper for lawyer and 'Archie John' for judge, and sure they're pardners!" Mr. Deacon accounts for his defeat in a like manner, but he is a lawyer and should not follow the example of an ignorant, uneducated layman. I would also say that should any disinterested person read the admissions of the defendant mentioned in the judgment of Clement, J., he would wonder how any judge could come to any other conclusion than that arrived at by the Privy Council and by the Court of Appeal of British Columbia.

AN OLD HAND.

## *PAYMENT BY CHEQUE.*

*To the Editor,* CANADA LAW JOURNAL:

DEAR SIR,— In an editorial on "Payment by Cheque" in 38 C.L.J., p. 2, commenting on *Day* v. *McLea* (1889) 22 Q.B.D. 610, it is remarked that where a cheque payable to order and expressly stated on its face to be "in full of amount due" is received by the creditor in payment of a larger amount, there has been no decision to the effect that the creditor may apply the cheque on account and claim the balance. The general impression is that in such a case the creditor may do so, his proper course being to immediately notify the debtor to that effect.

Will you kindly let me know whether or not there has been any decision on the point since the date of the above article.

Yours very truly,

Meaford, Nov. 8. SUBSCRIBER.

[Since *Day* v. *McLea* was decided there have been two decisions bearing on the question. One of these is *Henderson* v. *Underwriters Assurance Co.*, 65 L.T. 732, from which it would appear that the payee of a cheque expressed to be "in full" could not retain the money and at the same time repudiate "the accord and satisfaction" of the debt. The other is *Mason* v. *Johnston*, 20 Ont. App. 412. As Maclennan, J.A., points out in that case, there is a difference between money paid in satisfaction of a debt and money paid in respect of a tort.—ED. C.L.J.]

# REPORTS AND NOTES OF CASES.

## Dominion of Canada.

### SUPREME COURT.

Exchequer Court.] [November 2, 1910.

THE KING *v.* ST. CATHARINES HYDRAULIC CO.

*Lease—Covenant for renewal—Construction.*

A lease for 21 years of mill-races and lands on the old Welland Canal contained the following covenant: "After the end of 21 years, as aforesaid, if the said (lessors) do not continue the lease of the said water and works" they would compensate the lessees for their improvements.

*Held,* GIROUARD and DUFF, JJ., dissenting, that at the end of the 21 years the lessees were entitled to a renewal of the term but not to a new lease containing a similar covenant for compensation. They had a right to renewal or compensation but not to both.

After the original term expired the lessees remained in possession paying the same rental as before, for a further term of 21 years, no formal lease therefor having been executed and none demanded or tendered for execution. After the expiration of this second term they were dispossessed and claimed compensation for improvements by petition of right.

*Held,* DAVIES and ANGLIN, JJ., dubitante, that the original term of 21 years was continued, or renewed, for a further like term.

*Held,* per IDINGTON, J., GIROUARD and DUFF, JJ., contra, that the lessees having obtained a renewal their right to compensation was gone.

Per DAVIES and ANGLIN, JJ.:—The lease was probably not renewed within the meaning of the lessor's covenant, and as there was no proof of a demand for renewal the lessees, having remained in possession for the entire period for which they could have claimed a renewal, can have no right to compensation for improvements. If they ever had such a right in default of obtaining a renewal it is barred by the Statute of Limitations.

Per IDINGTON, J.:—The Statute of Limitations would be a

bar to the lessees obtaining compensation for improvements made during the original term.

Appeal allowed with costs.

*Dewart*, K.C., for appellant. *Mowat*, K.C., for respondents.

NOTE.—The reporter desires to substitute the above for the note appearing ante vol. 46, p. 738.—Ed. C.L.J.

# Province of Ontario.

## COURT OF APPEAL.

Full Court.] [Dec. 5, 1910.

REX v. HUGHES.

*Criminal law—Carnal knowledge of girl under 14—Second count for offence when girl over 14—Trial on both counts together—Withdrawal from jury of the second count—Conviction on first count.*

Motion for leave to appeal from a conviction by the Judge of the County Court of York.

The defendant was indicted for two offences, set out in separate counts, viz., (1) for having carnal knowledge in 1907 of a girl then under fourteen, and (2) for illicit connection in 1909 with the same girl—being a girl of previously chaste character—and then over fourteen, but under sixteen. The defendant was tried upon the two counts together, no application being made for a separate trial. But the trial Judge, after all the evidence had been taken, withdrew the second count from the consideration of the jury; and they found the defendant "guilty" upon the first count. The defendant suggested certain questions which might form the subject of a stated case, viz.: (1) whether it was proper to include the two charges in one indictment, and whether it was proper after all the evidence had been taken, to submit the first charge to the jury; (2) whether it was proper to exhibit the child of the prosecutrix to the jury as evidence against the defendant; (3) whether it was proper for the jury to hear evidence of criminal intimacy subsequent to 1907; (4) whether there was any evidence of carnal knowledge apart from what occurred after 1907, the prosecutrix's evidence

being self-contradictory and uncorroborated; (5) whether there should be a new trial.

*Held*, 1. It was within the power of the court to try both counts together, there being no objection made, nor any application for separate trial.

2. The fact that the trial judge withdrew from the jury the second count does not affect the question.

3. It has been the practice to permit the production of the child at the trial and the pointing out to the jury the likeness in the child to the defendant; and there is nothing objectionable to the principle of such evidence being given, but it ought to be within the power of the court to prevent any abuses of the practice.

*Robinette*, K.C., and *Plaxton*, for defendant. *Bailey*, K.C., for the Crown.

## HIGH COURT OF JUSTICE.

Divisional Court—Chy.] [Dec. 14, 1910.

RE ROWLAND AND MCCALLUM.

*Statute—Construction—"Shall" and "may"—Imperative or directory—Drainage Act.*

Appeal from an order of MEREDITH, C.J.C.P. The main question involved was the construction of sec. 48 of 10 Edw. VII. c. 90.

The language of the statute to be considered was as follows:—"At the court so holden the judge shall hear the appeal and may adjourn the hearing from time to time, but shall deliver judgment not later than thirty days after the hearing."

BOYD, C.:—The judge is here directed thus: he shall hear, he may adjourn, but shall deliver judgment not later than thirty days from the hearing. The effect of the words "shall" and "may" is here emphasized, and it is rather a misfortune than otherwise to see a disposition to read them as interchangeable and convertible. The force of the Interpretation Act was upheld by Armour, C.J.O., in *In re Township of Nottawasaga and County of Simcoe*, 4 O.L.R. at p. 11, and it appears to me to be a wholesome rule to bring about some certainty in the present flux of judicial opinion. The trend of legislation in this and kindred provisions for drainage suggests to my mind that the

time-limits prescribed are meant to be observed, and that summary and prompt and well-defined periods are given within which to bring to a practical close these disputes of merely local importance.

The burden is on the party who asserts that "shall" is to be read as permissive, and not as peremptory; and the text of this section and its history fortify that position. No reasons appear for any relaxation of the time-limit, on the facts of this case.

The method of decision in *In re Township of Nottawasaga and County of Simcoe* has been followed in the Supreme Court of Canada in *In re Trecothic Marsh*, 37 S.C.R. 79.

Appeal allowed, no costs.

*H. S. White*, for appellants. *Proudfoot*, K.C., for Rowland.

## Province of Nova Scotia.

### SUPREME COURT.

Drysdale, J., Trial.] [Nov. 20, 1910.

COREFTT *v.* PIPES.

*Cumberland Sewers Act—Acts of* 1893, *c.* 80—*The Marsh Act, R.S.N.S.* (1900) *c.* 66—*Construction of dykes and aboiteaux —Prescription—Lost grant.*

Sec. 3 of the Cumberland Sewers Act (being practically the Marsh Act as applied to the county of Cumberland) provides that "a majority in interest of the proprietors of any marsh, swamp or meadow lands within the jurisdiction of commissioners may by themselves or their agents select one or more commissioners to carry on any work for reclaiming such lands—and the choice or dismissal of any commissioner for or from the management of any particular land shall be made in writing under the hands of a majority of the proprietors in interest in such lands."

*Held*, 1. The owners of any tract of marsh land though such tract may comprise lands already in charge of a commissioner may organize under the above section for the purpose of carrying on a necessary work such as the building of an aboiteau.

2. The words "for reclaiming such lands" must be read not only to include the original reclamation of dyke lands but the upkeep of necessary works to protect them from the sea.

3. The Act permitted assessment for interest and also the employment of an overseer who was not a proprietor.

4. While the aboiteau in question was kept up as far back as evidence could be given by the proprietors of four certain bodies of marsh yet as it appeared that the contributions thereto were made under the provisions of the Marsh Act, the court would not in such case presume a lost agreement for contribution or base a right to recover on the theory of prescription. *Roach* v. *Ripley*, 34 N.S.R. 352, distinguished.

*Rogers*, K.C., for plaintiff. *Roscoe*, K.C., and *Ralston*, for defendant.

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Full Court.] [Nov. 26, 1910.

THE KING *v.* NEILSON.

*Industrial Disputes Investigation Act*, 1907—*Offence against—Aiding strikers—Word "employee"—Evidence on laying information—Code ss.* 655, 710.

A dispute arose between the Inverness Railway and Coal Company in relation to a deduction made from the wages of certain men employed by the company in their mines as a result of which some three hundred of the company's employees went out on strike. During the pendency of the strike defendant representing an organization known as the United Mine Workers of America gave cheques to merchants for goods supplied on his order to men who were out on strike.

*Held*, 1. This was an inciting, encouraging or aiding the persons so assisted to go or continue on strike, within the Industrial Disputes Investigation Act, (1907) Dom. c. 20, s. 60 and that defendant was properly convicted.

2. An employee of a company who without having been dismissed goes out on strike and who is at liberty to return to his employment is still an employee of the company within the meaning of the Act.

3. Sec. 655 of the Code as amended by Acts (Dom.) of 1909, c. 9 with respect to the taking of evidence when an information is laid only applies to indictable offences. Code s. 710.

*Mellish*, K.C., for prosecutor. *W. B. A. Ritchie*, K.C., for defendant.

Full Court.] [Nov. 26, 1910.

THE KING *v.* ATKINSON.

*Intoxicating liquors—Previous conviction—Evidence of—Same name and residence.*

Defendant was convicted before a stipendiary magistrate of a second offence against the Liquor License Act, the only evidence of the previous conviction being the production of a certificate under the Act from which it appeared that a person of the same name and address as defendant had been previously convicted before the same magistrate.

*Held,* affirming the conviction, that the evidence was sufficient.

*F. McDonald,* in support of appeal. *O'Connor,* K.C., contra.

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Full Court.] [Nov. 26, 1910.

THE KING *v.* BYNG.

*Intoxicating liquors—Club—Colourable transaction to evade Act.*

Defendant was tried and convicted on a charge of keeping intoxicating liquors for sale contrary to the provisions of the Liquor License Act. The defence relied on was that the premises upon which liquors were admitted to have been kept were the property of a duly incorporated and organized social club, but the evidence shewed that no bona fide club was ever organized and that the alleged transfer of the business previously carried on there by defendant was merely a colourable transaction having for its purpose the evasion of the provisions of the Act.

*Held,* that defendant was rightly convicted and that his appeal must be dismissed.

*O'Connor,* K.C., for appeal. *F. McDonald,* contra.

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Full Court.] [Nov. 26, 1910.

BENTLEY *v.* MORRISON.

*Statute of Frauds—Bill of sale—Agreement not to register—Promissory note—Continuing security—Judgment—Collateral attack.*

L. H. B. becoming insolvent made an assignment of his goods and stock in trade to F. by whom they were sold at public auction. At the sale, the goods wer bought in for A. M. B. the wife of L. H. B., who having obtained her husband's

consent to her doing business in her own name, on March 31st, 1904, registered a declaration under the Act of her intention to carry on business under the name and style of B. & Co. and gave a power of attorney to L. H. B. to act as manager of such business. In March, 1907, at a time when the firm of B. & Co. was in difficulties and unable to meet its liabilities, L. H. B. executed a bill of sale in his own name to defendant M. to secure the sum of $1,700 and at the same time delivered to him a promissory note for the same amount payable on demand. By agreement between the parties the bill of sale was not filed but was retained in the possession of M.'s solicitor until June, 1909, when M. purporting to act under the bill of sale sold the goods of B. & Co. to C. for the sum of $1,700, taking in part payment the note of C. made to B. & Co. and indorsed by B. & Co. to him. On the following day he brought action on the promissory note and recovered judgment for the amount of the note with interest and costs, and issued execution. In the interim between the date of the giving of the bill of sale and note B. & Co. had made payments on account and had been supplied with other goods by defendant.

In an action by plaintiff and other creditors to set aside the bill of sale and for an accounting and other relief,

*Held*, 1. The agreement between defendant and L. H. B. under which the bill of sale was not to be recorded rendered the transfer void as against creditors.

2. The promissory note given to defendant contemporaneously with the bill of sale was a continuing security upon which defendant was entitled to recover except in so far as the indebtedness had been reduced by payments, the amount to be determined by the assignee.

3. The judgment recovered by defendant in his action on the note could not be attacked collaterally or in the present proceedings.

*Mellish*, K.C., for appeal. *Rogers*, K.C., and *McLatchy*, contra.

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Full Court.] [Nov. 26, 1910.

GORTON-PEW FISHERIES CO. *v.* NORTH SYDNEY MARINE RY. CO.

*Negligence—Marine railway—Contract for hauling—Liability for proved acts of negligence—Negligence inferred from facts proved.*

Defendant company took charge of plaintiff's vessel for the

purpose of hauling it out on defendant's marine railway and making repairs. While the work of hauling out was proceeding the vessel fell over and was injured. In an action claiming damages defendants relied upon a written contract containing the following provision: "The company give distinct notice to all parties intending to use or using the railway and it shall be held to be part of their contract with such parties that the company will not be liable for any injury or damage by accident—which vessels or their cargo or machinery may sustain on the railway or whilst being moved there or being launched therefrom."

*Held*, 1. Such provision did not in any way limit the responsibility of the company for acts of well established negligence.

2. It was not necessary to plaintiffs' right to recover that some specific act of negligence on their part should be established but that such negligence might be inferred from the facts proved.

*W. B. A. Ritchie*, K.C., and *Robertson*, for appeal. *Mellish*, K.C., contra.

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Full Court.] [Nov. 26, 1910.

McCALLUM v. WILLIAMS.

*Principal and agent—Sale of land—Commission—Consideration—Written agreement—Construction—Oral evidence offered to shew intent.*

Defendant placed his farm in the hands of plaintiff, a real estate agent, for sale at a fixed price, under an agreement in writing whereby in consideration of plaintiff registering the farm in his real estate register (a publication issued by plaintiff), defendant agreed to pay a commission of three per cent. of the price obtained [illegible] or a sale of the property or any part thereof takes place." . . . "Such commission to be paid whether the said real estate . . . is sold either at the price mentioned above or at such other price that I may hereafter accept." There was no evidence that plaintiff, apart from including the property in the publication mentioned, did anything towards effecting a sale, and, as a matter of fact, the property was sold by defendant about a year after without the interposition of plaintiff.

*Held*, nevertheless, reversing the judgment of the County Court judge for District No. 4, that plaintiff was entitled

under the terms of the agreement to recover commission at the rate stipulated on the selling price of the farm.

DRYSDALE and LONGLEY, JJ., dissented and RUSSELL, J. who concurred, did so with doubt.

*Held*, that oral evidence offered for the purpose of shewing the meaning attached to the agreement by one of the parties thereto was properly rejected.

*O'Connor*, K.C., for appeal. *Milner*, contra.

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Graham, E.J., Trial.] [Dec. 2, 1910.

HUNT *v.* DARTMOUTH FERRY COMMISSION.

*Navigable waters—Public harbour—Grant of water lot—Wharf erected upon—Whether an interference with navigation—Injury to wharf by steamer—Liability for—Excessive speed during fog.*

A grant of a water-lot on the shore of a harbor is subject impliedly to the public right of navigation.

Whether a wharf erected by the grantee upon such water-lot is an interference with the right of navigation or not is a question of fact to be determined by the circumstances of each particular case.

A wharf so erected cannot be run into or injured by a vessel navigating the waters of the harbour if by the exercise of ordinary care such injury can be avoided.

Plaintiff was the owner, under a grant from the Crown, made many years ago, of a water-lot on the shores of Halifax harbour upon which lot a wharf was erected which was found, as a fact, not to be a nuisance but a convenience to the public, and to vessels arriving at the port with cargoes of produce for the Halifax market. Defendants were the owners of a number of ferry steamers plying between a ferry landing near plaintiff's wharf on the Halifax side of the harbour and the landing on the opposite side. One of the defendants' steamers, in crossing the harbour during a fog, ran into plaintiff's wharf and injured it. The evidence shewed that the fog at the time was so thick that the mate of defendant's boat only saw plaintiff's wharf when it was twenty feet away, too late to avoid a collision, and that although the usual running time of the boat from landing to landing was from nine to ten minutes and the boat on this occasion was stopped in the middle of the harbour to allow an incoming steamer to pass, the time occupied in crossing was between ten and eleven minutes.

*Held*, that the speed at which the steamer was run, under the circumstances prevailing at the time, was excessive and that defendants were liable in damages for the injuries resulting from the collision.

*W. B. A. Ritchie*, K.C., and *Robertson*, for plaintiff. *J. J. Ritchie*, K.C., for defendant.

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Full Court.] D'HART *v.* MCDERMAID. [Dec. 3, 1910.

*Vendor and purchaser—Amount payable by instalments—Interest—Construction of word "due."*

An agreement in writing for the sale by defendant to plaintiff of a house and lot of land for the agreed price of $800, payable in instalments, after providing for payment by plaintiff of the instalments at stipulated times and taxes, insurance and repairs, etc., provided: "The rate of interest chargeable by all parties concerned on the balance of this purchase price which may from time to time be due shall be, etc." It appeared that at the time of the transaction defendant was in insolvent circumstances and that the property was incumbered and that the price fixed, to be paid by plaintiff, was sufficient to discharge all incumbrances and to leave a small balance over to be paid as commission to the person named as defendant's agent to receive the money. Defendant admitted that he was handing the property over to the plaintiff for the incumbrances against it and that he was to receive nothing beyond that.

*Held*, reversing the judgment of the trial judge (RUSSELL, J. dissenting), that the interest clause of the agreement must be read as applying only to the instalments, *i.e.*, to instalments from time to time due and unpaid, and not to the principal sum named as the purchase price of the property.

*F. McDonald*, in support of appeal. *W. B. A. Ritchie*, K.C., contra.

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Full Court.] [Dec. 3, 1910.

OLAND *v.* MACKINTOSH.

*Partition—Sale by order of court—Sheriff's deed—Effect of—Easement—Right to continue drain—Heir buying will not acquire against third party in absence of reservation.*

*Held*, where land was sold by the sheriff by order of the court made in a partition suit and two of three lots of land were

purchased by plaintiff, one of the heirs at law and the third lot by defendant. *Held*, by the majority of the court that the conveyance by the sheriff has the same effect as a conveyance by one of the heirs and the fact of the sale being a judicial one, made under the order of the court, made no difference in the relations between the heirs, and that plaintiff purchasing, in the absence of an express reservation to that effect, would not acquire the right to continue a drain established by the common owner and passing through the lot purchased at the same sale by defendant.

Per RUSSELL and DRYSDALE, JJ., dissenting:—The principle that the grantor has no right to derogate from his own deed has no application to a judicial sale under order of the court. The deeds to the parties purchasing at such sale must be treated as simultaneous deeds from the court to such purchasers and plaintiff as purchaser of lots one and two would acquire as a quasi easement the right to drain through lot three, necessary to the reasonable enjoyment of her property.

*Mellish*, K.C., and *Macilreith*, for appeal. *J. M. Davison*, contra.

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Full Court.] [Dec. 3, 1910.

CUMBERLAND COAL AND RY. CO. *v.* MCDOUGALL.

*Criminal Code s. 501—Acts of intimidation by striking employees of company—Restraining order pending trial—Discretion of judge granting—Balance of convenience—Association or class—Suing representatives of.*

A restraining order, based upon alleged violations of the Criminal Code s. 501, was granted to a judge of the Supreme Court restraining defendants, pending the trial of the action, from the commission of certain acts of intimidation alleged to have been committed by them for the purpose of preventing the company from carrying on operations in connection with its coal mines by hiring other men to take the places of those of its employees who had gone out on strike. The evidence shewed concerted action on the part of the strikers with a view to preventing the company from working its mines until the demands of the strikers were complied with.

*Held*, 1. Where the judge, in the exercise of his discretion, after considering the affidavits before him, thought the case a proper one for a restraining order a strong case must be made out to induce the court to interfere.

2. In such a case the balance of convenience must be considered, and in this case the balance of convenience was in favour of continuing the restraining order.

*Semble.* There is no rule or authority to the effect that as a pre-requisite to suing an association or class of individuals in the name of some of them an order of the court or a judge must be obtained authorizing this to be done.

*O'Connor*, K.C., for appeal. *Mellish*, K.C., and *J. J. Ritchie*, K.C., contra.

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Full Court.] [Dec. 3, 1910.

SAM CHAK *v.* CAMPBELL.

*False arrest—Action for—Damages—Evidence in mitigation—Receivable in absence of plea—Jury—Verdict of —Reasonableness of.*

On the trial of an action by plaintiff claiming damages for false arrest, for loss of time during his detention in jail and for solicitors' fees paid in connection with procuring his discharge, plaintiff failed to appear on the trial to prove the damages claimed but his solicitor stated that the expenses incurred in connection with the discharge were something like $50. Evidence was given in mitigation of damages to shew that plaintiff's arrest and detention were due to an effort on his part to evade the provisions of the Chinese Immigration Act, R.S.C. c. 95 s. 7, in that he being a person of Chinese origin attempted to enter Canada without payment of the tax required in such cases.

*Held*, that such evidence was receivable without a plea in mitigation of damages and that it was proper evidence for the consideration of the jury in fixing the damages, if any, to which plaintiff was entitled and that they were not subject to limitation or control as to the degree of effect that would give to it.

The jury having awarded plaintiff one dollar damages,

*Held*, that it could not be said under the circumstances that this was not a conclusion at which reasonable men could arrive.

MEAGHER and RUSSELL, JJ., dissented, holding that the detention before plaintiff was brought to trial was unreasonable and that he was entitled to recover damages for such detention with costs of action and trial.

*O'Connor*, K.C., and *F. Macdonald*, for appeal *Macilreith*, contra.

Graham, E.J.] [Dec. 7, 1910.

DENNIS *v.* CITY OF HALIFAX.

*Municipal corporation—Supply of water for domestic purposes —Instalment of water meters—Regulations affecting—Words "service pipe"—Interference with city officials—Remedy.*

The Halifax City Charter authorizes the city engineer to cause a water meter to be placed on any service pipe supplying water to any premises in the city, and by other sections provisions are made giving city officials license to enter any such premises at reasonable times and to remain thereon for such reasonable length of time as may be required for the purpose of fixing, examining or reading the meter, etc.

*Held*, 1. That in determining the meaning to be given to the legislation the provisions of the charter must be read as a whole.

2. The words "service pipe" apply to the pipe leading from the main pipe in the street extended to and inside the wall of the house, whether the house is on the line of the street or back from it and that such pipe must go a reasonable distance inside the wall of the house, for the purpose of connection and use.

3. It appearing from the evidence that the meter placed in defendant's premises recorded accurately the quantity of water used and was reasonably close to the wall, and was removed by defendant and that defendant refused to permit the city official sent there for that purpose to replace it, this refusal was a sufficient interference to justify the engineer in proceeding in the event of a continued refusal to turn the water off from the premises.

*Allison*, for plaintiff. *Bell*, K.C., for defendant.

## Province of Manitoba.

### COURT OF APPEAL.

Full Court.] [Nov. 28, 1910.

STEWART *v.* TESKEE.

*Joint tort feasors—Liability for damages not necessarily the same in amount for all.*

Since the fusion of common law and equity the damages assessed against a number of joint tort feasors need not always

be the same for all; but, if one of them is responsible for only a part of the total wrong done and the liability, though joint as to all at the time of the commencement of the action, arose at different dates, there, may under Rules 219 and 220 of the King's Bench Act, R.S.M. 1902, c. 40, be a verdict against the one for that part and against the rest for the total amount of damage committed.

*O'Keefe* v. *Walsh* (1903), 2 K.B. 681; Mayne on Damages, 673, and *Copeland Chatterson Co.* v. *Business Systems Ltd.*, 11 O.R. 292, followed.

The defendant Teskee tortiously cut down and carried away a large number of trees from the plaintiff's land with the assistance of his co-defendants hired by him. The work occupied eight days, but the defendant K. was only engaged for two days upon it.

*Held*, that K. was not liable for anything beyond the amount of the damage done during the two days.

The plaintiff had failed to shew what that amount was; but, as K. had joined with the others in paying $91 into court to answer the plaintiff's claim, thus admitting his liability for that amount, the verdict of $1,000 against all in the trial court was changed to one for $91 against K. and for the balance, $909, against the other defendants.

*Fullerton* and *Jacobs*, for plaintiff. *Hoskin*, K.C., for defendants.

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Full Court.] [Nov. 28, 1910.

CITY OF WINNIPEG *v.* WINNIPEG ELECTRIC RY. CO.

*Injunction—Forfeiture—Waiver—Estoppel—Meaning of words "operation, conduct and management."*

Appeal from judgment of Mathers, J., noted ante., vol. 46, p. 116. This judgment as there noted was affirmed with the following variations.

*Held*, per HOWELL, C.J.A., and PERDUE, J.A., (RICHARDS, J. A., dissenting), that there was nothing in the agreement referred to in par. 1 of that note or in the company's Act of incorporation to prevent the company from using the direct electric current developed in the city as described in par. 3 to operate its street cars without the further consent of the city and erecting poles and wires for that purpose.

*Held*, also, unanimously, that the defendants had not acquired the corporate powers of the Manitoba Electric and

Gas Light Co., or the North West Electric Company under deeds transferring all their property, rights and franchises to the defendant company, for those companies had no right under their charters to alienate their corporate powers, and consequently, the defendants had no right to erect or maintain poles or wires in the city for purposes of electric lighting, heating or power unless authorized to do so by by-law of the city, although the companies named which were now defunct, had formerly acquired and exercised such rights.

*Wilson*, K.C., *Robson*, K.C., and *Hunt*, for plaintiffs. *Munson*, K.C., and *Laird*, for defendants.

## KING'S BENCH.

Mathers, C.J.] [Oct. 18, 1910.

RE FEDORENKO.

*Extradition—Political crime.*

The accused was a member of the social democratic party in Russia, whose object was not only to alter the form of government, but also to do away with private ownership of property. A propaganda was carried on by them throughout the country and many revolutionary outrages had been committed by them. The crime of which the accused was charged was the killing of a constable, in a district where martial law had been proclaimed and was in force, under the following circumstances: The accused and a companion, strangers to the locality, were staying at the house of a resident, when the village constable and a number of watchmen, hearing of their visit, decided to take them to the administrative office to give an account of themselves. When they got outside of the house the accused shot and killed one of the watchmen and he and his companion, being pursued, fired several more shots at their pursuers but escaped. They had not been accused of any offence and were not taken for any.

*Held*, that this crime, even although called in Russia, under the circumstances, a political crime, was not a crime of a political character within the meaning of the treaty between Great Britain and Russia as it was not one committed in furtherance of any political object, and that the prisoner should be remanded for extradition. *Re Castioni* (1891), 1 Q.B. 156, followed.

*Howell* and *A. V. Hudson*, for Emperor of Russia. *Hagel*, K.C., and *Finklestein*, for prisoner.

Macdonald, J.] [Nov. 16, 1910.

PHILLIPS *v.* SUTHERLAND.

*Infant—Repudiation of contract made by—Repayment of money received under voidable contract—Nonsuit, effect of.*

An infant who has made a sale of real property, and afterwards during infancy repudiated the contract, may, after attaining majority, maintain an action to cancel the contract, although such action is not brought immediately, provided that he has done nothing since attaining full age to avoid the previous avoidance; but in order to succeed in the action he should return any money received from the purchaser.

If, in such a case, the money is not paid back or offered, the plaintiff should be nonsuited, with a direction, however, that the nonsuit should not have the same effect as a verdict on the merits for the defendant.

*Robson*, K.C., and *Laidlaw*, for plaintiff. *Wilson*, K.C., and *Hamilton*, for defendant.

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Robson, J.] [Nov. 24, 1910.

HART *v.* DUBRULE ET AL.

*Attachment of debts—Garnishment—Action for unliquidated damages.*

The right to proceed under Rule 759 of the King's Bench Act for the attachment of debts before judgment is confined to cases in which the amount of the plaintiff's claim can be definitely ascertained at the time the action is brought and the rule does not apply when the claim is for unliquidated damages whether arising from tort or breach of contract.

Where, therefore, the plaintiff's claim was obviously partly made up of unascertained damages and neither the statement of claim nor the affidavit contained any definite allegation of a certain amount having been earned by plaintiff at the time the action was brought, an order attaching debts before judgment was set aside with costs.

*McIntyre* v. *Gibson*, 17 M.R. 423, followed.

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

Macdonald, J.] [Nov. 28, 1910.

PEDLAR v. CANADIAN NORTHERN RY. CO.

*Railway company—Liability for accident at level crossing—Sounding whistle and ringing bell of engine—Negligence—Contributory negligence.*

Two of the plaintiff's teams driven by his servants were approaching the level crossing of the highway with defendant's railway. The drivers were on the lookout for trains but saw and heard nothing and proceeded to drive across the track when a train struck and killed one of the teams and damaged the waggon and harness.

The engineer and fireman both swore that the whistle had been sounded as required by section 274 of the Railway Act, R.S.C. 1906, c. 37, but they did not claim that the bell had been rung as that section also required.

The defendants also contended that the drivers should have seen the headlight of the engine and therefore were guilty of contributory negligence, but there was some evidence that the headlight might have been obscured at the moment by escaping steam.

*Held*, that the plaintiff was entitled to a verdict for the amount of his loss.

*Fullerton* and *Foley*, for plaintiff. *Clarke*, K.C., for defendants.

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## Book Reviews.

*A Treatise of the De Facto Doctrine in its relation to public officers and public corporations, based upon the English, American and Canadian cases; including comments upon extraordinary legal remedies in reference to the trial of title to office and corporate existence.* By ALBERT CONSTANTINEAU, B.A., D.C.L., County Judge of Prescott and Russell, Ontario. Toronto: The Canada Law Book Company. Rochester, N.Y.: The Lawyers Co-Operative Publishing Company. 1910.

The author enters boldly into a new field of legal text-writing, and has by this work established for himself a high position as an author. This being the first book on the subject he has been without any help in the arrangement of the great mass of matter before him for consideration.

As some of our readers may not be familiar with the subject, it may not be amiss to shortly refer to his definition of the De Facto Doctrine. He speaks of it as a rule of law which, (1) justifies the recognition of the authority of governments established and maintained by persons who have usurped sovereign authority and assert themselves by force and arms against the lawful government; (2) which recognizes the existence of, and protects from collateral attack public or private bodies corporate, which though irregularly or illegally organized, yet, under colour of law, openly exercise the powers of regularly created bodies; (3) which imparts validity to the official acts of persons who under colour of right hold office under such governments or exercise existing offices where the performance of such official acts is for the benefit of the public and not for their own personal advantage; the doctrine being grounded on considerations of public policy, justice and necessity. It will readily be seen how wide a field is thus necessarily covered.

A careful examination has been made of the Canadian and English cases on the subject and they are all cited and discussed. The volume will therefore (apart from the citation of American authorities) be most useful both in England and her colonies. It must also, for this as well as other reasons, be most acceptable to the profession in the United States, for in that country is to be found, what cannot be found in the mother country and her dependencies, an unbroken current of authorities which traces the evolution of the governing principles from its first application to the settled doctrine of the present day.

The aim of the author has been, in setting forth the general principles of this somewhat neglected doctrine, as gathered from English, Canadian and American reports and in stating his propositions in accordance with his views of what each case decides, to illustrate them by interweaving verbatim quotations from the more important judicial utterances. This has several advantages and lends additional value to the work, especially as very many of the volumes consulted are not available to most practitioners.

Whilst the author has of necessity gathered largely from United States reports, the book is by no means what is generally called an American text-book. It evidently was not written for any particular jurisdiction, but for all communities whose systems of jurisprudence are based on the English common law. It must also be remembered that there is no English work

which more than hints at the great principles discussed in the book before us. The consequence is that the doctrine has largely been overlooked in many cases where its application would have been an easy means of settling difficult points of law.

The great labour of selecting the leading cases on the subject from the multitude of authorities in the various courts of the United States, can only be understood by those who have had occasion, in this or other matters, to search for light in that country's wilderness of authority.

In the latter part of the work are discussed matters which are of special interest in this country, such as habeas corpus, certiorari, mandamus, injunction and quo warranto; special care being given to the chapter on the latter subject. This will be found very valuable to Canadian practitioners. As a matter of detail we notice an excellent and exhaustive index with the date of every case cited.

## Bench and Bar.

We notice that Mr. Frank Ford, K.C., of Regina, formerly Deputy Attorney-General of Saskatchewan, has entered into partnership with Messrs. Emery, Newell and Bolton of Edmonton, Alberta. We congratulate this firm in having secured the services of Mr. Ford. He was most favourably known to the profession in Ontario before he went to the west, and there he admirably filled the duties of his office. We wish him all success.

### *COUNTY OF HASTINGS LAW ASSOCIATION.*

The members of the Bar of the county of Hastings have a full appreciation of the benefits of the old-fashioned social gathering of the profession. Their annual dinner was held on December 5th when a very pleasant evening was spent and some excellent speeches made. The principal guest was Sir Glenholme Falconbridge, Chief Justice of the King's Bench Division.