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THE RELATION BETWEEN CONTRACTS OF SERVICE AND OF BAILMENT.

1. Generally.

2. Relationship between the proprietor and driver of a cab or hackney carriage.

3. Other relationships discussed.

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1. Generally.—In the Codes which are based upon the Civil Law, the hiring of workmen is enumerated as one of the three principal species of hiring, labour and industry, the other two being the hiring of carriers, and the hiring of persons who undertake works by estimate.[1] Speaking generally, the juristic conception which, in this method of classification, associates contracts of service with one particular description of contracts of bailment is foreign to the Common Law. In a few of the older English cases, it is true, carriers have been referred to as "servants" of the bailor in some respects.[2] But, in view of the well recognized distinction between contracts which create the relation of master and servant and all other contracts which involve

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[1] French Civil Code, Art. 1779; Quebec Civil Code, Art. 1669; Louisiana Civil Code, Art. 2673 (2643).

One of the two kinds of *locati. operis faciendi* is the hire of labour and services in respect to the articles delivered. Story, Bailments, 9th ed., § 422.

[2] In *Ward* v. *Macauley* (1791) 4 T.R. 489, a case in which the question involved was one of the proper form of action, Buller, J., observed during the argument of counsel: "The carrier is considered in law as the servant of the owner, and the possession of the servant is the possession of the master."

Similarly, in *Gordon* v. *Harper* (1796) 7 T.R. 12, Grose, J., remarked, *arguendo:* "Where goods are delivered to a carrier, the owner has still a right of possession, as against a tort feasor, and the carrier is no more than his servant."

In this connection reference may also be made to the rule that, delivery of goods to a carrier by a seller for transmission to the buyer is deemed to be delivery to the buyer, and to constitute an "actual receipt" by him within the statute of frauds. Pollock & Wright, Possession, p. 59.

the performance of work, this language is manifestly wanting in precision. A carrier is an independent contractor, not a servant.

A point of contact between service and bailment is found in those cases where there is an undertaking by one person to assume the custody of a chattel delivered to him by the owner, either for safe-keeping merely or for the purpose of doing certain work in respect to it, or by means of it. Here, if the person to whom the chattel was delivered was a servant of the owner before the transaction took place, or was to pass under the control of the owner while his custody of the chattel continued, he might, from one point of view, be regarded as acting in the double character of servant and bailee. This situation may be dismissed with the remark that in almost every conceivable state of facts a merger of the character of bailee in that of servant would be implied, and the possession thus assumed would be treated as being that of the master himself.[3] On the other hand, if no such control over the bailee is to be exercised by the bailor, the rights and liabilities of the parties to the contract, both as between themselves and as regards third persons, are determined upon the theory that the bailee is an independent contractor. The question whether the latter situation is predicable under the circumstances is often one of no small practical importance. The effect of the decisions in which it has been dealt with is stated in the two following sections.

In criminal prosecutions the importance of differentiating bailees from servants arises from the fact that at common law a bailee, being considered to have rightful possession of property in his charge, could not be guilty of larceny in respect of it, for the reason that a conversion, that is to say, a

[3] It has been remarked that the holder of goods may make his servant a bailee if he thinks fit; but that the law does not regard this as a normal state of things, and probably rather strict proof would be required. Pollock & Wright, Possession, p. 60.

In *Reg.* v. *Green* (1856) Dears. & B. C. C. 113, where the prisoner was charged with stealing a pair of boots from a stall, of which a boy who was living with and assisting the owner, his father, had charge when the crime was committed, it was held that the boy was not a bailee, but a servant, and that the property in the boots could not be alleged to be in him.

wrongful change of possession, could not result from a misappropriation.[4] The effect of the cases which have turned upon the question whether the defendant was a servant or a bailee is stated below.[5] In England the distinction between the two classes of contracts in this point of view has become less important since the passage of a statute under which bailees of chattels, etc., may be found guilty of larceny if they fraudulently convert such chattels to their own use.[6] Enactments of the same tenor are presumably in force in most, if not all, of the British Possessions and of the American States. But in Eng-

[4] Roscoe, Crim. Ev., 9th ed., 651.

[5] The prisoner was convicted on an indictment charging him with embezzlement, in one count as servant to A, and in another count as servant to B. A and B were two, among other, sewers of gloves residing at C, the manufacturers of the gloves carrying on business at D. The prisoner was a carrier residing at C, and was exclusively employed between the glove sewers at C and the manufacturers at D. The sewers were not known to the manufacturers, but when a sewer wanted work the prisoner gave her name and a number to the manufacturers, and received from them unsewn gloves for her to sew. Each sewer, having her number, sent back by the prisoner the gloves when sewn, with her name pinned to the parcel. These parcels the prisoner delivered to the manufacturers; and if the parcels were found correct he received the total amount due to the sewers in one sum, and fresh parcels of unsewn gloves. His duty then was to deliver to each sewer her fresh work and also the money due to her, deducting his charge. If any work was missing the manufacturers looked to the sewer if found, but if not they looked to the prisoner for it. The prisoner, according to the course above stated, took out the numbers for A and B, and, having received money for both of them from the manufacturers, denied the receipt of the money, and applied it to his own use. Held, that the prisoner was not a servant, but merely a bailee, and was guilty only of a breach of trust. *Reg.* v. *Gibbs* (1855) Dears. C.C. 445.

A person who has been intrusted to drive a number of sheep a certain distance, and who on the way separates one of them from the rest, with the intention of fraudulently converting it to his own use, is not guilty of larceny, as he is not a servant, but a special bailee, and there has not been such a severance of the sheep as to put an end to the bailment. *King* v. *Reilly* (1826) Jebb. C.C. 51.

A drover who is employed to take cattle by rail to a certain place and deliver them to a purchaser, but who is at liberty to take charge of the cattle of any other person, is a mere bailee, although he is paid the expenses of the cattle on the journey, and is remunerated by daily wages. *Queen* v. *Hey* (1849) Den. C.C. 602. Doubts were expressed as to the correctness of *Rex* v. *M'Namee* (1832) 1 Mood. C.C. 368, where it was held that the possession of a drover is the owner's possession, although he is a general drover, at least if he is paid by the day.

A mechanic receiving materials to be made into shoes at his own shop is not an agent or servant of the person furnishing the leather, within the meaning of the Mass. Rev. Stat. chap. 126, § 29, against embezzlement. *Com.* v. *Young* (1857) 9 Gray. 5.

See also note 3, *supra*.

[6] 24 & 25 Vict. chap. 96, § 3.

land the question whether the defendant was a bailee or a servant may still be material; for, although a bailee is punishable as for a simple larceny under the section of the Act just cited, a servant is liable to a much more severe penalty under § 67.[7] A similar situation may possibly arise from the wording of the statutes in other jurisdictions.

2. Relationship existing between the proprietor and driver of a cab or hackney carriage.—(*a*) *At common law.*—The accepted doctrine is that, apart from statute, or some special circumstances which show an intention to create the relation of master and servant, the contract between the proprietor and the driver of a cab or hackney carriage will be deemed to be one of bailment, where the essence of the arrangement between them is that the driver is to have the use of the vehicle and horses for a certain price, and is to retain all his earnings in excess of that sum. This doctrine is controlling both in cases which are concerned with the liability of the proprietor to third persons for the tortious acts of the driver,[1] and in cases which involve the reciprocal rights of the proprietor and the driver *inter se*.[2]

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[7] See 2 Russell, Crimes, 317.

[1] *Venables* v. *Smith* (1877) L.R. 2 Q.B.Div. 279, per Cockburn, Ch. J.; *King* v. *London Improved Cab Co.* (1889) L.R. 23 Q.B.Div. 281; *Gates* v. *Bill* (1902), 2 K.B. (C.A.) 38 (per Vaughan Williams, and Romer, L.JJ., pp. 38, 42).

In a recent case, *McColligan* v. *Pennsylvania R. Co.* (1906) 212 Pa. 229, 6 L.R.A.N.S. 544, 63 Atl. 792, where the proprietor of a hansom cab was held not to be liable for the negligence of the driver, the lease under which defendant let the hansom to the driver provided that "for and in consideration of the sum of $4.50, and on the condition stated below, hires to H. Priest, driver, hansom No. 65 with two horses, for thirteen hours from 9.30 A.M. of the date stamped on the back of the certificate." The conditions stated therein were in substance, that the driver should assume all liability for damages to any person or property, and that he agreed not to use a horse longer than six and one-half hours without returning to the stable for exchange, to wear a uniform, to abstain from the use of intoxicating liquors, to present a neat and clean appearance, to conform to the prescribed rates and regulations. Upon his failure to observe these conditions, the company reserved the right to cancel the unexpired term of the lease. The court observed: "The defendant company does not control the results of the work, has no right to the proceeds arising from the fares paid drivers by passengers, and hence the fundamental and essential principle necessary to create the relation of master is lacking. The driver did

The conclusion thus arrived at is clearly an inevitable deduction from the notion that a bailee belongs to the category of independent contractors. But the practical consequences to which that notion leads in cases of the type with which we are here concerned and others of a similar description, can scarcely be regarded as satisfactory. There would seem to be sufficient grounds for saying that, under a genuinely scientific system of jurisprudence, which would leave a court at liberty to determine the rights of parties with reference rather to the essential effect and operation than to the actual form of their agreements, a contract of bailment which provides for the regular and continuous performance of work, by means of instrumentalities owned by the bailor, and under conditions

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not remain under the absolute direction and control of the company, and thereby cannot be said to be a servant within the meaning of the definition. The right of the master to discharge and remove the servant is incident to the relation, but in this case the abstract right did not exist. It is true the lease could be cancelled for the unexpired term, but only when the conditions thereof, or some of them, had been violated. The cancellation of the lease was a contractual right, and did not arise because of the employment relations of the parties. The driver, under the contract had legal rights enforceable against the company and only limited by the conditions therein contained. If the company undertook to cancel the lease, or remove the driver, for a reason not set out in the conditions of letting, it would be liable in damages for breach of the contract. Then, again, as has been stated, the driver is entitled to all the proceeds derived from fares received from passengers who hire the cab. The aggregate of these fares may be $5 or $25 a day, but the company has no control over, or interest in, the results of the work in this most important respect. All of these things are inconsistent with the relation of master and servant, and indicate that of bailor and bailee. We have, then, under the express terms of the contract, a bailment, and this relation is supported by the inferences and results just stated. As against this admittedly *primâ facie* relation of bailor and bailee, we are asked to say that, by reason of the conditions limiting the rates, fixing boundaries, prescribing kinds of uniforms, requiring cleanly and sober habits and other incidental matters, the relation is not what it appears to be on its face, but is something different. The contention is not sound. The conditions and regulations, incidents of the contract of letting, in some instances, it is true, are consistent with the relation of master and servant, but not inconsistent with that of bailor and bailee. If the company, in order to protect its property and give the travelling public modern conveniences and suitable accommodations, has deemed it advisable to embody in the contract of letting certain reasonable regulations, no legal or business reason can be properly assigned why the real relation of the parties should be changed thereby."

[2] *Fowler* v. *Lock* (1872) L.R. 7 C.P. 272. The court was divided in opinion as to the other points presented (see note 13, *infra*), but not as to this one.

substantially the same as those under which work of a like nature is performed by a servant, would probably be treated as subjecting the bailor, in respect to third persons at all events, to the responsibilities of a master. If this view be sound, the decisions discussed in the following sections, although by some authorities they have been thought to rest upon a questionable construction of the statutes involved, will merit approbation on the broad ground that they have established a rule which tends on the whole to subserve the ends of justice, in a class of cases in which third persons are left virtually remediless, if the enforceability of their claims is determined with reference to the normal incidents of contracts of bailment.

(*b*) *Under English and Colonial statutes.* The actual decisions in all the English cases have turned upon the effect of the Metropolitan Hackney Act and similar statutes.[3] It has been laid down that the provisions of these acts do not necessarily create in all cases the relation of master and servant between the proprietor and the driver. The terms of the contract must still be looked to for the purposes of determining what the relation between them really is.[4] But the actual decision in the case in which this doctrine was announced has been overruled, as being erroneous with relation to the facts involved;[5] and although this general expression of opinion has never been explicitly condemned, it is not easy, having regard to the general trend of the

[3] 1 & 2 Wm. IV. chap. 22; 6 & 7 Vict. chap. 86. The former of these prohibits any person from keeping, using, or letting to hire any hackney carriage, within the metropolis, without a license. Section 20 requires that on the hackney carriage shall be affixed a plate, on "which there shall be painted, in letters and figures of black upon a white ground, the Christian name and surname of the proprietor or of one of the proprietors of such hackney carriage." In the latter are the following provisions: By section 21 it is enacted that the proprietor of a hackney carriage, before he permits a licensed driver to take it out, "shall require to be delivered to him, and shall retain in his possession, the license of such driver or conductor while such driver or conductor shall remain in his service." By section 28 the proprietor is made liable to a penalty for the misconduct of the driver. By section 35 he is bound, when required, to produce the driver; and on failure is himself to pay.

[4] *King* v. *Spurr* (1881) L.R. 8 Q.B. Div. 104.

[5] See note 11, *infra*.

authorities, to conceive of any possible arrangement which would enable the proprietor to relieve himself from liability to third persons for the tortious acts of the driver. Whether an agreement might not be so drawn as to place the driver in the position of a bailee in respect of their reciprocal rights and obligations is a more doubtful point.[6]

The established doctrine is that, where the essence of the arrangement between the proprietor and the driver of a cab or hackney carriage is that the latter shall pay a certain amount per diem for the use of it, and make what he can by plying for fares, the effect of the statutory clauses mentioned at the beginning of this sub-section is to render him, so far as third persons are concerned, a servant of the proprietor.[7] The fact that the

[6] See cases cited in note 13, *infra*.

[7] In *Powles* v. *Hider* (1856) 6 El. & Bl. 207 (action for damages incurred by loss of luggage), Lord Campbell, C.J., reasoned thus: "Looking to the position of the proprietor and the driver of a cab under the circumstances proved, and to the acts of Parliament, which regulate their respective duties, we are of opinion that the driver is to be considered the servant or agent of the proprietor, with authority to enter into contracts for the employment of the cab, on which the proprietor is liable. There can be no doubt that this would be so if the driver were engaged at fixed wages, accounting to the proprietor for all the earnings of the cab. But must not the actual arrangement between them be equally considered a mode by which the proprietor receives what may be estimated as the average earnings of the cab, minus a reasonable compensation to the driver for his labour? To stimulate the industry and zeal of the driver, he is allowed to pocket all the earnings of the cab above a given sum: but it is from the earnings of the cab that this sum is paid; and it is evidently calculated on both sides that the earnings of the cab will exceed this sum, which varies according to the season of the year. This is quite different from hiring a job carriage or a carriage and horses to be driven by the hirer or his servant, where the hirer becomes bailee, and can in no sense be considered the servant of the proprietor. . . . The learned judge also observed that the acts of Parliament "always regard the proprietor and driver of the hackney cab as employer and employed, or master and servant, and clearly contemplate that the party who engages the cab under the care of the driver shall have a remedy against the proprietor." After stating the effect of § 20 (see note 5, *ante*), he proceeded thus: "The proprietor who applies for and accepts a license to which such a condition is annexed, and employs his cab under it, must be considered to hold himself out to the world as the proprietor; and he must incur the liabilities of proprietor to all who use the cab with the authority of the driver, in the ordinary course of dealing. If the proprietor does not drive it himself, he declares that the driver is his servant. Again, the sections 23, 24, 27, 28, of Stat. 6 & 7 Vict. chap. 86 (see note 5, *ante*), clearly consider that the driver is a person appointed by the proprietor, for whom, in the exercise of his employment as driver, the proprietor is answerable. It would be

driver's compensation is the amount by which his receipts exceed a fixed sum does not make any difference in the character of his

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most inconvenient and unjust towards the public if an action such as the present, brought against one who proclaimed himself to be the actual proprietor of the cab when it was engaged by the plaintiff, and actually was so, could be defeated by evidence of a secret agreement between the proprietor and the driver with respect to the remuneration of the driver, and the proportions in which the earnings of the cab are to be divided between them. On such considerations *Morley* v. *Dunscombe* (1848) 11 L.T. 199 [a *nisi prius* case], appears to have been decided. This decision is expressly in point; and we think that we ought to abide by it."

This decision was followed in *Venables* v. *Smith* (1877) L.R. 2 Q.B. Div. 279, where the arrangement was similar, and the proprietor was held liable for injuries caused by the negligent manner in which the driver handled the cab.

"In *Playle* v. *Kew* (1886) 2 Times L.R. 849, a *nisi prius* case, *Venables* v. *Smith*, was followed.

In *King* v. *London Improved Cab Co.* (1889) 23 Q.B.D. (C.A.) 281, the effect of the Act was again carefully considered, and the court reached the conclusion that it puts the driver, "so far as regards the public, in the position of servant, and the proprietor in the position of master, with the liabilities that attach to that position." Lopes, L.J., from whose judgment these words are quoted, repeated them in *Keen* v. *Henry*, *infra*.

In *Gates* v. *Bill* (1902) 2 K.B. (C.A.) 38, the liability of the proprietor of the vehicle was again affirmed. Romer, L.J., one of the members of the court, observed: "The law appears to me to have become perfectly well settled to the effect that the proprietor of a London cab, who employs a driver on the terms upon which the driver in this case was employed, is, so far as the general public are concerned, by virtue of the statute in the position of the master of that driver." But Vaughan Williams, L.J., made the following remarks (pp. 41, 43): "I cannot say that I consider the decisions which have been given on this subject altogether satisfactory. . . . It cannot, I think, be said that the grounds of decision in the various cases have been altogether identical; and, as regards the effect of the enactments in relation to hackney carriages, I must confess that had this matter come before me as a new matter with regard to which there had been no previous decisions, I should have hesitated to draw from the provisions of the statute the inference that the Legislature meant to assume the existence of any relation between the cab proprietor and the cab driver, or to impose any liability on the former, otherwise than in respect of the matters expressly dealt with by §§ 28 and 35 (of the Act of 6 & 7 Vict.). But I am not at liberty to deal with this matter as *res integra*."

In *Bombay Tramway Co.* v. *Khairaj Tejpall* (1883) Indian L.R. 7 Bombay Ser. 119 (buggy and two horses hired for a daily payment), the Bombay Act VI. of 1863 was held to require the same construction as the English one.

A by-law which was held to be within the powers of a city council, under the licensed carriages statute, 1864, of Victoria (Australia), provided that no owner of a licensed carriage should intrust that carriage to another person as driver except as that owner's servant. It has been held that every owner licensed under this by-law, and employing a driver, is to be presumed, until the contrary is proved, to have complied with the by-law. As the existence of such a presumption constituted some evidence, though not conclusive, that the driver was the owner's servant, it was held error to direct a verdict for the owner, in an action brought to recover for injuries caused by the negligence of the driver. *Clutterbuck* v. *Curry* (1885) 11 Vict. L. Rep. 810.

relation to the proprietor.[8] An action will in every instance lie against the registered proprietor of the vehicle, although he may have let it to another person, and the latter may have been the immediate employer of the driver. But this is merely an alternative remedy, and the injured party may, if he so desire, proceed against the immediate employer.[9] Nor can one of the members of a partnership which owns the vehicle escape liability on the ground that he has not actually obtained a license authorizing its use for the purpose of plying for hire.[10]

In a case decided by a Divisional Court it was held that a cab proprietor who let only the vehicle for hire, and not the

[8] *King* v. *London Improved Cab Co.* (1889) L.R. 23 Q.B. Div. (C.A.) 281.

[9] *Keen* v. *Henry* (1894) 1 Q.B. (C.A.) 292. There the defendant, the proprietor, had let a cab to his son, who had provided the driver, and also the horses and the harness. Lord Esher, M.R., said: "If the driver had been the servant of the defendant his negligence would at common law have given the plaintiff a right of action against the defendant. It follows that in such a case the Act gives the plaintiff a right of action against the defendant, although the driver is not his servant. This right, however, does not interfere with any right of action which the plaintiff may have at common law against the driver's master in the ordinary sense of the word. If the defendant's son were really the driver's master, the plaintiff could have brought an action against him in respect of the injury. But under the Act he is entitled also to bring an action against the registered proprietor of the cab, and the fact that he can do so in no way militates against his right of action against the defendant's son. The proprietors of hackney carriages cannot by letting their carriages escape from their liability under the statute." Adverting to the difference between the circumstances in the case under review and in *King* v. *London Improved Cab Co.*, *supra*, Kay, L.J., observed that the effect of the decision in the earlier case was that "in the interest of the public, the Act had made it unnecessary to consider the nature of the relation between the proprietor of the cab and the driver, and had rendered the proprietor liable in case, through the negligence of the driver, an injury should be done to one of the public. If that be so, the decision exactly covers the present case."

[10] *Gates* v. *Bill* (1902) 2 K.B. (C.A.) 38, Romer, L.J., said: "I cannot see that there is anything in the Acts which makes it an essential condition of his liability to the public for the negligence of the driver that he should have discharged his duty in the matter of obtaining a license, and have so become a licensed cab proprietor. It would be a strange thing, if a cab proprietor, whose duty it was to obtain a license, could be disregarding that duty, and illegally carrying on his business without a license, escape from the liability to which he would have been subject, if he had performed that duty. In the present case I would rather assume in favour of the defendant that she had not acted improperly in not obtaining a license, and that the true view is that, when the son obtained a license in his own name, he must be taken to have obtained it in that name as the trade name of the partnership for that purpose. But whichever way the case ought to be regarded, I think the defendant is liable in this action."

horses or harness, occupied the position of a bailor with respect to the driver, and was not liable for his negligence.[11] But by two of the members of the Court of Appeal the distinction thus suggested has been pronounced untenable.[12]

The extent and character of the reciprocal rights and obligations of the owner and the driver of the vehicle is a question which has been left in no little uncertainty by the only case in which the subject has been discussed.[13]

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[11] *King* v. *Spurr* (1881) L.R. 8 Q.B. Div. (C.A.) 104, 51 L.J.Q.B. (N.S.) 105, 45 L.T.N.S. 709, 30 Week. Rep. 152, distinguishing *Powles* v. *Hider* (1856) 6 El. & Bl. 207, and *Venables* v. *Smith* (1877) L.R. 2 Q.B. Div. 279, where the proprietor owned the whole equipment and the horses.

[12] In *Keen* v. *Henry*, (C.A. 1894) (812), 1 Q.B. 202, discussing the contention that *King* v. *London Improved Cab Co.*, note 9, *infra*, was distinguishable from *King* v. *Spurr*, *supra*, and that the latter case had not been overruled, Kay, L.J., remarked: "When I look at the two cases, it seems to me impossible to say that *King* v. *Spurr* has not been overruled. Lindley, L.J., did, indeed, in *King* v. *London Improved Cab Co.*, suggest that *King* v. *Spurr* might be distinguishable, 'though the distinction may not be a very broad one, for there the cab only was hired by the driver, and the horse was his property.' But it is evident that the Lord Justice did not think the distinction a sound one."

[13] In *Fowler* v. *Lock* (1872) 41 L.J.C.P. (N.S.) 99, L.R. 7 C.P. 272, 20 Week. Rep. 672, 26 L.T.N.S. 476, where a driver sued the proprietor of the cab for injuries due to his being furnished with an unfit horse which ran away, it was contended on behalf of the defendant, on the authority of the cases of *Morley* v. *Dunscombe* (1848) 11 L.T. 199, and *Powles* v. *Hider* (1856) 6 El. & Bl. 207, that the plaintiff was the servant of the defendant, and that, within the decisions on the subject, the master was not liable to the servant for injuries sustained in the ordinary course of service. On behalf of the plaintiff it was argued that those were cases where a third party, *viz.*, one of the public, was injured; and that, although the cab owner might, by reason of statutable provisions and responsibilities to the public, be liable to a person injured when riding in the cab, yet that they were not in point as to the relations of cab owner and cab driver; that these parties were to each other as bailor and bailee on a contract of hiring. It was further contended for the defendant that, even if the latter relation was the true one, there was no implied promise by the cab owner that the horse supplied was reasonably fit for the purpose for which it was used, and, if so, the defendant was not liable. On both these reserved questions, the majority of the court were of opinion that the plaintiff was entitled to judgment. Referring to *Powles* v. *Hider* (1856) 6 El. & Bl. 207, Grove, J., said: "I think it sufficiently appears that what the court had under consideration in that case was the relation and responsibility of the cab proprietor to the public; and that it had not in view the nature of the contract between the cab owner and the driver or cabman. Indeed, this seems to be excluded by the part of the judgment last quoted. The court, it is true, considered the payment of a fixed sum as a mode of compensation for the cabman's labour: and no doubt this may be so; but the payment by the person who uses the horse and carriage to the proprietor of it, though

(c) *Under the New York ordinance.* In a case relating to a cab plying for hire in New York, the doctrine of the English courts

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not inconsistent with such a view, cannot, I think, be regarded as evidence of a contract of service, but rather (primâ facie, at least) as more consistent with that of a contract of hiring. In this case, therefore, where the cabman is under no control as to his movements by the cab owner; where he may make special bargains with the public; where he does not and cannot reasonably be expected to know the risks he encounters; where he primâ facie pays instead of receives; where he is not carrying out his master's orders; where the perils are unknown to him and change from day to day; where there is no notice of dismissal, but only a refusal to supply cab and horse on nonpayment; and where there are no correlative duties beyond those of bailor and bailee, and statutable duties of each respectively to the public,—I feel obliged to come to the conclusion that the cabman is not the servant of the cab owner in the sense (to use the term above quoted) of rendering the latter exempt from liability to the former in cases where a party not bearing the relation of master and servant would be liable."

Byles, J., considered that, if the case had arisen before the hackney carriage acts were passed, or in a place where they were not applicable, the relation of the parties would have been the same as that which would have resulted from a contract by the owner of a horse and cart, to allow another man to have the entire and exclusive personal use and control of them at so much a week or so much a day, for the purpose of carrying, for the driver's profit, passengers or goods within the limits of a town, but without reserving to himself (the owner) any right to direct where the horse and cart should go, provided they were used within the prescribed limits, and were returned within the agreed time. Such a contract, he considered, would fall within that class of bailments called *locatio, i.e., contractus quo de re fruendâ vel faciendâ pro certo pretio convenit.* Certain expressions used by Lord Campbell in *Powles* v. *Hider* were admitted to be inconsistent with this view, but it was pointed out that these, as not being necessary to the decision of the case, were perhaps extrajudicial. That case, the learned judge remarked, "was decided on the hackney carriage acts there cited, and on the relation created by those Acts as between the proprietor and the public. Here, on the contrary, we are dealing with the rights and liabilities of the proprietor and driver *inter se.* The driver, as between the cab owner and himself, seems to me to have the complete and exclusive control and disposition of the vehicle within a certain district, and not to be a servant of the proprietor, and therefore by the terms of the contract entitled to be furnished with a suitable, at least with a quiet or manageable, horse. But, even on the supposition that the relation existing between these parties *inter se* was not analogous to that of bailor and bailee, but was that of master and servant, I think, nevertheless, in the present case that there was evidence of the defendant's liability. For, in this case, there was the personal interference and superintendence of the master, the now defendant, in the supply of the horse, and therefore evidence of his personal negligence causing injury to his servant, by sending the servant out with an untried, vicious, and dangerous horse, not reasonably fit and proper for the work; the master having had the means of knowing the horse's character, and the servant having had no such opportunity."

Willes, J., was of opinion that the driver was a servant, but the proprietor's want of knowledge of the defective qualities of the horse necessarily involved the consequence that the action could not be maintained (see chapter X., *ante*). "It would be a remarkable hardship," he said, "to

with respect to the liability of the proprietor for injuries caused to a third person by the negligence of the driver was followed, on the ground that the municipal ordinances of that city concerning such vehicles are substantially of the same tenor as the statutes which regulate hackney carriages in London.[14]

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hold that the cab master is not a letter out of the cab, but a principal, and liable for the cab driver as his servant as regards third persons, and yet that he is not an employer, but an independent letter to an independent hirer, as between him and the cabman, so as to be liable to the latter as upon a warranty which is not implied between master and servant or agent, or between coadventurers. The legislation upon the subject of hackney cabs has been relied upon as justifying us in putting this double face upon the transaction; but the effect of that legislation is to recognize and stamp upon the transaction the character of an employment in which the cabman is a servant, and to make the proprietor liable for him as such. The cabman is aware, or ought to be, that he enters into such a bargain as makes him in point of law the driver of the cab master; and in acting upon that employment he acquires no greater right against his employer than if he were the coachman of a private gentleman, whose claim under like circumstances would at once have been rejected. *Priestley* v. *Fowler* (1837) 3 Mees. & W. 1."

On appeal ([1874] L.R. 9 C.P. 751 note, 30 L.T.N.S. 800) the court of exchequer chamber was divided in opinion as to whether, upon the imperfect statement of facts on the record, the horse and cab were intrusted to the plaintiff as servant or as bailee. Those of the judges who inclined to the opinion that the driver was a bailee were not satisfied that there was necessarily a warranty that the horse was fit for the purpose for which it was bailed; and that it might be that the plaintiff took upon himself the risks of its fitness.

A new trial being had, the jury found, in answer to questions put to them by the judge, that the horse was not reasonably fit to be driven in a cab; that the plaintiff did not take upon himself the risk of its being reasonably fit to be so driven; that the defendant did not take reasonable precautions to supply the plaintiff with a reasonably fit horse; and that the horse and cab were intrusted to the plaintiff as bailee, and not as servant. A verdict having been thereupon entered for the plaintiff, the court refused to disturb it. Lord Coleridge, Ch. J., said: "The answer of the jury to the second question virtually amounts to a finding of personal negligence on the part of the defendant; and, as there was evidence to support that finding, and the learned judge is not dissatisfied with the verdict, there will be no rule." *Fowler* v. *Lock* (1874) L.R. 10 C.P. 90.

The views of Willes, J., as above stated were disapproved in a recent case by Vaughan Williams, L.J. *Gates* v. *Bill* (1902) 2 K.B. 38.

[14] *Cargill* v. *Duffy* (1905) 123 Fed. 721. The ordinances in question require licenses for both cabs and drivers, and provide that the cabs shall be numbered and have the name and place of business of the owner and licensee posted therein, and that every owner or driver of any hackney cab shall wear conspicuously a metal badge upon which is to be engraved the words "Licensed Hack" and the number of such licensed hackney cab, "said badge to be issued to and belong to said owner and to be issued by him to any driver representing him and for whom he shall be responsible."

3. Other relationships discussed.— (*a*) *Relationship between the owner of an omnibus and the person driving it.* In one case the relationship of bailor and bailee was held to have been created by an agreement between a hotelkeeper and another person, under which the latter, in consideration of his driving the former's guests free to or from certain railway stations, and paying the defendant so much a day for the board of the horses at the defendant's stables, should be entitled to the use of the omnibus and horses, and to take for his own use all sums which he could earn by conveying passengers other than the defendant's guests, and by carrying luggage.[1]

(*b*) *Relationship between the owner and the hirer of a traction engine.*—Where the defendant, who was the owner of a traction engine, to which his name and address were affixed, as required by the English Locomotives Act, 1865, §7, let it for three months, and, owing to the negligent management of the engine by the hirer, personal injuries were occasioned to the plaintiff,

[1] *Fleuty* v. *Orr* (1906) 13 Ont. L.R. 59 (hotel-keeper held not to be liable for the negligence of the driver). Anglin, J., said: "Apart from his contractual obligation to meet all trains and to convey Brunswick Hotel passengers to and fro free of charge, Mullen was at liberty to come and go with the bus and horses when and as he pleased; to carry what passengers and baggage he liked; and to use the 'bus and horses as he deemed best in his own interest. The accidental allusions to the receipts of Mullen, made by the defendant and by Mullen himself, as wages, are merely instances of the misuse of words by persons lacking appreciation of precise meaning and effect. Such accidental slips—while strongly indicative of honesty—in my opinion afford little assistance in determining the true legal relationship of these persons one to the other. On the other hand, all idea of improper design on the part of the defendant and Mullen in making the arrangement which they entered into being excluded, the circumstance that Mullen was to pay the defendant 70 cents a day for the board of the horses seems wholly inconsistent with the idea that Mullen was the servant of the latter. If, instead of carrying Brunswick Hotel passengers free, Mullin had agreed to pay a fixed sum approximately equivalent to their 'bus fares to the defendant, it would be scarcely possible to argue that the relationship was other than that of bailor and bailee. I cannot see how the true character of that relationship is altered by the fact that in lieu of paying to the defendant a certain sum in cash for the use of the horses and 'bus, Mullen contracts to carry certain passengers for the defendant free of charge. . . . I think all the evidence tends to prove that as to the manner and method of driving and using the 'bus and horses—subject only to his contractual obligation to carry certain passengers for the defendant) Mullen was as free and unfettered as he would have been if paying a certain sum in money for hire of the horses and the omnibus."

who was being driven in a carriage upon the highway, it was held that the defendant was not liable in respect of such injuries.[2]

(*c*) *Relationship between an employer and a person engaged to sell goods.*—In one case it was urged that a person hired to sell goods should be regarded as a bailee for the reason that he was the owner of the horse and wagon used for the purpose of transporting the goods from place to place. This contention was rejected on the ground that, as the given contract provided for the payment of wages, its effect to place the time and labour of the employé under the exclusive control of the hirer.[3]

(*d*) *Relationship between a merchant and a master porter.*—In one case it was held that a master porter, employed by a merchant at Liverpool to hoist or lower goods, was not a bailee, but a servant, and that the party employing him was liable for any injury caused through his negligence or want of skill.[4]

C. B. LABATT.

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[2] *Smith* v. *Bailey* [1891] 2 Q.B. 403. The court declined to accept the contention of counsel that, because it has been held, on the construction of the acts relating to hackney carriages (see above), that a cab owner must be treated, so far as the public are concerned, as the master of the cab driver, and as such responsible for his negligence, a similar construction should be put on the locomotives act.

[3] *Shea* v. *Reems* (1884) 36 La. Ann. 966.

[4] *Randelson* v. *Murray* (1838) 3 Nev. & P. 239, 8 Ad. & El. 109, 1 W. W. H. 149, 2 Jur. 324. As regards this decision, it may be observed that, although it was unquestionably correct in so far as the master porter was denied to be a bailee, the conclusion that he was a servant in such a sense that his negligence was imputable to the merchant was, in all probability, erroneous. See the author's article in the Canada Law Journal, Vol. XL., p. 541.

THE DOG AND THE POTMAN: OR "GO IT, BOB."

The somewhat discursive judgments delivered by the five learned judges who took part in deciding *Baker* v. *Snell* [1908] 2 K.B. 352, 825, 77 L.J.K.B. 1090, in the Divisional Court and the Court of Appeal have roused Mr. Thomas Beven to a drastic utterance in the May number of the *Harvard Law Review*. Now Mr. Beven, as our readers know, is a specially learned and expert critic on everything connected with the law of negligence, including the cases of "extra-hazardous risk," as Mr. Justice Holmes names them, in which negligence need not be proved. When such a critic attacks the Court of Appeal at large, and publishes his argument in a jurisdiction where English decisions, though constantly quoted with respect, are not binding authorities, it is a matter not to be neglected. It may save a little trouble to any readers already familiar with the case if we say at once that we agree with the general view of the law taken in the judgments of Channell, J., and Kennedy, L.J. (though not with all the language of either), and to that extent disagree with Mr. Beven's strictures, but, with great respect, are unable to accept the extra-judicial opinions of their learned brethren, and to that extent are in accordance with Mr. Beven.

For the present purpose the summary of the facts in the Law Reports head-note may suffice. "The owner of a dog known by him to be savage entrusted it to the care of a servant, who incited it to attack the plaintiff, and thereupon the dog bit the plaintiff." First, what is the position of the owner? We humbly conceive that, knowing the dog to be savage, he is bound to keep it under control at his peril to just the same extent as if it were a wild beast. A wild beast, we say, not an animal ferae naturae, which as Mr. Beven justly notes, is not exactly the same thing: for the law does not compel us to impossibilities, and cannot therefore expect us to deem the rabbit, for example, a savage and dangerous beast. We do not say, again, that a man commits a wrongful act by keeping any sort of animal, fierce or tame. Even with the qualification "in the sense that he keeps it at his peril" (see [1908] 2 K.B. 354) the phrase is not happy; without qualifica-

tion, notwithstanding that such is the language of Farwell, L.J. (ib. at p. 833), it is erroneous. No one has doubted that damage is the gist of the action; until there is damage there is no wrong to any one, and the breach of duty is not in keeping a tiger, a python, a monkey, a biting dog, or as the case may be, but in failing to keep it safely. Besides, common sense forbids us to accept premisses leading to the conclusion that the highly respectable and useful Zoological Society is an open and continual wrongdoer. "The law does not forbid a man to keep a menagerie": Holmes, The Common Law, 155. So far we can go with Mr. Beven; but we cannot go with him in trying to find some other distinction between dogs and wild beasts than the need of a "scienter." The well-known passage in Hale's Pleas of the Crown really seems plain enough. A lion, a wolf, or a poison snake is presumed dangerous because "you must think this, look you, that the worm will do his kind." We do not presume this of dogs generically, but vice in the individual, "if the owner be acquainted with his quality," puts it in the dangerous category. We cannot find any other distinction in Hale; the minute verbal variations in consecutive sentences on which Mr. Beven relies appears to us merely accidental. Besides, we cannot discover exactly what Mr. Beven's alternative is, for it is veiled by the cryptic formula "prima facie," for which the only English we can find is "subject to undefined exceptions." It would take us too far to follow back the rule to its medieval or earlier origin. Enough that Hale's Pleas of the Crown is a book of authority, and these dicta have, we believe, been uniformly accepted in the same sense for more than two centuries. No question arises here on the ingenious—and, we are disposed to think rational—difference between exotic and indigenous animals more fully propounded by Mr. Beven in his book. The owner's knowledge of the dog's character was also not in dispute. The dog, then, was at the owner's peril; whatever that, when we come to consider possible exceptions, may mean.

Secondly, what of the potman? The fact of the dog being loose at all was a failure in the defendant's duty to keep him safe, unless he were set free by some excepted agency for which

the defendant was not answerable. A man's own servant entrusted with the dog is, at all events, not such an agency; his recklessness in loosing the dog, whatever its motive, surely does not make his act the act of a stranger. Neither is it the act of God: the potman may be a humble minister of Dionysos, but he has no divine privilege under the Common Law. Nor yet of the King's enemies: let us hope, on the contrary, that the potman is or will be a good Territorial. Then, with great respect for Mr. Beven, the fact that the plaintiff was the defendant's housemaid is quite immaterial. It would have been material if the action had been for negligence imputed to the defendant through his servant. But this action is founded on a higher and more stringent duty in the nature of insurance, and such a cause of action is altogether outside the fellow servant doctrine. Where a man may be liable without any negligence of either himself or his servant, the fact of his servant being negligent can surely not improve his position as against anyone. There is also no room here for the rather discredited poor cousin of Common Employment called "volenti non fit iniuria." For the housemaid had certainly never bargained to have the dog in the kitchen, and had no reason to expect him there. But now we come to the dramatic incident which raises the really curious question in the case. The potman did not merely let the dog loose. Having turned him loose he followed up action with speech and addressed the dog in these memorable terms: "Go it, Bob": whereupon the dog flew at the plaintiff and bit her. Now the potman, immediately before loosing the dog, had offered to bet that it would not bite any one in the room. It is not stated that any one took the proffered bet on any or what terms, but it may be inferred that the potman did expect the dog not to bite any one, and that the words "Go it, Bob" were uttered "in a bravery" as the Elizabethans said. It may even be that he had amused himself by training the dog to understand those words in a non-natural sense, but the training proved incomplete. On the other hand the form of the exclamation has a suspicious likeness to the legendary postscript "Go it, Ned" which was or was not written by William IV., as Duke of Clarence and Lord High

Admiral, to Sir E. Codrington before the battle of Navarino. This however is irrelevant, for potmen, like other men, whatever their actual motives and intentions, are presumed to intend the natural consequences of their acts; and, for the purpose of the legal consequences, the statement that the potman incited the dog to attack the plaintiff must be taken as correct. Can this incitement be regarded as a new and independent act? The potman having once loosed the dog, were his words, so to speak, severable from his manual act, and of neither more nor less account than if they had been uttered by some equally imprudent bystander? Finally, do the answers to these questions make any difference to the result? On these points we find a remarkable divergence of judicial opinions. It is very true that the fatal words "Go it, Bob" are not expressly commented on by any one of the five learned judges, and were tacitly held immaterial by three of them. Stranger still, Mr. Beven has nothing to say of them after stating them as part of the facts. We shall shew, nevertheless, that everything turns or may turn on them.

All we are told of the County Court judge's judgment is that he treated the potman's conduct, apparently taking it all in the lump, as being "in fact as assault, for which the defendant was not liable," and so nonsuited the plaintiff. Channel, J., was of opinion that "the potman's act amounted to nothing more than a foolish and wanton act done in neglect of his duty to keep the dog safe," and that the defendant was responsible for such a dereliction as being "in the course of" the potman's "employment," but that the question should have been dealt with as a question of fact. Now we must observe on this head that, first, apparently no fact was in dispute; secondly, the test of course of employment is not applicable to duties which extend beyond the acts and defaults of a man's own servants, as this duty certainly does: see *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q.B. 72, 66 L.J.Q.B. 704. It is clearly not arguable that the owner of a dangerous beast can escape responsibility by making arrangements for its custody with an "independent contractor." What the effect of a bailment for a term might be shall not be discussed here, though we rather think a medieval court would

have held only the bailee responsible. But Channell, J., went on to make another point. It would be open to a jury "to find that the dog bit the plaintiff by reason of its savage nature, and by reason of that alone, and that the act of the potman had nothing to do with the result." This is a dark saying on the face of it, for savage nature alone would not have enabled the dog to bite the plaintiff if he had been tied up or on a leash, and the act of the potman in letting him loose would seem to have much to do with the plaintiff's mishap. We can only conjecture that in this passage "the act of the potman" means not the releasing but the inciting, and the suggestion is that the dog might have bitten the plaintiff even if the potman had not said "Go it, Bob." But if the biting was due to the verbal incitement, then (as we understand the learned judge) these words might or might not be regarded as being in fact an "unauthorized and wilful act"* of a stranger external to the defendant's means of control. If that is not the question of fact which Channel, J., thought proper to be left to a jury, we fail to see what is. However the learned judge held clearly enough that, when the proximate cause of damage done by a fierce animal is "the unauthorized and wilful act of a third person," the owner is not liable.

All the other judgments are mainly devoted to this point of law. We know not, and perhaps the profession never will know, what question of fact the County Court judge ultimately propounded at the new trial. Sutton, J., laid down the proposition of law (not necessarily for the decision of the case) that the owner of a dangerous animal "is liable for any injury caused by the animal biting a person, under whatever circumstances the biting may have taken place, except where the plaintiff by his own conduct has brought the injury upon himself." This adventurous gloss on the leading case of *May* v. *Burdett*, 9 Q.B. 101, 72 R.R. 189, was accepted by Cozens-Hardy, M.R. and Farwell, L.J., but not by Kennedy, L.J. The Master of the Rolls' judgment rests on the assumption that keeping a wild animal is somehow wrongful in itself, for which, with submission, there is neither authority nor principle. So does, apparently, Lord Justice Farwell's shorter

and even more dogmatic judgment. It has commonly been thought that the rule in *Rylands* v. *Fletcher* marks the extreme limit of civil responsibility imposed by a special policy of the law without requiring any proof of negligence. But the opinion of Cozens-Hardy, M.R., and Farwell, L.J., would create a still more strict liability. For there is uncontradicted authority, though not much of it, to shew that the rule in *Rylands* v. *Fletcher* does not extend to make a man answer for acts of strangers not under his control: *Wilson* v. *Newberry,* L.R. 7 Q.B. 31; *Box* v. *Jubb,* 4 Ex.D. 76; *Whitmores* v. *Stanford,* [1909] 1 Ch. 427. There is nothing in *May* v. *Burdett,* or any other authority prior to *Baker* v. *Snell* itself, to prevent the analogy of these authorities from governing the case of a wild animal being let loose by a stranger. We decline to count a mere surmise once thrown out by Lord Bramwell that even the act of God may be no excuse. It is far from certain that the strict rule of *Rylands* v. *Fletcher* was a necessary or politic rule. Many persons and some courts have deemed it a crude relic of archaic legal thinking for which modern jurisprudence has no use. But certainly the very able judges who decided *Rylands* v. *Fletcher* considered themselves to be declaring a principle of wide generality. They did not want to make one law for a reservoir of water and another for animals. Distinctions are necessary for determining what are the things so dangerous in the eye of the law that a man keeps them at his peril. But when once the dangerous character of the thing is ascertained, there is no reason for holding the same excuse to be sufficient in one case and not in another. Otherwise we should have a number of different arbitrary rules instead of a severe but intelligible principle. We suspect Mr. Beven of not much liking *Rylands* v. *Fletcher.* No more do we like it, but it is there, a decision of the House of Lords, and in these kingdoms the House of Lords has declared itself infallible. One thing is sure in any case. If ever again the editor of the Harvard Law Review lets our very learned friend Mr. Beven loose on the Court of Appeal, it will not be open to him to traverse the *scienter.*— SIR FREDERICK POLLOCK, in *The Law Quarterly.*

* Not to be confounded with so-called "collateral negligence," a risky ground of defence at best.

REVIEW OF CURRENT ENGLISH CASES.

GAMING—CAUSE OF ACTION—MONEY LENT FOR GAMING IN FOREIGN COUNTRY.

In *Saxby* v. *Fulton* (1909) 2 K.B. 208 a great deal of learning is devoted to the simple question whether an action will lie in England to recover money lent for the purpose of gambling in a foreign country where gambling is not illegal. The Court of Appeal (Williams, Buckley and Kennedy, L.JJ.) came to the conclusion that on the authority of *Quarrier* v. *Colston* (1842) 1 Ph. 147, it may, and affirmed the decision of Bray, J., in favour of the plaintiff. The Court of Appeal distinguish the case from *Moules* v. *Owen* (1907), 1 K.B. 746 (noted ante, vol. 43, p. 446), on the ground that there a cheque was given, which was drawn on an English bank and payable in England, and the transaction thereby became governed by the law of England. The distinction appears to be somewhat finedrawn.

MASTER AND SERVANT—INFANT—RESTRAINT OF TRADE—SEVERABLE STIPULATIONS—CONTRACT FOR BENEFIT OF INFANT—INJUNCTION.

In *Bromley* v. *Smith* (1909) 235, the plaintiff claimed to enforce a contract made by an infant. The plaintiff was a baker, and employed the defendant to go round with bread, and, as a condition of receiving the defendant into his employment, he was required to enter into an agreement that he would not within three years after leaving the plaintiff's employment either as principal, servant or agent enter into the business of miller, baker, hay or straw merchant within ten miles of the plaintiff's place of business. The defendant having left the plaintiff's employment, within three years thereafter did enter into the business of a baker within the limit of ten miles, and the action was brought for an injunction to restrain him from continuing such business. On the part of the defendant it was contended that the agreement was more extensive than was necessary for the plaintiff's protection, as it extended to other businesses in which the plaintiff was not engaged, viz., that of hay and straw merchant, and being bad in part it was claimed that it was void altogether, but Channell, J., who tried the action was of the opinion that the stipulations were severable and that so far as it

related to the business of a baker it was valid and for the benefit of the infant, as it was the means of his obtaining employment, and was therefore binding on him, and he therefore granted the injunction restraining the defendant from violating the agreement in so far as it related to the business of baking.

MUNICIPAL BY-LAW—ALTERATION OF DRAINS—LIABILITY OF AGENT CARRYING OUT WORK.

Kershaw v. *Brooks* (1909) 2 K.B. 265 was a prosecution for breach of a municipal by-law. The defendant had been employed by a householder to make certain alterations in the drains of his house, and in so doing a breach had been committed of the by-law of the London County Council, and the question was whether the defendant who was merely an agent was liable to the penalty imposed by the by-law for such breach. The magistrate dismissed the information and the Divisional Court (Lord Alverstone, C.J., and Walton and Jelf, JJ.) upheld his decision. The case turns on the wording of the by-law.

LIFE INSURANCE—POLICY—PROPOSAL BASIS OF CONTRACT—EFFECT OF ABSENCE OF SIGNED PROPOSAL—ESTOPPEL.

Pearl Life Assurance Co. v. *Johnson* (1909) 2 K.B. 288. This is a somewhat peculiar case. A policy was obtained by a woman on the life of her husband which was expressed to be issued in consideration of the wife having signed a proposal which it was declared was the basis of the contract, and that in case of any untrue statement being discovered as to the state of the health of the husband the policy was to be void. Premiums were from time to time paid until the husband's death. The insurance company refused to pay the policy on the ground of alleged untrue statements in the proposal, as to the husband's health. It was found as a fact that the wife had never signed nor authorized the signing of any proposal, and that in fact there was none, and in a summary proceeding to enforce payment of the policy the magistrate held that the policy must be read and construed as if all reference to the proposal had been struck out, and gave judgment for the wife for the amount of the policy. The Divisional Court (Lord Alverstone, C.J., and Walton and Jelf, JJ.) affirmed this decision, holding that the insurance company by reason of having issued the policy and received the premiums, were estopped from contending that there was no policy owing to the absence of a signed proposal.

DEFAMATION—LIBEL—OFFICER OF COURT—PUBLIC OFFICER—OBSERVATIONS IN "OFFICIAL" REPORT "FOR INFORMATION OF CREDITORS AND CONTRIBUTORIES."

Burr v. *Smith* (1909) 2 K.B. 306. This was an action of libel against the official receiver of a company in liquidation and a public functionary styled "Inspector General in Companies" for statements contained in reports made by them in the course of their official duties. The official receiver was an officer of the court and the statements in his official report reflected on the conduct of the plaintiff in relation to his connection with the company. The inspector was an officer appointed by the Board of Trade. In his annual report to the Board he also made similar statements to those contained in the official receiver's report. The defendants moved to strike out the statement of claim and dismiss the action as being frivolous and vexatious. Lawrance, J., affirmed the order of a Master granting the application and the decision of Lawrance, J., was affirmed by the Court of Appeal (Moulton and Farwell, L.JJ.), those learned judges holding that the statements made by the defendants in the course of their official duties were absolutely privileged.

PRACTICE—COSTS—APPEARANCE IN PERSON—SUBSEQUENT EMPLOYMENT OF SOLICITOR—FAILURE TO GET SOLICITOR'S NAME ON RECORD.

Mason v. *Grigg* (1909) 2 K.B. 341 is a decision on a trifling point of practice. The defendant in the action had appeared in person, pending the action he employed a solicitor, but he neglected to give notice thereof to the central office, and the solicitor's name did not therefore appear on the record as acting for defendant. The plaintiff's solicitors were, however, aware of the appointment, and had dealt with the solicitor as the defendant's solicitor. The action was ultimately dismissed with costs; and the question then arose whether, in these circumstances, the defendant could tax his solicitor's charges. The Master held he could not, and Bucknill, J., affirmed his ruling, but the Court of Appeal (Moulton and Farwell, L.JJ.) decided that the irregularity did not disentitle the defendant to tax his solicitor's costs, the opposite party having had notice of the appointment.

LANDLORD AND TENANT—DISTRESS—FIXTURES—ADVERTISEMENT HOARDINGS.

Provincial Bill Posting Co. v. *Low Moor Iron Co.* (1909) 2 K.B. 344. The plaintiffs under an agreement with the defendants were entitled for a specified term to the exclusive right of posting bills on hoardings to be erected by plaintiffs on the defendants' land, paying therefor a fixed annual sum in quarterly payments. The plaintiffs erected the hoarding and exhibited advertisements thereon. Having fallen into arrear the defendants levied a distress and seized and sold the hoardings. The plaintiffs brought the present action for a wrongful distress, and the defendants counterclaimed for rent. Bigham, J., held that the hoardings were tenant's fixtures, removable at the conclusion of the tenancy and were liable to distress, the action was therefore dismissed. The Court of Appeal (Buckley and Kennedy, L.JJ., and Joyce, J.), however, held that the hoardings being affixed to the freehold were not distrainable, even though they were removable as tenant's fixtures, and that the plaintiffs were therefore entitled to damages. They also held that the defendants were entitled to recover on their counterclaim, but, as the plaintiff company was in liquidation, it was held that the defendants could not set off against the plaintiffs' damages the amount due on the counterclaim. The Court of Appeal intimate that the agreement did not really amount to a demise, but was only a license.

SHIP—CHARTER-PARTY—EXCEPTED PERILS—DEVIATION—DAMAGE TO CARGO—LIABILITY OF SHIP OWNER.

Internationale Guano, etc., v. *Macandrew* (1909) 2 K.B. 360. In this case the plaintiffs were charterers of the defendants' ship to carry a cargo for delivery at Algeciras and Alicante, with leave to call at Corunna. The vessel was delayed at Corunna and Algeciras. On leaving Algeciras she deviated from the chartered voyage by going to Seville, whence she went to Alicante. By reason of the various delays the cargo delivered at Alicante was damaged, the bags in which it was contained being destroyed by chemical action of contents. It was held by Pickford, J., who tried the action that the deviation to Seville put an end to the charter-party as from the beginning of the voyage, and that the defendants were therefore liable as common carriers; but that as regards the damage arising from the delay at Corunna and Algeciras they were not liable, the damage being due to the

nature of the cargo and not to the failure of the defendants to carry the cargo with reasonable despatch; but that as to the increased damage occasioned by the delay caused by the deviation the defendants were liable as common carriers.

COMPANY—ARRANGEMENT WITH CREDITORS—JUDGMENT AGAINST COMPANY—STAYING EXECUTION PENDING CONSIDERATION OF ARRANGEMENT—COMPANIES ACT, 1908 (8 EDW. VII. c. 69), s. 120.

Booth v. *Walkden Spinning Co.* (1909) 2 K.B. 368. The plaintiffs had recovered judgment against the defendants, a limited company. An arrangement by the company with its creditors had been proposed, and a meeting of the creditors had been called to consider it under the Companies Act, and if approved it would, under the Act, become binding on all creditors; the defendant company applied to stay execution on the plaintiffs' judgment until the result of the meeting should be ascertained, but the court (Darling and Jelf, JJ.) held that there was no jurisdiction to grant a stay in such circumstances.

ADMIRALTY—SHIP—CARGO—FREIGHT—BUNKER COAL.

El Argentino (1909) P. 236. In this case bunker coal was supplied in England to a British ship on the personal credit of her owners. The vessel went in ballast to the River Plate, and her owners became financially involved, and mortgagees took possession of the ship when about to return with a valuable cargo. During the homeward voyage a quantity of the bunker coal was consumed, and on the arrival in England of the ship the freight was collected by a receiver appointed by the court, and the net proceeds, less disbursements, were paid into court. The mortgagees now applied for payment out to them of the freight in court, and the vendor of the coal claimed a deduction for the coal consumed in carrying the freight; but Bigham, P.P.D., held that he was not entitled, because the coal had been sold to, and was the property of the mortgagors, and therefore the vendor had no interest in the coal or the freight.

CHARITY—PROPOSED SCHEME FOR INSTITUTE OF MEDICAL SCIENCES—SCHEME PROVING ABORTIVE—RETURN OF CONTRIBUTIONS—CY PRÈS—CHARITABLE INTENT.

Re University of London, Fowler v. *Attorney-General* (1909) 2 Ch. 1. During a testator's lifetime a fund had been started by

voluntary contributions with the object of establishing an institute of medical sciences, and the testator had himself largely contributed to the fund. By his will he left a legacy of £25,000 to "the Institute of Medical Sciences Fund, University of London." His executors paid the legacy to the trustees of the fund, but the scheme subsequently proved impracticable and was finally abandoned, and the various contributions were returned to the respective contributors. The question then arose whether the £25,000 had been definitely devoted to a charitable purpose, and ought to be administered cy près. Joyce, J., before whom the application was heard, decided that the legacy was a gift to take effect upon a condition which had failed, and that therefore the applicants who were trustees of the fund were liable to repay the same to the testator's estate, as no general intent in favour of charity could be gathered from the will, and his decision was affirmed by the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.).

TRADE MARK—SIMILAR MARK ON REGISTER—"SAME GOODS OR DESCRIPTION OF GOODS"—CALCULATED TO DECEIVE.

In re Gutta Percha & India Rubber Co. (1909) 2 Ch. 10. This was an application by a Toronto company to register a trade mark, the distinctive feature of which was a Maltese cross. The application was resisted by an English company which had previously registered a trade mark which included the same device "for goods manufactured from india rubber or gutta percha not including dress shields or gusset webs." The applicants applied to register the mark in respect of "boots and shoes made wholly or partly of india rubber," and for "india rubber footwear included in this class, but not including gaiters or leggings or any goods of a like kind." It was held by Neville, J., that the opponents' trade mark was for "the same description of goods" as the applicants' proposed trade marks, and that the applicants' proposed trade mark was "calculated to deceive," and the application ought therefore to be refused, and his decision was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.JJ.)

WILL—CONSTRUCTION—DIRECTION TO PAY ANNUITY OUT OF INCOME—INDEFINITE TIME—ABSOLUTE GIFT OF CORPUS "SUBJECT TO THE AFORESAID ANNUITIES."

In re Howarth, Howarth v. *Makinson* (1909) 2 Ch. 19. The Court of Appeal (Cozens-Hardy, M.R., and Buckley and Ken-

nedy, L.JJ.), have not been able to agree with the decision of Joyce, J., (1909) 1 Ch. 485 (noted, ante, p. 349) and hold that the arrears of the annuities were charged on, and payable out of, the corpus of the fund, and the order of Joyce, J., was varied accordingly.

DENTIST—UNREGISTERED PERSON—DESCRIPTION—HOLDING OUT AS PERSON "SPECIALLY QUALIFIED TO PRACTISE DENTISTRY"—DENTISTS ACT, 1878 (41-42 VICT. c. 33), s. 3, (R.S.O. c. 178, s. 26).

In *Bellerby* v. *Heyworth* (1909) 1 Ch. 23, the defendants who were not registered dentists, advertised by notices at their place of business "finest artificial teeth. Painless extraction. Advice free." Parker, J., following *Barnes* v. *Brown* (1909) 1 K.B. 38, noted, ante, p. 124, held that this was an advertising themselves as dentists, and therefore a breach of the Dentists Act, 1878 (41-42 Vict. c. 33), s. 3, (R.S.O. c. 178, s. 26). The section of the English Act which it was alleged was contravened is as follows: "3. A person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition or description implying that he is registered under this Act, or that he is a person specially qualified to practise dentistry, unless he is registered under this Act." The Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.JJ.), hold that this section forbids a description of the person as distinguished from the acts done by him, and does not prohibit an unregistered person from advertising that he does dental work provided that he does not say that he does so as a dentist; they therefore overruled the decision of Parker, J., and overruled the decision of the Divisional Court in *Barnes* v. *Brown*, supra. The Ontario Act s. 26, it may be observed, explicitly forbids an unregistered person from practising dentistry or "performing any dental operation."

WILL—CONSTRUCTION—GIFT TO ISSUE "ACCORDING TO THE PARENT STOCK"—PER CAPITA—PER STIRPES.

In re Rawlinson, Hill v. *Withall* (1909) 2 Ch. 36. By his will dated in September, 1844, a testator gave his residuary estate to trustees upon certain trusts for the benefit of his widow and four daughters, and on the decease of the survivor of his said widow and daughters, he directed the trustees to divide the residuary

estate "between the issue then living of my said four daughters in equal shares according to the parent stock and not to the number of individual objects to the intent that the issue then living of any one of my said daughters may be entitled to a share equal to that which the issue (if any) of any other of them shall be entitled to, and in case there shall be issue then living of only one of them my said daughters, then the whole to be paid to or equally divided amongst such issue." The widow died in 1869 and the last surviving daughter in 1907. At that date there were living children of three of the daughters and both children and grandchildren of the other daughter. The question was whether the grandchildren were entitled to a share, their parents being still living. Joyce, J., came to the conclusion that they were not entitled to participate and that the gift was to the issue per stirpes throughout, so that children could not take concurrently with their parents.

ORDINANCE AGAINST IMPORTATION OF CHANDU—CONSTRUCTION—CONVICTION—ONUS PROBANDI—MENS REA.

Bruhn v. *The King* (1909) A.C. 317. This was an appeal from a conviction for breach of an Ordinance of the Straits Settlement against the importation of chandu, which is opium prepared for use in smoking, etc. The ordinance in question provided that the master and owner should be liable to conviction, and that the existence of chandu beyond a certain specified amount on any vessel should be deemed a breach of the ordinance "unless it is proved to the satisfaction of the court that every reasonable precaution has been taken to prevent such user of such ship, and that none of the officers, their servants or the crew, or any persons employed on board the ship were implicated therein." Chandu beyond the specific amount was discovered concealed in a boat on board the ship of which the appellant was master. He and his chief officer gave evidence that the chandu had been placed there without their knowledge or consent, but none of the other officers or crew were called. The master was accordingly convicted and fined $2,000 and costs, from which conviction he appealed; but the Judicial Committee (Lords Macnaghten, Atkinson and Collins, and Sir A. Wilson) dismissed the appeal, holding that under the ordinance a mens rea was not essential, and that the onus probandi was on the defendant of shewing that none of the officers or crew were implicated in the importation, which onus he had not discharged.

LEASE OF MACHINES—RESTRICTIVE CONDITION AS TO USER—RESTRAINT OF TRADE—MISREPRESENTATION BY LESSOR—ELECTION TO TREAT VOIDABLE LEASE AS VALID—INJUNCTION.

United Shoe Co. v. *Brunet* (1909) A.C. 330. The plaintiffs in this case falsely, as the court found, alleging that they were patentees of certain machines for the manufacture of shoes, made a lease of several of such machines to the defendants, subject to a condition that they should not use in their factory any machines not leased by them from the plaintiffs. The defendants, after discovering the misrepresentation made by the plaintiffs, continued to use the leased machines, and used for other ancillary purposes of their manufacture other machines not leased from the plaintiffs, who thereupon brought this action to restrain the defendants from violating the agreement under which the machines were leased. The Court of Appeal in Quebec considered that the agreement was in restraint of trade and tended to create a monopoly, and was against public policy and could not be enforced, and dismissed the action, but the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Collins and Gorrell) came to a different conclusion, and held that although the lease in question was voidable by reason of the misrepresentation, yet the defendants having continued to use the leased machines after notice of the misrepresentation could not repudiate its terms, and were bound by the restriction not to use other machines than those leased from the plaintiffs, which was not a term severable from the rest of the contract, and that the covenant was not in restraint of trade, as the defendants were at liberty to hire or not to hire the plaintiffs' machines on the terms imposed by the plaintiffs as they saw fit, and that there was nothing illegal in the terms imposed by the plaintiffs.

CANADIAN RAILWAY ACT, 1888, S. 134—CANADIAN RAILWAY ACT, 1903, SS. 128, 239—RAILWAY MAP—EVIDENCE—DAMAGE BY FIRE—IGNITION OF COMBUSTIBLE MATERIAL ON RIGHT OF WAY—NEGLIGENCE.

Blue v. *Red Mountain Railway* (1909) A.C. 361 was an appeal from the Supreme Court of Canada reversing a judgment of the Supreme Court of British Columbia. The action was brought to recover damages from the defendant railway company occasioned by fire which started from the ignition of combustible material on the defendants' right of way under s. 239 of the

Railway Act, 1903. In order to shew that the damage originated on the defendants' premises, a map filed by the company under s. 134 of the Railway Act, 1888 (being s. 128 of the Act of 1903), was tendered and received in evidence. The Supreme Court of Canada on the objection of the defendants refused to admit the map on the ground that it had not been tendered at the trial, and ordered a new trial, but the Judicial Committee of the Privy Council (Lords Atkinson, Collins and Shaw, and Sir A. Wilson) held that whether or not the Supreme Court was right in refusing to admit the map, their lordships would admit it, and that it was conclusive in favour of the plaintiffs, and that there had been no misdirection. The judgment at the trial in favour of the plaintiff was therefore restored.

BILL OF LADING—CONDITION FOR CESSER OF LIABILITY—CONSTRUCTION—DELIVERY OF GOODS TO AGENT—FRAUD OF AGENT.

Chartered Bank of India v. *British India Steam Navigation Co.* (1909) A.C. 369. This was an action on a bill of lading for non-delivery of goods. The bill of lading contained a clause providing that the shipowner should be free from liability "when the goods were free of the ship's tackle." The goods in question were delivered to landing agents appointed by the shipowners, in lighters and conveyed to the landing agents' wharf, and it was his business to deliver them to the person entitled, but through fraud on the part of the agents' servant the goods were delivered to a person not entitled to them. The plaintiffs contended that the shipowners remained liable, but the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson and Collins and Sir A. Wilson) dismissed the appeal from the Supreme Court of the Straits Settlement, on the ground that the clause for cesser of liability applied notwithstanding the landing agent was not the agent of the consignees.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Riddell, J.] McDOUGAL *v.* VAN ALLEN CO. [June 8.

Master and servant—Contract of hiring—Travelling salesman—Payment for services by commission on price of goods sold—"Good and accepted orders"—Basis for calculating commission—Goods actually sent to customers or goods ordered and orders accepted—Acceptance—Illness of servant—Wrongful dismissal—Unintentional breach.

The plaintiff, a commercial traveller, entered into an agreement in writing with the defendants. He therein agreed to carry samples as furnished by the defendants in the city of Toronto continuously from the 15th day of August, 1907, to the 15th day of August, 1910, and to take orders from the above city and samples as furnished. . . also to take good care of all samples, sample trunks, cases, etc., and to return same from time to time as requested. The defendants agreed to pay him the sum of 8 per cent. on all good and accepted orders taken at the prices as marked. The plaintiff, a very nervous man, contracted a cold, and about June or July of 1907 was advised by a friend to take Agnew's catarrh cure. He followed the advice of his friend; at first he used the article once a day or once every two or three days, but the habit grew upon him, and he finally used it many times a day. He says that the cure contained a drug, cocaine, and that although he knew that the use of it was destroying him, he continued its use, apparently having lost much of his will power and power to resist the attraction of the drug. He became a nervous wreck, and at last physically incapable of carrying the samples, and on the 17th of August, 1908, was taken by his friends to a sanitarium. He made a bill of sale to his brother, but made no arrangement for paying his rent, and the landlord seized upon his goods, amongst them the samples supplied by the defendants. The defendants were obliged to pay $135.00 to recover their property, and shortly thereafter gave the plaintiff notice of the termination of the contract. In the matter of com-

mission the question had arisen several times as to the meaning of the words "good and accepted orders." The defendants contented that only such goods as were actually sent could be considered in fixing the commission. The plaintiff contented that he was entitled to commission on all goods which the defendants received an order for, and which they would have filled if they had had the goods. The action is twofold:—(1) for the commission computed as the plaintiff contends it should be; (2) for damages for breach of contract.

Held. "In respect of the first matter I am of the opinion that 'good and accepted orders' is not synonymous with 'orders accepted and filled.' If the defendants dealt with an order in such a way as would lead the plaintiff or the customer to believe that they intended to fill it, I think it was 'accepted' within the meaning of the contract, and, I think, that receiving an order for goods and sending it to their factory that the goods might be made to fill the order, is an acceptance, and the plaintiff is entitled to a declaration that an order within the meaning of this contract might be accepted by the defendants without being actually filled.

"As to the second point, it is to be observed that the contract contained no terms allowing either party to put an end to it. The law in a case of the present kind has been recently laid down in *Poussard* v. *Spiers and Pond*, 1 Q.B.D. 410; also *Storey* v. *Fulham*, 23 T.L.R. 306.

"In the present case there is nothing to indicate that the plaintiff would not recover so as to be able to perform his agreement for the greater part of the time yet unexpired. He did in fact recover by the 29th of November. I do not find anything to indicate that the 'illness of the plaintiff put an end to the agreement in a business sense,' nor, as I think, does the fact that the illness of the plaintiff was brought on to a great extent, if not wholly, by his own folly, make a sufficient difference. I do not think that this illness of a nervous subject allowing himself to be overcome by a seductive drug which sapped his powers of self-control as well as his physical strength, can fairly be taken out of the category, 'act of God.' A man differently constituted might have escaped serious injury; the plaintiff's constitution afforded a suitable and prepared nidus for the operation of the poison. The defendants contended that the act of the plaintiff in borrowing certain sums of money from the customers justified his discharge. But I cannot find as a fact that the acts of bor-

rowing which it is admitted the plaintiff was guilty of constituted any serious offence or one which justified dismissal. The question is, 'Has the servant so conducted himself that it would be manifestly injurious to the interests of the master to retain him?' None of the witnesses called for the defendants said that the borrowing had affected them in the least.

"The next matter complained of is more serious, namely, the fact that the plaintiff permitted the property of his master to be seized by his landlord for his rent, thereby occasioning loss and annoyance to the defendants. Irrespective of the peculiar law of master and servant at the common law, the breach by one party to an agreement does not justify the other in treating the contract as at an end unless the breach goes to the root of the contract, and the same law exists in the employment of a nature not unlike that now under consideration. As at present advised, I think that a wilful disregard of this agreement would have justified the master in discharging the plaintiff, but the act. or rather, the omission, was not intentional. The failure to look after the samples properly was due to the illness of the plaintiff. I do not think, therefore, that this involuntary default upon this single occasion justified dismissal. There should be a declaration that the plaintiff was wrongfully dismissed, and a reference upon both branches of the case.

R. McKay, for plaintiff. *George Kerr*, for defendants.

Divisional Court.] FANCOURT v. HEAVEN. [June 14.

Malicious prosecution — Reasonable and probable cause — Continuation after—Question for jury—Favourable termination of proceedings—Withdrawal of charge.

This was an appeal by the plaintiff from the judgment of Clute, J., dismissing an action for false imprisonment and malicious prosecution. The plaintiff, an expressman, plying his trade in the city of Toronto, was arrested on a charge of obtaining a roll of sole leather by false pretences, at the instance of defendant, but was released on bail, and the charge was subsequently withdrawn. The plaintiff was employed by the real thief, who, by an ingenious scheme, obtained possession of the roll of leather from a firm of leather dealers of which defendant was a member, and sold it to one Brodie. The plaintiff was an innocent instrument in the hands of the real offender, who was subsequently

arrested and convicted. The defendant, being sued for the arrest and prosecution, pleaded that he had reasonable and probable cause for laying an information and prosecuting the plaintiff. A motion for nonsuit was reserved by the trial judge, and the case allowed to go to the jury, who found a verdict for the plaintiff, with $200 damages. Subsequently the judge granted the motion, and dismissed the action.

Held. The evidence shews that there was an absence of reasonable and probable cause in not withdrawing from the prosecution at an early stage. Though a private prosecutor may have such knowledge as would warrant the commencement of criminal proceedings, he is not relieved from the primary duty of acting discreetly and fairly towards the accused person in directing and continuing the prosecution. Though reasonable and probable cause may exist at the initiation, yet if it afterwards appear that there is good reason to doubt whether the charge is well founded, the private prosecutor should make reasonable inquiry to clear the doubt, and, if he has obvious means of finding out that the charge is not well founded, he should relinquish the matter or do what he can to dissever himself from its further prosecution.

The necessity for a prosecutor to take reasonable care to inform himself of facts with which he might have made himself acquainted was dealt with in *Abrath* v. *North Eastern R.W. Co.*, 11 Q.B.D. 440 (affirmed II. App. Cas. 247), and in *McGill* v. *Walton*, 15 O.R. 359.

Russell Snow, K.C., for plaintiff. *Dewart*, K.C., for defendant.

Chapelle, Master.] [Aug. 3.

KELLY BROS. *v.* TOURIST HOTEL CO.

Mechanics' and Wage Earners' Lien Act—Work done and material supplied—Written contract—Work to be done according to plans and specifications—Payments in monthly instalments—Guarantee bond—Entire contract—Condition precedent.

The plaintiffs, who were contractors, entered into a written contract with the defendants bearing date the 26th day of June, A.D. 1907, whereby they contracted and agreed with the defendants to do the work and furnish the material: the work to be done in accordance with written plans and specifications of the architect. The plaintiffs were to be paid for the whole of the said work the sum of $115,000, which sum was to be paid in monthly

instalments as the work progressed. The instalments to represent 85 per cent. of the amount of the work done and the material supplied. All payments to be made on the written certificate of the architect, the final payment to be made on the expiration of 31 days after the completion of the work. Provision was also made in said contract that within 15 days after its date the plaintiffs should deliver to the company a good and sufficient bond of a guarantee company satisfactory to the company in the sum of $10,000, conditioned upon the fulfilment and full performance of the conditions, stipulations and covenants of the said contractors therein contained. The plaintiffs commenced work in July, 1907, and nine progressive certificates were issued by the architect. Five of these certificates were paid and a portion of the sixth. The plaintiffs having failed to deliver said bond in accordance with the said agreement the defendants refused to make any further payments until the delivery of the said bond. The plaintiffs thereupon stopped the work on said building, and brought this action to recover the amount of the balance they claimed for work done and material supplied by them on a quantum meruit.

Held, that the contract is an entire and not a divisible contract, as contended by the plaintiffs. It is a contract to do the whole work in consideration of a fixed sum. Performance is a condition precedent to the right of the plaintiffs to enforce payment of the balance for the work done and the material provided exceeding what was allowed in the progress certificates. There has been no waiver or rescission of the contract nor any discharge or exoneration of the parties. When default is made in the performance of a contract by one of the parties it is for the court to determine whether or not the default amounts to a renunciation. The default in payment of any instalment will not discharge the contract though it might give a right of action. There is no question but that the plaintiffs were bound by the 17th clause of the contract to deliver a bond as therein set out, but their failure to do so did not justify the defendants in refusing payment of their progressive estimate, such an agreement being, I consider, a warrant and not a condition for which the defendants had their remedy. On the other hand, if the defendants refused to pay any more of the progress certificates until the bond was delivered the plaintiffs were not justified in abandoning the work on that account, as it only gave them the right to bring an action to recover the amount due them, and I am of the opinion that that is all they are entitled to recover in this action.

Province of Manitoba.

KING'S BENCH.

The Referee.] WEBB v. RODNEY. [July 8.

Interpleader — Different claimants to same amount — King's Bench Act, Rule 899.

Relief by way of interpleader may be granted, under Rule 899 of the King's Bench Act, to a vendor of land as between two agents each claiming the same amount as commission on the sale of the land, the vendor admitting that the amount is due to one or other of the agents. *Gyatorex* v. *Shackle* [1895] 2 Q.B. 249 distinguished.

Dennistoun, K.C., for applicant. *Mulock*, K.C., and *Young*, for respective claimants.

Mathers, J.] CALLON v. C. N. R. [July 17.

Railway company—Loss of baggage—Implied contract to carry personal baggage of passenger—Action by owner of goods or his assignee, neither being the passenger—What included in term "personal baggage"—Negligence.

Held, 1. Only the passenger or his assignee can sue a railway company on the implied contract with a passenger to carry safely his personal baggage arising from his having purchased a ticket for his conveyance. *Great Northern Ry. Co.* v. *Shepherd*, 8 Ex. 30; *Gamble* v. *G.W.R.*, 24 U.C.R. 409, and *Beecher* v. *Great Eastern Ry.*, L.R. 5 Q B. 241, followed.

2. If the action were founded in tort and it was shewn that the goods were lost through the defendant's negligence, the owner of the goods, though he was not the passenger, could sue. *Meux* v. *Great Eastern Ry. Co.*, L.R. 2 Q.B. 387, followed.

3. In the absence of proof of negligence, the passenger can only recover for personal baggage lost and only on clear evidence that such were contained in the missing pieces.

4. In the case of a married woman travelling with infant children to join her husband, the husband's clothing, household effects and the clothing of grown up daughters cannot be classed as personal baggage. *McCaffrey* v. *C.P.R.*, 1 M.R. 350, followed.

Kilgour, for plaintiff. *Clarke*, K.C., for defendants.

Macdonald, J.] LAWRENCE v. KELLY. [July 27.

Employers' liability—Accident to workman—Workmen's Compensation for Injuries Act—Accident happening out of jurisdiction—Negligence of fellow workmen.

A workman suing in Manitoba in respect of an injury suffered in Ontario caused by negligence of a fellow workman cannot claim the benefit of the "Workmen's Compensation for Injuries Act" of Manitoba, nor can he recover under the corresponding Ontario Act when he failed to give notice or bring his action within the time prescribed by that Act.

Neither can he recover at common law without proof of personal negligence on the part of his employer. *Plant* v. *G.T.R.*, 27 U.C.R. 78, and *O'Sullivan* v. *Victoria R.W. Co.*, 44 U.C.R. 128, followed.

Bonnar, K.C., and *Trueman*, for plaintiffs. *Galt*, K.C., and *Towers*, for defendants.

Macdonald, J.] KERFOOT v. YEO. [July 27.

Vendor and purchaser — Rescission of contract — Cancellation under provisions of agreement—Right to recover money paid under cancelled agreement.

After making some payments to the defendant on account of the purchase of land under an agreement, the plaintiff discovered that he had made a bad bargain and repudiated and abandoned the contract which the defendant then cancelled under the provisions thereof.

Held, that the plaintiff, having failed in his claim for damages in deceit founded on alleged misrepresentations of the defendant in making the sale, could not recover as an alternative the moneys he had paid on account of the purchase.

Fullerton and *G. F. Taylor*, for plaintiff. *Wilson*, K.C., *Bergman*, and *Sutton*, for defendants.

Macdonald, J.] WHITLA v. RIVERVIEW REALTY CO. [July 27.

Vendor and purchaser—Agreement for sale of land—Rescission pursuant to power in agreement when default made in payment of instalment of purchase money—Equitable relief—Specific performance—Right to recover back money paid on cancelled contract.

Pursuant to a provision in the agreement of sale by the defendants to the plaintiff of certain lands, the defendants notified the plaintiff that, by reason of his default in payment of an instal-

ment of the purchase money, they thereby cancelled the said contract and declared the same void and forfeited any payments already made by the plaintiff. Time was in the contract declared to be of the essence of it.

Held, following *In re Dagenham Dock Co.*, L.R. 8 Ch. 1022, and *Canadian Fairbanks Co.* v. *Johnston*, 18 M.R. 589, that the contract was not rescinded by such notice, as the plaintiff was not given an opportunity of making good his default.

Held, also, that, even if the notice had in effect cancelled and annulled the contract, the court can, and in this case should, grant relief against the forfeiture and decree specific performance at the suit of the plaintiff.

Semble, If the agreement had been effectually cancelled by the notice and it was beyond the power of the court to grant relief, the plaintiff could not recover the money he had paid on account as the agreement provided for the forfeiture of any such payments in the event of cancellation.

Phillips, for plaintiff. *Pitblado*, K.C., for defendants.

Metcalfe, J.] [Aug. 3.

TIMMONS *v.* NATIONAL LIFE ASSURANCE CO.

Practice—Discovery—Examination for—Interrogatories—King's Bench Act, Rule 407b, as enacted by 5 & 6 Edw. VII. c. 17, s. 2.

A party may be required to answer interrogatories delivered pursuant to Rule 407*b* of the King's Bench Act, as enacted by s. 2 of c. 17 of 5 and 6 Edw. VII., notwithstanding that he has also been ordered to attend and be examined for discovery under Rule 387. *Dobson* v. *Dobson*, 7 P.R. 256, followed.

Deacon, for plaintiff. *Robson*, K.C., for defendants.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] IN RE HOWARD. [Sept. 10.

Infant—Custody of charitable institution—Religious persuasion—Magistrate's jurisdiction to change order for custody on supplementary evidence.

An order was made by a magistrate awarding the custody of an infant to an undenominational society, but, upon further

evidence, changed the order and gave the custody of the child to a Roman Catholic institution.

Held, on appeal, affirming the decision of MARTIN, J., that the magistrate had power to make the second order.

Sir C. H. Tupper, K.C., for the appeal. *L. G. McPhillips*, K.C., contra.

SUPREME COURT.

Clement, J.] ADAMS v. ADAMS. [Aug. 9.

Divorce—Domicil.

Petitioner in 1895, when aged about 19, came from Ontario to British Columbia, where he spent some three or four years in different places. In 1899 he married and at once removed to the North-West Territories. In 1907, satisfied of his wife's infidelity, he "made her go away," and after some financial arrangements between the couple, she left for New York, since which time no communication has passed between them. In the autumn of 1908 he came to Vancouver, B.C., and took a position in a mercantile house, and in January, 1909, filed a petition for divorce, alleging that he and the respondent were domiciled in British Columbia.

Held, that he had not acquired a domicil in British Columbia to entitle him to a divorce.

The court will not decree a divorce until it is perfectly satisfied that at date of petition the domicil of the married pair was in this province. Mere residence does not constitute domicil, but there is needed in addition a "settled purpose of taking up a fixed and settled abode." *Wilson* v. *Wilson* (1872) 41 L.J.P. 76; *Bell* v. *Kennedy* (1868) L.R. 1 Sc. App. 310; *Udny* v. *Udny* (1869), L.R. 1 Sc. App. 449 followed.

Quære, whether domicil of wife invariably and necessarily follows that of husband.

Tiffin, for petitioner. No one for respondent.

Hunter, C.J.] [Sept. 10.

FRASER v. VICTORIA COUNTRY CLUB.

Criminal law—Betting on race tracks—Crim. Code ss. 227, 235—Lawful bookmaking.

The plaintiff, a director and shareholder in defendant company, brought action for an injunction restraining the defendants

from carrying out an arrangement entered into with a bookmaker named Jackson. The material points of the arrangement were that Jackson should be allowed to carry on his business as a bookmaker at a race meeting to be held on the defendants' race track at Victoria, provided that he carried on his betting operations at no fixed spot on the race track, but kept moving about. He was, however, to be allowed to pay off his bets at a booth on the track.

Held, 1. following *Rex* v. *Moylett* (1908) 15 O.L.R. 348, that the proposed method of betting was legal.

2. The booth from which it was proposed to pay off the bets was not a common betting house within the meaning of section 227 of the Code.

Semble, A corporation cannot be convicted of keeping a common betting house under sections 227 and 228 of the Code.

Helmcken, K.C., for plaintiff. *H. W. R. Moore*, for defendants.

Clement, J.] [Sept. 10.

WILLIAMS v. WILLIAMS AND HUTTON.

Divorce—Practice—Damages—Assessment of—Jury—Divorce and Matrimonial Causes Act.

The parties in an action for divorce consented to an order that the trial should take place before a judge without a jury. A decree for a divorce having been pronounced, the judge proceeded to assess the damages, when the co-respondent invoked s. 33 of the Divorce and Matrimonial Causes Act (20-21 Vict. c. 85) which provides that the damages to be recovered in any such petition (for divorce) shall in all cases be ascertained by the verdict of a jury.

Held, that, having allowed the order for trial without a jury to go, he was estopped from availing himself of this provision.

McIntyre and *Brown*, for petitioner. *Tiffin*, for respondent. *Davis*, K.C., and *C. B. Macneill*, K.C., for co-respondent.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Francois Octave Dugas, of the Town of Jolliette, of the Province of Quebec, to be puisne judge of the Superior Court in and for the Province of Quebec, vice the Hon. Charles Chamilly DeLorimier. (Sept. 6, 1909.)