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MAINTENANCE AND CHAMPERTY.

In the recent case of *Colville* v. *Small*, 22 O.L.R. 33, Mr. Justice Middleton has determined that where a man takes an assignment of a debt subject to an agreement that he is to sue for its recovery and divide the amount recovered between himself and the assignor that is a champertous agreement and void and that the action cannot be maintained.

Such a transaction would be a champertous bargain and void at common law because at common law choses in action were not assignable; an assignment, therefore, such as was in question in *Colville* v. *Small* would have no legal operation whatever at common law, and, notwithstanding the assignment, the action to recover the thing assigned would have had to be brought in the name of the assignor, and if that action were brought by the assignee in the assignor's name, ever with the latter's consent, he would have no legal right to maintain it, and his doing so would be "maintenance." The common law required every suitor to prosecute and maintain his own suit and regarded any third person carrying on suits in the name of others as committing an unlawful act which was called "maintenance" which was an indictable offence at common law: see *Alabaster* v. *Harness* (1894), 2 Q.B. 297; (1895), 1 Q.B. 639; 70 L.T. 375, and if in addition to maintaining the action he bargained for the proceeds, or any part of the proceeds of the litigation, that was called "champerty" and was also illegal and a criminal offence: *Meloche* v. *Deguire*, 34 S.C.R. 29.

But it was of the essence of the common law offence of maintenance, that the action maintained should be the action of some other person than that of the maintainor. No one could be guilty of "maintenance" in respect of an action brought in his own name and at his own cost. The Judicature Act now permits

the assignment of choses in action and enables the assignee to sue for their recovery in his own name, and it is clear that an assignee suing in his own name cannot be guilty of "maintenance." Under the Act a man may validly assign a chose in action in trust for himself (the assignor), and the assignee may lawfully sue for its recovery and it was so determined by the English Court of Appeal in *Fitzroy* v. *Cave* (1905), 2 K.B. 346; 93 L.T. 499. If a man may lawfully assign the whole chose in action in trust for himself why may he not assign part to the assignee for his own use and part in trust for himself (the assignor)? According to this decision in *Colville* v. *Small* this constitutes "champerty."

Champerty as the derivation of the word imports would seem originally to have applied to real actions, and the common law had to be supplemented by the statute against buying feigned titles, which has since been repealed. Formerly a mere right of entry could not be purchased so as to enable the purchaser to sue for the recovery of possession in his own name, but now it may. We have a statutory definition of "champertors" and a declaration that "champerty" is illegal, but the Act is merely declaratory of the common law, according to the Act (R.S.O. c. 327): "Champertors be they that move pleas and suits, either by their own procurement or by others, and sue them at their own costs, for to have part of the land at variance, or part of the gains."

This statutory definition of "champertors" appears to include as an essential part of the definition, the bringing or promoting of a suit in the name of some other person; "maintenance," therefore, seems to be an essential part of the offence of "champerty," and although there may be "maintenance" without "champerty" it does not seem possible according to the statutory definition of a champertor that there can be "champerty" without "maintenance," except, perhaps, in the case of a solicitor.

In short, as was said by Davis, J. in *Meloche* v. *Deguire*, supra, "champerty is defined to a species of which 'mainten-

ance' is the genus. It is said to be a more odious form of maintenance but it is only a form or species of that offence. The gist of the offence both in 'maintenance' and 'champerty' is that the intermeddling is unlawful and in a suit which in no way belongs to the intermeddler."

Champerty and maintenance may still be committed, the offence has not been abolished. If a man (other than a solicitor) at his own costs brings an action in another's name, with that other's consent, or supplies, or agrees to supply, him with money to bring it on an agreement to share in the proceeds of the litigation that would be both maintenance and champerty. The bringing of a suit in the name of a person under disability by his next friend, however, is not maintenance, because that is a proceeding authorized by law and if a solicitor bring an action for his client at his own cost, that is not "maintenance": *Re Solicitors, Clark* v. *Lee*, 9 O.L.R. 708, but if he do so on an agreement to share the profits of the litigation that would be "champerty": *Re Solicitor* 14 O.L.R. 404, though perhaps not "maintenance," unless it be that the champertous agreement would make that "maintenance," which, without it, would not be so. And even though a client were to assign to his solicitor some aliquot part of a chose in action the subject of litigation instituted by the solicitor in his own name on his client's behalf, and at the solicitor's own costs, that would also appear to be, if not champertous, at all events, illegal, because of the peculiar relation of solicitor and client, which precludes the making of such bargains: *Re Solicitor*, 14 O.L.R. 464. A mere agreement to divide the proceeds of litigation with some other person does not of itself constitute "champerty;" there must also be a carrying on, or a furnishing or agreement to furnish funds to carry on, litigation in the name of another who alone is legally interested, on a promise of the fruits or part of the fruits of the litigation.

When the case of *Colville* v. *Small* was previously before the same learned judge on an interlocutory motion (see 22 O.L.R. p. 2), he referred to the language of Cozens-Hardy, L.J., in

Fitzroy v. *Cave*, supra, where that learned judge said: "Henceforth in all courts a debt must be regarded as a piece of property capable of assignment in the same sense as a bale of goods. And on principle, I think *it is not possible to deny the right of the owner of any property, capable of legal assignment to vest that property in a trustee for himself.* . . . If the assignment is valid at all, it is valid in all courts, and the plaintiff is entitled to judgment ex debito justitiæ," which is a distinct authority for the proposition that there is no "champerty" in a man transferring a debt to another in trust for himself (the assignor) which seems to support the view which we have expressed, and we are therefore somewhat at a loss to understand how the learned judge ultimately reached the conclusion that the assignment of the chose in action in question was "champertous."

SIR WILLIAM BLACKSTONE.

The last number of *Case and Comment* has a series of articles referring to the life and work of Sir William Blackstone, setting forth the various ways in which his immortal Commentaries and other writings have conduced to the development and elucidation of the laws of England. As to this it has been said by Lord Campbell that he "rescued our profession from the imputations of barbarism." Sir William Jones writes:—"His Commentaries are the most correct and beautiful outline that ever was exhibited of any human science." Mr. Dicey thus refers to him:—"By virtue, both of his knowledge of law and of his literary genius, Blackstone produced the one treatise on the laws of England which must, for all time remain a part of English literature." Bentham says:—"He it was who, first of all institutional writers, has taught jurisprudence to speak the language of the scholar and the gentleman, put a polish upon the rugged science, and cleansed her from the dust and cobwebs of the office."

We would gladly give more space to this interesting subject, but have only room for the following, mainly compiled as we are told, from various articles appearing in the *Law Times*:—

William Blackstone, born July 10th, 1723, was the posthumous son of a London tradesman. "If Blackstone's father—the silk mercer of Cheapside—had not died before his son entered the world," says an English writer, "the author of the Commentaries on the Laws of England might have lived and died a prosperous tradesman—a citizen of 'credit and renown' like worthy John Gilpin, and nothing more. But Fate ordered otherwise. The silk mercer died, and young William Blackstone fell to the care of his maternal uncle, Mr. Thomas Bigg, an eminent surgeon of London, by whom at the age of seven, he was put to school at what his biographer calls 'an excellent seminary,'—to wit, the Charterhouse, the school of Addison and Steele, of Thackeray and Leech."

"So assiduous was he in his studies that at fifteen he had got to the top of the school and was fit for Oxford, whither he went shortly afterwards as an exhibitioner of Pembroke College—the same college where, a few years before, Samuel Johnson, a poor scholar, with characteristic independence of spirit, had flung away the new shoes which someone in pity of his shabbiness had put at his door. Here at Oxford Blackstone assimilated much Latin and Greek, logic and mathematics, and achieved a fellowship at All Souls. He even composed a treatise on architecture, but the 'mistress of his willing soul' was poetry.

"It was a poetical age; the stars of Swift and Pope were setting, but the stars of Thomson and Akenside, of Shenstone and Gray, were rising, and Blackstone had undeniably a very pretty gift that way. Already at school he had won a gold medal for a poem on Milton, and the fugitive pieces which he afterwards collected shew that he might have won an honourable place among the poets of the Augustan age of England. The motto he prefixed to these effusions was the line from Horace: 'Nec lusisse pudet, sed non incidere ludum,' which may be roughly rendered: 'I shame not to have had my fling; shame's his who cannot stop.' Conscious that poetry was not his life work; conscious, probably, of his own limitations in the art,—he bade farewell to his muse in some excellent lines, and girded himself up for his severer studies.

"It was no primrose path which he had chosen for himself in this study of the law, but a steep and thorny track. There was nothing in the legal London of the eighteenth century of the well-ordered academic life to which he was used at Oxford; no system of professional training. The age of moots and readings was past and that of 'pupilizing' had not begun. This is how he sketches the novitiate of the law student of his day. 'We may appeal to the experience of every sensible lawyer whether anything can be more hazardous and discouraging than the usual entrance on the study of the law. A raw and inexperienced youth in the most dangerous season of his life is transplanted on a sudden into the midst of allurements to pleasure, without any restraint or check, but what his own prudence can suggest; with no public direction in what course to pursue his inquiries—no private assistance to remove the distresses and difficulties which will always embarrass a beginner. In this situation he is expected to sequester himself from the world, and by a tedious, lonely process to extract the theory of law from a mass of undigested learning, or else by an assiduous attendance on the courts to pick up theory and practice together sufficient to qualify him for the ordinary run of business.' We have changed all that now, thanks very much to Blackstone himself. The law student of to-day has his director of studies, his student's library, his lectures, his prizes, his moots and debating societies. Had Blackstone himself enjoyed the last advantage—practised declamation in a debating society—he might have won his way to professional distinction earlier; for as his biographer admits, he was 'not happy in a graceful delivery and a flow of elocution, and so acquired little notice and little practice.' Well was it, however, for the world that he did not, for as a busy junior he could never have laid the foundations of that wide legal learning which shines forth in the Commentaries. We, looking back, can see this, but Blackstone only saw that he had been waiting vainly on Fortune, the fickle goddess, for nearly seven years after his call (1746), and he made up his mind to woo her smiles no longer, but to retire to his fellowship at All Souls.

"A most useful member of the college he proved. As bursar he put the college muniments in order, he reformed the system of accounts, completed the Codrington Library, and by an essay on Collateral Consanguinity did much to relieve the college from troublesome claims by remote kindred of the founder. As a delegate of the University press he made himself master of the mechanical part of printing, remedied abuses, and rescued the press from the 'indolent obscurity' into which it had sunk. As visitor of Queen's College he was instrumental in building the fine façade of that college which now fronts the High Street. Wherever he went Blackstone brought with him—all his life—an active, orderly, reforming mind, and an enormous capacity for taking pains.

"At the suggestion of Murray, afterwards Lord Mansfield, Blackstone delivered a series of lectures on English law, on his own account, at Oxford, 'and the experiment proved eminently successful. The lectures are attended, we are told, by a "very crowded class of young men of the first families, characters, and hopes," and Blackstone's fame as a lawyer grew in proportion. The King paid him the compliment of asking him to read his lectures to the Prince of Wales, afterwards George III. An addition of the Great Charter and of the Charter of Forest, which he published at this time, added much to his reputation; and so when, a year or two after, a professor was to be appointed under Mr. Viner's bequest to the University, Blackstone was unanimously chosen.'

"Jeremy Bentham, however, who attended the lectures, declares that Blackstone was a 'formal, precise, and affected lecturer—just what you would expect from the character of his writings—cold, reserved, and wary, exhibiting a frigid pride.' But this estimate need not surprise us when we recall the mental attitude of Bentham, who states that to no small part of the lectures he listened 'with rebel ears.'

"For four years Blackstone was Vinerian Professor, a period signalized by the composition of those lectures which became known to fame as the Commentaries, and which, so it is

said, brought the fortunate author a return of no less than £14,000—probably the largest remuneration the author of a single treatise has ever been able to secure. Blackstone's practice at the Bar increasing, he resigned his Vinerian Professorship in 1762, being succeeded by Robert Chambers, afterwards Chief Justice of Bengal, but best remembered as an intimate friend of Dr. Johnson. In 1777 Chambers was succeeded by Richard Woodeson, who wrote several legal works of no great note, and in 1793 he in turn gave place to James Blackstone, a son of the first professor. A new distinction was conferred upon the post when, in 1882, Mr. A. V. Dicey was elected to fill it; for his lectures have given us his classic work on the English Constitution, and his no less interesting and valuable Law and Opinion in England.

"In 1759 on the strength of his rising fame, Blackstone had taken chambers again in the Temple, and his own reports (King's Bench), covering the whole period from his call to his death (1746-1779), shew that his services were increasingly in demand. His name constantly appears in the arguments before Lord Mansfield. In 1760 he was invited by Chief Justice Willes to take the coif. In 1763 he became Solicitor-General to the Queen and a Bencher of his Inn—the Middle Temple. But it was not until 1765 that the first volume of his famous Commentaries, based on his lectures, made its appearance.

"The Commentaries were written on the first floor (south) of 2 Brick Court, Temple, but not without interruption from a lively neighbour. Oliver Goldsmith, recently enriched to the amount of £500 by the profits of the Good-Natured Man, had invested the money in the purchase of chambers on the second floor of the Brick Court, exactly over Blackstone's head, and these chambers were the scene of much hilarious festivity. Sometimes it was 'a cheerful little hop,' at other times a supper party with blindman's buff, forfeits and games of cards, diversified with Irish songs, or a minuet danced by Goldsmith with an Irish lady, in which the poet testified the exurberance of his spirits by wearing his wig back to front, or tossing it gaily up to the ceiling.

'Very probably,' said Lord Chief Justice Whiteside, 'while Blackstone was deep in the mysteries of the Feudal system, his investigations were interrupted by the merry companions of Goldsmith singing lustily "The Three Jolly Pigeons." These overhead revels naturally did not assist the progress of the great work, and were the subject of frequent complaint on the part of the Doctor of Laws against the Doctor of Physic.' But we may well overlook the eccentricities and faults of Ireland's sweetest poet when we remember the splendour of his genius. We may say with Dr. Johnson, who, when he first learned that Goldsmith was dead, sadly remarked: 'Poor Goldy was wild—very wild—but he is so no more.'

"Another interesting circumstance is related by Dr. Scott. 'Blackstone,' he says, 'a sober man, composed his Commentaries with a bottle of port before him, and found his mind invigorated and supported in the fatigue of his great work by a temperate use of it.'

"With his return to practice in London, Blackstone entered Parliament as a member for Westbury. Wilkes, the notorious agitator, had just then set the country in a blaze with an obscene and impious libel, and in consequence had been expelled from the House of Commons, and Luttrell elected in his place. This election of Luttrell, known as the Middlesex election, was challenged by the Whigs as unconstitutional on the ground that Wilkes' expulsion did not create in him an incapacity of being re-elected. The Tories brought on a motion to declare Luttrell duly elected, and Blackstone, being put forward to support it, gave it as his opinion that Wilkes was by the common law disqualified from sitting in the House. Grenville, on behalf of the Whigs, retorted by reading a passage from the Commentaries (p. 162) stating the causes of disqualification, none of which applied to Wilkes. Instead of defending himself, Blackstone, according to Philo-Junius, 'sunk under the charge in an agony of confusion and despair.' 'It is well known,' says the same writer, describing the scene, 'that there was a pause of some minutes in the House, from a general expectation that the doctor would say

something in his own defence, but it seems that his faculties were too much overpowered to think of those subtleties and refinements which have since occurred to him.' Smart party journalism of this kind must not be taken too seriously. Blackstone was silent, partly because he was not naturally a ready debater, and partly because your deep thinker takes longer to adjust his ideas. But Sir Fletcher Norton—an expert debater—came to his rescue and turned the laugh against Grenville: 'I wish,' he said, 'the honourable gentleman instead of shaking his head, would shake a good argument out of it.'

"The passage in question from the Commentaries furnished, no doubt, a capital argumentum ad hominem for debating purposes, but it was not inconsistent with Blackstone's Parliamentary view. It enumerated the disqualifications for serving in Parliament, not mentioning the cast of expulsion, which, no doubt, Blackstone had not thought of before, and concluded with these words, 'But, subject to these restrictions and disqualifications, every subject of the realm is eligible of common right.' In subsequent editions of his work Blackstone added Exclusion from the House to the list, and hence arose the practice at Whig banquets of giving as a toast 'The First Edition of Blackstone's Commentaries.' Whatever the merits of the controversy, its result was to disenchant Blackstone with Parliamentary life. It taught him the lesson—to use his own words—that 'amid the rage of contending parties a man of moderation must expect to meet with no quarter from any side.' "

"Junius's Anti-Blackstonian letters," wrote Mr. N. W. Sibley, "are some five in number, some of which were written under the nom de guerre of Philo-Junius. Speaking of the learned Commentator's action in the Wilkes' controversy, the great satirist wrote: 'Doctor Blackstone is solicitor to the Queen. The doctor recollected that he had a place to preserve, though he forgot he had a reputation to lose. We have now the good fortune to understand the law, and reason the doctor's book may safely be consulted, but whoever wishes to cheat a neighbour of his estate, or to rob a country of its rights, need make no scruple

of consulting the doctor himself.' In the letter which he openly addressed to Dr. Blackstone, Solicitor-General to Her Majesty, Junius declared that the omission of a previous expulsion from the category of incapacities to sit in the House of Commons amounted to so grave a defect in the Commentaries as to render them—what Blackstone himself called unrepealed penal laws—'a snare to the unwary.' Junius concluded: 'If I were personally your enemy I should dwell with a malignant pleasure upon these great and useful qualifications, which you certainly possess, and by which you once acquired, though they could not preserve to you, the respect and esteem of your country. I should enumerate the honours you have lost, and the virtues you have disgraced; but having no private resentments to gratify, I think it sufficient to have given my opinion of your public conduct, leaving the punishment it deserves to your closet and yourself.' To employ Edmund Burke's language about Junius, he made the doctor his quarry, and made him bleed beneath the wounds of his talons. On the other hand, Blackstone's oration in the House of Commons on Wilkes' re-election, while it gave birth to a literature almost as extensive as that of the German critics on Cicero's 'Oratio pro Murena,' found able defenders, and the doctor's reply to Junius was not wanting in incisiveness. It is impossible not to recognize the force of his defence that the House had the power to pass a law on a particular person, that the privilegium of the Roman law furnished a parallel, and that acts of attainder afforded apt instances of laws passed against particular persons. But perhaps Junius won a triumph over the doctor, by his pointing out that the latter attributed to a resolution of one House the force of law, and that in 1698 an expelled member was re-elected and sat again in the House. Besides his support of the government in Wilkes' case, Blackstone incurred the censure of Junius for having been an adviser of Sir James Lowther against the Duke of Portland in the dispute concerning the Cumberland Crown lands in Inglewood Forest upon the obsolete law of nullum tempus. But perhaps the letter written by Junius under the nom de guerre of 'Simplex,' protesting

against the pardon granted to one Quirk, a rioter during the Wilkes' contest, contains the most elaborate satire written by Junius on Blackstone. The innuendo in the letter seems to lie in imputing to Blackstone that he never gave advice consistent with his statement of the law in the Commentaries. But, so far from denouncing his Commentaries on this occasion as 'a snare for the unwary,' Junius said: 'The respect due to his (Blackstone's) writings will probably increase with the contempt due to his character, and his works will be quoted when he himself is forgotten or despised.'

"In 1731 Parliament enacted that thereafter all proceedings in the courts should be in the English language, written in common legible hand, and in words at length. 'Such eminent personages, however, as Mr. Justice Blackstone and Lord Chief Justice Ellenborough,' says the *Daily Telegraph*, "frankly confessed that they regretted the halcyon days when Norman-French and Latin were the legal tongues. Norman-French, though fairly copious as to vocabulary, was not always equal to demands made upon it by legal gentlemen. Occasionally they found themselves compelled to eke out their Norman-French with English. An address to a grand jury is preserved, in which that body was being at once cautioned against the dangers of Popery, and reminded of the enormity of the offence of those who received stolen goods. "Car jeo dye," remarks the draftsman, "pur leur amendment, ils sont semblable als vipers labouring to eat out the bowells del terre, which brings them forth. De Jesuits leur positions sont damnable. La Pape a deposyer Royes ceo est le badge et token del Antichrist. Doyes etre careful to discover aux. Receivers of stolen goods are semblable a les horse-leeches which still cry, 'Bring, bring.'" This was the jargon which Cromwell abolished and King Charles II. restored to the courts, and which Mr. Justice Blackstone lamented.

"In 1770 Blackstone was raised to the bench as a judge of the Common Pleas, and continued to sit until his death, nine years later. But the great commentator on the laws of England was not destined to develop into the great judge—the rival of Mans-

field or Buller. He was lacking in initiative—too cautious in his views; too scrupulous in his adherence to formalities. The reputation he has left is that of a sound and painstaking judge not a judge of the brilliant or architectonic order.

"He was not too busy to find time for innocent amusements. He was, says his brother-in-law, 'notwithstanding his contracted brow (owing in a great measure to his being very near-sighted) and an appearance of sternness in his countenance, often mistaken for ill-nature, a cheerful, agreeable, and facetious companion.' But all men have their failings, and his was a constitutional irritability of temper, increased in later years by a strong nervous affection. This may be illustrated by an anecdote related by the author of The Biographical History of Sir William Blackstone: 'I was perfectly well acquainted with a certain bookseller, who told me that, upon hearing Mr. Blackstone had commenced Doctor of Civil Law, the next time he did him the honour of a visit, he (the bookseller) in the course of conversation, and out of pure respect, called the new made civilian, "Doctor." This familiar manner of accosting him (as he was pleased to term it) put him in such a passion, and had such an instantaneous and violent effect, and operated upon him to so alarming a degree, that the poor bookseller thought he should have been obliged to send for a doctor. People in these days put such irritability down to temperament, and are rather proud of it. Not so Blackstone. He was—so Lord Stowell tells us—the only man he had ever known who acknowledged and bewailed his bad temper.'

"His home was at Priory Place, Wallingford—conveniently situate between London and Oxford—and here, as elsewhere, he was active in local improvements, in road making and bridge building; the bridge at Shillingford, well known to lovers of the Thames, is one which we owe to him. To his architectural talents, liberal disposition, and judicious zeal, Wallingford likewise owes the rebuilding of the handsome fabric, St. Peter's Church. He died on February 14th, 1780, in the fifty-seventh year of his age, and was buried in a vault built for his family in this church."

JUDGES vs. *JURIES.*

We have been favoured by Mr. John W. Hinsdale of Raleigh, N.C., United States, with a copy of his address to the North Carolina Bar Association, in which he discusses at some length two important questions:—

First. Whether jury trial of civil actions should be abolished, and if so, what is the best substitute.

Second. How can the system of trial by jury be improved.

After giving a sketch of the institution of trial by jury established, as generally believed, by Alfred the Great, the writer goes on to shew how, in times of oppression, jurors had often stood between the oppressor and the oppressed, though sometimes forced to become the weapon of the former. He concludes this part of the subject by saying, "the halo of glory which surrounds this institution by reason of the splendid conduct of juries in the state trials of past ages still dazzles us with its splendour, and unborn generations will cling to it, in criminal cases, with increasing tenacity, love, and admiration."

With regard to juries in civil actions the result is not so satisfactory. In some classes of cases, as for instance where a woman is a party, or where corporations are concerned, juries are apt to be guided in their verdict in the first case by chivalrous regard for the fair sex, and in the second by the opinion that, as between a corporation, especially a railway company, and a private person, the latter is the one to whom favour should be shewn. He refers to the courts of equity, as they formerly existed, in which so wide a jurisdiction was exercised by the judge alone, and where it so seldom happened that juries were called upon to decide questions of fact. He also quotes at length the opinion of the Hon. J. H. Choate, who puts the case this way: "If jury trial is so good, why not extend it to the numerous class of cases in which it is not taken advantage of? Why not extend it to courts of equity, of admiralty and of divorce?" If, he says, "jury trial is such an admirable

system let us extend it to the decision of all questions of fact" in all the courts. "If it is a system of doubtful utility, and a bungling and uncertain means of arriving at justice, let us then curtail it, at least in civil cases."

After quoting many authorities and adducing many facts to shew how often very little confidence could be placed in the finding of juries in civil cases, the writer goes on to point out why this is so, the reason being the incompetence of jurors generally, from want of education, experience, and general knowledge, to judge and sift testimony, and to detect falsehood, for which something more than common sense is required. "Jurors are emotional, sympathetic, frequently prejudiced, and often regard their oath as a mere matter of form. It is sometimes a task beyond their powers to apply the propositions of law laid down by the court to the facts of the case." The writer's conclusion is that all issues of fact in civil cases can be more safely, certainly, and satisfactorily determined by one or three impartial, experienced, and learned judges, than by a jury, however honest and well-intentioned.

This is the answer to the first question, and in pursuance of it the writer proposes that "all civil actions should be tried by three nisi prius judges who should rotate and thus avoid all possible local influence, prejudice or favour." But however desirable and however much desired, such a change may be, there are constitutional difficulties in the way which must be removed before it can be effected, and these the writer proceeds to consider, and to point out how, until they are removed, the system of trial by jury may be improved. Into this part of Mr. Hinsdale's address we cannot enter as it deals with conditions differing from ours, and with which we are not concerned. Enough has been said upon the general question to shew what a strong feeling exists among those engaged in the administration of justice in the United States in favour of the substitution of judges for jurors in all civil cases for the trial of questions of fact as well as of law.

In this country, as well as in England, the trend of public opinion is in the same direction, as is proved by the increasing number of cases in which the decision of a judge in questions of fact is preferred to that of a jury and by the tendency in all matters of procedure to adopt the same principle.

TRESPASS BY AEROPLANE.

The art of flight has progressed so rapidly, and cross-country flights are of such frequent occurrence, that the question of trespass by flying over a person's land merges from an abstract subject for discussion into a matter of the greatest practical importance. The following observations discuss (1) the proposition that it is an act of trespass merely to fly over a person's land, and (2) the right of a landowner forcibly to eject a trespassing aviator.

(1) To constitute trespass, which may be defined as the wrongful entry upon or the interference with the possession of the land of another person, proof of entry either actual or constructive is necessary. Constructive entry includes every interference or entry other than actual or physical entry, and it is submitted that, on the existing authorities, the flight by an aviator over the land of another without alighting is a constructive entry, and constitutes an act of trespass.

Cujus est solum ejus est usque at cælum. He who possesses land possesses also that which is above it, but whether the owner of land can maintain an action for trespass against a man who uses the air above his land by flying in an air-machine has been doubted by Lord Ellenborough, but affirmed by Lord Blackburn. In *Pickering* v. *Rudd*, [1815] 4 Camp. 219, where the defendant nailed to his own wall a board so as to overhang the plaintiff's close, it was held by Lord Ellenborough that an action for trespass would not lie against a man for interfering with the column of air superincumbent on a close, but that the proper remedy for any damage arising from the board overhang-

ing the close would be by an action on the case; otherwise it would follow that an aeronaut would be liable to an action of trespass quare clausum fregit at the suit of the occupier of every field over which his balloon passed in the course of his voyage. Lord Ellenborough's dictum was questioned fifty years later in *Kenyon* v. *Hart*, [1865] 6 B. & S. 249, 252, wherein Blackburn, J. (as he then was), said, "I understand the good sense of that doubt, though not the legal reason of it"; and it is difficult to see how *Pickering* v. *Rudd* is an authority of assistance to the argument that flight over a person's land is not an act of trespass. From the judgment of Lord Ellenborough it is clear that he was of opinion that, although no action of trespass would lie, the proper remedy would have been by an action on the case. It must not be forgotten that this case was decided in the year 1815, when, as was recently observed in the Court of Appeal, the form of an action was of the utmost importance in the eyes of the court, and when there was no machinery by which an action of trespass could be turned into an action on the case. The old distinction between an act which itself occasioned a prejudice and an act a consequence from which was prejudicial, was abolished by the rules of the Supreme Court under the Judicature Acts, and the one action of trespass now covers both an action of trespass and an action on the case.

It is submitted that the occupier of land is entitled to the free user of the air above his land. Although there is no right to air under the Prescription Act, or as an easement by prescription from the time of legal memory, it has been held that a vestry or a board of works in whom is vested the management and control of the streets situate within their district are entitled to so much of the air above the streets as is compatible with the ordinary user thereof. In *Wandsworth Board of Works* v. *United Telephone Co.*, [1884] 13 Q.B.D. 904, the defendants suspended from chimneys telephone wires across a street. An injunction restraining the defendants was granted by Stephen, J., which was dissolved by the Court of Appeal, the ratio decidendi being, not that the air above the surface of the street was

not vested in the plaintiffs, but that although the plaintiffs were entitled to so much of the area which was above the surface as was the area of the ordinary user of the street as a street, the suspension of wires from chimneys did not interfere with the ordinary user of the street in question. It is clear from the judgment of Brett, M.R., that he did not question the law as stated by Lord Coke, and that not only the owner of land under a grant is entitled to the free user of the air above the land, but that the word "street" in an Act of Parliament includes the air necessary for the ordinary user of the street.

Moreover, it is common enough to commit trespass by wrongful entry below the ground as by mining, and there seems no reason why wrongful entry above the surface should not similarly constitute an act of trespass. The improbability of actual damage is irrelevant to the pure legal theory, neither is it necessary that there should be force nor unlawful intention; there seems every reason to support the proposition that the mere flight over a person's land is an act of trespass, and that an action would lie against the offending aviator.

(2) The owner of land upon which a trespass is committed is entitled to remove the trespasser, and may use in so doing that degree of force which is necessary to eject the wrongdoer. The right to eject being a remedy whereby the owner of property may assert his rights, the following question may shortly come before the court to be decided.

Acts of trespass to land have been committed by A. flying repeatedly at a level within the height of ordinary buildings over B.'s land. B., instead of bringing an action for damages, or for a declaration that A. is a trespasser, or to restrain him from further acts of trespass, determines to terminate at once the annoyance by exercising his right of ejectment.

It is not easy to see how the owner could enforce his right, except by shooting at the aeroplane with the object either of frightening the aviator away, or of "winging" his machine and compelling the aviator to descend; and the question at once arises,

would the owner be committing an illegal act, and what would be his liability if the aviator were (*a*), injured; (*b*), killed.

(*a*) It is clear that if B. shot at A.'s aeroplane without warning and without taking any precautions he would be committing a criminal offence. It may, however, be argued that a prudent course would absolve the owner from any criminal liability arising from the consequences of his act. It may be said that the owner should, in the first place, fire a blank cartridge as an invitation to A. either to fly away or descend, just as a gunboat warns a foreign trawler fishing in prohibited waters by firing a blank shot across the bows of the offending craft. If a blank cartridge had no effect, B. should, before actually shooting at the aeroplane, fire ball cartridge past the aeroplane, so that the whistling of the bullet through the air might indicate to A. that B. was seriously determined to compel him to descend. Having taken the above preliminary steps, in addition to the precaution of engaging a skilled marksman and mechanician to shoot at the offending aeroplane, it may be argued that to fire at A.'s aeroplane would be neither an act of unnecessary violence, nor for that matter a criminal act at all.

The answer to this argument is that it is a felony punishable with penal servitude for life, unlawfully and maliciously to shoot (or even attempt to shoot) at a person with intent to maim, disfigure, disable, or do any other grievous bodily harm. Although there may be no intent to maim or disfigure, the object of the shooting is to disable the aeroplane, and there is sufficient mens rea, therefore, to constitute the above felony. It is a misdemeanour, also, punishable with five years' penal servitude, unlawfully and maliciously to wound any person, or inflict any grievous bodily harm upon him: and in *R.* v. *Ward*, L.R. 1 C.C.R. 356, it was held that a man who fired a gun at a boat with the object of frightening away the occupant, and who wounded him owing to the boat being suddenly slewed round, was rightly convicted of malicious wounding. It does not appear from the report of the case that the prisoner was the owner of the water upon which the boat was, nor that he was enforcing a

legal right, but it is not likely that the courts would draw so fine a distinction between this case and that of an owner protecting his property, and therefore the act of shooting at a trespassing aviator, or even merely of pointing a gun which the owner knew to be loaded, would be the commission of a criminal offence, and of an act of unnecessary violence.

(*b*) If the result of the shooting were fatal, the owner would be guilty of manslaughter, even if it is assumed in his favour that no offence under 24 & 25 Vict. c. 100, has been committed.

It is a principle familiar to all that every criminal offence involves the mental condition of a "vicious will" or "intention," and that there must be some form of mens rea, *i.e.*, the wrongdoer must (1) be able to "help doing" what he does, (2), know that he is doing a criminal act, and (3), every sane adult is presumed to foresee and to intend the natural consequence of his conduct. Assuming that the owner has the right to eject trespassers, and that he has used the only force which can under the circumstances be used by him, it would be idle for the owner to argue that he did not know that a fatal accident might result, or that it is impossible to foresee such a contingency arising, or that, taking everything into consideration, such as the care with which he had fired at the aeroplane, and that he had warned the aviator of his intention to shoot, he had not in law intended the natural consequences of his act.

But the opinion has been expressed by Denman, J., in *R.* v. *Prince*, L.R. 2 C.C.R. 154, that criminal liability may exist even where there is an intention to do some act which is wrong, even although it does not amount to a crime; whilst Bramwell, B., giving judgment in the same case, actually went so far as to say that the intention to commit an act only morally wrong was sufficient mens rea.

However much this latter view may be questioned, it is clear that criminal liability exists where there is an intention to commit a crime, even although it is not the particular crime in fact committed or where there is an intention to do a tortious or wrongful act which yet falls short of a crime. To shoot with

fatal result at a trespassing aviator, without warning and without taking precaution, would be manslaughter (assuming always that 24 & 25 Vict. c. 100, does not apply), because owner intended to commit and did in fact commit an act which was wrong. Neither would the taking of precautions, as suggested above, absolve the owner from liability since every sane adult is presumed to intend the natural consequences of his conduct, and is assumed by law to have the power of foreseeing these consequences. From whatever point the question is approached, it seems clear that the owner would not be able to enforce his right of ejectment, but would be obliged to rest content with his right of action for damages or for a declaration, or for an injunction to restrain further acts of trespass.

In view of the present stage of development arrived at by the science of aviation, the writer ventures to suggest that the landowner has at his command all the remedies he requires, and to express the hope that no landlord will be tempted, should he read this article, to institute proceedings for trespass against an aviator merely for flying over the owner's land.—*Law Magazine.*

VERBUM SAP.—On the door of the old Court-room of the Court of Appeal at Osgoode Hall is affixed the notice: "Dangerous, keep out."

NE SUTOR ULTRA CREPIDAM:—Motion before Court of Appeal for stated case by way of appeal from the conviction of a cobbler, aged 73, for non-support of his second wife aged 63. Mr. Justice Magee: "She was probably his last, and he did not stick to her."

REVIEW OF CURRENT ENGLISH CASES.

ADMIRALTY—BILL OF LADING—INCORPORATION INTO BILL OF LADING OF CONDITIONS OF CHARTER-PARTY—ARBITRATION CLAUSE—STAYING ACTION.

The Portsmouth (1910) P. 293. In this case goods were shipped under a bill of lading which provided for payment of freight "and other conditions as per charter-party." The charter-party provided inter alia for the payment of demurrage, and also contained an arbitration clause in the event of any dispute. The shipowners commenced an action for demurrage against the holder for value of the bill of lading, and an application was then made by the defendant to stay the action, on the ground that the matter in dispute must be referred to arbitration. The County Court judge granted the application and the Divisional Court (Evans, P.P.D., and Deane, J.) affirmed his decision holding that the terms of the charter-party were by reference incorporated into the bill of lading.

EMPLOYERS' LIABILITY—NOTICE OF ACCIDENT—REASONABLE DOUBT AS TO CAUSE OF DEATH—PREJUDICE TO EMPLOYER—WORKMEN'S COMPENSATION ACT, 1906 (6 EDW. VII. c. 58), s. 1, SUB-S. 1, s. 2 (1a), s. 8—(R.S.O. c. 160, s. 13 (5)).

Eke v. *Hart-Dyke* (1910) 2 K.B. 677 was an action under the Employers' Liability Act, 1906, which contains similar provisions to those in R.S.O. c. 160, s. 13, as to giving of notice. The deceased workman had died in October and no notice of the accident was given until December. The excuse for not giving the notice was the uncertainty of the real cause of the deceased workman's death, and this was held to be a "reasonable cause" for not giving the notice within the statutory period.

COMPANY—WINDING-UP—OFFICIAL RECEIVER AND LIQUIDATOR—FRAUD—EXAMINATION OF PERSON CHARGED—LIQUIDATOR UNSUCCESSFULLY OPPOSING APPLICATION FOR EXCULPATION—JURISDICTION TO ORDER LIQUIDATOR TO PAY COSTS PERSONALLY.

In re Tweddle & Co. (1910) 2 K.B. 697. This is the decision of the Court of Appeal (Cozens-Hardy, M.R., and Farwell and

Kennedy, L.JJ.), varying the judgment of the Divisional Court (1910) 2 K.B. 67 (noted ante, p. 537). As was remarked in that note, while agreeing with the Divisional Court that in respect of the liquidator's report and the consequent examination of the parties charged therein with fraud, the liquidator was merely discharging his official duty and as to those proceedings there was no jurisdiction to order him to pay costs personally, yet the Court of Appeal considered his unsuccessful opposition to the motion of the party charged for an exculpatory order stood on a different footing, and having made himself an active party to litigation he incurred a personal liability to pay costs if he failed, and the order of the Divisional Court was varied by directing him to pay those costs.

JUSTICES—PRACTICE—HEARING OF INFORMATION—ABSENCE OF INFORMANT—EXAMINATION OF WITNESSES BY POLICE OFFICER.

In *May* v. *Beeley* (1910) 2 K.B. 722 an information was preferred by Beeley, superintendent of police, against the appellant May, charging him with driving a motor at an excessive speed on the highway. On the hearing the informant was not present nor represented by counsel or solicitor, but witnesses were produced and examined in support of the information by a police sergeant who was also one of the witnesses in the case. The appellant's solicitor called the attention of the justices to the fact of the sergeant taking the conduct of the case, and they offered to adjourn, but the solicitor for the appellant declined an adjournment and the appellant was convicted, no objection being made to the hearing of the information in the informant's absence. On appeal from the conviction the Divisional Court (Lord Alverstone, C.J., and Bucknill, and Bray, JJ.) held that though there was some conflict as to what actually took place before the justices in regard to the offer to adjourn, the court was bound to accept the statement of the justices, and the appellant having waived the adjournment offered could not now contend that the mere fact that the police officer had improperly acted as advocate in the absence of the informant, invalidated the conviction.

Correspondence

GORDON v. HORNE AND THE PRIVY COUNCIL.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR,—I have read with interest Mr. Deacon's letter in your last issue as well as your editorial comments upon the case of *Gordon* v. *Horne*. May I be permitted to add my item to the discussion. I have read the evidence set out in the judgment of Clements, J., in 13 B.C. 140-141. It seems to me incomprehensible how any court composed of reasonable men could have come to any other conclusion than what was arrived at by the Supreme Court of British Columbia, and by the Judicial Committee of the Privy Council. It was not a question of conflict of evidence but one as to the evidence of the defendant himself. I cannot see how the Privy Council, the court of last resort, could have come to any other conclusion.

Yours, etc.,

K. C.

Toronto, Nov. 22.

ADMIRALTY LAW AND COMMON LAW.

To the Editor, CANADA LAW JOURNAL, TORONTO:

DEAR SIR,—In your issue of November 1st, at page 654, you cite *The Drumlanrig* (1910), p. 249, to shew "the difference between admiralty law and common law on the question of liability for negligence." May I suggest with all deference that your comments on this case do not define this difference in accordance with the cases? You contrast the common law rule of *Thoroughgood* v. *Bryan* with the admiralty rule adopted in *The Drumlanrig*, and point that while the common law rule prevents a passenger injured in one of two colliding vehicles, equally in fault, from recovering damages from the driver or owner of the other vehicle, the cargo owner, on the other hand, under similar circumstances can recover half his damage from the owner of the other boat. You suggest that the cargo owner has a better remedy than the passenger. Is it not so that *Thoroughgood* v. *Bryan* was decisively overruled by the House of Lords in *The Bernina*, 13 A.C. 1, and that the doctrine that the passenger is always identified with his vehicle was emphatically condemned? And was not the main point in the *Drumlanrig*

case that the cargo owner could recover only half of his damages from the owner of the other boat? Is it not the fact that the difference between the admiralty and common law rules is, in this light, rather the reverse of what you suggest?

Then, too, when you say that it seems to follow that this (*The Drumlanrig*) case would govern the practice in Canadian Admiralty Courts, because the Colonial Courts of Admiralty Act (Imp.) permits our Court of Admiralty to exercise its jurisdiction "in like manner" as the High Court in England, do you not overlook section 918 of the Canada Shipping Act (R.S.C. 1906, c. 113), which gives us express legislation on the point?

I hope you will not think me too critical, and that you will believe me as thankful as your many other readers for the uniform accuracy and interest of the JOURNAL'S articles and reviews.

Faithfully yours,

Kingston, Ont. FRANCIS KING.

[Notwithstanding what is said by the House of Lords in *The Bernina*, 13 A.C. 1, regarding their Lordships' disapproval of the principle on which *Thoroughgood* v. *Bryan* was decided, it is an arguable point whether that case is not still an authority at common law. (See per Williams, L.J., p. 262, per Moulton, L.J., p. 265.) The reporters say it was overruled, but it must be remembered that the point actually decided by the House of Lords was merely that the rule laid down in that case did not apply in Admiralty. The English Court of Admiralty is, as Mr. King is aware, a Division of the High Court of Justice, and that being the case, R.S.C., c. 113, s. 918, to which he refers, merely shews, as was stated in the note, that *The Drumlanrig*, is an authority in our Courts of Admiralty. As the law stands, we think, with all due respect to Mr. King, that the comment to which he objects, though perhaps not free from question, can hardly be said to be manifestly incorrect. We are rather inclined to think it would require a decision of the House of Lords expressly on the point involved in the case of *Thoroughgood* v. *Bryan* before that case could be considered by any inferior Court to be overruled. See *Parent* v. *The King*, ante, p. 694. —EDITOR, C.L.J.]

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Exch. Court.] [November 2.

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

Lease—Covenant for renewal—Construction.

A lease for twenty-one years, made in 1851, of mill-races and lands on the old Welland Canal contained the following covenant: "After the end of 21 years, as aforesaid, if the said (lessors) shall or do not continue the lease of the said water and works to the said parties of the second part or their assigns," they would pay for improvements. After the expiration of the lease, in 1872, the lessees remained in possession and in 1880 they asked for a new lease "with trifling alterations," but were informed that their application could not be considered until the nature of the alterations was submitted. Nothing further was done, and on the expiration of a second term of 21 years the lessors resumed possession of the premises. The lessees filed a petition of right claiming compensation for improvements.

Held, that, the lessees were entitled to a renewal of the original term but not to a renewed lease containing the above covenant; that they were entitled to renewal or compensation; that their occupancy during the second period constituted a renewal, having obtained which their right to compensation was gone. Appeal allowed with costs.

Dewart, K.C., for appellant. *Mowat,* K.C., for respondent. *Collier,* K.C., for sub-lessees.

Man.] [November 2.

DOMINION FISH CO. *v.* ISBESTER.

Negligence—Ship on fire—Injury to passenger.

A ship lying at her dock caught fire during the night and was destroyed. The officers of the ship failed to arouse passengers asleep in the cabins in time to permit them to escape in safety and, in an action to recover damages for injuries sustained in consequence by one of the passengers the owners adduced no evidence to explain the origin of the fire.

Held, that, in the circumstances, the only inference to be drawn was that the owners were grossly negligent.

In such an action the owner of the ship cannot invoke the limitation provided by section 921 of the Canada Shipping Act, R.S.C. 1906, c. 113. Appeal dismissed with costs.

Affleck, for appellants. *Blackwood,* for respondent.

Que.] [November 2.

OUTREMONT *v.* JOYCE.

Appeal—Jurisdiction—Matter in controversy—Instalment of municipal tax.

In an action instituted in the province of Quebec to recover the sum of $1,133.53 claimed as an instalment of an amount exceeding $2,000 imposed on the defendant's lands for special taxes, the Supreme Court of Canada has no jurisdiction to entertain an appeal although the judgment complained of may be conclusive in regard to further claims arising under the same by-law which would exceed the amount mentioned in the statute limiting the jurisdiction of the Court. *Dominion Salvage and Wrecking Co.* v. *Brown,* 20 Can. S.C.R. 203, followed. Appeal quashed with costs.

Beaubien and *Lamarche,* for appellant. *Davidson* and *Ritchie,* for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [October 13.

BARNETT *v.* GRAND TRUNK RY. CO.

Railway—Collision—Negligence—Injury to licensee or trespasser on another railway.

Appeal by defendants from the judgment of a Divisional Court, 20 O.L.R. 390, which set aside the judgment entered for the defendants by MEREDITH, C.J.C.P., upon the findings of a jury.

The plaintiff was on a car of the Pere Marquette Ry. Co. when the accident happened. He was not a paying passenger, but getting a gratuitous ride. The injury was caused by a car

of the defendant's colliding with the one on which the plaintiff was. The accident was caused by negligence of the defendants. The Divisional Court held that the plaintiff was a licensee and entitled to recover damages against the defendants.

Held, that the judgment of the Divisional Court should be sustained, for even if the plaintiff were a trespasser the defendants were liable. He was not at the time a trespasser upon the rights of the defendants. The accident was caused by their gross negligence and it was no objection to the plaintiff's claim to say that if the Pere Marquette Company or their employees had known of his presence, they would have objected and perhaps removed him. This would not relieve the defendants of their responsibility for the injury. It did not appear that as between the defendants and the Pere Marquette Company there was an obligation upon the latter not to permit any but their own employees to be upon their train. They might (as the evidence shews their trainmen were in the habit of doing) allow others beside their own employees to be upon the same train under similar circumstances. There was nothing to absolve the defendants from the duty of exercising due care to avoid collision with the Pere Marquette train.

MEREDITH, J.A., dissented on the ground that the plaintiff was a mere trespasser and that the defendants owed him no duty.

Appeal dismissed with costs.

D. L. McCarthy, K.C., for defendants. *Faulds*, and *Bartlett*, for plaintiff.

Full Court.] [October 22.

TREASURER OF ONTARIO *v.* PATTIN.

Succession duty—Deceased resident of Ontario, but owning mortgages on lands in foreign country—Specialties—Domicile—Situs of debt.

Appeal by administrator of a deceased from the judgment of the judge of the Surrogate Court of Essex, who held that certain mortgages belonging to the deceased on lands in the United States and made by mortgagees residing there, were liable to duty. The deceased died at Windsor on February 18, 1907, having resided there for about seven years. By the law of the state where the lands were these mortgages were instruments under seal creating debts by specialty, sufficient to create

them that according to the law of this province at the time of the death of the deceased. The mortgages were in his custody at Windsor.

Held, GARROW, J.A., dissenting, that these mortgages could not be said to be instruments creating merely simple contract debts. They were bona notabilia and as such were comprised of the list of properties held by the personal representative upon his application for letters of administration. The estate was therefore liable to succession duty in respect of the amount of these mortgages.

F. D. Davis, and *Cartwright*, K.C., for appellant. *Hanna*, K.C., and *McLeod*, for treasurer of Ontario.

Province of Nova Scotia.

SUPREME COURT.

Russell, J.—Trial.] [November 8.

O'BRIEN *v.* CROWE.

Contract to saw lumber—Failure to complete—Defective work—Termination of contract—Damages.

Defendant contracted for an agreed price "barring accidents" to saw for plaintiff a certain number of feet of lumber per day from logs which plaintiff was to deliver at defendant's mill. The logs were sawn in such a way as to render a percentage of the lumber produced unmerchantable and to considerably reduce the market value of a large portion of the balance. The defence was raised that the logs were delivered at the mill in a muddy condition and in some cases were covered with frozen mud to such an extent as to cause the saws to work irregularly so that the lumber could not be sawn to a uniform thickness.

Held, 1. This was one of the accidents with which the defendant had to reckon when he undertook to do the work and that it was no excuse for his failure to carry out his contract.

2. The plaintiff was justified in terminating the contract and in making other arrangements for the sawing of his logs and that he was entitled to recover damages both for the non-completion of the contract and for the defective manner in which part of the work was done, the damages in the later case being the reduced price which the lumber brought in the market.

B. T. Graham, for plaintiff. *J. P. Bill*, for defendant.

Longley, J.] [November 8.

GIRROIR *v.* MCFARLAND.

Title to land—Question of, will not be tried on affidavit on summary application—Ejectment—Parties—Effect of judgment.

Plaintiff recovered a judgment in ejectment against defendants in respect to a lot of land claimed by him of which they were alleged to be in possession and an order for a writ of possession was granted in pursuance of which the applicant in the present proceeding was removed and plaintiff was placed in possession. The applicant moved for an order to restore her to possession on the ground that subject to a deed made to plaintiff by way of mortgage she was sole owner of the land by purchase and in sole possession at the time of the granting of the order for the writ of possession and recovery of the judgment in ejectment and that she was not a party to the proceedings in which the judgment was recovered.

Held, dismissing the motion with costs that the question of title—the question of the validity of the deed or to vary its character—could not in the face of the judgment already given and executed be tried on summary motion and on affidavit.

W. Chisholm, in support of the application. *Gregory*, K.C., contra.

Meagher, J.—Trial.] [November 10.

FULLER *v.* HOLLAND.

Bills and Notes—Consideration—Sale of goods—Part delivery—Loss by fire—Question of title.

Plaintiffs ordered from Belgium a number of packages of goods including 45 packages for defendant all of which arrived at Halifax consigned to plaintiffs and without any mark distinguishing those ordered for the defendant from the others. The terms of payment agreed on were 30 days after the arrival of the goods which was understood to mean 30 days after delivery of the invoice. Defendant was notified of the arrival of the goods and failing to take delivery they were removed to plaintiffs' warehouse. Defendant asked for and received delivery of a part of the goods and the balance was held to his order. Defendant was unable to pay for the goods at 30 days as agreed and offered his note at 60 days, which plaintiffs accepted, defendant paying the interest on the additional thirty days.

After the giving and acceptance of the note and the delivery of the part of the goods above referred to the warehouse with the balance of the goods was destroyed by fire.

Held, 1. The extension of time asked for and given to defendant involved a change of position on the part of plaintiffs constituting consideration for the note.

2. There was an implied promise on the part of plaintiffs to deliver the balance of the goods and to pay damages in the event of their failure to do so.

Semble, that in order to support the defence of failure of consideration defendant must prove a demand and refusal. And if the title passed and plaintiffs were merely holding the goods as agents or bailees of defendant they were at defendant's risk and there was no failure of consideration.

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

Drysdale, J.—Trial.] [November 10.

FENERTY v. CITY OF HALIFAX.

Water and water courses—Public supply—Storage system—Private owners—Reservation of rights for milling purposes—Limitation of.

By a deed made in 1846, between plaintiffs' predecesssors in title and the city of H., the city was given the right in connection with its water supply system to bring the waters of Long Lake into the Chain Lakes for storage purposes and the right of plaintiff's predecessors to receive water for their mills was expressly limited to the quantity of water naturally flowing theretofore from the Chain Lakes.

Held, that plaintiffs' rights must be based upon the natural flow of water from the Chain Lakes as it existed prior to the date of the deed, and that they were concluded by the terms of the deed from asserting the right to a greater flow by reason of the fact that the city had constructed extensive storage dams and had made one large water-shed and had increased the flow by bringing into the Chain Lakes other streams.

Fenerty, for plaintiffs *Bell*, K.C., for defendant.

Longley, J.] [November 19.

THE KING v. MCKAY.

Intoxicating liquors—Certiorari—Second application.

Application was made to a judge of the Supreme Court to remove a conviction for a violation of the Liquor License

Act and was refused on the ground that the affidavits of justification of bail were not sufficient. The affidavits were amended and the application was renewed on substantially the same grounds (non-service of the writ of summons) before the presiding judge, at Sydney.

Held, following *R.* v. *Pickles*, 12 L.J.Q.B. 40, that the application must be dismissed, a previous application having been made on the same grounds to another judge and refused.

D. A. Cameron, for prosecutor. *Gunn*, for defendant, applicant.

Province of Manitoba.

KING'S BENCH.

Mathers, C.J.] [September 14.

WEST WINNIPEG DEVELOPMENT CO. v. SMITH.

Practice—Costs—Landlords and Tenants Act—Summary proceedings for ejectment.

The costs of a summary proceeding under the Landlords and Tenants Act, R.S.M. 1902, c. 93, to eject a tenant are the costs of an action in the King's Bench and taxable on the same scale.

Maclean, for landlord. *Blackwood*, for tenant.

Prendergast, J.] [September 14.

MILLER v. SUTTON.

Vendor and purchaser—Cancellation of agreement of sale for default in payment—Recovery by purchaser of money paid on account—Counterclaim.

In an action by the vendor of land against the purchaser for specific performance of the agreement to purchase or in the alternative for cancellation of the agreement for default in subsequent payments, if the purchaser has acquiesced in the cancellation after notice thereof served on him by the vendor, he cannot recover back by counterclaim the money which he had originally paid on account of the purchase.

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

Robson, J.] [September 21.

HIME v. COULTHARD.

Attachment—Tort—Action for enticing away plaintiff's wife and crim. con.

An attaching order against the defendant's property cannot properly be made under rules 813-858 of the King's Bench Act, R.S.M. 1902, c. 40, upon the commencement of an action for damages for enticing away the plaintiff's wife and for criminal conversation, because,

Held, 1. There is not "a cause of action arising from a legal liability" within the meaning of that expression in rule 815, as the cause of action and the legal liability arose simultaneously from the tortious act. Legal liability giving rise to a subsequent cause of action is found only in contract.

2. The plaintiff could not properly make the affidavit required by rule 817, viz., that the defendant is legally liable to him in damages in the sum claimed in the action. *Emperor of Russia* v. *Proskouriakoff*, 18 M.R., at page 73 and *McIntyre* v. *Gibson*, 17 M.R. 423, followed.

3. The words in rule 817 "after making all proper and just set-offs, allowances and discounts" are not applicable in regard to torts.

Mackay, for plaintiff. *Aylesworth*, for defendant.

Robson, J.] [October 1.

STANGER v. MONDOR.

Registry Act—Real Property Act—Effect of filing deed after application for certificate of title under Real Property Act—Priority as between such deed and an unregistered prior conveyance.

The filing of a deed with an application for a certificate of title under the Real Property Act, R.S.M. 1902, c. 148, as one of the evidences in support of the title, does not constitute a registration of the deed under the Registry Act, R.S.M. c. 150, so as to give it priority over a prior unregistered conveyance, although the practice in the land titles office is to make certain entries in the abstract book kept under the old system and to give the deed a number. *Farmers & Traders Loan Co.* v. *Conklin*, 1 M.R., at pp. 188, 189, and *Renwick* v. *Berryman*, 3 M.R., at p. 400, followed.

Heap, for caveator. *Blackwood*, for caveatee.

Robson, J.] [October 1.

SMITH *v.* CANADA CYCLE AND MOTOR CO.

Pleading—Denials of allegations of fact in the statement of claim—King's Bench Act, rule 290, *as re-enacted by* 7 *and* 8 *Edw. VII. c.* 11, *s.* 4.

To an action charging negligence on the part of the defendants in leaving open and unguarded a trap-door in their premises through which the plaintiff, while lawfully there, fell and was injured, it is proper for defendants to plead, under rule 290 of King's Bench Act, as re-enacted by 7 and 8 Edw. VII. c. 11, s. 4., denying in separate paragraphs the leaving of the trap-door open or unguarded, and that it was by reason of its being open or unguarded that the plaintiff fell into it, if (which was not admitted) he did in fact fall into it, and setting up in other paragraphs that, if the trap-door was open (which was denied) it was sufficiently guarded by a rail and was not dangerous, that there was no negligence on the part of the defendants and that the plaintiff did not exercise ordinary care or caution in the matter.

Form of defence in Bullen and Leake, 6th ed., at p. 889, referred to.

Chandler, for plaintiff. *St. John*, for defendants.

Robson, J.] [October 3.

NATIONAL TRUST CO. *v.* PROULX.

Devolution of estates—Death of administrator—Unadministered estate of intestate—Appointment of administrator of estate of deceased administrator—Costs.

L., the owner of the land question, died intestate. His widow was appointed administratrix of his estate. She died without dealing in any way with the land and the plaintiffs were appointed administrators of her estate.

Held, that the plaintiffs had no title to the land, and that a grant of letters of administration of the unadministered estate of L. would be necessary, followed by a conveyance from the new administrator to the plaintiffs, before they could get title. The defendant was only allowed the costs of a demurrer, as the point of law was apparent on the pleadings and he should have raised it by demurrer instead of going to trial in the ordinary way.

Blackwood and *Beaupre*, for plaintiffs. Towers, for defendant.

Prendergast, J.] [October 11.

COPPEZ *v.* LEAR.

"Wages," meaning of word—Act respecting assignments of wages or salaries to be earned in the future, 9 Edw. VII. c. 2—Earnings of man employed to work with his own team at a rate per day, whether wages or not.

Wages are the personal earnings of labourers and artisans and it is an essential ingredient in wages that the personal services of the labourer or artisan must not only be rendered, but must have been contemplated as such in the contract. Where, therefore, the defendant owning two teams of horses was employed to haul gravel at a rate per team per day, and hired another man to drive one of the teams for him, the earnings of the defendant for the work were held not to be wages within the meaning of 9 Edw. VII. c. 2., and an assignment by the defendant to the claimant of such earnings, although part had not yet been earned, did not come within the said Act and was held to be valid as against a garnishing order subsequently served by the plaintiff.

Ingram v. *Barnes*, 26 L.J.Q.B. 319, and Stroud's Judicial Dictionary, vol. 3, p. 2206, followed.

Blackwood, for plaintiff. *Hanneson*, for claimant.

Mathers, C. J.] [October 18.

WELLS *v.* KNOTT.

Practice—Summary judgment—Counterclaim—Stay of execution pending trial of counterclaim.

Although the plaintiff has obtained leave to sign judgment for rent due, a stay of execution should be granted until after the trial of the defendant's counterclaim for damages to the goods on the premises alleged to have been caused by non-repair, if the counterclaim is so far plausible that it is not unreasonably possible for it to succeed if brought to trial, unless some reason is shewn to believe that the plaintiff will be put in peril of losing the amount of his judgment by the delay. *Sheppards* v. *Wilkinson*, 6 T.L.R. 13, followed.

Burbidge, for plaintiff. *Coyne*, for defendant.

Robson, J.] [October 20.

SHEA *v.* GEORGE LINDSAY CO.

Guarantee—Indemnity—Oral promise to answer for the debt of another—Statute of Frauds.

The plaintiff had supplied goods to the defendants, the Lindsay Co., in which the defendant Finn held most of the stock, and was pressing for payment, when Finn verbally promised to pay the debt or see it paid, if plaintiff would extend the time for payment and continue to supply goods to the company and that he would "go good" for such past and future indebtedness.

Held, that this promise was not a contract of indemnity or novation, but was a "promise to answer for the debt of another" within s. 4 of the Statute of Frauds, and that, as it was not in writing, an action for the breach of it could not be maintained.

Beattie v. *Dinnick*, 27 O.R. 285, and *Harburg & Co.* v. *Martin* (1902), 1 K.B. 778, followed.

A. V. Hudson and *Ross*, for plaintiff. *L. Elliott*, and *Stackpoole*, for defendant Finn.

Robson, J.] [October 20.

ALLIS-CHALMERS *v.* WALKER.

Warranty—Description of goods—Sales of goods—Contract for work and materials.

The plaintiffs submitted a written proposal to supply and erect in operating order, in the basement of defendant's theatre on foundations supplied by him, an engine, generator and switchboard for a sum mentioned. The proposal embodied specifications for the engine, describing an "Ideal" engine in language evidently that of the manufacturers as follows: "The Ideal engine is particularly adapted to direct connected work on account of its perfect balance, quiet running, etc." The defendant, who had previously selected the kind of engine he wanted from a number of different kinds mentioned in the preliminary discussions, accepted the proposal. The plaintiffs performed the contract, but the engines could not be made to run quietly enough to satisfy the defendant as the noise was heard in the auditorium above.

Held, that the bargain was not a sale of goods, but a contract for work and materials and that there was no war-

ranty that the engine would be "quiet running" but only a recommendation of the type of engine chosen for the work required. The clause was general in its terms and had not in view any particular use of the engine

Chalmers v. *Harding*, 17 L.T. 571, foll wed.

Hull and *Sparling*, for plaintiffs. *H. A. Burbidge* and *F. M. Burbidge*, for defendant.

Metcalfe, J.] [October 26.

HEWITT v. HUDSON'S BAY CO.

Workmen's Compensation for Injuries Act—"Workman," meaning of—Sales clerk not a workman—Trial by jury—King's Bench Act.

A sales clerk in a shop is not a workman within the meaning of that term, as used in the Workman's Compensation for Injuries Act, R.S.M. 1902, c. 178, so that an action by a sales clerk against his employee for damages for injury alleged to have been sustained through the employee's negligence, is not one which, under section 59 of the King's Bench Act, R.S.M. 1902, c. 40, must be tried by a jury.

To entitle a workman to the benefit of the Act, the labour performed must be manual.

Bound v. *Lawrence* (1892), 1 Q.B. 226, followed.

Deacon, for plaintiff. *Rothwell*, for defendants.

Mathers, C. J.] [November 2.

PARKS v. CANADIAN NORTHERN RY. CO.

Railway company—Liability for animals killed on track—Railway Act, R.S.C. 1906, c. 37, s. 294, sub-ss. 4 and 5—Fences—Construction of statutes—Negligence or wilful act or omission of owner of animals getting at large.

The liability of a railway company, under sub-sections 4 and 5 of section 294 of the Railway Act, R.S.C. 1906, c. 37, for damages in the case of animals at large killed or injured by a train, is not limited to territory where the company is by section 254 obliged to erect suitable fences, and the company can only escape such liability by shewing that the animal got at large through the negligence or wilful act or omission of the owner or his agent or the custodian of such animal or his agent.

The Railway Act of 1903 changed the law in this respect. *Bank of England* v. *Vagliano* (1891), A.C., per Lord Herschell at p. 144, followed as to the interpretation of a statute altering the former law.

Arthur v. *Central Ontario Ry. Co.*, 11 O.L.R. 537; *Bason* v. *Grand Trunk R. Co.*, 12 O.L.R. 196, and *Becker* v. *C.P.R. Co.*, 7 Can. Ry. Cas. 29, followed

The plaintiff had for two years been accustomed to turn his horses out of the stable in the winter to go without halters, to a watering trough about fifteen yards away and driving them back to the stable after drinking. On the occasion in question the plaintiff and his hired man were carrying out the usual routine when three of the horses after drinking, without their noticing it, walked off in the direction of the road instead of returning to the stable. When the fourth had finished drinking it started to walk after the others. The plaintiff observed this and immediately tried to intercept the horses, but the three escaped and, although the plaintiff followed them up at once and did his best to recover them, they eventually got onto the defendants' railway track and were killed by a train on a bridge.

Held, that the plaintiff was not guilty of negligence or of any wilful act or omission in the matter so as to disentitle himself to recover.

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

Robson, J.] [November 4.

RE CANADIAN NORTHERN RAILWAY CO. AND BLACKWOOD.

Railway company—Expropriation of land for railway—Possession before payment of compensation—Railway Act, R.S.C. 1906, *c.* 37, *s.* 217—*Board of Railway Commissioners, jurisdiction of.*

An order of the Board of Railway Commissioners for Canada, giving leave to a railway company to construct an extension of a spur track, and authorizing the expropriation of the necessary land is conclusive unless reversed on appeal to the Supreme Court, as to the right of the company to expropriate the land and construct the extension.

A warrant to put the company in possession of the required land before payment of the compensation should, however, not be granted under section 217 of the Railway Act, unless there

is some urgent and substantial need for immediate action in the interest of the railway itself or of the public, and it is not sufficient to shew that the interests of an individual, whose property would be reached by the spur line when built, urgently call for such construction in order that he may profitably carry on his business on such property.

Re Kingston and Pembroke Ry. Co., and Murphy, 11 P.R. 304, and *C.P.R.* v. *Little Seminary of Ste. Therese*, 16 S.C.R. at p. 617, followed.

Wilson, K.C., and *G. A. Elliott*, for Blackwood. *Clarke*, K.C., for the railway company.

Book Reviews.

The Employers' Liability Act of 1880 *and the Workmen's Compensation Act*, 1906. By His Honour Judge Ruegg, K.C.; with Canadian notes by F. A. C. Redden, of the Ontario Bar, solicitor of the Supreme Court, England. 8th edition. Butterworth & Co., 11 & 12 Bell Yard, London; Canada Law Book Company, Toronto; Cromarty Law Book Company, 1112 Chestnut St., Philadelphia. 1910

Whilst this is the eighth edition of a work which may claim to be the standard work on this subject in England, it is the first edition in which the Canadian cases on the subject are collected. As Mr. Ruegg says in his preface:—"Decisions upon the Employers' Liability Statute in force in Canada have been added in the form of foot notes and the statutes themselves appear in the appendix. It is hoped that this addition may increase the utility of the book." We have no doubt that this latter remark is true even so far as England is concerned; but, so far as Canada is concerned, it makes a really good book the most useful one we have on this subject.

As our readers are aware the Imperial Employers' Liability Act, 1880 has, with some modification, been followed in the legislation of the English-speaking provinces of the Dominion, and legislation somewhat similar has quite recently come into force in the Province of Quebec; there are, however, some differences in the legislation of the various provinces. In view of this, it has been the aim of the author to make this edition equally useful in all the provinces; whilst, at the same time, its

contents gives a bird's eye view of all the legislation in this country on the subject. The value of this feature will readily be seen, as well by the practitioner seeking for authority, as by those whose duty it is from this general view of the situation to amend the legislation in their respective provinces, by noting the working of the Act in other parts of the Dominion.

It need scarcely be said that the work done by Mr. Redden is most excellent. His well-known accuracy and industry would be a sufficient guarantee as to this. But more than that, an examination of his work in the book before us makes it quite evident that those who seek knowledge on this subject have now before them an exhaustive collection of our authorities so well arranged that the reader can readily find all the law to be had on the subject.

Whilst we may have our own opinion as to the wisdom of some of this legislation, it has been accepted as a fact, and every lawyer who has any business whatever, must be familiar with it. This familiarity can best be obtained from the pages of the volume before us.

Law Societies.

The Law Society of Alberta.

The triennial election of Benchers of the Law Society of Alberta was held on the 7th ult., the Benchers so elected to take office on first day of this month and to hold office for three years from that date. The following is the list of those elected:—James Muir, K.C., Calgary; W. L. Walsh, K.C., Calgary; C. F. P. Conybeare, K.C., Lethbridge; J. C. F. Bown, K.C., Edmonton; C. M. Biggar, Edmonton; D. G. White, Medicine Hat; George W. Greene, Red Deer; R. B. Bennett, K.C., Calgary; E. P. McNeill, Macleod.

Bench and Bar.

JUDICIAL APPOINTMENT.

John Lyndon Crawford, Red Deer, Alberta, Barrister-at-law: to be Judge of the District Court of the District of McLeod in the room of His Honour A. A. Carpenter, transferred to the District of Calgary. (Nov. 25, 1910.)

ANALYTICAL INDEX