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WHEN THE LAST DAY FALLS ON A SUNDAY.

A short paragraph on p. 105 of a little book recently issued by Mr. G. S. Holmested, K.C., entitled "The Sunday Law in Canada," calls attention to the unsettled condition of the law as to the day for performing a legal act when the last day for doing so happens to fall on a Sunday. At common law it was apparently the rule that, when the last day for doing such an act fell on a Sunday, it had to be performed on the previous day. This is still the general law in England with reference to the maturity of bills of exchange and promissory notes, following the "law merchant;" though a curious anomaly exists there in consequence of an express statutory provision that, when the last day of grace is a bank holiday, other than Christmas Day or Good Friday, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, then the bill is payable on the succeeding business day. Our own Bills of Exchange Act is more logical in providing that "whenever the last day of grace falls on a legal holiday or non-juridicial day in the Province where any such bill is payable, then the next day following, not being a legal holiday or non-juridical day in such Province, shall be the last day of grace."

It is not necessary to review the old English cases in support of the rule of law above mentioned, but it may be interesting to refer to some of the later ones, as well as to the few decisions of our own courts. The first of these latter in point of time was *Whittier* v. *McLennan* (1856), 13 U.C.R. 638. In that case the last day for payment of certain money under an agreement fell on a Sunday, but the money was not tendered until the following Monday. Robinson, C.J., who delivered the judgment of the court, said: "I am disposed to think he was too late, though I am aware that in a case of this kind, where the day of performance

falls upon a Sunday, the question has been considered a doubtful one, whether the party who should make the payment is in time on the Monday, or whether he should pay on the Saturday. . . . I am inclined to think that the plaintiff in this case should have come on the Saturday, if the money could not have been tendered on the Sunday, but am not confident that the law is so settled." The point, however, was not necessary to be determined in that case, as the decision turned on a question of pleading.

Cline v. *Cawley* (1867), 4 P.R. 87, was decided before the proceedings in an action of ejectment were assimilated to those in other actions. In that case the last day for appearing to a writ of ejectment fell on a Sunday, and judgment by default was entered on the Monday morning following. An application was made to set aside the judgment as being signed too soon, as well as on the merits. Morrison, J., dismissed the application on the former ground, following *Rowberry* v. *Morgan*, 9 Ex. 730, and *Regina* v. *Justices of Middlesex*, 7 Jur. 396, but made the order on the latter ground, on the payment of costs. This decision was, however, inconsistent with a previous unreported decision of Draper, C.J., in *Adshead* v. *Upton*, in January, 1863, which does not appear to have been referred to. He held that, where the last day for appearing to a writ of ejectment fell on a Sunday, the defendant had the whole of the following day on which to appear, and that therefore a judgment for want of appearance on he Monday was signed too soon.

The next case was *McLean* v. *Pinkerton* (1882), 7 A.R. 490. There the last day for filing a chattel mortgage under the Statute expired on a Sunday, and it was held by the Court of Appeal, affirming the judgment of the County Court, that it was too late to file it on the following Monday. Wilson, C.J., referred to a number of English cases in support of this decision, and distinguished the case of *Hughes* v. *Griffiths*, 13 C.B.N.S. 324, on the ground that the act to be done in the latter case, viz., the issuing of a capias, had to be done by the court, whereas the filing of a chattel mortgage was the act of the party. The statute was shortly afterwards amended, probably in consequence of this

decision, by 57 Vict. c. 37, s. 30, which provided that, where the time for filing any instrument under the Act expired on a Sunday or other day on which the office was closed, such filing might be done on the day on which the office should next be open.

Re Simmons and Dalton (1887), 12 O.R. 505, was a decision under the Dominion Franchise Act, 48-49 Vict. c. 40. The following extract is taken from the judgment of Proudfoot, J.:—"The time appointed for holding the final revision was Monday, the 12th July, and it is conceded by all parties that the last day for service of the notice was Sunday, the 27th of June. The 26th sec. of the Act requires the notice to be given 'not less than two weeks before the day named for the final revision.' But by section 2, sub-sec. 2 of the Act, if the time limited for doing any act, etc., expires upon a Sunday or holiday, the time so limited shall be extended to, and such act may be done upon the day next following, which is not a Sunday, etc. This overrides the whole Act, and the last day for giving notice expiring on Sunday, the notice was well given upon Monday. The revising officer relied upon some statements in Mr. Hodgins' book, that the notice might be served on Sunday. But Mr. Hodgins also says, p. 52: 'Where the last day for doing an act which is to be done by the court falls on a Sunday or a holiday, it may be done on the next practicable day thereafter.' Mr. Ermatinger in his work on the Act, makes a more precise statement, and one that entirely agrees with my views of the Act. In his note to sec. 27, p. 57, on the phrase 'not less than two weeks before,' he refers to his note to sec. 19, where, remarking on the phrase 'at least one week before,' he says, 'but if the last day for giving the notice falls on Sunday or a holiday, then under sec. 2, sub-sec. 2, the notice may be given on the following day.' I think the notice was in time."

The last case is *Cudney* v. *Gives* (1890), 20 O.R. 500. In that case, which was an action for specific performance, the last day for tendering the conveyance and purchase money fell on a Sunday. Prior to that day the vendor had expressed his unwillingness to perform the contract until the time for performance had actually arrived. Rose, J., held that, while there

would have been nothing illegal in making the tender on Sunday, the nature of the transaction indicated that it would require to be done on a business day, and he came to the conclusion that the plaintiff was not bound to tender on a Sunday. He distinguished the case of *Whittier* v. *McLennan*, above referred to, on the ground that the contract in the latter case was that the deed should "be delivered on *or before* the 1st day of April, 1855," and he therefore concluded that that decision did not give the vendor any assistance. After referring to numerous authorities, he adds: "But I do not think it necessary to inquire further what the law may be, or to determine whether, at law, it was sufficient to tender on the Monday, because, as it seems to me in cases such as the present, the Court has a discretion to grant specific performance after the day named."

The case of *Child* v. *Edwards*, 78 L.J. K.B. 1061, was decided in England in 1909, and although it is only the decision of a single Judge, it was not appealed from. This was an action for illegal distress where the rent fell due on a Sunday and the distress was made on the following day. The plaintiff relied, in support of his action, upon the statement of the law in Woodfall's Landlord and Tenant, 18th ed., p. 459, that "when rent nominally falls due on a Sunday, the ndymus cosinSust bedered as dies non; and that the rent is not legally due until the Monday morning, and is not in arrear until midnight of that day." Ridley, J., however, refused to accept this statement of the law, and held that the distress was properly made on the Monday. It had previously been decided in *Werth* v. *London & Westminster Loan Co.* (1889), 5 Times L.R. 521, that the "Sunday Observance Act" (1677) made it illegal to distrain on a Sunday for rent that fell due on the previous day.

In addition to the special provisions of the Bills of Exchange Act, the Franchise Act and the Chattel Mortgage Act above referred to, there have been several general enactments altering the common law rule above mentioned. "The Interpretation Act" (Ontario), now 7 Ed. VII. chapter 2, contains the following provisions as sub-section 15 of section 7: "If the time limited by an Act for any proceeding, or for the doing of anything under

its provisions, expires or falls upon a holiday, the time so limited shall extend to, and such thing may be done on, the day next following which is not a holiday." This sub-section was first enacted in 1887, and therefore after the decision in *McLean* v. *Pinkerton*, above referred to. Similarly Con. Rule 345 declares that "Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, the act or proceeding, so far as regards the time of doing or taking the same may be duly done or taken, on the next juridical day." The English Marginal Rule 963 is to the same effect. And section 31 (h) of "The Dominion Interpretation Act" also provides that "if the time limited by any Act for any proceeding, or the doing of any thing under its provisions, expires or falls upon a holiday, the time so limited shall be extended to, and such thing may be done on the next day following which is not a holiday."

In *Hamel* v. *Leduc* (1898), 29 S.C.R. 178, it was held under the last mentioned Act, that when the time limited for presenting a petition against the return of a member of the House of Commons of Canada expires on a holiday, such petition may be effectively filed upon the day next following which is not a holiday. A somewhat similar question had previously come before the Privy Council in 1894, in the case of *Dechene* v. *City of Montreal*, 64 L.J. P.C. 14. A statute of the Province of Quebec authorized the city to make an annual appropriation to meet municipal expenses, and a subsequent Act provided that any municipal elector might petition the Superior Court to obtain the annulment of any appropriation within three months of such appropriation. The Code of Civil Procedure of that Province provides that "if the day on which anything ought to be done in pursuance of law is a non-juridical day, such thing may be done with like effect on the next following juridical day." It was held, affirming the judgment of the Court of Queen's Bench, that the provision of the Code refers to things which the law directs to be done in the course of a suit, and not to the title of a person to present a petition, as had been done in this case, on the day following a non-juridical day, which latter was the last day of the three

months. No reference to this decision appears to have been made in the case of *Hamel* v. *Leduc*, above mentioned.

The Encyclopedia of the Laws of England, vol. 6, at p. 35, contains the following general statement of the law: "The rule that, when the last day of the time to do any act falls on a Sunday, the time extends so as to include the next working day must, be regarded as applying only to procedure in actions and matters before the courts, and not as adding an extra day to time fixed by statute." An illustration of this statement may be found in *Morris* v. *Richards*, 45 L.T. 210. A promissory note fell due on June 14th, 1874, which was a Sunday. A writ was issued on June 14th, 1880, which was a Monday. It is held that the Rules of the Judicature Act did not apply to such a case as this, as it was not intended to extend the time fixed by the Statute of Limitations, and the action was therefore barred. In *Chambon* v. *Heighwey*, 54 J.P. 520, this principle was also applied to what would seem to be a matter of procedure only. In that case it was held that, in calculating the time within which to serve a notice of motion by way of appeal from an order of a Judge in Chambers, Sunday could not be excluded; so that when the last day on which the notice of motion could be served was a Sunday, and the notice was not given until the Monday, it was too late. This case, however, seems to be inconsistent with the other decisions on questions of procedure.

As usual the American decisions are absolutely irreconcilable, so they are not helpful in arriving at an accurate view of the law. The cases are collected in "Cyc." vol. 38, at pp. 329 *et seq.* On the whole one may fairly draw the conclusion that, in all cases, except where it is otherwise specially provided by Statute or by Rules of Procedure, when the last day falls on a Sunday, and the act is not one that can be legally or conveniently done on that day, it must be performed on the preceding Saturday. Whether this state of the law should be allowed to continue is of course a matter for our legislators to determine. The advantages, however, of a uniform rule applicable to every possible case, whether of law or of practice, are so manifest, that one may hope to see some general enactment along these lines in the near future.

This is all the more important because there seems to be a very general opinion among business men that the law now actually makes a performance on the next juridical day sufficient in all cases.

M. J. GORMAN.

Ottawa.

HON. MR. JUSTICE LENNOX.

A recent Act of the Ontario Legislature provides for the appointment of two additional judges of the High Court of Justice for Ontario. Mr. Haughton Lennox, K.C., M.P., has been selected as one of these. His appointment is dated April 17th, and he was sworn in, at Osgoode Hall, on the 2nd instant.

Mr. Lennox was born in the county of Simcoe on February 28th, 1850. He studied law in the town of Barrie and in the city of Toronto, and was called to the Bar in 1878. Since then he has practised in the county town of the county of Simcoe, being of late the head of the firm of Lennox, Cowan & Brown, which does a large share of the business of that county. Mr. Lennox has represented the riding of South Simcoe since 1900. He early took a leading part in the House of Commons debates, rapidly gaining the ear of the House, and he has constantly increased his reputation as a Parliamentarian.

The following extract from a contemporary thus speaks of that part of his career: "It is within the mark to say, perhaps, that there was no man, on either side, in the House of Commons with a better grasp of railway matters generally than Mr. Lennox, and none who compared with him in his knowledge of Transcontinental affairs. His constant efforts on behalf of railway employees are well known. The legislation he introduced a few years ago to prevent railway companies from contracting themselves out of liability to their employees, was a very notable piece of legislation, and he was the only lawyer in the House who had the courage to declare that the Federal House had jurisdiction to pass such an Act, and this he afterwards vindicated by carrying the Act to the Supreme Court and later to the Privy

Council in England, where it was declared valid and entirely within the competence of the Parliament of Canada. It is, therefore, law to-day, and stands as a protection between the employee and company."

Although best known to the public as a member of Parliament, Mr. Lennox has many of the qualifications which should appertain to those who wear the ermine. Being a good lawyer, a great worker, painstaking, with a desire to get at the root of a matter, eminently fair, with an ambition to do well and thoroughly all he turns his hand to, respected by his brethren at the Bar, courteous and affable, we may expect for him a useful career in his new position.

IN WHAT CASES CAN A TRUSTEE APPOINT AN ATTORNEY?

It is well settled and well known that whenever a power is given which reposes a personal trust and confidence in the donee of it to exercise his own discretion he cannot refer such power to the execution of anyone else, for delegatus non potest delegare. Thus neither a trustee for sale nor an executor can sell by attorney. A tenant for life with power of leasing for twenty-one years cannot grant leases by attorney, because he has but a particular power which is personal to him: (see *Coombes'* case, 9 Rep. 75). (An amusing instance of a power which could not be delegated is given in that case—namely, that the lord might beat his villain for cause, or without cause, and the villain shall not have any remedy; but if the lord commands another to beat his villain without cause, the villain shall have an action of battery against him who beats him in such case.) As stated by Lord Westbury in *Robson* v. *Flight* (11 L.T. Rep. 558; 4 De G.J. & S. 614), in the execution of the duty or office of granting leases much judgment is required to be exercised—the fitness and responsibility of the lessee, the adequ . of the rent, the length of term to be granted under the circumstances, and the nature of the covenants, stipulations, and conditions which the lease should contain, are matters requiring knowledge and prudence. A trustee

cannot delegate his powers even to a co-trustee: (*Crewe* v. *Dicken*, 4 Ves. 97, a case where one trustee for sale released and conveyed to his co-trustee, and refused to join in the receipt of the purchase money). But a trustee can appoint an attorney to do many ministerial acts which involve no personal discretion. Thus he may appoint an attorney merely to pass the legal estate: (see Farwell on Powers, p. 446, 2nd edit.). In *Offen* v. *Harman* (1 L.T. Rep. 315; 29 L.J. 307, Ch.), where trustees had power to consent to the substitution of other estates for the settled estates, and they were made parties to a deed for carrying out such substitution and saw and approved of the draft of it, the execution of such deed by one of them by attorney was held valid. Of course, in that case, the trustees had exercised their discretion personally. And it seems that a trustee may appoint a bank attorney to receive dividends and pay them to the cestui que trust; (*Clark* v. *Laurie*, 1 H. & N. 452; 2 H. & N. 199). And a trustee in whom the management of property in a foreign country is vested may, if resident in England, appoint an attorney abroad to execute the trust even in matters of discretion. There are also other cases in which delegation is permitted where there is a moral necessity for it. Thus a trustee may employ a broker to buy securities authorized by the trust, and may pay the purchase money to him, if he follows the usual and regular course of business adopted by prudent men in making such investments: (*Speight* v. *Gaunt*, 48 L.T. Rep. 279; 9 App. Cas. 1). It is submitted, however, that a prudent trustee in buying stocks will only pay for them, or instruct his bankers to do so, on production of the transfers. The Trustee Act, 1893, s. 17, expressly authorizes a trustee to appoint a solicitor to receive and give a discharge for money receivable under the trust by permitting the solicitor to have the custody of, and to produce, a deed containing a receipt for the consideration money. That section further authorizes a trustee to appoint a banker to receive and give a discharge for any money payable to the trustee under a policy of assurance, by permitting the banker or solicitor to have the custody of, and to produce, the policy of assurance with a receipt signed by the trustee. It was decided in *Re Hetling and Merton's Contract*

(69 L.T. Rep. 266; (1893) 3 Ch. 269) that the attorney of a trustee under a *general* power of attorney could not give a receipt under that section, and it is submitted that a trustee cannot appoint a person, not being a solicitor, as attorney to receive and give a discharge for money, and that a trustee can only appoint a solicitor to do so in the cases and manner pointed out in the said Act.

—*Law Times.*

SCIENTIFIC ADMINISTRATION OF CRIMINAL LAW.

The citizen of the twentieth century faces many grave and difficult problems, but none of them more grave or more difficult than the problem of the proper administration of the criminal law.

With the rapid growth of modern cities and the ever-increasing congestion of population in small areas, there have developed criminal classes in our midst; people whose vocation is to commit crime, whose hands are upraised against their fellowmen from the cradle to the grave, and who know and expect no other or better life than the life of the jail, the prison, and the reeking alley.

That these criminal classes are increasing in size, that they already form an imperium in imperio, many of whose subjects are either mental defectives or moral and physical degenerates, are facts which we cannot deny without falsehood, nor overlook without cowardice.

It is also claimed by many who cannot be considered as mere alarmists, that respect for law is waning among the mass of the people at large, that acts of violence against person and property are on the increase, and breaches of trust more frequent.

These are not pleasant things to say or to hear. If they be true they should give pause to every thoughtful citizen; if there be remedies they should be found and applied without delay. Is the administration of the criminal law in any measure responsible for the situation, and, if so, in what respects?

This latter question is the one which should particularly appeal both to those who make and to those who administer the criminal

law, especially in view of the fact that it has been recently said by one in very high station that the administration of the criminal law in America is a disgrace to the nation. A very large proportion of those who make the laws are lawyers, and all of those who administer the laws in the courts are lawyers, and thus the question appeals primarily and perhaps most forcibly to lawyers. The invincible bourbons among the profession will avoid or belittle the question with the fatuous obstinacy of the bourbon of all ages, and all countries, but the lawyer whose face is toward the light (and I believe there are many such) will see its tremendous importance, and will make every effort to meet it like a patriot and a man. It is certain that no criminal code has yet been perfect—no method of punishment ideal. We have progressed much since the days when the criminal was treated as a wild beast and punishments took the form of public vengeance, but have we yet reached anything like philosophic treatment of individual cases or of the general subject? It seems to me that no honest intellect can answer the question with an unqualified affirmative.

Delay or Miscarriage of Justice.

I shall not here discuss the much-debated subject of the delays in criminal trials and the miscarriages of justice by reason of the extreme technical rulings of some of the courts, the incompetence of prosecuting officers, or the too great zealousness of courts to enforce constitutional or statutory provisions which may be so magnified as to hamper, rather than promote, the attainment of justice. All of these questions are improtant, and some of them are burning questions; but they are receiving earnest attention in substantially all jurisdictions, with gratifying results, and they are not within the scope of the present brief essay. I wish to say a few words upon the question of the treatment of the criminal, both before and after conviction. Do we treat him philosophically, do we treat him fairly, nay, do we treat him in the way which is calculated to produce the best results to society?

Individualization of Punishment.

It is incontestable that in most of our states the laws regulating punishment for crime, by imprisonment in jails or prisons, follow substantially the same lines as the Codes of a hundred years ago; terms of imprisonment have been changed perhaps, and courts have been given greater latitude as to the length of the sentence; in some states reformatories have been provided for first offenders and indeterminate sentences authorized; all these things are commendable, but they do not reach the real fundamental difficulty, and that difficulty is that our laws provide substantially the same punishment for every criminal who has performed the same forbidden act, whether he be young or old, a first offender or a hardened criminal, and they neither contemplate nor provide any efficient method by which the trial judge can learn the history of the offender, his heredity, or his environment, or the hidden causes which led up to the offence, and which would illumine its true character. This cast-iron, unbending method of treating crime was excusable, perhaps unavoidable, a century ago, but not now. Since that time man has come to study his fellowman, and has learned that responsibility for a given act is not accurately to be determined by considering that act alone. We continue, however, to measure the quality of the act by the same rule as before, when we know full well that we can make no just estimate unless we know something of the history of the person, his birth, his surroundings, his education, and his heredity.

If, as we loudly proclaim, the great object of punishment is not vengeance, but reform of the criminal, our present mode of treatment of the convicted man is very much as if a physician should prescribe an unvarying dose of an unvarying medicine for the cure of every patient whose temperature reaches 102 degrees, regardless of the history of the case and of all other symptons, and pay no more attention to the case. The physician who should in this day and age attempt to treat bodily disease by such methods would not be tolerated for a moment, but the laws which provide for the treatment of moral disease by the same methods

excite no serious comments among the mass of the people, nor even among many whose duty it is to administer it.

The writer of this article was upon the trial bench for seven years, and had occasion to pass sentence upon a considerable number of convicted persons, and he frequently felt the utter impossibility of satisfying himself as to the wisdom or justice of the sentences which he imposed. It seemed always to be merely a guess, and a very unsatisfactory guess at best. He always recognised the difficulty of the task, but he did not then comprehend, as he now comprehends, the true reasons for that difficulty; namely, the fact that he could make no study of the convicted person's previous life or environment, or the causes of his act, nor avail himself of the study of any expert on the subject; and the further fact that, even if he could accomplish these things, he could take little or no advantage of them, but must still impose a predetermined prison sentence, regardless of its fitness to the crime or its probable deterrent or reforming effect on the criminal. While these considerations apply in some degree to all criminal prosecutions, they apply with the greatest force to those cases in which the offenders are either (1) very young, or (2) in some degree peculiar, or not wholly normal by reason of heredity, or environment, or other cause, or (3) first offenders who, though not children, are still at the age where, under favourable conditions, reform may be reasonably hoped for, or (4) confirmed and repeated criminals, as to whom there can be no hope of reform.

As to each and all of these classes of offenders, the prevailing practically immutable methods of punishment seem to me quite indefensible. It is perhaps needless to enter into any argument of this proposition as to the first class named. Already the rank folly of treating the child offender as a criminal, and sending him or her to the bridewell in the company of the harlot and the thief, only to receive an advanced course of instruction in crime, has been quite generally realized, and juvenile courts administered by wise and kind judges, with power to temper justice with love and mercy, have been established in our great cities, and their number is increasing. Thank God for this advance!

Peculiar or Abnormal Offenders.

As to the other three classes, however, the difficulties are still acute in most of the states. Consider for a moment the second class enumerated above. We all know how many persons there are who, though apparently entirely normal under ordinary circumstances, are yet either by heredity or unfortunate environment peculiarly susceptible to a sudden impulse or suggestion, but without criminal intent. Such a person is brought into court, charged with an offence; the commission of the criminal act is fully proven; the person himself seems to be and is, so far as the ordinary acceptation of the term is concerned, entirely normal, the trial judge has no opportunity to make inquiry as to the previous life or history of the prisoner, and it would be of little or no avail if he had the opportunity; yet in many such cases careful and sympathetic study and investigation of the history of the offender by an expert physician or psychologist would disclose perfectly satisfactory causes for the criminal act, either in the way of heredity, environment, physical injury, irritation resulting from the hardships or injustice of daily life, which would put a vastly different face on the criminal act, and make it, instead of a deliberate crime, rather the unfortunate outcome of untoward circumstance, operating perhaps upon an originally backward mind and brain.

Now, here is a situation fraught with grave consequences. The offender must, under the prevailing system, be sent to jail or prison, and serve his sentence. The result is generally that he comes out embittered by punishment, ready to make war on society, and add another to the army of the confirmed and hopeless criminals. Were it possible for the court to delay sentence, to cause the investigation which I have suggested to be made, to ascertain where the real difficulty has been, and then to treat the case as an individual problem, prescribing such measures, either therapeutic, disciplinary, or segregative, as its history indicates to be best, society might easily acquire a sober, industrious citizen, instead of an enemy.

First Offenders.

The same considerations apply with somewhat less force to all first offenders; there are many of them who have yielded to some sudden and overwhelming temptation, but who are not criminals at heart or by choice; if they had half a chance to try again they might easily become fairly respectable citizens. Here, too, an intimate knowledge of the previous history, temperament, and surroundings of the offender, gained by the investigation of an expert, together with power to treat the case, so far as punishment is concerned, in such a manner as the apparent lack of deliberate criminal intent and the possibility of reform demand, would make it entirely possible for a discriminating and humane judge to save a life from shipwreck, and society from an additional menace. Under the present system, however, there is no choice—the prison sentence must be imposed, and at its close the offender is quite apt to come forth a pariah and an Ishmael, whose hand is henceforth against every man.

Confirmed Criminals.

As to the confirmed criminal, the man who spends his life serving prison or jail sentences, with brief intervals in which he is propagating his kind and executing new crimes, the question is somewhat different, but the need of knowledge of the man's history is just as important, not that he may be treated with clemency or in the hope of reform, but that measures may be taken so that the criminal who has made crime his profession may be permanently placed where he can neither continue the race of criminals nor instruct other in his business.

It is said that nine-tenths of the serious crimes in England are committed by men who have already served one or more terms of imprisonment, and who may be called permanent and confirmed criminals. Probably the same percentage would not hold good in this country, but doubtless it would be very large.

When it is ascertained that a man's sole purpose in life is to commit crime, is it not monumental folly to imprison him for a short term, and voluntarily send him forth again, time after

time, to continue his warfare on society? Is not this one great reason for the formation and growth of the criminal classes? Is not society justified in protecting itself against this tremendous menace by providing for the permanent segregation or imprisonment of the incorrigible criminal? These are questions which deserve the most careful and serious thought.—Hon. J. B. Winslow in *Case and Comment.*

A curious situation was revealed in a case which came before the Court of Criminal Appeal last month. Upon an indictment charging an appellant with feloniously having in his possession without lawful excuse a mould for coining, a plea of guilty was entered, the appellant stating, when arraigned, that he had the moulds in his possession. When called upon to state whether he had anything to say why judgment should not be pronounced, the appellant, for the first time, said that he had possession of the mould for the purpose of making medals. Upon an appeal against his conviction and sentence, the court held that the appellant had not completed his plea, and that the sentence passed was therefore not a legal sentence, and the indictment was sent back to the Central Criminal Court, in order that the appellant might again be called upon to plead to it. At first sight, it might appear that the court had in effect sent the case back for a new trial, to do which it has no power under the Criminal Appeal Act, 1907. It will be seen, however, that this was not the case, as the trial upon the indictment was bad ab initio, inasmuch as no plea was properly entered upon it, so that even the court of first instance would have had power to re-try the case upon the same indictment.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

WILL—CONSTRUCTION—BEQUEST OF "MONEY" AT POST OFFICE SAVINGS BANK—CONSOLS PURCHASED WITH MONEY ON DEPOSIT.

In re Mann, Ford v. *Ward* (1912) 1 Ch. 388. In this case a testatrix whose will was in question, after directing pecuniary legacies to be paid out of "any money" standing to her credit in the Post Office Savings Bank, bequeathed the "residue of such moneys" to the plaintiff. The will contained a residuary bequest. Prior to the date of her will the testatrix had purchased a sum of consols through the post office with money withdrawn from her savings account, and at the time of her death she had a sum standing to her credit in the Post Office Savings Bank, and also the sum of consols so purchased. Neville, J., held that the consols did not pass under the bequest of "money," but fell into the residuary estate. The case was distinguished from *Re Adkins*, 98 L.T. 667, where Eve, J., had held that consols purchased with moneys deposited in the Post Office Savings Bank passed under a bequest of "money deposited in the Post Office Savings Bank." The difference in the language used, and the fact that in *Re Adkins* there was no residuary bequest, were the grounds of distinction.

WILL—CONSTRUCTION—SUBSTITUTIONARY GIFT—WILL FOLLOWING WORDS OF WILLS ACT, 1837, (1 VICT. C. 26,) S. 33—(10 EDW. VII. C. 57, S. 37. O.)

In re Greenwood, Greenwood v. *Sutcliffe* (1912) 1 Ch. 392. A testatrix by her will (made in 1897) gave her residuary estate to trustees upon trust to convert and pay the proceeds in specified proportions to her two brothers and a nephew and a niece. And the will provided that, if any of the beneficiaries predeceased the testatrix without leaving issue, his or her share should go to the other beneficiaries, and it also provided as follows: "I declare if any of these my said brothers, my niece, and my nephew shall die in my lifetime leaving issue, and any of such issue shall be living at my death, the benefits heretofore given to him or her so dying shall not lapse but shall take effect as if his or her death had happened immediately after mine." One of the brothers, and the

nephew, predeceased the testatrix, leaving issue who survived the testatrix, and both had left a will. Parker, J., held that the shares of the deceased brother and nephew did not lapse, but went to their respective legal representatives as parts of their respective estates; the learned Judge holding that there was a good substitutionary gift in favour of the persons who would have taken if the legatees had survived the testatrix and died immediately afterwards.

WILL—CONDITION—PROVISION THAT WHOLE COSTS OF ANY ADMINISTRATION ACTION COMMENCED BY A BENEFICIARY SHOULD BE BORNE BY HIS SHARE—ACTION BASED ON WILFUL DEFAULT—REPUGNANCY.

In re Williams, Williams v. *Williams* (1912) 1 Ch. 399. This was an action by certain beneficiaries under a will for the administration of the testator's estate against the representative of a deceased executor and two surviving trustees, who were charged with wilful default. The will provided that if any beneficiary brought an action for the administration of the testator's estate the whole costs of the action should be borne by that beneficiary's share. The defendants contended that under the clause above mentioned the costs of the action must be borne by the plaintiffs' shares; but Eady, J., held that the clause did not prevent him from visiting on the defendant trustees the consequences of their own misconduct by ordering them to pay personally the costs up to, and including, the hearing; being of the opinion that the clause did not apply to an action occasioned by wilful default of the trustees, and that if it did it would be void for repugnancy.

COMPANY—WINDING UP—CALLS—SET-OFF.

In re Law Car and General Insurance Corp. (1912) 1 Ch. 405. This was a winding-up proceeding, in which a call was made by the liquidator in respect of unpaid shares. One of the shareholders, a director, had made an agreement with the company whereby he undertook to guarantee a bank in respect of certain advances made by the bank to the company, and the company agreed that any payments made by him in respect of the guarantee might if he chose be treated as payments in advance of future calls. After the winding-up order this director paid the bank a certain sum in respect of the guarantee which he claimed to have treated as a payment on the call; but Neville, J., held that his claim was in the nature of a set-off, and could not be allowed.

WILL—CONSTRUCTION—MISNOMER OF DEVISEE—LATENT AMBIGUITY—EVIDENCE—COSTS—UNSUCCESSFUL LITIGANT.

In re Halston, Ewen v. *Halston* (1912) 1 K.B. 435. In this case a testator, by will made in 1891, devised his real property to his wife for life, and after her death "unto and to the use of John William Halston (otherwise Alston), the son of Israel Halston (otherwise Alston)," in fee simple. The testator died in 1899 and his widow in 1911. Israel Alston, the testator's brother, had a son called John William Alston who was born in March, 1874, whose existence was known to the testator, but who died ten days after birth, seventeen years before the date of the will. Israel Alston had other sons, one of whom, John Robert Halson (otherwise Alston) claimed the property. There was evidence that the son who died had received his names at the request of the testator, and that the testator had desired that John Robert should bear the name of John; also that the testator had told John Robert that the land would be his some day. There was no evidence that the testator knew that he had been given the name John Robert. The legal personal representatives of the testator issued a summons to obtain the decision of the Court as to who was entitled, which was served on John Robert and the three co-heiresses at law of the testator, only one of whom appeared and asserted a claim. Eve, J., held that the testator must have contemplated benefiting some person who was alive at the date of his will, and on the extrinsic evidence, which he held was admissible, he came to the conclusion that the devise was intended for John Robert. He also held that the costs of John Robert must be paid by the unsuccessful contestant, following in this respect *Re Buckton* (1907) 2 Ch. 406, 415.

EXECUTOR—RIGHT OF EXECUTOR TO PLEDGE CHATTELS—PLEDGE BY EXECUTORS MANY YEARS AFTER TESTATOR'S DEATH—PAYMENT OF DEBTS—NOTICE OF EXECUTORSHIP TO PLEDGEE.

In *Solomon* v. *Attenborough* (1912) 1 Ch. 451, the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have not been able to agree with the decision of Joyce, J. (1911) 2 Ch. 159 (noted ante, vol. 47, p. 585). It may be remembered that the action was brought by the trustees of the will of Moses Solomon to recover possession of a quantity of plate belonging to the estate which had been pledged to the defendants in the following circumstances. The testator died in 1878, and by his will appointed two executors, to whom he gave his residuary estate in trust for sale and distribution as therein mentioned.

In 1892 one of the executors, without the knowledge of his co-executor, pledged the plate in question, which formed part of the residuary estate, with the defendants, as security for an advance which he misappropriated. At the time of the pledge all the debts had been paid, but the residuary estate had not been completely distributed. It did not appear that the pledgee knew that the pledgor was an executor, nor did he deal with him in that capacity. Joyce, J., held that the executor, notwithstanding the lapse of time, had a legal right to pledge the plate, and gave judgment for the defendants subject to the right of the plaintiffs to redemption; but the Court of Appeal holds that inasmuch as the pledgor had not purported to act as executor and the defendants had no notice that he was executor, the latter had no title to the plate and must deliver it up to the plaintiffs; but in so doing the Court of Appeal does not in any wise impugn the doctrine stated by Sir John Leach in *Watkins* v. *Cheek* (1825), 2 S. & S. 199, 205, where he says: "A mortgagee or purchaser from the executor of a part of the personal property of the testator has a right to infer that the executor is, in the mortgage or sale, acting fairly in the execution of his duty, and is not bound to inquire as to the debts and legacies." But the Court holds that in order that a purchaser or mortgagee may have the benefit of that doctrine he must be consciously dealing with a person as executor.

STATUTE—CONSTRUCTION—NOTICE TO BE SENT BY POST—PERSONAL SERVICE OF NOTICE.

Jarvis v. *Hemmings* (1912) 1 Ch. 462 may be briefly noticed. By a statute relating to landlords and tenants it was provided that a superior landlord might serve a sub-lessee with notice that the rent due the superior landlord was in arrear, "by registered post" addressed to such sub-lessee; and Warrington, J., held that a notice personally served on the sub-lessee was a sufficient compliance with the statute, following the old case of *Walter* v. *Rumbal* (1695) 1 Ld. Raymond 53, where a statute required notice to be left "at the chief mansion house or other notorious place" on premises, and it was held that personal service of the notice was sufficient under the Act.

VENDOR AND PURCHASER—CONDITION OF SALE AFFECTING PURCHASER WITH NOTICE OF TERMS OF EXISTING TENANCIES—AGREEMENT BY VENDOR WITH TENANT AS TO IMPROVEMENTS—CLAIM BY TENANT FOR IMPROVEMENTS.

In re D·by and Fergusson (1912) 1 Ch. 479. In this case

land was sold subject to a condition that the purchaser should be deemed to have notice of the terms of all existing tenancies. The vendor prior to sale had given a tenant an agreement entitling him to compensation for improvements made by him. After the completion of the contract the tenant claimed against the purchaser to be allowed for improvements, and it was held by Joyce, J., that this agreement was one of the terms of tenancy within the condition above referred to, and such claim must be borne by the purchaser.

WILL—CONSTRUCTION—LEGACY—GIFT OF CAPITAL AND ACCUMULATIONS OF INCOME AT TWENTY-SIX—VESTED OR CONTINGENT—SEVERANCE.

In re Nunburnholme, Wilson v. *Nunburnholme* (1912) 1 Ch. 489. In this case a will was in question whereby a testator charged his debts and estate duty on the income and profits of certain shares in a company, and bequeathed the shares, in trust out of the income to augment the income of his daughters as specified, and to pay his son £3,000 a year until he should attain twenty-six, and when and so soon as he should attain that age to hold the shares and the accumulations of income therefrom for his son absolutely. There was no gift over. The son died at the age of twenty-three, intestate and unmarried. Neville, J., held that the gift to the son was vested, and on his decease his personal representative became entitled thereto; but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) reversed his decision, being of the opinion that the gift had not been severed from the rest of the estate, because during the lives of the daughters the trustees were to be able to resort thereto to augment their incomes, as provided for in the will, out of the income of the shares, and on that ground they held that the gift to the son was contingent; but even if there had been a severance of the shares from the rest of the estate the Master of the Rolls was not prepared to say that the gift would have vested before the legatee attained twenty-six.

DEBT—RELEASE—WILL—DEDUCTION OF DEBT FROM LEGACY—ENTRIES IN TESTATOR'S LEDGER—APPOINTMENT OF DEBTOR AS EXECUTOR.

In re Pink, Pink v. *Pink* (1912) 1 Ch. 498 presents some peculiar features. A testator during his lifetime made advances of £5,800 and £9,800 to his sons-in-law Rayner and Moore respectively. In February, 1908, Rayner was adjudicated bank-

rupt and had not obtained his discharge. In the testator's ledger was an undated entry, "This debt is cancelled as altogether bad, debtor being bankrupt," and with respect to Moore's debt there was entry in the ledger in 1905 that £5,000 had been given off the debt for an object arranged with Moore's wife, and in June, 1909, there was a further entry, "This debt is absolutely cancelled from this debt of £4,800 and interest. Edward Pink." By his will dated in March, 1908, the testator appointed Moore one of his executors, and settled a sum of £20,000 and one-fourth of his residue upon the wives of Rayner and Moore and their children. He directed the debt of Rayner should not be called in for five years if interest was paid, but if not, or in the event of Rayner's bankruptcy, the whole principal and interest should be immediately payable. And he directed that if the wife of Moore should die within seven years of his death any sum due from Moore should be extinguished; and he also declared that any loss sustained in respect of the indebtedness of either Rayner or Moore should be credited as a loss to the trust legacy of £20,000 to the wife of the debtors and not as a loss to his residuary estate. Rayner paid no interest. The executors applied to the Court to determine whether, in the circumstances, the debts of Rayner and Moore were still due; and Eve, J., held that the entry in the ledger as to Rayner's debt could not operate as a release, nor had his bankruptcy put an end to his indebtedness. And as to Moore's debt, he held that there was not sufficient evidence of an intention by the testator to make a gift, and even if there were an imperfect gift it was not perfected by the naming of Moore as executor. He therefore came to the conclusion that both debts were subsisting, and if any loss arose therefrom it must be charged against the £20,000 legacy in favour of the respective wives of the debtors.

WILL—REMOTENESS—LIMITATIONS AFTER ESTATE TAIL—CONTINGENCY OF ATTAINING TWENTY-ONE—PERPETUITY.

In re Haygarth, Wickham v. *Holmes* (1912) 1 Ch. 510 raises a somewhat nice point of real property law regarding perpetuities. A testator devised his real estate to trustees upon trust to pay the income to his brother for life, and after his death to stand seized thereof upon trust for the first and other sons of his brother successively in tail, with remainder upon trust for the first and other daughters successively in tail, and if the trusts for his brother for life, and for his issue in tail, should fail or determine, then the testator directed the trustees to sell and hold the proceeds for such of the testator's five cousins, naming them, as should be living

when the direction for sale should come into operation (each share to be retained upon the usual trusts of a settled share for such cousin for life, and after his or her death for his or her children), provided that if any of his cousins should die before the direction to sell came into operation leaving a child or children living when such direction should come into operation who being a male should attain twenty-one, or being a female should attain twenty-one or marry, then such child or children should take the share of the deceased parent would have taken if he or she had survived the testator. The testator died in 1902, and his brother died in 1911 without issue; and the present motion was for an adjudication as to whether the gift in favour of the cousins was valid. Joyce, J., in accordance with the law as laid down by James, L.J., in *Heasman* v. *Pearse* (1871), L.R. 7 Ch. 275, 282, 283, held that the gift was valid, and that under the limitation in question the person to take, if not definitely ascertainable immediately on the termination of the estate tail, was nevertheless ascertainable within a life in being and twenty-one years from the death of the testator.

WILL—TRUST FOR CONVERSION WITH POWER TO POSTPONE—TENANT FOR LIFE AND REMAINDERMAN—INCOME OF UNAUTHORISED INVESTMENTS—LEASEHOLD SUBLET AT A LOSS.

In re Owen, Slater v. *Owen* (1912) 1 Ch. 519. In this case a testator gave his residuary estate to trustees on trust for conversion, with a discretionary power to postpone the sale, and directed the net proceeds to be invested and held in trust for his wife for life, with remainder to his sons. The will contained no direction as to the income pending conversion. The estate consisted largely of unauthorised securities, some of which produced no income, and some more, and some less, than four per cent. One of the questions submitted to the Court was what income should be paid to the tenant for life in respect of these unauthorised securities pending conversion thereof, and Neville, J., decided that four per cent. on the aggregate of such securities should be paid to the tenant for life, and if the income therefrom in any year did not realise four per cent., then any over-payment would have to be adjusted out of her subsequent income. Another question submitted was in reference to a certain leasehold estate of the testator, which had to be sublet at a loss of £50 per annum owing to the executors being unable to sell or surrender it, and Neville, J., decided that this loss must be deducted from the income of the residuary estate, as an outgoing of the estate.

RAILWAY—NEGLIGENCE—INSUFFICIENT FENCE—CHILDREN TRESPASSING—INVITATION TO ENTER LAND.

In *Jenkins* v. *Great Western Railway* (1912) 1 K.B. 525, a plaintiff, a child of two years, claimed to recover damages from the defendants in the following circumstances. The plaintiff lived with his parents in one of a row of houses across the road from the defendants' yard, which was fenced from the highway by a fence repairable by the defendants. Inside the fence was a pile of wooden railway sleepers, and beyond, about thirty-five yards from the house of the plaintiff's parents, was the main line of the defendants' railway. The plaintiff went through or over the fence and strayed on to the main line and was injured. The jury found that some of the company's servants must have known that children were in the habit of playing on the pile of sleepers, but not that they were in the habit of getting on the main line; they also found that the fence was not a reasonably fit fence for the purpose of separating the railway from the highway having regard to the proximity of houses on the other side of it; that children were in the habit of getting on the pile of sleepers through or over the fence by the leave or license of the company, but not elsewhere; and that the defendants, having regard to all the circumstances, were guilty of negligence in not taking some sufficient means for preventing children getting on the line. Bankes, J., on these findings, held that the leave and license was to play on the sleepers and not elsewhere, and that there was no duty on the defendants to fence off the sleepers from the rest of their land, and that they were not liable, and he gave judgment in favour of the defendants, which was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.). *Cooke* v. *Midland G. W. Ry.* (1909) A.C. 229, where the defendants had left a turntable unlocked and accessible to children who were known to play with it, was held to be distinguishable on the ground that there there was leave and license on the part of the defendants to the plaintiff to play with a dangerous machine which caused the injury complained of.

CONTRACT—EMPLOYMENT REQUIRING SECRECY—PRIVATE DETECTIVE AGENCY—IMPLIED WARRANTY OF SECRECY—BETRAYAL OF SECRET BY FORMER SERVANT.

Easton v. *Hitchcock* (1912) 1 K.B. 535. This was an action by a private detective to recover for services rendered. The plaintiff in the advertisements of her business stated that her inquiries were conducted with secrecy. She was employed by the de-

fendant to watch the defendant's husband; and the plaintiff employed various men—among others, one Davis—to carry out her contract. Davis subsequently left the plaintiff's employment, and thereafter told one Gardiner, who had also been a former employee of the plaintiff, that he had been watching the defendant's husband, and Gardiner informed the husband of the fact; and the defendant, on hearing from her husband that he knew he was being watched, refused to pay the plaintiff; but Hamilton and Lush, JJ., held that the foregoing facts afforded no defence to the action; and that there was no implied warranty by the plaintiff that her servants after they left her employ would maintain secrecy.

SALE OF GOODS—DELIVERY OF MORE THAN BOUGHT—TRIFLING EXCESS—RIGHT OF BUYER TO REJECT WHOLE—SALE OF GOODS ACT, 1893, 56 & 57 VICT. c. 71, s. 30 (2).

Shipton v. *Weil* (1912) 1 K.B. 574. The Sale of Goods Act (which is supposed to be declaratory of the common law) provides—s. 30 (2)—that where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. In this case the plaintiffs contracted to sell to the defendants 4,500 tons of wheat, with the option to ship 8 per cent. more on contract quantity—the maximum quantity sold being thus 4,950 tons. The plaintiffs tendered 55 lbs. in excess of the latter quantity. The price payable for this excess at the contract price would be 4s., but the plaintiffs never made any claim therefor. Notwithstanding this, the defendants claimed the right to reject the whole of the wheat; but Lush, J., who tried the action, held that as the excess was trifling and no charge was made therefor, the defendants had no right to reject the whole as claimed by them. He considered that in order to entitle the buyer to reject the goods there must be a substantial difference between the quantity bought and the quantity tendered. The wheat had been resold by the plaintiffs at a loss, and the defendants were held liable for the loss.

BANKRUPTCY—ASSIGNMENT OF DEBTOR'S BUSINESS TO A COMPANY—BUSINESS CARRIED ON BY RECEIVER APPOINTED BY DEBENTURE HOLDERS—ASSIGNMENT TO COMPANY SET ASIDE AS FRAUDULENT—LIABILITY OF RECEIVER TO TRUSTEE IN BANKRUPTCY—TRESPASSER.

In re Goldburg (1912) 1 K.B. 606 is a bankruptcy case, but

is worth noting. The debtor made an assignment of his property to a company, which issued debentures authorising the debenture holders in certain events to appoint a receiver. A receiver was accordingly appointed and entered into possession of the assets and managed the business of the company. The debtor was adjudicated bankrupt and the assignment of his business to the company was declared to be fraudulent and void. In these circumstances, Phillimore, J., held that the receiver was bound to account to the trustee in bankruptcy for the assets and property he had received, and that he and the debenture holders were jointly and severally liable as trespassers, the receiver having no better status than the debenture holders by whom he was appointed.

PRACTICE—COUNTY COURT—CERTIORARI—REMOVAL OF ACTION FROM COUNTY COURT TO HIGH COURT—NEGLECT OF PLAINTIFF TO PROCEED AFTER REMOVAL OF ACTION.

Harrison v. *Bull* (1912) 1 K.B. 612 illustrates a rather peculiar point of practice. By agreement of the parties the action had been removed on the application of the defendant by certiorari from a County Court to the High Court. After the removal, the plaintiff failed to proceed with the action, and the present application was made by the defendant to compel him to proceed; but the Court of Appeal (Farewell and Kennedy, JJ.) affirmed the ruling of the Master, and Bucknill, J., that after a cause has been removed by certiorari, the plaintiff may proceed in the action or not as he thinks fit, and that there is no jurisdiction to compel him to proceed if he does not choose to do so.

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Lord Chancellor (Earl Loreburn), Lords Macnaghten, Atkinson, and Robson.] [Feb. 21.

NATIONAL TRUST COMPANY *v.* WHICHER.

Company—Mortgage deed—Trustee for bondholders—Purchase of "bonds offered at the lowest price"—Breach of trust.

The mortgage deed of a company provided that a fund for the purchase or retirement of bonds should be constituted out of the profits of the company, and that the trustee for the bondholders should periodically advertise for bonds, and from the bonds offered in response to the advertisement should "purchase those bonds which are offered at the lowest price, not, however, exceeding par value."

Held, that in buying bonds the trustee was bound to consider number as well as price, and was not bound to buy a small parcel of bonds at a low price when such a course would have prevented him from buying a larger quantity offered in one block at a higher price but still below par, and would have compelled him to expend the balance of the fund in the purchase of bonds at par, and that he had not been guilty of a breach of trust in so doing.

Appeal allowed.

Sir *R. Finlay*, K.C., *Anglin*, K.C., and *W. Finlay*, for appellants. *Younger*, K.C., and *Geoffrey Lawrence*, for respondents.

Dominion of Canada.

EXCHEQUER COURT.

Cassels, J.] [March 16.

THE KING *v.* RIVERS AND TAGGART.

Damages—Eminent domain—Value for special use.

Held, that the market price of lands expropriated by the Crown for public works is prima facie the basis of valuation in

eminent domain proceedings, but where a use for a special purpose is shewn on the part of the owner a reasonable allowance must be added in respect thereof.

Dodge v. *The Queen*, 38 Can. S.C.R. 149, applied.

John Thompson, K.C., for the Crown. *Andrew Haydon*, for defendants.

Province of Quebec.

SUPERIOR COURT.

Charbonneau, J.] [March 8.

NURNBERGER *v.* CHOQUET AND ROBERTS.

Intoxicating liquors—License—Renewal—Trial.

Held, 1. The License Commissioners for the Province of Quebec, although endowed with ministerial functions, yet, in cases of oppositions to renewals of license certificates, exercise judicial duties, and such contestations must be heard and tried as any other case brought into Court.

2. The holder of a liquor license, the renewal of which is opposed, has the right to be heard in support of his claim for a renewal and to submit evidence in respect thereof, and a judgment rendered by license commissioners refusing a renewal to the license holder, but without his having been called upon to defend himself, is radically null and will be quashed on *certiorari*.

D. R. Murphy, K.C., for petitioner. *G. Désaulniers*, K.C., for respondent.

Province of Manitoba.

KING'S BENCH

Robson, J.] MESSERVEY *v.* SIMPSON. [March 5.

Parties—Partners joined in slander action—Irregularity.

As a rule there can be only one defendant in an action of slander, namely, the person who uttered the words complained of, and unless the plaintiff pleads that one defendant instructed

the other to utter the slander sued on, a claim against two persons jointly, although alleged to be partners, will be struck out as embarrassing.

See Odgers on Libel, 5th ed., p. 601.

N. F. Hagel, K.C., for plaintiff. *H. Phillipps*, for defendant.

Robson, J.] ALEXANDER *v.* SIMPSON. [March 5.

Pleadings—Statement of claim—Allegation of conspiracy.

The mere use of the words "in collusion" in a pleading claiming damages against a defendant for having "in collusion with" his co-defendant defamed the plaintiff is insufficient as a claim for damages for conspiracy.

N. F. Hagel, K.C., for plaintiff. *H. Philipps*, for defendants.

Prendergast, J.] THE KING *v.* JOHNSON. [March 6.

Habeas corpus—Vagrant—Common law and statutory powers—Summary conviction—Depositions in shorthand by unsworn stenographer—Cr. Code (1906), *s.* 683.

Held, 1. As regards summary convictions the jurisdiction to review commitments thereunder on habeas corpus is not limited to the statutory powers founded on Imperial statute 31 Car. II. c. 2, and the writ may be supported also upon the jurisdiction at common law.

R. v. *McEwen*, 13 Can. Cr. Cas. 346, 17 Man. R. 477, distinguished.

2. The regularity of a summary conviction for a vagrancy offence (Cr. Code 1906, s. 238) is properly enquired into upon habeas corpus when the proceedings before the magistrate are brought up upon a writ of certiorari in aid of the habeas corpus writ.

The King v. *Pepper*, 15 Can. Cr. Cas. 314 and *The King* v. *Leschinski*, 17 Can. Cr. Cas. 199, specially referred to.

3. The omission to swear the stenographer appointed to take down the evidence at the hearing of a prosecution under the summary conviction clauses of the Criminal Code (1906), as required by Code s. 683, is a matter of jurisdiction and not a mere defect of form, and the depositions taken by the unsworn stenographer are invalid.

4. It is a good ground for quashing a summary conviction

that the stenographer who took down the depositions was not sworn as required by Code s. 683.

R. B. Graham, for Attorney-General. *P. E. Hagel*, for prisoner.

COURT OF APPEAL.

Howell, C.J., Richards, Perdue, and Cameron, JJ.A.] [March 5.

FRASER *v.* CANADIAN PACIFIC RY. CO.

Contract—Sub-contractor for work on identical terms—Equitable assignment.

An agreement whereby a contractor for work sub-contracts with another to do the same work at the same price as he is to receive, and agrees to pay the second contractor in the same instalments as are stipulated for in the original contract with the property owner, does not constitute an assignment to the person who performs the work of the moneys to accrue under the original contract made by the property owner, and such transaction is not an equitable assignment of a chose in action.

M. G. Macneill and *W. L. McLaws*, for plaintiff. *Fullerton*, K.C., and *J. P. Foley*, for defendants.

Province of Saskatchewan.

SUPREME COURT.

Wetmore, C.J., Newlands, Lamont and Johnstone, JJ.]

THE KING *v.* HOO SAM. [March 9.

Evidence—Confessions and admissions—Trial—Misdirection—Presumption—Foreign language.

Held, 1. An entirely voluntary confession by the accused made to one in authority and without interrogation by the person in authority is admissible, although no caution or formal warning was given the accused.

2. A confession made to one not in authority in the presence of a person in authority need not be preceded by a warning, if it is shewn affirmatively that the confession was free and voluntary.

3. It is not misdirection for the trial Judge charging the jury to speak of an admission against his interest, made by the accused as a "confession" and to use the word "confession" synonymously for a statement against interest.

4. Per NEWLANDS, J., LAMONT, J., concurring:—It will be presumed that English-speaking people in Canada are not conversant with the Chinese language so as to understand an overheard dialogue in that tongue between two Chinamen and the conversation between the Chinamen in the presence of the chief of police, but in which the officer took no part is to be treated as if the latter were not present as regards the proof of an admission or confession made therein.

Alex. Ross, for Crown. *C. E. Gregory*, for accused.

Book Reviews.

The Sunday Law in Canada. By GEO. S. HOLMESTED, K.C. Toronto: Arthur Poole & Co., law publishers. 1912.

This comes at an appropriate time, as the subject of Sunday observance has been a prominent topic of conversation, of lectures and of litigation for some time past; and it is likely so to continue, as the world drifts away, as it is apparently doing, from its old moorings. Mr. Holmested gives the reader a concise summary of the law as it stands at present, referring particularly to that of the Province of Ontario; but his book is by no means a dry discussion of law and statutes, for the reader will find much historical information, gathered from various sources and interestingly set forth.

Chitty's Statutes of Practical Utilities. Arranged in alphabetical and chronological order, with notes and indexes. Volume 17, Part 1. By W. H. AGGS, M.A., barrister-at-law. London: Sweet & Maxwell, Limited, 3 Chancery Lane; and Stevens, Limited, 119 and 120 Chancery Lane. 1912.

This gives us the statutes of practical utilities passed in 1911. All that needs be said about this volume is that it is a continuation of previous ones in the same form, and of the same excellence.

Bench and Bar.

Judicial Appointments.

Haughton Ignatius Samuel Lennox, of the Town of Barrie, in the Province of Ontario, K.C., to be a Judge of the Supreme Court of Judicature for Ontario and a Justice of the High Court of Justice for Ontario. (April 17.)

Law Society of Upper Canada.

Mr. Donald having resigned the position of Secretary of the Law Society of Upper Canada, an excellent choice has been made by the Benchers in the appointment of Mr. Edwin Bell, barrister, as his successor. Mr. Bell for some years practised in Chatham, Ont., and subsequently in Toronto. Highly thought of by his brethren at the Bar for his personal worth, they are indebted to his industry and learning for several works which have made his name widely and favourably known to the profession in the Province of Ontario. We refer to his work on Landlord and Tenant, Bell and Dunn on Mortgages, Bell and Dunn's Practice forms, and his treatise on the Principles of Argument. That he will be a success in his new position goes without saying.

Flotsam and Jetsam.

A Wheeling (West Virginia) lawyer says that he has heard many queer verdicts in his time, but that the quaintest of these was that brought in not long ago by a jury of mountaineers in a sparsely settled part of that state.

This was the first case for the majority of the jury, and they sat for hours arguing and disputing over it in the bare little room at the rear of the court room. At last they straggled back to their places, and the foreman, a lean, gaunt fellow, with a superlatively solemn expression, voiced the general opinion:

"The jury don't think that he done it, for we allow he wa'n't there, but we think he would have done it ef he'd had the chanst."
—*Harper's Magazine.*