Canada Law Journal.

VOL. LII. TORONTO, FEBRUARY, 1916 No. 2

EXECUTION PENDING APPEALS.

PROVINCE OF ONTARIO.

Under the former procedure which the late consolidation of the Rules has superseded it will be remembered there used to be appeals to the Divisional Courts of the High Court, and from thence to the Court of Appeal. The recent Judicature Act put an end to Divisional Courts of the High Court, and it in effect substituted for the double appeal above mentioned one appeal to a Divisional Court of the Appellate Division of the Supreme Court—and the procedure for such appeals was apparently intended to be, as nearly as possible, the procedure which regulated the former appeals to the Divisional Courts of the former High Court of Justice: see Jud. Act, s. 75.

The effect of this alteration was to give an appeal to what was the former Court of Appeal, but is now the Appellate Division of the Supreme Court, without any prior intermediate appeal. On an appeal to the former Court of Appeal security for the costs of the appeal was required, and, in case it was sought to stay execution pending the appeal, security for the amount awarded by the judgment appealed from was also required to be given; and C.R. 828 provided that on such security being given the execution might be stayed on the fiat of a judge. In appeals to a Divisional Court of the former High Court no security was required to be given, but without any security being given an execution on the judgment appealed from was stayed on the setting down of the appeal. This practice is still preserved by Rule 496, but is varied by Rule 497.

It is always a difficult matter to avoid mistakes when endeavouring to combine enactments relating to different subjects.

Former C.R. 827, which is now Rule 496, dealt with the stay of executions on appeal to Divisional Courts, whereas C.R. 828, which is now Rule 497, related to the stay of executions on appeals to the Court of Appeal, in the former of which no security to stay execution was required, and in the latter of which it was required.

In this state of things the proper course of action it appears to us would have been to leave out of the recent consolidation C.R. 828 altogether as dealing with a part of the former procedure which has been superseded. But that Rule has not only been continued but continued with a variation which has the effect of making, as we believe, a quite important and wholly unnecessary change in what was the practice on appeals to the former Divisional Courts which it was really intended should be continued. Rule 497, it will be seen, provides that pending an appeal to the Appellate Division an execution issued upon the judgment or order appealed from shall be superseded upon a certificate of the Registrar being lodged with the Sheriff that an appeal is pending from the judgment or order on which the execution was issued.

The former C.R. 828 merely provided that the execution should be "stayed," but at the time that Rule was in force, as we have already said, security was required to be given for the debt and costs awarded by a judgment appealed from, as a condition of staying execution therefor; and the former Court of Appeal held that the effect of the "stay of execution" under C.R. 828 was equivalent to a supersedeas, because the legislature must be taken to have intended to substitute the security given upon the appeal for the lien on the property of the appellant created by the execution, leaving it free to be disposed of by him, and liable to the claim of his other creditors: see per Osler, J.A., *O'Donohoe* v. *Robinson*, 10 Ont. App. 629.

Now it is to be noted that although no security is now given for debt or costs recovered by a judgment appealed from, the new Rule 497 (varying the wording of C.R. 828)expressly provides for superseding the execution.

The variation made in the wording of C.R. 828 by Rule 497 may have been thought merely to make C.R. 828 say what it had been held to mean, without perhaps taking into account why it received that peculiar construction. But if C.R. 828 had been retained in an unaltered form it is reasonable to suppose that the stay of execution under Rule 496 would not now be held to be a supersedeas, but merely a stay as under the former Divisional Court practice.

This change from the former procedure of the Divisional Courts we do not think was well advised. It is one thing to say an execution shall be superseded because the judgment creditor has security for his debt; it is quite another thing to say his execution shall be superseded, although he holds no security, and yet that is precisely the change which Rule 497 in its present form has effected.

We are disposed to think that Rule 497 should be repealed leaving the stay of execution pending an appeal to be governed by Rule 496.

The recent case of *Saskatchewan Land Co.* v. *Moore*, 9 O.W.N 343, indicates that where an appellant neglects the formality of obtaining a certificate from the Registrar and lodging it with the sheriff, the execution though stayed under Rule 496 is not superseded under Rule 497, although the obtaining of a judge's fiat under the former C.R. 828 was held to be immaterial: see *O'Donohoe* v. *Robinson*, supra (per Hagarty, C.J., at p. 625).

Seeing that security is no longer required as a condition of appeal, and therefore the reason for superseding execution pending appeal is taken away, it may well be doubted whether in the circumstances the change made in C.R. 828 by the present Rule 497 was well advised. Certainly it seems somewhat hard to rob the creditor of the benefit of his execution without giving him any equivalent.

What is the precise effect of superseding execution under Rule 497 remains to be determined. It certainly can never

have been intended that the writ should be superseded so that no other execution could be issued thereafter, although that was the effect of the decision in *O'Donohoe* v. *Robinson,* supra.

It will be a question whether the respondent, in case the appeal is dismissed, must not apply for leave to issue another execution, or whether he may, notwithstanding the former writ has been superseded, nevertheless on the termination of the appeal in his favour issue an alias writ without leave, as of course. We do not see how the original writ which has been superseded can be again resuscitated.

Then again, although a writ which is merely stayed might be kept alive by renewal, a writ which is superseded would appear incapable of renewal.

The effect of the change effected by Rule 497 in superseding writs of execution, though no security has been given, will have other effects, it will prolong the time which the debtor's lands may be reached by execution, and very often it is to be feared may deprive suitors of the means of recovering debts by reason of the prolonged delay which the debtor may create by an appeal, during which time the debtor's estate may be swept away by transfer, or under other executions.

LIABILITIES OF MEDICAL MEN.

The unhappy incident of a child being born malformed and not likely to live, except possibly by means of an operation, brings up the question whether it is a crime for a physician or surgeon to cause a parent to withhold a life-saving operation or remedy from a dying child. The law in the United States is that all men "are endowed by their Creator with an inalienable right to life, liberty, and the pursuit of happiness." This statement in the Declaration of Independence is substantially the common law of England.

Some observations on this subject, in an article in the *Central Law Journal,* may therefore be appropriately referred to as ex-

planatory of the general law on the subject, and so we quote a portion of the article.

The writer of the above article contrasts a monarchial government with the republican form of government which exists in the United States, and implies that life is (or ought to be) more sacred in the latter country than in the former. Statistics amply prove the contrary. The sacredness of life is one of the traditions of the British people, and it would be well if other countries were to follow our example. The difficulty in the United States is, of course, the enormous inflow of emigrants from countries outside the British Isles, and the foreign element overtasks the digestion of the Anglo Saxon portion of the community.

We quote as follows:—

"If a parent has merely a duty to preserve the life and health of a child, it certainly would not seem to be the arbiter of its death. And one agreeing with the parent that neglects to care for its life is to be in pursuance of a purpose that its death without care will probably occur, appears to us opposed to every principle in our law. If our government regards the right to life as preserved, instead of further endangered by our law, what right has any citizen to agree for the benefit of society that a particular child is not entitled to the blessing of life? And may anyone determine that there is no deprivation of the blessing of life as to any being? If he has a reason that satisfies him, may not another have another reason that satisfies him, that there is no blessing in a particular life? The result of such reasoning would not be in furtherance of government, but in direct support of anarchy. We have shown, we think, that an agreement with a parent for a child to be permitted to die from neglect is one to accomplish a crime. It therefore excuses no one that he makes such an agreement. But it may be evidence against him of deliberation to perpetrate a crime. What crime may this be if death results? It has been laid down as a principle in criminal law that taking the life of one affected with an incurable disease in no way extenuates the guilt of his slayer: 21 Am. & Eng. Encyc. Law 93, citing authorities. It is also a principle that punishable homicide may be the involuntary result of any unlawful act or conduct. Is it not an

unlawful act or unlawful conduct for a physician to advise a parent that he has no duty to care for the life of his child, and he, with his parent's consent, will withhold from the child the means of life? It is a principle of law that one who from domestic relationship has the custody of an imbecile child, or any child having any incapacity of mind or body, is guilty of manslaughter, "if by culpable negligence he lets the helpless creature die:" *Reg.* v. *Cox*, 13 Cox C. C. 75. If such a ruling could be made in a monarchical government, *a fortiori* might it be made in a country where its constitution is framed to secure the inalienable right to life. This editorial is suggested by the recent determination by a physician in a Chicago hospital, upon consent of a child's parent, to withhold from a child the benefits of an operation, that would have saved its life. The reasoning to this conclusion was that the child was a monstrosity in deformity and probable lack of brain power. It was only agreed that this course could be taken as to such a child, and not as to a normal child. Waiving, however, the question of ultimate benefit to society in the child's not being permitted to live, first it is denied that there is any distinction under our law in the right of a defective child to life and of one that is normal. Secondly, if there is such a distinction, law should provide the means for its application. Until this is done the distinction is non-existent. Theorists as to what will benefit society, more should be bound by the rules that society makes for itself than others are. Back, however, of all statute on this subject, our contention is that any statute, which contemplates the depriving of another of life except as a forfeit for crime, would be unconstitutional. In conclusion, we may say if the physician assumes to act for the parent, he stands in *loco parentis* and is bound as the parent would have been bound for neglect to save the life of the child. If this doctor's position is right and lawful, then the eugenics may urge that, for moral defectiveness, a child may, upon consent of a parent, be neglected though he surely will die from the neglect. The upshot of all of this is that physical or moral defectives may be submitted to vivisection as the supreme requirement of science. And so the fame of Herod will "pale its ineffectual fires." We do not wish to assail this doctor's moral

view—we have nothing in a law journal to say about that. We do say, however, that he seems never to have asked himself how he, as arbiter of death, would stand as to the law of the country where he lives.

LAW REPORTING.

Lord Reading, Chief Justice of England, a member of the Anglo-French Commission seeking the great war loan lately negotiated, is reported to have said, at a reception in his honour by the New York Bar Association:—"I am strongly impressed with the undesirability of the constant reporting of decisions which lay down no new principles, but only repeat the application of old principles to new facts. To make one's self familiar with your law, it is necessary to look up not only all the decisions, but all the statutes of your 48 states. I wonder how you surmount this mountain of legal knowledge. The system of citing corroborating cases has been changed with us. We now strive to get at the merits, to allow no technicalities to prevent the court from perceiving the true facts and arriving at a just decision, notwithstanding all the learned counsel that appear before the judge."

The *Central Law Journal* remarks that, had the Chief Justice said "opinions," instead of "decisions," he would have more accurately portrayed the evil of which he spoke; but the context induces the thought that he meant "opinions" rather than "decisions," in the strict sense of the latter word. The immense output of language in opinions by judges, rather than the rendering of decisions, which only repeat the application of old principles to new facts, is said to be the real burden of American jurisprudence.

Another burden laid upon us is what we would venture to call the pernicious practice of individual dissenting opinions of appellate judges, certainly of judges of Courts of last resort, being reported. What is needed is to have reported the decision arrived at by the Court; in other words, what the majority of the judges decide. The desideratum is certainty and conciseness.

We want to know what the law is, not what dissentient judges think the law, in their opinion, ought to be.

The same writer, as to this point, says that the present practice is one of the ways that opinions by appellate judges have of unsettling, instead of settling, the application of old principles to new facts. Suppose two cases where two opinions by two judges of the same bench apply the same old principle in the same way, but differ in their reasoning to this end. Then attorneys in another case of slightly differing facts will "divide a hair twixt south and south-west side," with these opinions as the basis for their contentions.

NOTES FROM THE ENGLISH INNS OF COURT.

1915 IN THE LEGAL WORLD.

"It is not without interest that in the seventh century after Magna Charta the country should again be struggling against a despotism of an even more serious character, which would enslave a world, and put the higher ideals of civilization beneath the domination of brute force." Thus a writer in the *Law Times* on January 1, 1915, aptly concludes an article entitled "1915." To the English lawyer the year that has just come to an end has been an eventful one indeed.

When John signed the famous Charter, he attached his sign manual to something which was to crystallize, for ever more, the relationship between British sovereign and British people.

He laid the foundation of one of the pillars of our municipal law. So it is hoped that, when the war has ended, the terms of peace will mark an era in the law of nations. They should signify that observance of the international code as it was understood prior to August, 1914, has enabled the Allies to triumph over those who have been guided solely by the rule that "Might is Right."

THE TRUE MEANING OF VICTORY.

What will be the true significance of victory from the English point of view? We are engaged in this war as a nation;

our existence depends upon the outcome of the conflict. Our institutions are fighting the institutions of the Central Empires. Is the "freedom" of Prussia to defeat the "freedom" of England? One had grown a little tired, even before the war, of this boasted German freedom. What did—what does it mean when the German sings of "Einigkeit und recht und freiheit" in his National Anthem? His freedom involves—has involved for years—conscription; lese majeste, compulsory vaccination; police supervision everywhere, "streng verboten," writ large on notice boards up and down the Fatherland. To compare English with German freedom is to compare Amaryllis to a satyr!

Is the German so-called freedom to prevail over British free institutions? Given a victorious Germany and the British Empire, whose unity has been so amply demonstrated during the last eighteen months, may cease to exist as such. Her several parts may fall asunder.

What Holds the Empire Together?

That there is a bond which at present holds the Empire of King George together is certain. It is a bond which is almost imperceptible; so much so that the German, who in other respects has shewn himself an admirable imitator, is wholly unable to copy it. Germany endeavoured to create a colonial empire; but she signally failed. When Togoland was surrendered about a year ago, the former native subjects of the Kaiser lined the streets in their thousands to cheer and welcome the victorious British force. The dusky African hated the German colonist and was glad to be rid of him. What is it, then, which makes the native, be his creed or colour what it may, cheerfully submit to British rule? Let the answer to this question be supplied by one who is not a lawyer.

Lord Curzon's View.

The writer once heard Lord Curzon address a number of law students at the annual dinner of the Hardwicke Society. The speaker had not long since returned from India, where he had

served the office of Viceroy. He took occasion to explain to his audience what he conceived to be the real secret of the success of British rule in India. It was not the army; it was not the civil service; it was, in his considered opinion, the administration of the law in accordance with English ideals. "The Bengali peasant," said Lord Curzon, "knows that if he brings suit against a neighbouring landowner his cause will be heard promptly and tried impartially. To none in the Empire of India do we sell, delay or deny justice." He went on to say that however high the native opinion of the local courts, they are considered as nought compared to the Judicial Committee of the Privy Council. Each member of that august tribunal is almost worshipped as a god. It is the rule of law according to English ideals that appeals to the native in all parts of the world.

Counsel's Clerks.

The war is affecting "counsel learned in the law" in more ways than one. As a rule a number of men share chambers in the Temple. A single clerk, aided (sometimes) by a boy, looks after them all and derives emolument from the practice of each. Many a barrister's clerk is now serving his country on land or sea, while his principals are left to the tender mercies of "the boy." In some cases, owing to the serious shortage of labour, chambers are being run without a clerk of any kind. In a profession which is full of anomalies, the barrister's clerk is, perhaps, the most striking anomaly of all. He is employed by the barrister and paid by the client, the clerks' fees being solemnly recognized in the Rules and allowed on taxation. The minimum fee of an utter barrister is £1 3s. 6d. If and whenever it is paid the clerk gets the odd half crown. It sometimes happens that two men, who share chambers, are opposed to each other in a cause. In that event the clerk cheerfully draws the clerks' fees from both sides.

Relations with the Clerk.

In the Temple there are clerks and clerks. The writer has heard one King's Counsel say: "I owe all my success at the Bar

to my clerk." Another, equally eminent in his profession said: "I got on in spite of my clerk." At times the relationship is of a most cordial description. When an eminent Chancery Judge, who has recently retired, was a junior in flourishing practice he lived, to all outward appearances, in a state of constant embroilment with his clerk. The latter said to the writer upon one occasion: "The governor dismisses me nearly every week, but I turns up, reg'lar, on Monday mornings." Man and boy, he was clerk for 40 years, following his master on to the Bench. When this faithful servant died, a few years ago, the learned judge was heartbroken.

How a Barrister's Clerk was Outwitted.

A story used to be told about the clerk to an eminent common law judge now, alas, no more. In the midst of an enormous practice, his master was raised to the Bench. A fat brief had just been delivered, which the clerk was told to return to the solicitor. He was to point out, however, that it would be contrary to etiquette to return the fee. The solicitor came round to congratulate the eminent King's Counsel upon the honour which the Lord Chancellor had conferred upon him. To the clerk he said: "I am greatly obliged to you for returning the papers; and as I knew it might be a violation of professional usage for you to return the cheque, I took the precaution of stopping it at the bank."

Re New Year's Honours.

Of the members of the legal profession honoured by the King on New Year's Day one of the most conspicuous is Lord Mersey, who has received a step in the peerage. He will in future be known as Viscount Mersey. A man of charming personality and high legal attainments, his promotion is well deserved. One is reminded of a famous mot attributed to this distinguished judge, when he first became a member of the Upper House. An old member of the Northern Circuit, to which the present Attorney-General (Sir F. E. Smith) also belonged,

Sir John Bigham was first a puisne judge. He was then made President of the Probate, Divorce and Admiralty Division. Finally he became a law lord. Mr. F. E. Smith was then in the full tide of his early and great success at the Bar. When some one chaffed Sir John Bigham for having assumed the somewhat grandiloquent title of Lord Mersey, he replied: "Yes! But I've left the Atlantic Ocean for F. E. Smith!"

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LIABILITY OF OWNER FOR NEGLIGENCE OF MEMBER OF HIS FAMILY IN OPERATING AUTOMOBILE.

There are two theories on which the owner of an automobile may be held liable for injuries caused by his machine while it is being operated by another. One is founded on agency or the relation of master and servant; the other is based on negligence of his own in intrusting his machine to one who is incompetent or has not the ability to properly operate the machine. These rules are applicable whether or not the operator is a member of the owner's family.

An automobile is not in itself a dangerous instrument and the rule of law relating to liability for injuries caused by dangerous animals, explosives, and the like does not apply to its use.

However, an automobile is a machine that is capable of doing great damage if not carefully handled, and for this reason the owner must use care in allowing others to assume control over it. If he intrusts it to a child of such tender years that the probable consequence is that he will injure others in the operation of the car, or if the person permitted to operate the car is known to be incompetent and incapable of properly running it, although not a child, the owner will be held accountable for the damage done, because his negligence in intrusting the car to an incompetent person is deemed to be the proximate cause of the damage.

Automobile Kept for Use of Family.—One who keeps an automobile for the pleasure and convenience of himself and his family

is liable for injuries caused by the negligent operation of the machine while it is being used for the pleasure or convenience of a member of his family.

This is on the theory that the principal or master is responsible for the wrongful acts of his agent or servant committed while acting under his express or implied authority and in furtherance of his business.

And the fact that a son, member of the owner's family for whose pleasure the automobile is maintained, was operating the same for his own pleasure, does not change his relation of agent to his father, because the father made it part of his business to furnish pleasure to his son.

Thus, in an action in which it appeared that a father kept an automobile which he authorized his child to use for pleasure at any time, and that the child operated the car so negligently that she caused a collision with another machine, to the injury of the occupants of the other machine, it was held that the liability of the owner was a question for the jury. In this respect the Court said: "Defendant might properly make it an element of his business to provide pleasure for his family; and, as the car was intended for the use of the members of the family for purposes of pleasure, as well as for other purposes, and the daughter had authority to take it and operate it for such purposes, it was at least a question for the jury whether, at the time of the accident, she was not the servant of the defendant and engaged upon the business of defendant."

Where the owner of an automobile gave his wife general authority to use the machine whenever she desired to do so, and his son, who was the only member of the family licensed to drive the machine, was expected to obey the mother, such owner was held liable for injuries caused by the negligent operation of the machine by the son who was driving it with his mother and at her request.

So, too, an owner who keeps an automobile for the use of his family, and who directs his chauffeur to take their orders, is liable for injuries caused by the negligence of the chauffeur while operating the machine under the directions of the owner's son.

A father who kept an automobile for his family's use was liable for injuries caused by its negligent operation by his minor son who was driving the machine for the pleasure of himself and sister, and a friend, who was a guest of the father's family, it being held that the son was performing the business of the father at the time.

In an action against a father and son to recover for the death of plaintiff's husband, caused by his team, which he was driving on a public highway, becoming frightened by the negligent operation of the defendant father's automobile, while it was being driven by the defendant son, and running away, it appeared that about a year prior to the accident the father bought the automobile for the use of himself and family, which consisted of several members, including the defendant son and two other sons, all of whom learned to operate the machine, but the father did not learn to operate it. The defendant son had reached his majority, was married, worked in the bank of which his father was president, and lived with his father's family as a member thereof, paying no board. The father testified that when he purchased the machine none of the children were to use it without his or his wife's consent, but that at no time had any of them been refused the use of it when requested. On the day of the accident the father was absent, and the son was working in the bank as usual. That afternoon the machine was left in front of the bank by the mother, and at about 4.30 in the afternoon the son and the other employees in the bank took the automobile and went into the country a few miles for a pleasure ride, and it was on the return trip that the accident occurred. It was held that the father was liable, the Court, in part, saying: "When the ownership of the machine was conceded, the presumption arose that when defendant's son was using it he had his father's consent therefor, and the burden was then cast upon the father to prove to the satisfaction of the jury that no consent was given. The facts disclosed by the testimony tended strongly to prove that the son had the actual or implied consent of the mother. The machine was left standing in front of the bank, where the son was employed, having been left there by his mother, and there being no showing that she

intended to or did return there for it, and he was permitted without objection from anyone to take it and go upon a pleasure trip."

Where the niece of the owner of a car, who resided in his household, was operating the machine at the time of an accident, but was not operating it for any general or special purpose of the owner, but for her own purposes, the owner was held not to be liable.

One Hayes owned an automobile which he kept for the general use of his immediate family, and it was for this purpose habitually operated by himself and his two sons (who were members of his family), sometimes with and sometimes without his express consent or direction. On the occasion in question one of the sons was driving the car, and it contained also the wife and daughter of the father, who were also members of his immediate family, and two others, one a young lady guest of the daughter, and the other a young man guest of the son. While on this trip the plaintiff, a little girl 7 years of age, was injured by the negligent operation of the automobile. It was held that these facts were sufficient to form a basis for a finding that the son was acting as the servant of the father and within the scope of his employment as such. Hence, judgment against the father was affirmed.

In this case the Court said: "In the present case there exists a very important fact, which is that the automobile at the time of the accident was occupied by the father's immediate family and their guests. This fact constituted affirmative evidence that the automobile was being used in the father's affairs or business. It was within the scope of the father's business to furnish his wife and daughter, who were living with him as members of his immediate family, with outdoor recreation just the same as it was his business to furnish them with food and clothing, or to minister to their health in other ways. It cannot be said, therefore, that in this case there was no evidence of possession except a mere presumption which could be overcome by proof of inconsistent facts. Here there was affirmative proof of the fact of possession quite apart from any presumption."

Where the head of a family kept an automobile for the pleasure of himself and family, and it was customary for his son, 24 years

of age, who was a law student, and lived at home, to act as chauffeur when the car was used by his father or any other members of the family, it was held that the owner was not liable for injuries caused by the negligent operation of the car by the son when he had taken the car for a pleasure drive accompanied by several of his friends, neither the owner nor any other member of the family, except the son, being in the party. The Court held, that at the time of the accident the car was neither expressly nor constructively in the use or service of the owner, and that in driving the car the son was in no way acting as the agent of the father.

A married woman owned an automobile as her separate property, and with her consent it was used for and by the family in the usual manner of family conveyances, being driven by different members of the family, including her son. On the day in question she was absent from home, but, with her approval, given before her departure, her daughter, a member of the family, gave a luncheon to some of her friends. To assist in the work of the luncheon an extra servant was procured for the day, and, during the evening, it became necessary to convey this servant to a street car that she might return to her home. The son, at the request of the daughter, his sister, then proceeded with the servant to the street car in his mother's automobile, and during the trip negligently ran over and injured a person. The owner knew nothing about this use being made of the machine, but, as she testified, the machine was there to be used for family purposes as the occasion might arise. It was held that the owner of the automobile was liable.

In a jurisdiction holding that where it is shown that the vehicle doing the damage belonged to defendant at the time of the accident, that fact raises the presumption that the vehicle was then in the possession of the owner, and that whoever was driving it was doing so for the owner, it was held that this presumption was not overcome as a matter of law by evidence of mere advice and an expression of preference on the part of a parent, owner of an automobile which injured a pedestrian while being operated by his daughter, some weeks before the accident, that the daughter should not drive the machine.

While it has been declared that where a parent provides an automobile for the pleasure of his adult child and an injury is caused to another by the negligent operation of the machine while it is being driven by a third person at the direction, and for the pleasure of the child, the owner is not liable, the contrary has been held and seems to be the correct view. Accordingly, where an automobile was kept for the pleasure of the grown daughter of the owner, and an accident occurred while the machine was temporarily being driven by another young lady, with the daughter's permission, the daughter and several of her friends being in the car at the time, the owner was held liable.

Adult child.—In respect of competent adult children, the liability of the parent can be based only upon the relation of master and servant, or, as it is sometimes termed, upon "agency" Liability cannot be cast upon a person merely because he owns a car that causes injury to another, or because he permits his son to drive the car whenever he wishes to do so. Liability arises from the relation of master and servant, and must be determined by the inquiry whether the driving at the time was within the authority of the master, in the execution of his orders, or the doing of his work.

There must be some evidence that a child who is competent to operate an automobile was operating the same by authority of his father, as agent or servant of his father, before the latter can be held liable for his negligence—that the machine was being operated in connection with the father's business, or to carry out some wish or desire or purpose of the father—it may be to furnish pleasure to the child. Such authority may be found in actual presence of the father, in express or implied direction, or in a precedent course of conduct. If the act is within the general scope of authority conferred by the father, or in carrying out the enterprise for which the son has been commissioned, then the father may be liable even though he had no knowledge of the specific conduct in question and it was contrary to his direction. If the act is not done by the son in furtherance of the father's business, but in performance of some independent design of his own, the father is not liable.

Where an accident occurred while an automobile was being operated by a chauffeur at the direction of the owner's daughter it was said that the owner was not liable simply because of the relationship, but that to render her liable there must have existed an authority from the mother to the daughter to do the act, or a subsequent ratification of it.

A mother, riding in an automobile with her son, merely at his invitation, is not liable for his negligent operation of the car.

The plaintiff, in a personal injury action, was struck and injured by defendant's automobile while it was being driven by defendant's stepson, who was grown and married, and who occupied an apartment in the same building in which defendant lived. The defendant owned and maintained the automobile as a pleasure car for his family, and the stepson drove the car for defendant and his family at times, but did not have authority to get or use the car without permission from defendant or his wife. He had used it by express permission on a few occasions. On the day of the accident neither defendant nor his wife was at home, and the stepson took the car to go after his wife, and while returning home the accident happened. It was held that the stepson was liable, but that defendant was not.

The fact that the agency is not a business one, and the services of the child not remunerative, does not affect the question of liability.

Minor Child.—Aside from the question of agency or the relation of master and servant, in order to render a parent liable for an injury caused by the negligence of his minor child, it is essential that the parent might reasonably have anticipated the injury as a consequence of permitting the child to employ the instrument which produced the injury, and that the parent's negligence made it possible for the child to cause the injury complained of.

Thus, if a parent should place his automobile in charge of a child of tender years, who is incompetent and unable on account of his youth to safely operate such a machine, he will be held liable for injuries caused thereby. But this liability is on account of his own negligence in intrusting his automobile to the child, and does not arise from any imputed negligence of the child.

Where a parent purchased a large, heavy automobile for the use of his son, 11 years old and weighing 85 pounds, and the machine was kept at a garage subject to the boy's orders, the father paying the bills, and the boy was permitted to drive the machine whenever he wanted to, and he injured a pedestrian on a busy city street, along which he was recklessly driving at the time, it was held that the parent was liable.

So, where a father permits his 16-year-old son to operate the father's car, in violation of a statute prohibiting persons under 18 years of age from operating automobiles, except under certain conditions, is liable for an injury caused by the son's negligent operation of the machine. Such a statute, in effect, declares that such persons do not possess the requisite care and judgment to run motor vehicles on the public highways without endangering the lives and limbs of others.

A petition which alleged that the defendant was a widow, having the exclusive control and custody of her minor unmarried daughter; that defendant was the owner of a certain automobile; and the daughter was riding in said automobile, having authority and command over its movements, when it was negligently caused to run down and injure the plaintiff, was held to state no liability on the part of defendant.

A physician owned two automobiles, which he used in connection with his practice, and regularly employed a chauffeur to drive them. His son 18 or 19 years old, was permitted to use one of the machines for his own purposes when it was not otherwise in demand. On the occasion in question he was so using the machine, having with him two other young men, who were not members of his father's household, and ran down and killed a pedestrian. It was held that the father was not liable for the son's negligence at such time.

Although a child may be a minor, if he is of such an age of discretion and has such ability to operate an automobile that it cannot be said that the father is negligent in permitting him to use his machine, then the father cannot be held liable, aside from the question of agency or the like, if the son takes the car with the father's permission and while operating it for his own pleasure negligently injures someone.—*Central Law Journal.*

PARENT AND SCHOOLMASTER.

The case of *Nunn* v. *Selwyn* (*Times*, 22nd inst.) tells of a conflict between a schoolmaster and a parent with regard to the exercise of authority over a scholar which one would hardly believe could have arisen; yet in such relations it is as a rule only singular circumstances which bring a case in to court. It is singular, for instance, that a schoolmaster should ever have caused the death of his scholar by flogging; but such a case —one of extraordinary brutality, which resulted only in a penalty of four years' penal servitude—is the leading authority on the power of a schoolmaster to administer punishment. "By the law of England a parent or a schoolmaster (who for this purpose represents the parent and has the parental authority delegated to him) may, for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable" (*per* Cockburn, C.J., in *Reg.* v. *Hopley* (1861), 2 F. & F., p. 206). And in *Fitzgerald* v. *Northcote* (1865), 4 F. & F. 656, which raised questions of the rights of detention and expulsion, the same judge said: "A parent, when he places his child with a schoolmaster, delegates to him all his own authority, so far as it is necessary for the welfare of the child." But, of course, the parent can revoke the authority at any time. The effect of an agreement handing over the custody of a child is, it was said by Lord Esher, M.R., in *Reg.* v. *Barnardo* (24 Q.B.D., p. 291), only to give to the custodian "authority to do certain things as long as such authority remains unrevoked." And if a contract can be made out not to revoke the authority, then the remedy is on the contract. It does not prevent the revocation. On these principles it seems to follow quite clearly that a schoolmaster cannot punish a boy for doing what the parent has told the boy to do. Any delegated authority for this purpose has been revoked, and the schoolmaster's remedy, if any, is against the parent. Moreover, the chastisement is not "for the purpose of correcting what is evil in the child," for the child's obvious duty is to obey the

parent in preference to the schoolmaster. In the case in question a schoolmaster—the Warden of Radley College—caned a boy for remaining at home longer than the school regulations permitted, but under express parental sanction. Such chastisement could not be justified, and the case resulted in a verdict of £10 against the schoolmaster—a light enough verdict, but fortunately the caning was light.—*Solicitors' Journal.*

The Divisional Court has just disposed of the rule for the issue of a writ of attachment which was granted last week in *Re Hobbs* v. *National Steam Car Co. (Limited)*; *Rex* v. *Levy* (*Times*, 18th inst.). It appears that the defendant Levy's brother was summoned on a jury, but was unable to attend, so the defendant good-naturedly took his place—and presumably decided the point at issue, just as his brother would have done. But an aggrieved party found out the personation, and moved for his attachment, on the ground that he had committed a substantive contempt. When the preliminary ex parte application was made last October, Bray, J., was at first inclined to think that the circumstances disclosed a common law offence—perhaps obtaining the jury fee by false pretences, or illegal usurpation of a public duty. But in any case the existence of such an offence could not purge the contempt of court, or prevent a writ of attachment from issuing; the maxim nemo debet bis vexari does not apply where one alleged wrong is civil and the other is criminal. The Court has now held that a contempt had clearly been committed, and has ordered the defendant to pay costs, allowing the writ to be withdrawn on tender of an apology. Clearly the course of justice is interfered with if an unauthorized person adjudicates upon a case; and if he does so wilfullly his conduct amounts to a contempt.—*Solicitors' Journal.*

REVIEW OF CURRENT ENGLISH CASES.

SHIP—GENERAL AVERAGE ACT—SHIP AND CARGO IN DANGER—DAMAGE TO DOCK—TORTFEASORS—CONTRIBUTION.

Austin Friars S.S. Co. v. *Spillers* (1915) 3 K.B. 586. This was an act on by shipowners against the owners of the cargo for contribution to general average loss. The ship and cargo being in peril, and the pilot on board having to choose between running the vessel aground or entering a dock, at the risk of striking the dock pier, chose, as the Court found, properly, the latter alternative, and, in so doing, damaged the vessel to the extent of £1,600 and the dock to the extent of £5,000. The plaintiffs claimed contribution from the defendants in respect of these two sums. Bailhache, J., who tried the action, held that the plaintiffs were entitled to recover,and the Court of Appeal (Cozens-Hardy, M.R., and Pickford and Warrington, L.JJ.) affirmed his decision, holding that the common law rule as to there being no contribution between tortfeasors was not applicable to cases of contribution in general average.

AFFIDAVIT—DESCRIPTION OF GRANTOR'S OCCUPATION—"BAPTIST MINISTER."

Barron v. *Potter* (1915) 3 K.B. 593 may be briefly noticed. By the English Bills of Sales Act an affidavit is required to be filed giving, *inter alia*, a description of the residence and occupation of the person making the bill of sale. In this case the grantor was described as "a Baptist minister." It appeared that the grantor was a qualified Baptist minister, and until four or five years before the making of the bill had been in regular occupation as a pastor, but had held no pastorate since. In the interval he had preached, lectured, and visited the poor, but not in connection with any particular church. Since making the bill of sale he had preached on several occasions at Chelmsford. He was a director of three or four companies, and, with the assistance of a secretary, conducted his business in connection with them from an address in London, and the bill of sale was given for the purposes of such business. Atkin, J., in the circumstances, held that "Baptist minister" did not properly describe the actual occupation of the grantor, but Lush, J., who sat with him in the Divisional Court, dissented. The Court of Appeal (Cozens-Hardy, M.R., and Pickford and Warrington, L.JJ.)

agreed with Atkin, J., being of opinion that his business in respect of which the bill of sale was given should also have been given.

WAR—CROWN—PREROGATIVE—DEFENCE OF THE REALM—RIGHT OF CROWN TO TAKE POSSESSION OF LAND WITHOUT COMPENSATION—DEFENCE OF THE REALM ACT, 1914 (5 GEO. 5 c. 8).

In re a Petition Of Right (1915) 3 K.B. 649. In this matter it was held by Avory, J., and his decision was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Pickford and Hardy, L.JJ.), that in time of war the naval and military authorities of the Crown, by virtue of the Royal Prerogative and the Defence of the Realm Act, 1914 (5 Geo. 5 c.8), and the regulations made thereunder, may take possession of and occupy any lands and premises for the defence of the realm without making any compensation to the owner, and that the prerogative is not limited to a case of actual invasion rendering immediate action necessary.

CONTRACT—IMPOSSIBILITY OF PERFORMANCE OWING TO ACT OF CROWN—IMPLIED CONDITION—SALE OF SPECIFIC GOODS—GOODS REQUISITIONED BY CROWN BEFORE DELIVERY AND BEFORE PROPERTY PASSED TO PURCHASER.

In re Shipton and Harrison (1915) 3 K.B. 676. This was a case stated by arbitrators. Shipton agreed to sell to Harrison a quantity of wheat. Before delivery to, and before the property in the wheat passed to, Harrison, it was requisitioned by and delivered to officers of the Crown, and the question was whether, in these circumstances, the seller was legally excused from carrying out his contract. The Divisional Court (Lord Reading, C.J., and Darling and Lush, JJ.) held that he was.

CRIMINAL LAW — HOUSEBREAKING INSTRUMENT — WORKMAN'S TOOLS—POSSESSION AT NIGHT—ONUS OF PROOF—LARCENY ACT, 1861 (24-25 VICT. c. 96), s. 58—(R.S.C. c. 146, s. 464 (*a*)).

The King v. Ward (1915) 3 K.B. 696. By the English Larceny Act, 1861, s. 58 (see R.S.C. c. 146, s. 146 (*a*)), it is an offence for a person to be found by night in possession of an implement of housebreaking without lawful excuse, the proof of which shall lie on such person. In this case it was held by the Court of Criminal Appeal (Lord Reading, C.J. and Ridley and Bailhache, JJ.) that the onus of showing lawful excuse is discharged by the accused person if he proves that the alleged instrument of housebreaking, though capable of being used for that purpose, is a tool used by him in his trade or calling.

ALIEN—NATIONALITY—SON BORN ABROAD OF NATURALIZED BRITISH SUBJECT.

The King v. *The Superintendent of Albany St. Police Station* (1915) 3 K.B. 716. The question in this case was whether a person born in Germany in 1884, whose father was a naturalized British subject, was also a British subject. If his father were a natural-born British subject, the son would also (under 4 Geo. 2 c. 21) have been a British subject, but that Act and the Act of 1772 (13 Geo. 3 c. 21) were held by the Divisional Court (Lord Reading, C.J., and Darling and Lush, JJ.) not to apply to the children or grandchildren of naturalized British subjects, but only to those of natural-born British subjects. It was, therefore, held that the applicant was not a British subject, and was properly interned as an alien enemy.

MERCHANDISE—FALSE TRADE DESCRIPTION—"NORWEGIAN SARDINES"—50-51 VICT. c. 28—(R.S.C. c. 146, s. 489).

Lemy v. *Watson* (1915) 3 K.B. 731. This was a prosecution for selling goods with a false trade description. The goods in question were marked "Norwegian sardines." Sardine is the French name for pilchard. The goods in question were not pilchards, but brislings, a Norwegian fish similar to the sprat, and it was held that this was an offence against the Act (50 & 51 Vict. c. 28), and not excused under s. 18.

ADMIRALTY—SALVAGE—CONTRACT OF TOWAGE—"NO CURE, NO PAY, NO SALVAGE"—LIABILITY OF CARGO OWNER FOR SALVAGE—PROTECTION OF SEAMEN AGAINST ABANDONMENT OF RIGHT TO SALVAGE—MERCHANT SHIPPING ACT, 1894 (57-58 VICT. 60, s. 156.

The Leon Blum (1915) P. 290. This was an action by the owner, master and seamen of a tug to recover a claim for salvage against the owners of the cargo on board the Leon Blum. The tug had made a contract for towing this vessel, and the owners of the tug had agreed that they would perform the contract on the terms "No cure, no pay, no salvage charges." While the vessel was in tow, her position became critical, and salvage services were rendered by the tug. The owners of the cargo claimed to be entitled to the benefit of the contract made with the owners of the vessel, but the Court of Appeal (Eady, Phillimore, and Bankes, L.JJ.) held, affirming the judgment of Evans, P.P.D., that they were not so entitled, because the contract did not purport to be made for them or for their benefit, but solely with

and for the vessel owners; and because, even if it was intended to apply to the cargo, such contracts, as far as the master and seamen were concerned, are prohibited by the Merchant Shipping Act, 1894 (57-58 Vict. c. 60), s. 156, which says that "A seaman shall not . . . abandon any right that he may have or obtain in the nature of salvage, and every stipulation in any agreement inconsistent with any provision of this Act shall be void," and, therefore, the owners had no power to bind the master and the crew to any agreement to waive their claim to salvages, and, as regards the owners, they were entitled to recover, because the contract they made with the tug owners was not so made as agents of, or for the benefit of the cargo owners, but solely for themselves.

INSURANCE (ACCIDENT) — POLICY — EXCEPTIONS — ACCIDENT CAUSED BY ANYTHING SWALLOWED OR INHALED—DEATH BY INVOLUNTARY INHALATION OF NOXIOUS GAS.

In re United London and Scottish Ins. Co. (1915) 2 Ch. 167. This was a summary proceeding for the construction of a clause in an accident policy. The clause in question excepted, *inter alia*, accidents caused by "anything swallowed, or administered, or inhaled." The assured came to his death by involuntarily inhaling coal gas. Astbury, J., held that this was not within the exception, but the Court of Appeal (Lord Cozens-Hardy, M.R., and Pickford and Warrington, L.JJ.) held that it was, and reversed his decision.

INTESTACY—VERDICT OF INQUEST THAT SON OF INTESTATE MURDERED HIM—INDICTMENT FOR MURDER—INSANITY—INDICTMENT NOT PROCEEDED WITH—RIGHT TO SHARE IN FATHER'S ESTATE.

In re Houghton, Houghton v. *Houghton* (1915) 2 Ch. 173. The facts in this case were that a son killed his father, and a coroner's jury returned a verdict of murder against him. He was accordingly indicted for murder, but, being found to be insane, the indictment was not prosecuted. In these circumstances Joyce, J., held that the son was not precluded from sharing in his father's estate.

COMPANY—WINDING—DISTRESS FOR RENT PAYABLE IN ADVANCE ——DISTRESS BEFORE COMMENCEMENT OF WINDING-UP—INJUNCTION—(R.S.C. c. 144, s. 22).

Venner's Electrical Appliances v. *Thorpe* (1915) 2 Ch. 404. This was an action for an injunction to restrain the defendant

from proceeding with a distress for rent payable in advance, on the ground that winding-up proceedings had been commenced against the plaintiff company. Neville, J., refused the motion, on the ground that the distress had been levied before the winding-up, and it was not shewn that it would be inequitable to allow it to proceed, and with this view the Court of Appeal (Cozens-Hardy, M.R., and Pickford and Warrington, L.JJ.) agreed, and the fact that the rent was payable in advance was held to be no special reason for restraining the distress.

CONSTRUCTION OF DEED—APPOINTMENT OF "TRUST FUNDS AND PROPERTY" WITHOUT WORDS OF LIMITATION—ABSOLUTE INTEREST—(R.S.O. c. 109, s. 5).

In re Nutt, McLaughlin v. *McLaughlin* (1915) 2 Ch. 431. In this case a tenant for life, having power to appoint the remainder of the trust estate in favour of her children, executed a deed of appointment of "the trust funds and property" in favour of her four sons in equal shares without any words of limitation. The trust estate consisted of money and real estate, and money subject to a trust to be laid out in the purchase of real estate, and the question was raised whether the sons took the real estate and money to be laid out in real estate absolutely or only as tenants for life. Neville, J., held that it was clear under the appointment that the sons were to take the money absolutely, and also the money to be laid out in land, which must be regarded as money, because the notional conversion in equity had never been carried to such an extreme length as, in the present circumstances, to require it to be regarded as land; and he also held that this disposition of the money sufficiently indicated the intention of the appointor that the appointees should also take the realty absolutely.

WILL—TENANT FOR LIFE AND REMAINDERMAN—UNAUTHORIZED INVESTMENTS HELD AT TESTATOR'S DEATH—POWER TO CONVERT—RIGHT OF TENANT FOR LIFE TO INCOME IN SPECIE.

In re Rogers, Public Trustee v. *Rogers* (1915) 2 Ch. 437. By the will in question in this case, the testator gave all his residuary estate to the Public Trustee, with the consent of the testator's wife, to sell and convert and with the like consent to postpone sale and conversion and to hold proceeds upon trust to invest in certain specified securities and pay the income to the wife during her life. At the time of the testator's death the estate comprised investments not authorized by the will and which

produced a larger income than 4 per cent., and the trustee applied to the Court to determine whether, in these circumstances, the widow, until conversion, was entitled to the income actually received, or only to interest at the rate of 4 per cent., and Neville, J., held that, as conversion, and the postponement of conversion, were both subject to the wife's consent, it was the same as if conversion was postponed until after her death, and, therefore, she was entitled to the income actually received.

COMPANY—WINDING-UP—INSOLVENT SHAREHOLDER INDEBTED TO COMPANY—SET-OFF BETWEEN COMPANY AND ESTATE OF INSOLVENT SHAREHOLDER.

In re Peruvian Ry. Construction Co. (1915) 2 Ch. 442. This was an appeal from the judgment of Sargant, J. (1915) 2 Ch. 144 (noted ante vol. 51, p. 362). A deceased shareholder's estate, which was insolvent, was entitled to a share in the surplus assets of the company which was being wound up; the shareholder was at the time of his death a debtor to the company, and Sargant, J., held that the company was not entitled to set off against the estate's share of the surplus the whole amount of the deceased's debt to the company, but only the dividend which his estate was able to pay in respect of such debt; and the Court of Appeal (Lord Cozens-Hardy, M.R., and Bankes and Warrington, L.JJ.) have now affirmed that decision.

WILL—LEGACY TO CORPORATION—OBJECTS OF COMPANY SUBVERSIVE OF RELIGION—BLASPHEMY—PUBLIC POLICY—VALIDITY OF GIFT.

In re Bowman, Secular Society v. *Bowman* (1915) 2 Ch. 447. This is the case in which the Court upheld a gift to a Secular Society formed, *inter alia*, for promoting "the principle that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action." This thoroughly Germanic principle Mr. Justice Joyce and the Court of Appeal (Lord Cozens-Hardy, M.R., and Pickford and Warrington, LJJ.) hold is not illegal or contrary to public policy, and the gift was held to be valid and enforceable by the Court. We have already (see vol. 51, p. 385) made reference to this case, and have indicated our views on the subject. In arriving at its decision the Court of Appeal overruled *Briggs* v. *Hartley* (1850), 19 L.J. Ch. 416, and *Cowan* v. *Milbourn* (1867), L.R. 2 Ex. 230. The latter case, we may observe, was followed in *Pringle* v. *Napanee*, 43 U.C.R. 285. What happens to a country by the

dissemination of anti-Christian principles amongst its people we are learning to-day by a painful experience.

TRUSTEE IN DEFAULT—SET-OFF OR RETAINER—BENEFICIAL INTEREST OF DEFAULTING TRUSTEE IN TRUST ESTATE.

In re Dacre, Whitaker v. *Dacre* (1915) 2 Ch. 480. Under the will of one Womack, Henry Dacre was appointed a trustee; by the will a legacy was bequeathed to Alice Dacre; she died, and Henry Dacre became entitled to the legacy. He died, and his executors, who were also administrators with the will annexed of Alice Dacre's estate, were now entitled to the legacy. On the death of Henry Dacre it was found that he had received £1,500 of the Womack estate, which he had paid into his private bank account, and had misappropriated all of it but £215 5s. 9d., which at his death remained to the credit of his account, and which had never fallen to a lower figure. The present action was for the administration of Henry Dacre's estate. The surviving trustee of Womack's estate claimed to be entitled to the £215 5s. 9d. as part of the Womack trust estate, and this claim was conceded by the executors of Henry Dacre's estate. He also claimed to set off or retain as against Henry Dacre's defalcation the amount of the legacy to Alice Dacre to which the estate of Henry Dacre was now beneficially entitled. This was resisted by the administrators with the will annexed of Alice Dacre's estate, who were also Henry Dacre's executors, but Sargant, J., held that the trustee of the Womack estate was entitled to retain *pro tanto* the legacy to Alice Dacre as claimed, and it was immaterial that the title of Henry Dacre's estate to that legacy was derivative.

BRIDGE ACROSS CANAL—STATUTORY DUTY TO KEEP BRIDGE IN REPAIR—STANDARD OF REPAIR.

Sharpness R.D. and G. and B. Navigation Co. v. *Attorney-General* (1915) A.C. 654. In this case the House of Lords has been unable to agree with the Court of Appeal. The defendants in the action were empowered by statute to construct a canal across a highway, and were required to make a bridge across the canal in accordance with the requirements of certain commissioners, which bridge the defendants were required by statute from time to time to support, maintain and keep in sufficient repair. The bridge was erected in 1812, in accordance with the requirements of the commissioners; having regard to the present needs of the district, this bridge had become inadequate, and

the action was brought to compel the defendants to put the bridge in a condition to accommodate the existing traffic. This the Court of Appeal held that they were bound to do (1914) 3 K.B. 1 (noted *ante* vol. 50, p. 503), but the House of Lords (Lords Haldane, Dunedin, Atkinson, Parker and Parmoor) hold that all the defendants were required to do was to keep the bridge in the like condition it was when originally erected with the approbation of the commissioners, their Lordships being of the opinion that the defendants' liability in the premises is clearly limited by the terms of the statute under which the bridge was erected, and that they were under no common law liability in respect thereof.

EMPLOYER AND WORKMAN—NEGLIGENCE—PLANT—OMISSION TO PROVIDE SAFETY APPLIANCE—DUTY OF EMPLOYER.

The Toronto Power Co. v. *Paskwan* (1915) A.C. 734. This was an appeal from the Appellate Division of the Supreme Court of Ontario. The action was by the representatives of a deceased workman of the defendants, under the Workmen's Compensation for Injuries Act and Lord Campbell's Act, for damages for occasioning the death of the workman. The death occurred owing to the over-winding of a drum connected with a hoisting apparatus. The jury found *inter alia* that the accident was due to the negligence of the employers, through their master mechanic, in failing to install proper safety appliances and to employ a competent signal man. The Appellate Division affirmed a judgment in favour of the plaintiff by the Judge at the trial, and the Judicial Committee (Lords Atkinson and Parmoor and Sir Geo. Farwell and Sir Arthur Channell) affirmed that decision. The judgment of the Committee contains some useful observations on the duty of employers in regard to their plant, for the efficiency of which it is said they are responsible, and, though they are not bound to adopt all the latest improvements, it is a question of fact in each case whether there has been a want of reasonable care in failing to install the appliance the absence of which is alleged to constitute negligence. In the present case it appeared by the evidence that there had been a previous accident due to the same cause, and that the defendants' superintendent had visited other works to see the safety devices employed, and had come to the conclusion they were not satisfactory, and no attempt to provide any was made on behalf of the defendants. The Committee considered there was evidence proper to be submitted to the jury

or the question of negligence, and that their finding ought not to be disturbed.

RAILWAY—MAN IN CHARGE OF HORSE—"LIVE STOCK SPECIAL CONTRACT"—CONDITION—EXEMPTION FROM LIABILITY—NEGLIGENCE—RAILWAY ACT (R.S.C. 1906, c. 37), ss. 284 (7), 340.

Grand Trunk Ry. v. *Robinson* (1915) A.C. 740. In this case the plaintiff was carried on the defendants' railway, in charge of a horse, under a "live stock special contract" made by the representative of the owner of the horse with the railway company in the presence of the plaintiff, the contract being in a form authorized by the Board of Railway Commissioners. The contract provided for the carriage of the horse, and contained upon its face a condition relieving the railway company from liability for death or injuries, even where caused by negligence, to a person permitted to travel with the horse at less than full fare. The document was handed to the plaintiff, as he knew, in order to shew that he was travelling with the horse, but neither he nor the owner's representative read the condition. Across the contract was printed in large, red type, "Read this special contract," and at the side was written, but not as part of the contract, "Pass man in charge half-fare." The plaintiff was injured, in the course of the journey, through the negligence of the defendants, and the simple question was whether, under the special contract, the defendants were exempt from liability. The Appellate Division set aside the judgment of the Judge at the trial in favour of the plaintiff, but the Supreme Court of Canada reversed the decision of the Appellate Division. The Judicial Committee (Lords Haldane, Dunedin and Parmoor, and Sir Geo. Farwell and Sir Arthur Channell) have now reversed the decision of the Supreme Court of Canada, their Lordships holding that the true inference was that the plaintiff accepted the document knowing that it contained a contract made on his behalf for his conveyance, and that he was bound by the condition on its face exempting the defendants from liability. Their Lordships also hold that, under the Railway Act (R.S.C. c. 37), s. 340, the defendants were entitled to rely on the contract as authorized by the Railway Board, though guilty of negligence, notwithstanding s. 284 (7).

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT OF CANADA.

B.C.] [Nov. 2, 1915.

VANCOUVER BREWERIES, LIMITED v. DANA AND FULLERTON.

Landlord and Tenant—Lease—Licensed Hotel—Accommodation Required by Regulations—Covenant by Lessor—Repairs and Improvements—Loss of Liquor License—Determination of Lease—Implied Condition.

In a lease of property, upon which was situated a hotel licensed to sell liquors, the lessor covenanted to repair and improve the premises in compliance with municipal regulations which might be made from time to time in respect to hotels for which liquor licenses should be granted. During the term of the lease a regulation was made, requiring licensed hotel premises to be enlarged and improved in certain respects, with which the lessor did not comply and, in consequence, the renewal of the liquor license was refused at the end of the license year then current.

Held, that neither the circumstances in which the lease was entered into nor the lessor's covenant to make repairs and improvements gave rise to an implied condition to the effect that the obligation of the tenant to pay the rent reserved should terminate upon the hotel, through no fault attributable to the lessee, ceasing to be licensed premises. *Grimsdick* v. *Sweetman* (1909) 2 K.B. 740, followed.

Judgment appealed from (21 B.C. Rep. 19) affirmed.

Lafleur, K.C., and *Harvey*, K.C., for the appellants. *Wallace Nesbitt*, K.C., for the respondents.

B.C.] READ *v.* COLE. [Nov. 2, 1915.

Solicitor and Client — Fiduciary Relationship — Transfer of Lands—Joint Negotiations—Agreement to Share Profits—Intervention of Third Party—Solicitor's Separate Advantage—Bonus from Third Party—Obligation to Account to Client.

The Government of British Columbia had unsuccessfully at-

tempted, through the agency of A., to obtain a transfer of the rights of a band of Indians in the Kitsilano Reserve. About a year afterwards C. became interested in the matter and arranged with R., a solicitor, that they should undertake to obtain the required transfer on the understanding that any profits made out of the transaction should be equally divided between them. Long negotiations with the band took place without any definite result, when, without the consent of C., through the intervention of A., the transfer was obtained and R. received a sum of money from A. as a share in the profits realized on carrying the transaction through. In an action by C. to recover one-half of the amount so received by R.,

Held, affirming the judgment appealed from (20 B.C. Rep. 365), that throughout the whole transactions the fiduciary relationship of solicitor and client had continued between R. and C. and, consequently, that R. was obliged to account to C. for what he had received from A. as remuneration for services in connection with the business which they had jointly undertaken in order to obtain the transfer of the title from the Indians.

Appeal dismissed with costs.

J. A. Ritchie, for appellant. *J. W. deB. Farris*, for respondent.

Alta.] BOULEVARD HEIGHTS *v.* VEILLEUX. [Nov. 2, 1915.

Construction of Statute—Sales of Subdivided Lands—Registration of Plans—Prohibitive Sanction—Land Titles Act, 6 *Edw. VII.*, c. 24; 5 *Geo. V.*, c. 2 (*Alta.*)—*Retrospective Legislation—Illegality of Contract — Rescission — Recovery of Money Paid—Right of Action—Practice—Pleading—Appeal.*

The effect of the amendment of the Alberta Land Titles Act, 6 Edw. VII., c. 24, by 1 & 2 Geo. V., c. 4, adding the seventh subsection to s. 124 of that Act, is to prohibit sales of land subdivided into lots according to plans of subdivision until after the registration of the plans in the proper lands titles office and also to render any sales made in contravention of the prohibition inoperative.

The vindicatory sanction of invalidity imposed by the statute is directed against the vendor and where there is no presumption of knowledge of the invalidity on the part of the purchaser he cannot be deemed in pari delicto with the vendor and is not de-

prived of the right of action to set aside the agreement and recover back moneys paid thereunder.

After the judgment appealed from had been rendered the statute was further amended (5 Geo. V., c. 2), by the addition of sub-s. 8(a), providing that the seventh sub-section could not be pleaded or relied on in any civil action or proceeding by a party to any such agreement when the plan in question had been registered before the action or proceeding was instituted or where it was the duty of the party pleading to make such registration.

Held, that, as the last amending Act was not a statute declaratory of the law as it stood at the time when the judgment appealed from was rendered, and as appeals to the Supreme Court of Canada are not of the nature of he-hearings to which the principle decided in *Quilter* v. *Mapleson*, 9 Q.B.D. 672, applies, the restricting provisions can have no effect in regard to the decision of the present appeal.

Judgment appealed from, 8 West. W.R. 440, affirmed.

A. H. Clarke, K.C., for appellants. *M. B. Peacock*, for respondent.

B.C.] [Nov. 2, 1915.

ATTORNEY-GENERAL FOR CANADA *v.* RITCHIE CONTRACTING AND SUPPLY CO.

Constitutional Law—Canadian Waters—Sea Coasts—Property in Foreshores—Harbours—Havens — Roadsteads — Ownership of Beds—Construction of Statute—B.N.A. Act, 1867, *ss.* 108, 109.

The term "public harbours" in item 2 of the third schedule of the British North America Act, 1867, is not intended to describe or include portions of the sea coast of Canada having merely a natural confirmation which may render them susceptible of use as harbours for shipping; such potential harbours or havens of refuge are not property of the class transferred to the Dominion of Canada by s. 108 of the British North America Act, 1867. The term used refers only to public harbours existing as such at the time when the provinces became part of the Dominion of Canada.

Per Davies, Idington, Anglin and Brodeur, JJ.:—As that part of Burrard Inlet, on the coast of British Columbia, known as "English Bay," was not in use as a harbour at the time of

the admission of British Columbia into the Dominion of Canada, in 1871, it did not become the property of the Dominion as a "public harbour" within the meaning of s. 108 and the third schedule of the British North America Act, 1867; consequently, the Province of British Columbia retained the property in the bed and foreshore thereof and could validly grant the right of removing sand therefrom.

Per Davies, Idington and Anglin, JJ.:—Inasmuch as the proclamation, by the Dominion Government, on the 3rd of December, 1912, and the Dominion statute, c. 54 of 3 & 4 Geo. V., deal merely with the establishment of the port and the incorporation of the Vancouver Harbour Commissioners, they had not the effect of transferring English Bay from the control of the Provincial Government to that of the Dominion Government nor of giving the Dominion Government any right of property in the bed or foreshore of that bay.

Per Duff, J.:—The transfer effected by s. 108 of the British North America Act, 1867, of the subjects described in the third schedule of that Act was a transfer of property operative upon the passing of the Act and such subjects were necessarily ascertainable at the passing of the Act by the application of the descriptions to the facts then existing, and, consequently, the question of "public harbour" or no "public harbour" must be determined according to the circumstances as they were at the date of the Union.

Per Duff, J.:—The term "public harbour" implies public user as a harbour for commercial purposes as distinguished from purposes of navigation simply, or some recognition, formal or otherwise, of the locality in dispute by the proper public authority as a harbour for such purposes, but the question of "public harbour" or no "public harbour" is a question of fact depending largely upon the particular circumstances.

Per Duff, J.:—If the question of "public harbour" or no "public harbour were to be decided according to the circumstances existing when the dispute arose, English Bay must be held to be now a "public harbour" within the meaning of item 2 of the third schedule of the British North America Act, 1867.

Judgment appealed from (20 B.C. Rep. 333) affirmed. Leave to appeal to the Privy Council granted.

Newcombe, K.C., Deputy-Minister of Justice, for appellants. *L. G. McPhillips*, K.C., and *J. A. Ritchie*, for respondents.

Ont.] TRUSTS AND GUARANTEE CO. *v.* RUNDLE. [Nov. 2, 1915.

Appeal—Probate Court—Surrogate Court—R.S.C., 1906, *c.* 139, *s.* 37(*d*).

Under the terms of s. 37(*d*) of the Supreme Court Act, an appeal lies to the Supreme Court of Canada from the judgment of the Appellate Division of the Supreme Court of Ontario in a case originating in a Surrogate Court of that province. Idington, J., dubitante.

On the merits the judgment of the Appellate Division (32 Ont. L.R. 312) was affirmed. Appeal dismissed with costs.

Rowell, K.C., for appellants. *Hales*, for respondent.

N.S.] McGILLIVRAY *v.* KIMBER. [Nov. 15, 1915.

Pilotage Authority—Compulsory Retirement of Pilot—Judicial Functions—Liability to Action.

The pilotage authority in a pilotage district of Canada has not absolute and arbitrary power to cancel a pilot's license, but can only do so after complaint and proof on oath of incapacity.

If a pilotage authority, by resolution alone, without complaint, notice or investigation, declares a pilot to be dismissed "for neglect and incapacity" and thus prevents him from performing a pilot's duties, inasmuch as they failed to observe the statutory requirements respecting the proceedings for such dismissal they have not exercised judicial functions and are not protected from liability to an action by the pilot for damages. Fitzpatrick, C.J., and Davies, J., dissenting.

Judgment of the Supreme Court of Nova Scotia (48 N.S. Rep. 280) reversed.

Mellish, K.C., and *Finlay Macdonald*, K.C., for appellant. *Rogers*, K.C., for respondents.

EXCHEQUER COURT OF CANADA.

Cassels, J.] [Oct. 30, 1915.

IN RE GAUTHIER AND THE KING.

Constitutional Law—Effect of New Provincial Legislation on Pre-existing Rights of the Crown Represented by Dominion Government—Specific Performance of Contract Entered into by Crown—Dominion Interpretation Act (R.S. 1906, c. 1), s. 10.

Where the Crown, represented by the Dominion Govern-

ment, prior to the enactment of the Ontario Arbitration Act (R.S.O. 1914, c. 65), had the right to revoke any agreement for submission to arbitration to which it may have been a party.

Held, 1. That such right was not taken away by the provisions of the Act mentioned.

2. The court will not decree against the Crown specific performance of contracts entered into with its subjects.

3. Observations upon the effect of s. 10 of the Interpretation Act (R.S.C. 1906, c. 1), in applying the law of the province where a cause of action in tort arises as its exists at the time of the action brought. *The King* v. *Desrosiers*, 41 S.C.R. 75.

McGregor Young, K.C., for suppliant.

Cassels, J.] OLMSTED v. THE KING. [Nov. 12, 1915.

Rideau Canal—Damage to Lands from Flooding—8 Geo. IV., c. 1, s. 26—Limitation of actions.

Suppliants filed their petition of right for damages arising out of the flooding of their lands alleged to have been caused by the negligence of certain officers of the Rideau Canal in keeping the waters of the Canal at an improper level at divers times.

Held, that the claim for damages (if any) arose more than six months before the petitions were filed and that the same was barred by the limitation prescribed in s. 26 of 8 Geo. IV., c. 1, which is still in force.

R. V. Sinclair, K.C., for suppliants. *J. A. Smellie*, for respondent.

Cassels, J.] THE KING v. SUSAN HAMILTON. [Nov. 22, 1915.

Title to Land—Adverse Possession Against Crown—Acknowledgment.

Defendants were claiming title to certain real property by adverse possession of 60 years against the Crown. During the ripening of their statutory title two of defendants' predecessors in possession, under whom they claimed, wrote a letter to the Minister of Public Works, under whose control the property in dispute fell at the date of such letter, in which it was stated that the property had then been in possession of the writers' family for 39 years, and the following request made: "We most urgently and respectfully solicit that the aforesaid lot be sold

to us, as we consider we have the prior right and are willing to pay any reasonable amount for a deed of the same."

Held, that the above letter was an acknowledgment of the Crown's title, and interrupted the operation of the statute in defendants' favour.

A. E. Fripp, K.C., for defendant.

Audette, J.] [Dec. 9, 1915.

THE KING, EX REL. ATTORNEY-GENERAL OF CANADA *v.* MCLAUGHLIN.

Expropriation—Compensation—Offer Made Before Information Filed—Amount of Offer not Based upon Proper Valuation —Market Value — Market Value Established by Sales— Costs.

1. Where an offer of compensation is made to the owner by the Crown prior to legal proceedings being taken to ascertain the value of the lands expropriated, such offer, if it is extravagant when tested by the evidence before the Court, is not shewn to have been based on any proper valuation, and is, moreover, made with a view to a settlement of the claim without litigation, the court will not regard it as evidence of the true market value of the land.

2. Even when the amount recovered is so much less than that claimed as to make the latter appear extravagant if negotiations for a settlement prior to action brought involve an offer by the Crown far in excess of the sum offered by the information, the defendant ought not to be deprived of his costs.

McLeod v. *The King*, 2 Ex. C.R. 106, considered and distinguished; *The King* v. *Woodlock*, 15 Ex. C.R. 403, referred to.

3. The prices paid for properties purchased in the immediate neighbourhood of land expropriated afford the best test and the safest starting point for an enquiry into the true market value of the lands taken.

G. G. Stewart, K.C., and *E. Taschereau*, for plaintiff. *F. Murphy*, K.C., and *A. Laurie*, for defendants.

Bench and Bar

LAW SOCIETY OF UPPER CANADA.

An old and highly respected member of the Bar takes the place of Mr. Shepley as Treasurer of the Law Society of Upper Canada: John Hoskin, K.C., LL.D.

This position is an historic one, dating back, as will be seen by the list given in another place of those who have occupied the position, as far back as 1797. Those who have been selected to fill the position have always been among the most eminent in the profession. The name given to the highest officer of the Law Society may indicate one of his honorary duties, but is mainly suggestive that the person who holds the office has been counted worthy to fill the highest position of dignity which can be given to him by his professional brethren.

Dr. Hoskin was born in Devonshire, England, in 1836. He came to Canada in 1854, and for almost fifty years has been a member of the Canadian Bar. He was for some time partner with two of the most eminent lawyers that Canada has produced, the late D'Alton McCarthy and Britton Bath Osler. He was for many years Official Guardian of Infants.

Being interested in educational matters he was at one time Chairman of the Board of Toronto University, which conferred on him the degree of LL.D. He was subsequently a member of the Board of Governors. Afer he gave up practice Dr. Hoskin became President of the Toronto General Trusts Corporation.

Having resided for some years in England, he recently returned to this country, and, on Mr. Shepley's death, was unanimously elected by the Benchers to fill the vacant place.

The following is a list of the Treasurers of the Law Society of Upper Canada from its inception up to the present time:—

1797-1798—John White.
1798-1801—Robt. I. Dey Gray.
1801-1805—Angus Macdonell.
1805-1806—Thomas Scott.
1806-1811—D'Arcy Boulton.
1818-1819—J. B. Robinson.
1819-1820—H. J. Boulton.
1820-1821—W. W. Baldwin.
1821-1822—J. B. Robinson.
1822-1824—H. J. Boulton.
1824-1828—W. W. Baldwin.
1828-1829—J. B. Robinson.
1829-1832—George Ridout.
1832-1836—W. W. Baldwin.
1836—R. B. Sullivan.
1836-1841—R. S. Jameson.

1841-1843—L. P. Sherwood.
1843-1845—W. H. Draper.
1845-1846—R. S. Jameson.
1846-1847—H. J. Boulton.
1847-1848—Robert Baldwin.
1848-1849—J. E. Small.
1849-1850—R. E. Burns.
1850—James G. Spragge.
1850-1859—Robert Baldwin.
1859—James B. Macaulay.
1859-1876—J. H. Cameron.
1876-1879—Stephen Richards.
1879-1893—Edward Blake.
1893-1913—Æmilius Irving.
1913-1916—G. F. Shepley.
1916—John Hoskin.

OBITUARY

GEORGE FERGUSON SHEPLEY, K.C., M.A.

Mr. Shepley, who had been in ill health for several years, died at his residence in the City of Toronto on the 15th ultimo.

The deceased was born in 1844 in the Township of Blenheim, Ontario, being a son of Rev. Joseph Shepley. He was educated at the Berlin Grammar School and at Victoria University, where he was a gold medalist, taking the degree of B.A. in 1872, and three years later graduating as M.A.

In 1878 Mr. Shepley was called to the Bar, and rapidly took a leading position. He continued the active practice in his profession until some five years ago when he was compelled to give up most of his briefs. In the later years of his life, however, he devoted himself to his duties as Treasurer of the Law Society of Upper Canada, to which position he was elected in 1913, taking the place of the late Æmilius Irving.

Mr. Shepley was a lawyer of marked ability and learning and commanded the confidence of his many clients; and was engaged in many important cases.

A large number of the judiciary and the profession attended the funeral to shew their respect to his memory, and to do honour to the high position he occupied as Treasurer of the Law Society of Upper Canada.

We have to record the loss of other well known members of the profession in the Province of Ontario:—

His Honour Robert Baldwin Carman, Judge of the County Court of the County of Lincoln, Ontario, died at his residence in St. Catharines on the 24th ultimo. Mr. Carman was born in 1843. He was for a short time one of the Professors at Victoria

University; but, subsequently taking up the law as a profession, was called to the Bar in 1873. He commenced the practice of his profession in the Town of Cornwall; and was in March, 1883, appointed Junior Judge of the United Counties of Stormont, Dundas and Glengarry. He was subsequently made Judge of the County Court of Lincoln. Mr. Carman did his duty as a soldier at the time of the Fenian Raid in 1866, and was much respected in the places where he resided.

The County of Peel has also suffered a great loss by the death of William Henry McFadden, K.C., LL.B. He attended the funeral of the late Mr. Shepley and the day after suddenly expired. Mr. McFadden was born at the Town of Picton, October 11, 1851, was called to the Bar in 1874, and appointed County Crown Attorney for the County of Peel in 1882. Both as a citizen and a lawyer he enjoyed the esteem and respect of the whole community, and will be greatly missed. Mr. McFadden also served his country in a military capacity, being for some time an officer in the 36th Peel regiment.

The profession in Toronto is also the poorer by the sudden death of Mr. W. M. Douglas, K.C. He was at one time a partner in the firm of which Mr. D'Alton McCarthy and Mr. B. B. Osler were members. He was known as a sound lawyer and an able counsel and was a great favourite in the circle of his more intimate friends.

JUDICIAL APPOINTMENTS.

George Wellington Greene, of Red Deer, in the Province of Alberta, Barrister-at-Law: to be the Judge of the District Court of the District of Medicine Hat, in the said province. (December, 18, 1915.)

James Jeffers Mahaffy, of Medicine Hat, in the Province of Alberta, Barrister-at-Law: to be the Judge of the District Court of the District of Reed Deer in the said province. (December 18, 1915.)