Canada Law Journal.

VOL. XLVII. TORONTO, OCTOBER 16. No. 20.

WHAT IS AN EX PARTE ORDER?

In *Broom* v. *Pepall*, 23 O.L.R. 630, on the application of the plaintiff, in the absence of the defendant, and without notice to him, an order was made by the Master in Chambers purporting to be made on the defendant's consent, but which did not in fact follow the consent. On the defendant becoming aware of the mistake in the order, he immediately applied to the Master in Chambers to rectify the order and the Master granted the application, but a Divisional Court has solemnly determined that this procedure was erroneous, that the Master had no power to correct the mistake, and the defendant's only remedy was by appeal, because it was said the order was made ex parte within the meaning of Rule 358. With great respect to the learned judges who arrived at that conclusion, we venture to think that it is not well founded. In Sweet's Dictionary the following explanation is given of the meaning of the term "Ex parte." "S. 1. In its primary sense 'ex parte' as applied to an application in a judicial proceeding means that it is made by a person who is not a party to the proceeding, but has an interest in the matter which entitles him to make the application. Thus, in a bankruptcy proceeding, or an administration action, an application by A.B., a creditor or the like, would be described as made 'ex parte A.B.,' that is, on the part of A.B. S. 2. In its more usual sense ex parte means that *an application is made by one party to a proceeding in the absence of the other.* Thus an ex parte injunction is one granted without the opposite party having had notice of the application. It would not be called ex parte, if he had proper notice of it, and chose not to appear to oppose it." This definition we think quite correctly lays down what is meant by the term, and it is the secondary meaning above given which

is applicable to the case of *Broom* v. *Pepall*. If the defendant had had notice of the application for the original order, and had failed to appear, then, it is true, the order would not have been ex parte; neither if the order made had followed the consent, could the order be said to have been ex parte, but where a party purporting to move on a consent, behind the back of the opposite party obtains an order not warranted by the consent, then such an order appears clearly to be ex parte within Mr. Sweet's definition.

We refer to the matter because it seems desirable that every facility should be given for the correction of orders improperly granted in such circumstances, such as is provided by Rule 358, but to substitute for the inexpensive and summary procedure of that Rule the more cumbrous and expensive machinery of an appeal seems to be rather unnecessary, to say the least of it.

FAIR WAGES CLAUSES IN CONTRACTS.

A stipulation is frequently made in contracts for public works and for public supplies that the workman shall be paid the trade union scale of wages, and that the customary hours of labour shall be observed. There has been, however, no standard form in which this stipulation could be expressed. A recent circular issued by the local Government Board in England embodies several clauses which have been generally adopted by contracting departments of the British Government pursuant to the recommendation of the Fair Wages Advisory Committee. These clauses will be found easily adaptable to Canadian conditions, and are as follows:—

1. (*Fair Wages Clause.*)—"The contractor shall pay rates of wages and observe hours of labour not less favourable than those commonly recognized by employers and trade societies (or, in the absence of such recognized wages and hours, those which in practice prevail amongst good employers) in the trade in the district where the work is carried out. Where there are no such wages and hours recognized or prevailing in the district those

recognized or prevailing in the nearest district in which the general industrial circumstances are similar shall be adopted. Further, the conditions of employment generally accepted in the district in the trade concerned shall be taken into account in considering how far the terms of the fair wages clauses are being observed. The contractor shall be prohibited from transferring or assigning, directly or indirectly, to any person or persons whatever, any portion of his contract without the written permission of the department. Sub-letting other than that which may be customary in the trade concerned, shall be prohibited. The contractor shall be responsible for the observance of the fair wages clauses by the sub-contractor."

2. (*Exhibition of notice at works.*)—"The contractor shall cause the preceding condition to be prominently exhibited for the information of his workpeople on the premises where work is being executed under the contract."

3. (*Inspection of wages books, etc.*)—"The contractor shall keep proper wages books and time sheets, shewing the wages paid and (so far as practicable) the time worked by the workpeople in his employ in and about the execution of the contract, and such wages books and time sheets shall be produced whenever required for the inspection of any officer authorized by the department. (Specify the department.)"

4. (*Factory clause for inclusion in contracts in certain trades.*)—"All work executed under the contract shall be carried out at the contractor's own factory or workshop at or other place approved by the department (specify the department), and no work under the contract shall be done in the homes of the work people."

5. (*Direct payment of wages, for inclusion in contracts in certain trades.*)—"All wages earned by workers engaged on work under the contract shall be paid directly to them and not through a foreman or others supervising or taking part in the operations on which the workers are engaged."

QUIETING TITLES ACT AND THE TORRENS SYSTEM.

The attempts made by these Acts to facilitate the conveyance of real property and to simplify titles are very praiseworthy and, in many cases are of great value. They would be more acceptable, however, to the profession if in their practical working out there was more elasticity, and their machinery less complicated. It would also be well if there were more facilities than there are in some of the offices for doing business, and doing it more speedily.

One of our correspondents whose opinion is of value, sends us a communication on the subject which we give to our readers. We should be pleased to hear from others what their views are on the subject. His remarks are as follows:—

"In the year 1875 the title to a tract of land in West Toronto was quieted under the Quieting Titles Act at very considerable expense. Recently an application was made to quiet the title to two small lots which were part of this tract, and for the purpose of the application no less than sixty-three deeds had to be produced to establish the title—most of them were not in the petitioners' possession, and copies had to be procured from the registry office at very considerable expense. It is almost needless to say that the same difficulty would be found to attend the proof of many another lot included in the same tract, and yet this accumulation of deeds and difficulties in the proof of title was merely the result of the dealings with the land for the past 36 years. As time goes on and transactions take place with reference to land, the difficulties multiply, under the old system of land transfer, until at last the title is buried in such a heap of documents that it has either to be taken on trust, or it costs more to investigate the title and see if it is all right, than possibly the land may be worth.

"In 1885, the Land Titles Act was brought into force in the city of Toronto and the county of York, and if the land in question had been registered under that Act, the owner, instead of having a pile of deeds a foot high, would have had one single document, that anyone could understand, to prove his title.

"For some strange reason the public seem slow in adopting the Land Titles system of transfer, although anyone can see its superiority to the old system, which is bound to occasion difficulty sooner or later.

"Each owner under that system, if he thinks of the matter at all, probably hopes that the trouble and difficulty will not fall on his shoulders, but that he may be able to dispose of his property, as perhaps he himself acquired it, namely, to one so desirous of acquiring it that he will be willing to take risks. He may wake up some fine morning, however, and find a purchaser calling on him to prove his title, and then the trouble will begin, and by the time he has got through he may find himself out of pocket three or four hundred dollars."

CAPITAL PUNISHMENT.

We are indebted to a writer in *Nineteenth Century and After* for a luminous article on the subject of punishment and crime. We give our readers the benefit of his observations on the subject of capital punishment, which he deals with in a convincing manner, coming to the conclusion (a conclusion with which we fully agree) that it would not be in the interest of the public that it should be abolished.

The writer in the early part of his article works out four canons for the consideration of his subject, which he names in order of importance: (1) Segregation, (2) Deterrence, (3) Reformation, (4) Humanity, and then discusses how the various modes of punishment now in use conform to the requirements of these canons; and then proceeds:—

The extreme penalty of the law at present is capital punishment. Much controversy has been aroused about it in recent times, and the allegation is freely made that the death penalty is a relic of barbarism, and ought to be abolished. It is largely with a view to finding a psychological solution to this problem at I have undertaken the present article. The first requirement of punishment—segregation—is very effectively met by it. The

criminal, by losing his life, is finally removed from society, and all possibility of his committing any further injuries is withdrawn. The segregation, while thus more perfect than by any other mode, is brought about at low cost, and with little trouble to society. No cell has to be provided for his habitation, no warders told off to watch him, no work created for him. We are frequently told that murderers are often much less truly criminal than the majority of petty thieves and swindlers. Their crime was committed in a fit of passion, possibly with strong provocation; they have previously led blameless lives; and the suggestion is made that their punishment should be lighter, rather than heavier, than that of more vulgar offenders. The argument may have some weight in favour of lenient treatment while in prison; but the demands of segregation for such a man are fully as urgent as in the case of the most brutal ravisher or assassin. For a man who has once been carried away to such an extent by a fit of passion is very likely to be carried away a second time—more likely, indeed, for it is a well-known law of physiology that mental processes which have once occurred render the way easier for a recurrence. The danger to life from such a person is considerable, and he must be altogether removed from society. Capital punishment is the easiest and most certain method by which this can be effected.

I come now to my second canon—Deterrence. I am aware that it is often said that capital punishment does not truly act as a deterrent. I have noted also the coincidence that persons who make this statement are nearly always those who on grounds of humanity demand the abolition of capital punishment. The allegation, which thus bears on its face the appearance of being made to bolster up a case, may, I think, be conclusively refuted. Inductively, we have such facts as the recrudescence of assassination in France accompanying the suspension of the death penalty. A. Lacassagne, in his important book, "Peine de Mort," shews that homicides are rarest in those countries where capital punishment is most rigorously enforced. I do not want to press this, however, as the relation of cause and effect is proverbially difficult to trace in social affairs, and the

apparent connection may possibly be due to other conditions which remain obscure. I prefer to rely on syllogistic reasoning and the deductive method, which Mill represents in his Logic as the instrument of chief value in the study of social affairs. I have pointed out that the punishments inflicted by society are such as to afford adequate gratification to the vindictive sentiments against the criminal. The degree of punishment is proportionate to the strength of the resentment. Now, there is no question that capital punishment is more potent to gratify the public revenge than any other form of punishment now in use. It is (in full harmony with public opinion) confined to the most callous and cold-blooded murders, in which public animosity is roused to its fullest extent. It is *not* employed for minor crimes, in which vindictive feelings are less powerful; though even then, in such cases as the wholesale ruin of poor people by some fraudulent company-promoter exciting our high indignation, we often hear it said that the offender deserves to be hanged. The fact that capital punishment is only invoked to meet the highest flights of public resentment is an unequivocal proof that popular sentiment regards it as the most terrible of all punishments. Whether popular sentiment on this matter is well grounded or not, is another question. I shall shortly endeavour to shew that it is not; but in the meanwhile I am only concerned to note the attitude of popular sentiment, and to draw the obvious corollary that the punishment which popular sentiment regards as the most terrible is necessarily that which the public are most desirous to avoid, and therefore that which has the greatest deterrent effect.

The same conclusion may be drawn from the propaganda of the abolitionists themselves. Do they regard capital punishment as the most terrible of all penalties? If not, is it the case that they wish to abolish it for the purpose of instituting another punishment, such as prolonged imprisonment, which appears to them more terrible? They will hardly admit it. If, then, they advocate abolition, simply because capital punishment appears to them too horrible for our modern civilization, we may surely

infer that this is the punishment that they would themselves be least willing to face; and that is only another way of saying that it is the punishment which has the greatest deterrent effect.

Let me not be misunderstood, however. I do not mean to say that for all men, and at all times, capital punishment must of necessity be the strongest of all deterrents. Mankind are not all alike, and doubtless there are many who would much prefer to suffer the death penalty than a long term of imprisonment. Some months ago a gentleman wrote to the *Times* to say that it had often been his duty to notify to condemned criminals the fact that they had been reprieved. In one case he got the blunt answer, "Thank yer for nothing; I'd rather be hanged." Other cases of similar purport sometimes occur. But the good people who bring out these exceptional instances appear to think that a generalization may be founded upon them, and that capital punishment is shewn to have no deterrent force. Nothing could be more absurd. All that is shewn is the infinite variety of human nature, and that the same motives affect different people in different ways. We have to legislate, and to supply deterrent motives, not for exceptional people, but for the general run of humanity around us. And I have already proved that the general run of humanity is more likely to be deterred by capital punishment than by any other means open to us. Probably the exceptions are not really very numerous. When a prisoner is annoyed on hearing of his reprieve, everybody is startled and surprised, and the fact is considered worthy of being chronicled in the *Times*. I venture to hazard the opinion that the large majority of prisoners shew relief when they hear of their reprieve, and that no one would think this appearance of relief so remarkable as to call for a letter to the *Times*.

There is one further class of criminal to whom I must allude —the murderer by sudden impulse. Of him it may possibly be true that capital punishment is no deterrent; but it certainly is equally true that no other punishment would be any deterrent either. The impulsive murderer does not stop to think; he never reflects for a moment on any consequences of his action,

however appalling; he is borne away by a momentary passion, carrying before it all remnants of common sense or regard for the future. We have no reason for supposing that capital punishment would not be more likely to deter him than anything else. On the contrary, we must suppose that if he stopped to think for a moment, he would be more affected by a punishment which appeals so powerfully and vividly to the imagination than by one less striking but more prolonged. At all events, the discussion as to the relative efficiency, for deterrence, of various punishments, cannot be affected by the case of one who is momentarily blind and deaf to any future punishment whatever.

We arrive, then, at the conclusion that Deterrence is more effectively achieved by capital punishment than by any other method; and that it satisfies the requirements of our second canon as completely and thoroughly as I have previously shewn it does the first.

My third canon was Reformation of the criminal. Since capital punishment involves destruction of the criminal, there is no need to reform him, and the canon is irrelevant. Some naïve persons have suggested, indeed, that we ought to give the criminal time to reform and lead a better life, lest his soul should be eternally damned. To that I have two answers: (1) That it is not the business of the State to trouble itself as to what happens to the souls of the departed; its business is to regulate society for the benefit of the living. (2) That the height of a criminal's repentance is most likely to be reached shortly after he has been condemned to death, and the gravity of his offence thus strongly brought home to him. By executing him at this auspicious moment, he will be relieved of the danger of a moral relapse—alas! only too probable with human nature as it is—and his soul will in consequence be given the very best opportunity it is likely to have of getting into heaven.

The fourth canon—Humanity—brings me to the centre of the controversy that has raged round the whole subject. It is said that capital punishment is so horrible and barbarous that it

ought to find no place in modern civilization, and that no crime, however foul, can justify it. The support of it is no less purely one of sentiment, than the opposition to it is one of sentiment. In some minds compassion for the criminal is uppermost, while in other minds compassion for the victim and resentment against the criminal is uppermost. I shall now proceed to dismiss both sentiments from consideration, and to submit the humanitarian allegations to a dispassionate analysis. At the risk of being repellent, I shall seek to ensure dispassionateness by the employment of arithmetical symbols. These symbols must not be taken as accurate representations of the facts, but they serve to fix in our minds the leading points, which otherwise might evade us, with an accuracy as amply sufficient as the occasion calls for.

I have pointed out that the canon of Deterrence requires that the infliction of suffering should be a necessary part of all punishment. We may therefore compare two punishments by estimating the quantity of suffering inflicted by each. The alternative to capital punishment is penal servitude for life, or at all events for a very long period of years. We may therefore confine our comparison to these two punishments. Let us call the average daily quantity of suffering experienced by a convict in penal servitude one unit of suffering, or one penal unit; so that in the course of a year, a convict undergoes 365 penal units. Now let us analyze the state of mind of the man condemned to death. The punishment may be considered in two parts—first, the suffering experienced during the actual moment of execution; second, the sensations of terror and gloomy foreboding which presumably fill the period between the passing of the sentence and its consummation. Dealing first with the first part, it is agreed on all hands that death is practically painless, and, in addition, that the whole proceedings are exceedingly swift. From the moment that the executioner enters the condemned man's cell to the moment of death is stated to be not more than sixty seconds. The executioner, after binding the criminal, performs his work on the scaffold with lightning rapidity. The criminal himself appears often to be so dazed

as to be little capable of feeling the suffering with which he is credited. But however he may feel it, it seems undeniable that the most excruciating mental suffering that is over in sixty seconds can only be as a featherweight in the balance compared with the protracted agony of many years' penal servitude. I pass, therefore, to the more formidable side of capital punishment—the terrible anticipations of the last weeks of life. We have to compare one day of anticipation with one day of penal servitude, and endeavour to estimate by how much the agony of the former exceeds that of the latter. The waiting anticipation appeals so vividly to our minds, and is so forcibly realized, that we are apt to over-estimate its pain, in comparison with that of the less easily represented penal servitude. It seems probable that Fechner's laws of sensation may be applicable here. His theory states that sensation only increases in arithmetical progression when the stimulus increases in geometrical progression. Which, if we may draw the analogy, means that if a certain stimulus produces a certain quantity of pain, double that stimulus will produce very much less than double the quantity of pain. So that, when the pain has already reached a tolerably high level, it will require a very large increment of stimulus to produce a very small increment of pain Now, the one penal unit per diem which accrues to the convict in penal servitude is already a fairly high degree of pain. To a refined person, it must be such a degree as is not susceptible of a very large increase under any stimulus. The stimulus of anticipated death is far from being the worst of human inflictions. There is no physical pain attached to it; nor have I ever heard of a criminal going off his head on account of it. As a doloriferous agency, therefore, it must be concluded that the prospect of death, though considerably greater, is not immeasurably greater, than the combined physical and mental sufferings of penal servitude. And the quantity of suffering actually felt would be, under Fechner's law, very much less than proportional to the increase of the doloriferous agency. Seeing how much suffering is included in the one penal unit of penal servitude, it seems rea-

sonable to suppose that anticipation of death would not be productive of more than two penal units, or double the amount of suffering. Much more than this could hardly be tolerated; yet we know that whatever suffering there is, *is* tolerated. Let me, however, place the case in the most unfavourable possible light for my own theory. Let me make the impossibly extravagant assumption that the criminal awaiting execution undergoes ten units of suffering per diem. Then of he has three weeks to wait, his total punishment is equal to 10 x 21, or 210 penal units. Suppose we allow for the minute of actual execution another ten units, the sum total of suffering is 220 units. This is equivalent to 220 days' penal servitude. So that, on the most favourable possible hypothesis the actual amount of suffering inflicted by capital punishment is less than that undergone in eight months of penal servitude!

That the conclusion here established will be accepted by sentimentalists at large I do not for a moment imagine. Sentiment can only be shaken by sentiment; it is not touched by logical analysis: the two terms are incommensurable. Arguing with sentimentalists is like writing on water; and I shall here content myself with protesting against their claim to monopolize humanitarianism. I defend capital punishment on the express ground of humanity. I affirm that those who wish to abolish it, in favour of penal servitude, are enemies to humanity, and that their success would cause a large increase of suffering to the very persons on whom they lavish their pity. In Italy the death penalty has been replaced by carcere duro, which is characterized by Lacassagne as "une peine atroce." The fundamental virtue in sentiment is its driving energy; its fundamental vice is that it excludes intellectual analysis, and is liable, with the highest and most sincere professions, to bring about evils that a calmer mind would have easily foreseen.

If capital punishment is in reality so humane, it must now be shewn why soft-hearted people protest so energetically against it. A false theory is more effectually demolished when the psychological grounds for its tenure have been exposed. The exist-

ence of the prejudice against capital punishment is due to the peculiarly vivid manner in which an execution appeals to the imagination — the very same element that constitutes it so strongly deterrent a force. We see the little whitewashed chamber, the trap-door and pit, the "ugly lever"; and we fancy to ourselves with terrible realism the moment when the condemned man, his head concealed in a white bag, is launched into eternity as the bolt is released. The horrid apparition grips the mind with a spastic clutch that paralyzes the intellectual faculties. The essence of sympathy is to feel some part of the pain which we pity in another; and accordingly much pain must be excited in sympathetic minds by so horrible a vision. The picking of oakum, the privation of liberty, etc., do not and cannot appeal in anything like so forcible a manner to our imaginations; we forget the bleeding fingers and fractured nails, the spirit broken down by hardships and indignities; and the long years cannot be grasped in our thoughts in any but a symbolical sense. And because the thought of capital punishment fills us with much pain, while the thought of penal servitude fills us with less pain, we assume that the realities have corresponding relations. The fallacy is one with which all students of metaphysics are abundantly familiar. What are only the laws of thought are taken to be the laws of things. Subjective relations are regarded as equivalent to objective relations; and the universe is whittled down to that evanescent appearance which can be contained in the brain of a human being.

Yet another psychological fallacy is involved. The refined and sensitive person who declaims against the death penalty is apt to assume that a murderer is a refined and sensitive person like himself. Cold-blooded murderers (and these alone are now hanged) have by the fact of their crime proved their callousness and lack of sensitiveness. Readers of Lombroso will not require to be informed of the almost incredible indifference to pain that criminals exhibit. Men will endeavour to commit suicide (and succeed) by driving large spikes into their own heads with a hammer; or by thrusting a white-hot iron rod some

inches into the abdomen. Dr. Quinton, in his interesting little book on Crime and Criminals, records an instance of a prisoner who, merely to spite his gaoler, smashed his own thumb by putting it into the hinge of a jointed table, and forcibly raising the flap. No one denies that criminals as a whole are characterized by an astonishing lack of sensibility, both physical and mental. Condemned men often spend their last night in comfortable sleep, and walk to the scaffold with no sign of trepidation. The fallacy of reading into others the same motives and feelings as animate ourselves is productive of endless mistakes in interpreting human character. The calmness of men on the point of execution has long bewildered the world, from the time of Plato onwards. We are, perhaps, less astonished at the coolness of Socrates, since we are apt to regard philosophers as somewhat inhuman. Montaigne was struck by the indifference of condemned men. I quote, with modernized spelling, from Florio's translation of the essay "That the taste of goods or evils doth greatly depend on the opinion we have of them:"—

One who was led to the gallows desired it might not be through such a street, for fear a merchant should set a sergeant on his back for an old debt. Another wished the hangman not to touch his throat, lest he should make him swoon with laughing, because he was so ticklish. Another answered his confessor, who promised him he should sup that night with our Saviour in heaven, "Go thither yourself to supper, for I am used to fast anights." Another upon the gibbet calling for drink, and the hangman drinking first, said he would not drink after him for fear he should take the pox of him. Every man hath heard the tale of the Piccard, who being upon the ladder ready to be thrown down, there was a wench presented unto him with this offer (as in some cases our law doth sometimes tolerate), that if he would marry her his life should be saved, who, after he had a while beheld her, and perceiving that she halted, said hastily, "*Away, away, good hangman, make an end of thy business: she limps.*" The like is reported of a man in Denmark, who, being adjudged to have his head cut off, and being upon

the scaffold, had the like condition offered him, but refused it because the wench offered him was jaw-fallen, long-cheeked, and sharp-nosed.

Humanitarians may rest easy that no one in this country will be required to pass through the ordeal of execution unless he has previously qualified as regards lack of sensitiveness by the commission of a brutal act that would have been impossible to a sensitive man.

To sum up: we have found that all our four canons of punishment—Segregation, Deterrence, Reformation, and Humanity—are met by capital punishment in an almost ideal manner, and that its removal from the statute book would be, from every point of view, a most profound and unfortunate mistake.

IS A "WIRELESS MESSAGE" WITHIN THE PROVISIONS OF CRIMINAL STATUTES RELATING TO TELEGRAPHS AND TELEPHONES?

1. It is not the province of a law journal, or of a legal editor, to take cognizance of every "point" a resourceful attorney may present, or of every question an ill-advised criminal prosecution may raise. But in those cases in which a great fundamental principle of the law is involved—especially where the exact point presented has not been passed upon or adjudciated by a court in any of the states of the Union, or any of the federal courts—a legal journal or a law editor is warranted in presenting the fundamental principles and authorities which do, or should, govern courts in arriving at a conclusion, even though they are somewhat elementary in their character.

2. The question whether a "message" sent by electric space-telegraphy, through the instrumentality of any of the various methods of sending what are popularly known as "wireless messages," is embraced within the provisions and prohibition of the ordinary criminal laws of a state relating to and governing telegraph and telephone lines, has been raised by an indictment re

cently returned by a grand jury at Los Angeles, California, "under instruction," no doubt.

3. The occasion for this indictment, briefly, is as follows: For a number of years there have been in Los Angeles three five-cent morning papers all of the class known as of the "reactionary" type. Recently a one-cent morning paper, of the "progressive" type, was established there, resulting in a "war of types." One of the old papers published a scurrillous, not to say libellous, attack upon the owner and publisher of the new paper. The proprietor of another of the morning papers (who is said to own and control the third) telephoned to the editor of the third paper, suggesting that it reproduce the attack of paper number one. The editor of the third paper being on a vacation at Avalon, and out of the reach of telephone or messenger, the matter was communicated to him by "wireless" from the wireless station in the building of paper number one. This "message" was "taken" by a fifteen-year-old boy "operator," on a private wireless apparatus rigged up in his father's house. The new paper published the wireless message as taken by the boy operator. The genuineness of the message is not denied, and the accuracy of the "taking" is not questioned. The matter of the publication of this message in the new paper was laid before the grand jury, and an indictment returned under s. 619 of the California Penal Code, relating to telegraph and telephone messages, and making it a felony to wilfully disclose the contents of such a message without the permission of the person to whom addressed.

4. If there is any statute in that state which will justify or support this indictment it is found in s. 619 or s. 640 of the Penal Code of that state, which sections are in pari materia. Neither of these sections of the Penal Code specifically provides as to a 'wireless message," and neither uses any word or words of equal import indicating any intention on the part of the legislature to include within the prohibition and punishment such a message. Such an intention can not be incorporated into these by statutes by inference and construction. By express pro-

vision of the California Penal Code, a criminal statute is to be "construed according to the fair import of the terms, and with a view to effect its object;" and, by the provisions of the Code of Civil Procedure of California; the court is prohibited from reading into the statute language or words not incorporated therein.

5. History and import of ss. 619 and 640. These sections of the California Penal Code were both enacted on February 14, 1872, and were both amended into their present form and provisions on March 21, 1905. When these sections were originally enacted they related solely to a mode of telegraphy and to a message which depended upon "conduction:" that is, upon the conveyance of an electric current by an unbroken metallic wire suspended or laid between two stations. As a matter of fact no other method of telegraphy was at that time known, or put into practice for more than a quarter of a century thereafter. These statutes having been enacted before such a thing as "wireless telegraphy," or a "wireless message," was known—or even dreamed of, unless it may have been in the privacy of the laboratory, by an eminent scientist here and there over the world—the courts, and officers of the judicial department, cannot presume that there was an intention on the part of the legislature to include within the prohibition and punishment provided in these sections a thing not known and not in existence at that time—a "wireless message." Telephones were not known at the time these sections were originally enacted; and it has always been conceded, on all hands, in California, as far as the criminal laws of the state are concerned (whatever may be the rule as to civil statutes), that telephony and telephonic messages were not embraced within the provisions of the original sections. As a matter of fact, these sections were amended on March 21, 1905, into their present form for the express purpose of making them cover telephony and telephonic messages. The amendment to s. 619 consists simply in the insertion of the words "or telephonic" after the word "telegraphic," and before the word "message;" and the amendment to s. 640 consists simply in the insertion of

the words "or telephone" before the word "line," and also before the word "office." This shews beyond the possibility of question, or of a remote doubt, that there was no intention on the part of the legislature to so amend these sections as to make them embrace "wireless telegraphy" and "wireless messages." To bring "wireless messages" within the provisions of the criminal statutes, it is thought, it will be absolutely necessary to do so in express terms.

6. A "wireless message" is a thing apart, both from a telegraphic message and a telephonic message. It differs as much from each as they differ from each other; and telephonic messages had to be especially provided for by specific amendment to bring them within the operation of the statute.

7. The word "telegraph" is derived from a Greek word which means, literally, afar writing, or to write afar; and, as known to the law, refers to the entire system of appliances used in the transmission of telegraphic messages by electricity, consisting of, first, a battery or other source of electric power; secondly, of a line, wire, or other artificial conductor for conveying the electric current from one station to another; thirdly, of the apparatus for transmitting, interpreting and reversing the electrical current; and, lastly, of the indicator or signalling instrument; and courts take judicial notice that the "telegraph" of a railroad company consists of wires strung on poles set upright in the ground along its road.

These sections of the California Penal Code, as enacted in 1872, embrace the words "telegraphic message" and "telegraph line," shewing unmistakably that the only thing the legislature had in mind at the time of their message was the "conduction" method spoken of above; and the amendments to the original section simply introduce the words "telephonic" and "telephone," leaving the original sections, in purpose, absolutely as they were enacted, except their extension so as to include telephone lines and telephone messages—both of which are operated through and depend upon a wire "conduction." These two sections of the California Penal Code, being in pari materia, are

to be constructed together, and so construed there can be no doubt or question but that "conduction" was the only method of transmission in the contemplation of the legislature.

8. The sole object of these sections of the California Penal Code, when enacted, and as amended, was and is to prevent the employees of telegraph and telephone lines and offices from giving out to other than the addressee, or making a private use of messages sent and received; and also to prevent persons not employees from getting possession of the contents of messages and information not intended for and not delivered to them; that is, by the means popularly known as "wire-tapping." To accomplish or perpetrate the offence of wire-tapping there must be an overt act of invasion, a trespass, upon the rights and property—the line—of the company. No telegraph or telephone company, or other company, can have either a "right of way" or "private property" in the air. "Usque ad ocrum, et usque ad coelum," is a venerable maxim of the law. Hence, any one who goes onto a house-top and there shouts his private business into the air, which is common to and the property of all men, takes the chance of having his "shout" overheard by anyone whose premises the sound-wave passes; and if he is injured thereby, he has but himself to blame; it is damnum absque injuria. And this rule holds good, no matter in what "language" the "shout" is uttered.

9. Elementary rules of construction. The conditions which justify this article make it necessary that a few of the elementary rules for the construction of criminal statutes and penal statutes shall be given. These rules are well settled; the authorities are all "one way;" and a few of the late cases, only, will be cited. One of the elementary rules for the construction of a criminal statute, is that it shall be according to the natural and obvious meaning; and where there is no ambiguity in the language used, and its meaning and purpose are clear, the courts are not authorized to either limit or extend the language of the act by construction. Such a statute is open to construction in those cases, only, where there is reasonable uncertainty in the meaning.

10. Where the meaning is plain, the statute must be carried into effect according to its language, or the court would be assuming legislative authority. Where the language is clear, it is not for the court to embrace cases not described, because no reason is seen why they were not included. And this rule has been widely, we might with truth say universally, followed. No case can be brought by construction within a criminal statute unless it is completely within the words. Where an act is not, beyond all reasonable doubt, within the express terms of the statute, it may not be brought within the statute after the event by intendment. It is not sufficient that the purpose of a criminal statute should be manifest. To be effective, that purpose must find expression in its language, as required by legal rules. Courts may be authorized, sometimes, to restrain the generality of terms used in a criminal statute so as to exclude exceptional cases, but cannot enlarge the terms of a limited law.

11. California rule, as laid down in a recent case, is that the court, in construing a criminal statute, cannot read into it language or words not incorporated therein; and that where any particular article or thing is mentioned in a criminal statute as the subject of an offence, it is such articles or things or property, only, as are popularly designated by the term used that can be regarded as embraced within the prohibition. Thus, where the question involved was whether a statute making it a felony to maliciously burn a "stack" of hay included a case where the burning was the malicious burning of a "cock" or "shock" of hay, it was held that it did not. The court says: "Why the legislature did not include the act of maliciously burning 'shocks' or 'cocks' of hay within the penalty prescribed by s. 600 of the Penal Code, is a matter which need not be inquired into here. In the determination of the question decisive of the case here, it is enough to know that the legislature did not do so, and that it is for that department of the government to say what wrongful acts shall incur the penalties." Substituting the words "wireless message" for the words "shocks" or "cocks" of hay, and the s. 600 by ss. 619 and 640 of the Penal

Code, the above decision fits exactly the question of interpretation raised by the indictment returned for the publication of the wireless message "taken" by the boy "operator." Plainly, on very elementary principles of the criminal law, the act complained of is not within the prohibition and punishment of the statute relating to telegraph lines and telegraph messages.—*Central Law Journal.*

THE IDENTIFICATION OF A MARK.

A writer in the *Central Law Journal* takes exception to an article in that journal which defined a mark as a character (not a writing) made by an inked pen operated by a human hand and consisting of a single straight stroke or of two or more disconnected straight parallel strokes, or of two straight strokes crossing each other.

The writer then says:—

Marks for the authentication of legal documents are, of course, the marks under discussion. Such marks are usually made by illiterates, but are sometimes made by persons who can usually write, but who are so enfeebled by disease or age as to be unable to do so at the time of executing the document in question. In an experience of over forty-three years, marks made for the purpose of authenticating documents have always, so far as we have observed, been in the form of a cross, thus: × or +. We do not remember ever having seen one made otherwise. These marks are rarely made by the marksman holding and directing the pen himself, but usually by his touching the upper end of the penholder while held and directed by some other person, usually the one who draughted the instrument, who in fact makes the mark; but very rarely by the marksman holding the pen in his own hand, which, in turn, is itself held and directed in its motion by the hand of another person.

While a mark made for the purpose of authenticating a document will, if properly proved, undoubtedly be binding upon a marksman competent and able to write, yet the fact of his

making a mark in such case would draw suspicion upon the document; and I have never seen one so executed except in case of illiteracy or debility as above described. Almost always the name of the party executing the instrument is written in the proper place for the signature with the mark between the Christian and sir names, though this is not absolutely necessary, if the mark can be identified and proved. Such marks may unquestionably be proved by witnesses to their execution in the same manner as ordinary signatures. Can they be proved by opinion evidence? We refer not to the question of the admissibility of such opinion evidence, but to its probative value. While cases may arise in which, under peculiar surrounding circumstances and the enfeebled condition of the marksman, it may be clear that he could not have made the particular mark in question, we contend that the ordinary mark of an illiterate or enfeebled person, unless the circumstances are very peculiar and unusual, is incapable of identification by mere opinion evidence; and such is believed to be the very general opinion of those experienced in this line of research. We have never before seen the contrary opinion advanced by any writer.

Now for the reasons for this opinion: If, as is usually the case, the mark is in fact made by the scrivener, the marksman merely touching the top of the penholder, the attempt to identify the marksman in such case by opinion evidence would be flatly and absurdly impossible, for the mark takes its character, if it has any, from the one holding and directing the pen, and not from the marksman touching the top of the penholder.

The case of an illiterate actually holding and directing the pen, which rarely arises, presents a different question. The basis of the identification of any writing is the persistence of involuntary and unconscious habit carried into the written characters, which being unconscious, cannot readily be laid aside. I affirm without fear of contradiction that the illiterate marksman has no such habit and therefore no characteristics inhere in his mark. Unless it be first proved that he has practised making his mark so as to do it automatically, as is the case with a ready

writer in making letters and figures, there is no basis for an opinion, because no characteristics exist.

In the case of a person accustomed to write, but who makes his mark because of being temporarily too nervous or too feeble to write, it is clear that the making of a mark is not habitual but exceptional, and hence, as before, there is no basis for expert opinion evidence. If the real basis of expert opinion evidence above stated is kept in mind, there will be no danger of going astray in such cases. The practice of expressing an opinion upon little or no sufficient grounds, as we have attempted to shew in this case, is in our opinion largely responsible for the little esteem in which expert evidence is often held, both by the laity and the profession. A conservative course for which sufficient reason can be given is the only proper one to pursue.

We would call attention to the case of *Wolfson* v. *Oldfield* ante infra p. 623), in which Mr. Justice Robson, of Manitoba, deals with the too common practice of agents acting for both parties in the sale and purchase of property. Land agents are frequently found doing that which divine wisdom says is impossible, i.e., serving two masters. They are often so anxious to effect a sale and pocket the commission that they entirely forget that they, in most cases, owe a special duty to one or other of the parties. In the case referred to the agent was found guilty of a fraud and the sale was set aside. What was done on that occasion is being done every day by other agents and the same result would follow in many cases if the parties either knew the view judges take of such fraudulent conduct, or took the trouble to bring it to their attention. Conduct such as this has brought land agents into well-merited disrepute. A few decisions of the kind above referred to would conduce to more honest dealing and brush up the dulled consciences of those who know right from wrong in such matters, and be a salutary lesson to those who do not.

Newspaper men have opportunities for airing and making the most of their grievances in reference to the subject of libels; but a recent case referred to by the *Law Times* (Eng.) was, as therein said, an unpleasant surprise. Too often, newspapers contain libellous and unfair statements, which go broadcast, and no apology can ever undo the wrong done. The only way to insure less recklessness on the part of the writers, would seem to be a money fine. The item we refer to is as follows:—

"The law of libel as it affects newspapers has naturally been a subject of discussion during the present week at the meeting of the Institute of Journalists. No doubt the result of the case of *Hulton and Co.* v. *Jones*, 101 L.T. Rep. 831, (1910), A.C. 20, was an unpleasant surprise, but the soundness of that decision cannot be doubted. Owing to the wide publicity given to a defamatory statement that appears in the columns of a newspaper, the verdicts of juries have clearly shewn their disposition to treat libels in the press seriously, and, although we do not for one moment suggest the existing law should not be amended in some respect, such amendments, to our mind, ought to be directed more towards the existing practice and procedure in actions for libel and slander rather than the principles which apply to the law of defamation itself."

Many of our readers will remember the incident which caused the suit of Laidlaw v. Russell Sage, in New York, some years ago. It will be remembered that the multi-millionaire, Sage, used his bookkeeper, Laidlaw, as a shield to protect him from a bomb hurled at him. Norcross, the bomb thrower, was blown to pieces, and the bookkeeper was much mangled by the explosion, but the millionaire escaped unhurt. The latter declined to make any compensation to the man who thus saved his life, thereby earning for himself undying infamy. The jury gave Laidlaw a verdict for $40,000, but it was set aside by the courts on some legal technicality, and the unfortunate bookkeeper never received a cent from the heartless and shameless Russell Sage. Broken in

health, Laidlaw was cared for by two sisters. Quite recently he died a pauper, leaving a widow and a son. Russell Sage has also gone to his account. It is not our province to judge any man, but the case of Lazarus v. Dives would seem to point a moral, though it is an insult to Dives to class him with Sage.

Ever since the establishment of the weekly sitting of the High Court at London, Ont., there has been much inconvenience caused by the fact that no regular hour of sitting has been fixed, and though the matter has been occasionally brought up and the judges have frequently expressed their readiness to approve any arrangement that would do away with the inconvenience, nothing definite has ever resulted. The matter has recently been brought to the attention of Sir John A. Boyd, K.C.M.G., the President of the High Court, who after conference with his brother judges, has arranged that the sittings of the Weekly High Court at London shall hereafter be held at 10 a.m. on Saturdays. In the event of anything unforeseen occurring to prevent the sitting at the hour named, notice is to be given by telegram or otherwise to the Registrar of the Weekly Court at London. It is thought that this new arrangement will be a very great convenience and avoid much loss of time to the lawyers both of London and the neighbouring counties.

The strike of the railway workmen in Ireland has, not unnaturally, a somewhat Irish flavour. The railway companies refused to comply with the union's demand that they should not be compelled to handle goods of firms which were in dispute with their employees. The union men and their socialistic leaders may possibly have known that railway companies, being common carriers, are compelled by law to carry the goods which these men refused to handle; and may or may not have seen where the joke came in, at least they left the companies to enjoy it.

REVIEW OF CURRENT ENGLISH CASES.

MUNICIPAL BODY—CONTRACT FOR DISCHARGE OF PUBLIC DUTY—CONTRACTORS' NEGLIGENCE—LIABILITY OF EMPLOYER FOR NEGLIGENCE OF CONTRACTOR.

In *Robinson* v. *Beaconsfield District Council* (1911) 2 Ch. 188 the defendants, a municipal body, had undertaken, under their statutory powers, the cleaning of cesspools in the district subject to its control. For the purpose of carrying out the job they made a contract with one Hawke to empty the cesspools and cart away the contents, but made no provision as to where they were to be deposited. The contractor deposited them on the land of the plaintiff, thereby creating a nuisance and damage to the plaintiff, and the question was whether the defendants were liable for the damage thus occasioned. Joyce, J., held that they were liable, and the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.JJ.) affirmed his decision. The court held that the municipal body was under a liability not only to provide for the removal, but also for the proper disposal of the sewage; because, after its removal from the cesspools it was their property, and they were responsible for its proper disposition.

MORTGAGE TO SECURE DEBENTURES—FLOATING CHARGE—ASSIGNMENT—PRIORITY—NOTICE.

Re Ind, Coope & Co., Fisher v. *The Company* (1911) 2 Ch. 223. This was a contest between parties claiming certain assets of a company under a mortgage which created a floating charge, and others claiming under a specific assignment of certain debts made subsequent to the floating charge. The facts being, that a company issued debenture stock secured by a mortgage of certain specified leaseholds and which also created a floating charge on all its assets. Subsequent to the creation of this charge it assigned to Wilde & Honnibal certain book debts, and rents in arrear in respect of leases, some of which were specifically included in the mortgage to secure the debenture stock, and also certain drawbacks due from the government. Wilde & Honnibal gave notice of their assignment to the tenants, but not to the government. A receiver and manager having been appointed at

the instance of the debenture holders. He gave notice of his appointment to the Crown, and to the tenants. Warrington, J., who tried the action held that the rents in arrear in respect of property not specifically charged belonged to Wilde & Honnibal, and also the drawbacks due from the government, and that the rents due in respect of property specifically charged belonged to the debenture holders, and he held that they could not acquire priority in respect of the drawbacks by first giving notice to the government, because by the terms of the floating charge the company had power to make the assignment of property not specifically charged, and the debenture holders, with notice of the assignment, could not acquire priority by prior notice to the debtor.

ADMINISTRATION ORDER—ORDER FOR SALE—CONVERSION.

In *Fountleroy* v. *Beebe* (1911) 2 Ch. 257, the short point decided by the Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Kennedy, L.JJ.) is, that where an administration order is made directing the sale of land, that operates as a conversion of the land into personalty from the date of the order.

WILL—CONSTRUCTION—LEGACY TO SERVANTS—"ONE YEAR'S WAGES"—WEEKLY HIRING.

Re Sheffield, Ryde v. *Bristow* (1911) 2 Ch. 267. In this case a testator had bequeathed to each of his indoor and outdoor servants who had been in his service for five years previous to his death "the amount of one year's wages." Neville, J., held that all servants who fulfilled the condition as to service were entitled to a year's wages, irrespective of whether they were hired at yearly or weekly wages. The Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Kennedy, L.JJ.) affirmed his decision. The distinction drawn between the present case and *Re Ravensworth* (1905) 2 Ch. 1, appears to be rather like a mathematical point.

HUSBAND AND WIFE—MARRIAGE WITH DECEASED WIFE'S SISTER—DEATH OF HUSBAND BEFORE 1907—DEATH INTESTATE OF SON OF FIRST MARRIAGE—NEXT OF KIN—SPES SUCCESSIONIS—7 EDW. VII. c. 47, ss. 1, 2.

In re Green, Green v. *Mcinall* (1911) 2 Ch. 275 is an illustration of the fact that the English Act permitting marriage with a deceased wife's sister (7 Edw. VII. c. 47) has the effect of

creating some curious legal puzzles. The Act validates marriages of that kind which had taken place before its passing, but provides that the validating of such past marriages is not to interfere with rights acquired by reason of their previous invalidity. In this case a man, before the Act, went through the form of marriage with his deceased wife's sister, and died before the passing of the Act. He had children by his first marriage, and also by the deceased wife's sister. One of the children of the first marriage having died intestate subsequent to the passing of the Act, the question for adjudication in this case was, whether the issue by the deceased wife's sister were entitled to share in his estate as next of kin, with the children of the first marriage, the latter claiming that they alone were entitled, and that they had such a prospective interest in the deceased's estate as was saved by the Act. But Warrington, J., held that the effect of the Act was to validate the marriage as a civil contract, and to make the issue of it legitimate, and that the issue of the first marriage had merely a spes successionis prior to the Act, which gave them no actual estate or interest such as the Act intended to protect.

COMPANY — DEBENTURE — CONSTRUCTION — PRINCIPAL PAYABLE "ON OR AFTER" A SPECIFIED DATE—PROVISION TO REPAY DEBENTURES BY LOT—EVIDENCE—INADMISSIBILITY OF PROSPECTUS TO EXPLAIN DEBENTURES ISSUED PURSUANT THERETO—PROVISION VOID FOR REPUGNANCY.

In re Tewkesbury Gas Co., Tysoe v. *The Company* (1911) 2 Ch. 279. The plaintiff's action was brought to recover the amount of a debenture which the defendant company had covenanted to pay on or after January 1, 1898. The debenture, however, contained the following provision. "The debentures to be paid off will be determined by ballot, and six calendar months' notice will be given by the company of the debentures drawn for payment." The company never paid off any debentures, nor held any ballot, but after the 1st January, 1898, the plaintiff gave the company six months' notice to pay off her debenture, and at the expiration of the notice brought the present action. Parker, J., held that in the events that had happened the principal money secured by the plaintiff's debenture was due and payable, and that if the provision regarding payment of the debentures by ballot, meant that the company was never bound to pay off the debenture unless it elected to do so, it was void for repugnancy.

PRACTICE—COSTS—CROSS ACTION—SECURITY FOR COSTS—PLAINTIFFS IN CROSS ACTION OUT OF JURISDICTION—DISCRETION.

New Fenix Co. v. *General Accident Corporation* (1911) 2 K.B. 619. This was a cross action in which a judge had reversed the order of a master, requiring the plaintiffs to give security for costs, they being resident out of the jurisdiction. The judge was of the opinion that a cross action was in the nature of a cross-bill under the old chancery practice, and according to the former chancery practice in such a case the defendants were not entitled to security. The Court of Appeal (Williams, Moulton, and Farwell, L.JJ.), however, held that there was no hard and fast rule on the subject, and it was a matter of discretion in each case, having regard to all the circumstances, whether or not security should be ordered. In this particular case, the Court of Appeal came to the conclusion that the order should be granted.

PRACTICE—DISCOVERY—QUESTIONS FOR PURPOSE OF ASCERTAINING NAMES OF OPPONENT'S WITNESSES.

In *Knapp* v. *Harvey* (1911) 2 K.B. 725 the Court of Appeal (Williams, Moulton, and Buckley, L.JJ.) held that in action to recover damages for injuries occasioned by the bite of the defendant's dog, in which the plaintiff had delivered particulars of two occasions on which the dog had bitten other persons, it was not admissible, for the purpose of discovery, for the defendant to administer interrogatories as to the names of the persons alleged to have been bitten, on the ground that such questions were merely put for the purpose of ascertaining the names of witnesses by whom the plaintiff intended to prove his case.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J., Garrow,
Maclaren, and Magee, JJ.A.] [Sept. 20.

ROGERS *v.* NATIONAL DRUG AND CHEMICAL CO.

Landlord and tenant—Agreement for lease—Covenant for renewal running with land.

Appeal by plaintiff from a judgment of RIDDELL, J.A., 23 O.L.R. 234, dismissing the plaintiff's action to recover possession of demised premises.

The lease in this case was not under seal. It was admitted that if it had been, a covenant to renew would have run with the land. The contention was that the present demise not being under seal, the agreement to renew was not binding on the lessor's assignee.

Held, that this view was too narrow, in that it took no account of the equitable rule stated by RIDDELL, J., to the effect that a tenant having a right to the legal estate, which right was enforceable in the Court in which the action was brought, equity looks upon that as done which ought to be done, and the court governs itself accordingly. The further contention that the option created was only a personal obligation was, under the circumstances, immaterial.

Bicknell, K.C., and *M. Lockhart Gordon*, for plaintiff *Armour*, K.C., for defendants.

Full Court.] D'EYE *v.* TORONTO R.W. CO. [Sept. 20.

Street railway—Injury to person attempting to get on car Findings of jury—Negligence—Evidence.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., upon the findings of a jury, in favour of the plaintiff, for the recovery of $2,500 damages for personal injury sustained by the plaintiff by reason of the negligence of the

defendants, as she alleged, in starting a car while she was in the act of getting into it.

The judgment of the Court was delivered by MEREDITH, J.A.:—There was evidence upon which reasonable men could have found for the plaintiff in this action. According to the plaintiff's testimony, the car was not moving when she attempted to board it; a signal was given, and the car put in motion, when she had her hand on the handrail and one foot on the step, in a position of evident danger if the car were then put in motion. Her evidence fails to bring home to any one, having any control of the car, knowledge of her predicament: but that want of evidence is supplied by the conductor, who admits having seen her, though he exculpates himself in a clear manner, so that the defendants must have failed if the jury believed that part of his testimony; but they did not. Coupling part of the plaintiff's testimony with part of the conductor's, a case is made out; for, though the plaintiff may have had no right to attempt to board the car where she did, yet, having done so and being in a dangerous position, it was an act of actionable negligence on the conductor's part to put the car in motion while, to his knowledge, the woman was in a position, safe while the car was not moving, obviously very dangerous if the car were then put in motion. The jury might, as no doubt they did, have given credit in part only to the evidence of the conductor, and add that to so much of the plaintiff's testimony as made out a case against the defendants.

Appeal dismissed.

D. L. McCarthy, K.C., for defendants. *B. H. Ardagh*, for plaintiff.

HIGH COURT OF JUSTICE.

Boyd, C.] [Sept. 19.

PATTISON v. CANADIAN PACIFIC RY. CO. AND CANADIAN NORTHERN RY. CO.

Railway—One railway crossed by another—Signal-man for both—Negligence—Injury to servant of one railway company—Joint servant—Liability.

Action by the widow of a locomotive fireman employed by the defendants, the Canadian Pacific Ry. Co., to recover damages for his death, alleged to have been caused by negligence of a ser-

vant of the defendants, at a place where the two railways crossed, in failing to give the proper signal.

The Canadian Northern was the senior road in possession of the track. Leave was granted to the Canadian Pacific to cross the track on condition that the Canadian Northern should appoint a man to take charge of the crossing. This man became intoxicated and the disaster resulted. The service in question was performed solely for the benefit of the Canadian Pacific. The question of liability was brought before the Railway Board, but irrespective of the accident, and the Chief Commissioner gave a ruling that this signalman should be regarded as the joint employee of each railway; and that each company should be liable for all damage suffered on its own line caused by the negligence of this joint signalman.

BOYD, C.:—This ruling was in March, 1909, and does not authoritatively control the relative liability of these defendants for what occurred in September, 1910, under the permission to cross, granted in April, 1908, but it is a valuable expression of the mind of the Railway Board as to existing legal liability.

This man, appointed by the one company and paid by the other, would be a person in charge of the signals at the crossing and interlocking switches, within the meaning of the Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5; *Gibbs* v. *Great Western R.W. Co.* 12 Q.B.D. 208.

In the evolution of the law, the old test, as to who hired and paid is being modified, if not superseded, by the more modern method indicated in the judgment of Garrow, J.A., in *Hansford* v. *Grand Trunk R.W. Co.*, 13 O.W.R. 1184, at p. 1187: *i.e.*, the whole circumstances of the employment must be looked at; and the real effect of the actual relation existing must not be lost sight of in deference to a formula about hiring or paying.

The common signal-man is to be regarded as the person employed by the company for which he is adjusting the points and giving the signals.

If the order of the Board be regarded as a quasi-contract or in the nature of a contract between the companies, the rules of common law would place liability on the company which was making use, on its own line, of the common servant for the sole prosecution of its own work at the crossing of the other road. . . . *Hall* v. *Lees*, [1909] 2 K.B. 602.

Or, if the theory of joint service be rejected, and the signalman, so appointed and so paid, be regarded as a servant or agent sui generis of both companies, then fairness and good sense

would support the proposition that the company for which the signal-man was alone acting on the particular occasion, was the principal against which relief should be sought, if the then agent of that road was guilty of misconduct by which an employee of the road was injured.

The proper conclusion in this case is, that the damages agreed upon be paid by the defendant, the Canadian Pacific Railway Company, with costs of action. As to the other defendant, the action is dismissed, without costs, as the precise question involved now arises for the first time in the courts.

F. H. Keefer, K.C., for plaintiff. *W. H. Curle*, for the defendants, the Canadian Pacific Ry. Co. *O. H. Clark*, K.C., for the defendants, the Canadian Northern Ry. Co.

Meredith, C.J.C.P.] [Sept. 25.

BENNER v. MAIL PRINTING CO.

Libel—Newspaper—Libel and Slander Act, s. 8—Notice—Insufficiency—Motion for judgment on pleadings—Action dismissed.

Motion by the defendants for judgment on the pleadings and admissions of the plaintiff upon his examination for discovery, in an action for a libel published in a newspaper.

Held, that the notice served by the plaintiff specifying the statements complained of was not a sufficient notice to the defendants, within the meaning and for the purposes of sec. 8 of the Libel and Slander Act, being addressed: "To W. J. Douglas, Esq., Publisher and General Manager Mail & Empire." The notice was not given to the defendants, as required by sec. 8.

The Chief Justice also thought the point could be properly dealt with as upon a demurrer, as no evidence that might be given at the trial would help the plaintiff.

Action dismissed with costs.

C. Swabey, for defendants. *H. S. White*, for plaintiff.

Middleton, J.] RE BROOM. [Sept. 23.

Criminal Law—Police magistrate—Information for perjury—Refusal to issue summons—Crim. Code, s. 655—8 & 9 Edw. VII. c. 9—Mandamus—Discretion of magistrate.

Application by James Broom for a mandamus to compel one

of the police magistrates for the city of Toronto to issue a summons against one Turner, for perjury.

MIDDLETON, J.:—Broom laid an information against Turner for assault, a warrant was issued, and the case heard before the police magistrate. There was an issue of fact before the magistrate, and he believed Turner, and did not believe Broom and his wife, and accordingly dismissed the charge. Broom now seeks to prosecute Turner for perjury; and, a summons (or warrant) having been refused by the magistrate, now moves for a mandamus.

Passing by all other difficulties in the applicant's way, it is, I think, clear that it is the duty of the magistrate, upon receiving an information, to hear and consider the allegations of the informant, and (if he thinks proper) of his witnesses (see the amendment to s. 655 of the Criminal Code by 8 & 9 Edw. VII. c. 9, sch.); and, if he is of opinion that there is no case made for the issue of a summons or warrant, to refuse it.

The magistrate's discretion in issuing or refusing to issue a summons is not subject to review in this court. He can be compelled to do his duty; but in this case he has well discharged this duty by declining to permit a witness, whom he has believed, to be prosecuted for perjury, at the instance of a witness whom he did not believe, and where, upon the perjury charge, there could be no further evidence than that given upon the trial of the assault. It is not in the public interest that the trial of a trivial assault case should be had in this indirect way.

Rex v. *Meehan*, No. 2, 5 Can. Crim. Cas. 312, *Ex p. MacMahon*, 48 J.P. 70, and *Re Parke*, 30 O.R. 498, establish the law governing me.

Motion dismissed with costs.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] [Sept. 27.

HUSON v. HADDINGTON ISLAND QUARRY CO.

Practice—Appeal—Stay of proceedings pending appeal to Privy Council from Court of Appeal—Want of jurisdiction in Supreme Court to grant stay.

In an appeal to the Court of Appeal, judgment was given allowing the appeal with costs. Respondent having decided to

appeal to the Judicial Committee of the Privy Council, took out a summons for an order granting a stay of proceedings pending such appeal, and Morrison, J., to whom the application was made, granted the order. An appeal was taken from this order to the Court of Appeal on the ground, inter alia, that the judge had no jurisdiction to stay the execution of an order of the Court of Appeal.

Held, IRVING, J.A., dissenting, that a judge of the Supreme Court had no jurisdiction to order a stay of proceedings in the circumstances, and that the proper tribunal to apply to was the Court of Appeal.

F. Higgins, for appellant. *A. M. Whiteside*, for respondent.

Full Court.] [Sept. 29.

REX v. DEAKIN.

Criminal law—Affirmation—Conditions precedent to—Duty of judge—Discretion—New trial—Criminal Code, sec. 1018.

At the trial the evidence on which the accused was convicted was given by a witness who was a Church of England minister, but not actively following his profession. On being offered the Bible to take the oath in the usual form, he said: "I affirm." No objection was made at the time, but on the cross-examination being reached, he was asked: "What is your object in making an affirmation, then, instead of taking an oath on the Bible?" He answered: "I believe it is optional with the court," and, "I consider that that is a private matter of my own discretion." To a statement that for private reasons he had retired from the diocese of British Columbia, he was asked: "Are those reasons that you do not believe in Christian doctrines?" He answered: "I appeal to the judge whether I have to reveal my private conscience to the gentleman." He was not asked whether he had conscientious scruples against the taking of an oath on the Scriptures. His appeal was sustained and the defence was not allowed to cross-examine witness on his religious belief. Two questions were reserved for the opinion of the Court of Appeal: (1) Could the judge consider the statements of this witness as evidence, inasmuch as he did not state that his objection to taking an oath was on grounds of conscientious scruples?

(2) Should the judge have allowed accused's counsel to cross-examine said witness on the question of his belief in Christian doctrines, and was the accused prejudiced in his defence by my refusal?

Held, on appeal, IRVING, J.A., dissenting, that a witness claiming the right to affirm instead of taking the oath must make it clear to the court that he has conscientious scruples to the taking of an oath.

Aikman, for appellant. *Maclean*, K.C., for the Crown, contra.

Book Reviews.

Inquests and Investigations. A practical guide for the use of Coroners holding inquests in Ontario. By ARTHUR JUKES JOHNSTON, M.B., M.R.C.S., M.M.C., Chief Coroner for the city of Toronto. Toronto: Canada Law Book Company, Limited. 1911.

A very practical publication which should be in the hands of all coroners, as well as of the legal profession who are so often called upon to take part in investigations of the "Crowner's quest" class. The author jumps into his subject without preface or introduction, and gives to the reader much valuable information and many useful forms, but with a somewhat inadequate index. The universally popular Dr. Johnston does most things very well indeed, but indexing is not his strong point. We wish him great success with his first venture in the medico-legal line.

The Law of Evidence. By S. J. PHIPSON, M.A., Barrister-at-law. 5th ed. London: Stevens & Haynes, law publishers, Bell Yard, Temple Bar. 1911.

The first edition of this work was published in 1892. Since then, it has been growing in size and reputation. The raison d'etre of this edition is the fact that, since the previous one, a number of statutes dealing wholly or in part with the subject of evidence have been passed, the effect of which have been incorporated in the present edition. Over five hundred new cases have been added, which practically exhaust the English authorities of any value on the subject treated by the author. A feature of this book is the convenient arrangement in parallel columns of examples given of the various propositions stated under the headings, admissible or inadmissible.

A Guide to the Law of Betting, Civil and Criminal. By HERBERT W. ROWSELL and CLARENCE G. MORAN, Barristers-at-law. London: Butterworth & Co., law publishers, Bell Yard, Temple Bar. 1911.

This is a well-arranged collection of the law on a subject of general interest, and claims to have collected all the cases on the subject. They are grouped with explanatory comments in which the authors do not fail to express their own opinions. The book begins thus. "What is a bet? Very few English laymen would admit their inability to answer the question, 'What is a bet?' But when one is asked to frame his reply in a definition capable of bearing the test of a legal analysis, the surprising difficulty of the task becomes apparent to him." The first reference is to a case where the expression, "playing the game," now in common use, is to be found. In that case, it was the "game of foot racing." We commend the book as well to the betting fraternity as to those on the Bench, and others who seek to restrain this common development of the frailty of human nature.

United States Decisions.

BILLS AND NOTES.—A recital in a promissory note that it is secured by deed of trust is held in *Zollman* v. *Jackson Trust & S. Bank* (Ill.), 32 L.R.A. (N.S.) 858, not to destroy its negotiability, so as to charge a purchaser for value, before maturity, with notice of latent defences which the maker may have against the payee.

BILLS OF LADING.—A bank which cashes a draft in its favour, with bill of lading attached, is held in *Cosmos Cotton Co.* v. *First Nat. Bank* (Ala.), 32 L.R.A. (N.S.) 1173, not to be liable to the consignee who pays the draft upon presentation, for shortage or inferiority of quality in the shipment.

CARRIERS.—A railroad company is held in *Commonwealth* v. *Illinois C. R. Co.* (Ky.), 32 L.R.A. (N.S.) 801, not to be punishable for hauling the sleeping car of another corporation, which is not provided with compartments for coloured persons and does not bear any indication of the race for which it is set apart, or having no additional separate sleeping car for coloured passen-

gers, under a statute providing for the punishment of any railroad company running or operating railroad cars or coaches, which does not furnish separate coaches or cars for the transportation of white and coloured passengers, and have each respective coach or compartment marked with appropriate words in plain letters indicating the race for which it is set apart, where it receives no compensation for hauling the car except the regular fare for transportation of persons occupying it and the advantage of its being a part of its train.

Under the doctrine of implied police power, a common carrier is held in *Jansen* v. *Minneapolis & St. L. R. Co.* (Minn.), 32 L.R.A. (N.S.) 1206, to be bound to exercise the utmost diligence in maintaining order and in guarding its passengers against assaults by other passengers, which might reasonably be anticipated or naturally expected to occur.

A railroad company is held in *Houston & T. C. R. Co.* v. *Bush* (Texas), 32 L.R.A. (N.S.) 1201, not to be liable for the act of a station porter who boards a train and makes an assault on a through passenger travelling thereon, for the purpose of satisfying a personal grudge, where its other servants are not negligent in failing to anticipate and prevent the assault.

A passenger is held in *Penny* v. *Atlantic C. L. R. Co.* (N.C.), 32 L.R.A. (N.S.) 1209, to be guilty of contributory negligence which will prevent his holding the carrier liable for injury from a stray bullet fired by another passenger, if the danger of such injury could have been apprehended by him, and he did not turn out of his way or make any effort to avoid it, although the conductor who knew of the danger failed to give him warning.

A fireman riding free on a street car, who, contrary to known rules of the company requiring him to ride on the rear platform, and forbidding persons to ride on the running boards of cars which are next to the parallel track, takes his position on such running board, is held in *Twiss* v. *Boston Elevated R. Co.* (Mass.), 32 L.R.A. (N.S.) 728, to be a mere licensee, and not to be entitled to hold the company liable for injuries negligently inflicted upon him while there; and it is held to be immaterial that the conductor assented to his remaining there, since he had no authority to waive the rules of the company.

A baggage man with express authority to notify the conductor of trespassers upon the train, and, upon request, to aid him in expelling them, is held in *Daley* v. *Chicago & N. W. R. Co.* (Wis.), 32 L.R.A. (N.S.) 1164, to be properly found to be acting within the scope of his authority in expelling one without report-

ing him to the conductor, so as to render the railroad company liable in case he causes injury by the use of excessive and unusual violence in so doing.

That it is the duty of a common carrier to provide reasonably safe approaches to its cars, and to provide such approaches with lights at night, is declared in *Messenger* v. *Valley City Street & I. R. Co.* (N.D.), 32 L.R.A. (N.S.) 881.

The liability of a carrier for suffering on the part of a sick person, due to its neglect promptly to transport and deliver medicine to him, is held in *Hendricks* v. *American Exp. Co.* (Ky.), 32 L.R.A. (N.S.) 867, not to be affected by the fact that the order was given without his knowledge or approval.

A railroad company is held in *Dingman* v. *Duluth, S. S. & A. R. Co.* (Mich.), 32 L.R.A. (N.S.) 1181, not to be prevented from granting to a particular person engaged in transferring passengers and baggage the exclusive right to a representative on its trains to solicit patronage, by a statute requiring such corporation to grant equal facilities for transportation of freight and passengers without discrimination.

LIBEL.—A petition presented to a police magistrate, charging misconduct on the part of occupants of a dwelling and asking that they be required to move therefrom, is held in *Flynn* v. *Boglarsky* (Mich.), 32 L.R.A. (N.S.) 740, to be absolutely privileged, if the charges are pertinent, material, and positive, although it cannot properly be called a pleading in a case.

TRESPASS.—The maintenance of the portion of the foundation wall of the building, which had without right been projected over the boundary line into the soil of the adjoining owner, is held in *Milton* v. *Puffer* (Mass.), 32 L.R.A. (N.S.) 1009, to be a continuing trespass or nuisance and for the injury inflicted by it upon him, one succeeding to the title of the adjoining property may maintain an action against the wrongdoer.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Kenneth John Martin, of the city of Charlottetown, in the Province of Prince Edward Island, Barrister-at-law; to be Judge of the City Court of the city of Charlottetown. (Oct. 7.)

Flotsam and Jetsam.

Recently the deaths have occurred of three notable lawyers. Last week we had to announce the decease of Sir Samuel Walker, the Lord Chancellor of Ireland, on the 13th inst., and this was followed on Friday last week by the death of Lord James of Hereford, and of His Honour Judge Willis on Tuesday last. For some time past Lord James had practically retired from all political and judicial duties, and at the time of his death was in his eighty-third year. Judge Willis was but seventy-six years of age, and, until the beginning of the illness which has resulted in his death, shewed much of the vigour that has characterized his life. In him the profession will lose a member "of the highest and most attractive character"—to quote the *Times*—and one of undoubted popularity.—*Law Times.*

WOULDN'T TAKE ANY:—The late Lord Young, of the Scottish Bench, was responsible for enlivening many a dull case. One of the best remarks that ever fell from his lips was the reply to a counsel, who urged on behalf of a plaintiff of somewhat bibulous appearance: "My client, my lord, is a most remarkable man, and holds a very responsible position; he is manager of some waterworks."

After a long pause, the judge answered: "Yes, he looks like a man who could be trusted with any amount of water."—*Law Notes.*

In the *Daily Mail* last month we read a report of a murder trial. The *Mail* quoted from the *Sun* as follows:—"Counsel closed a powerful argument by singing to the jury in a tear-choked voice, 'Home, Sweet Home.' The song trembled on his lips and brought tears to the eyes of all the jurors, the defendant, and the crowd which was packed in the room. It was a dramatic finish to the most dramatic murder trial in Texas history." We venture in all humility to suggest that our leading counsel should take a hint. We should like to hear, say, Sir Edward Carson (or in this country say, Æ. Irving, K.C., A. B. Aylesworth, K.C., or E. F. B. Johnston, K.C.) concluding an impassioned defence with a pathetic rendering of some appropriate song.—*Law Notes.*