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THE RIGHT TO SHOOT AN ESCAPING CRIMINAL.

I. Introduction.

As this subject has been brought somewhat prominently before the notice of the public by recent cases, an examination of the law bearing on it may be timely. The rule, as stated by the press comments on these cases, has been said to be "that a policeman has absolutely no right to shoot at a man who is simply running away. Let it be clearly understood hereafter, then, that an officer who fires at a fleeing man leaves himself open to the danger of being called upon to face a charge of murder."

In a later case than the one above referred to the judge is reported to have pointed out that a constable has no right to shoot a prisoner who is merely running away. A constable is justified in killing, the judge said, "only when this is necessary to save his own life or that of someone else whom it is his duty to protect."

In the absence of any official report of these cases it may well be assumed that no such wide proposition of law was laid down therein as is above stated. No doubt the facts in the above cases warranted the actual disposition made of them. Even if such general words were in fact used, we have been told by very high authority "that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found:" *Quinn* v. *Leathem,* [1901] A.C. 495, at p. 506, per Earl of Halsbury, L.C.

The subject is a practical one and it is desirable to see what is the true rule of law in regard to it.

While it is on the one hand important to discourage and repress the use of firearms by peace officers unless there is a real necessity for their use, it is, on the other hand, just as important that criminals should not be led to believe that in no case is an officer justified in firing at them when they are trying to evade justice and to escape by flight. The objection to the use of firearms in such cases is pointed out by Mr. Justice Perdue in charging the jury in the case of *King* v. *Smith*, 13 Can. Cr. Cas. 326, at p. 330, as follows:—

"Shooting is the very last resort. Only in the last extremity should a peace officer resort to such a dangerous weapon as a revolver in order to prevent the escape of the accused person who is attempting to escape by flight.

"A man who is fleeing from lawful arrest may be tripped up, thrown down, struck with a cudgel and knocked over if it is necessary to do so to prevent his escape, and if he strikes his head on a stone and is killed the police officer is absolved because the man was fleeing to escape lawful arrest and the means taken to stop him were not dangerous and not likely in themselves to cause his death. But firing at a man with a revolver may result in the death of the man, as it did in this case, though the intention was only to wound and so prevent his escape."

II. The Common Law Doctrine.

(*a*) *English Authorities.*

There is, and always has been, at the common law a clear distinction between such cases arising in civil actions and in felonies.

"If a man be in danger of arrest by a capias in debt or trespass, and he flies, and the bailiff kills him, it is murder; but if a felon flies, and he cannot be otherwise taken, if he is killed, it is no felony, and in that case the officer so killing forfeits nothing, but the person so assaulted and killed forfeits his goods." (1 Hale P.C. 481).

Sir Michael Foster (271) deals with the question as follows:

—"The case of bare flight in order to avoid an arrest in a civil proceeding and likewise in some cases of a criminal nature, will fall under a different consideration. A defendant in a civil suit, being apprehensive of an arrest fleeth, the officer pursueth, and in the pursuit killeth him: *this*, saith Lord Hale, *will be murder.*

"I rather choose to say, it will be murder or manslaughter, as circumstances may vary the case; for if the officer in the heat of the pursuit, and merely in order to overtake the defendant, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon *not likely to kill*, and death should unhappily ensue, I cannot think that this will amount to more than manslaughter, if in some cases even to that offence. The blood was heated in the pursuit, his prey, *a lawful prey*, just within his reach, and no signal mischief was intended. But had he made use of a deadly weapon, it would have amounted to murder. The mischievous, vindictive spirit, the *malitia* I have already explained, which always must be collected from circumstances, determineth the nature of the offence. What hath been said with regard to bare flight in a proceeding merely civil is equally true in the case of a breach of the peace, or any other misdemeanour short of felony But where a felony is committed, and the felon fleeth from justice, or a dangerous wound is given, it is the duty of every man to use his best endeavours for preventing an escape; and if in the pursuit the party fleeing is killed, *where he cannot be otherwise overtaken*, this will be deemed justifiable homicide; for the pursuit was not barely warrantable, it is what the law requireth and will punish the *wilful* neglect of. I may add that it is the duty of every man in these cases quietly to yield himself up to the justice of his country, and for this reason it is that flight alone upon a charge of felony inducęth a forfeiture of goods, though the party upon his trial may be acquitted of the fact; for he hath done what in him lay to stop the course of public justice. . . . . .

"These rules are founded in public utility, *ne maleficia remaneant impunita.*"

That the above quotations embody the well-settled rules of the common law on this subject is made manifest by the treatment of them by the Fourth (Imperial) Commission on the Criminal Law, appointed in 1845.

In their Second Report the Commissioners said as follows:—

"Owing to the important changes which have taken place in the law, whereby felonies have been made to include a variety of offences of a much less aggravated description than those to which the term was originally applied, and the difference between felonies and misdemeanours having become, except as regards the law of procedure, merely nominal, the rules concerning justification in cases of homicide have in several instances, it is submitted, become unreasonable and inexpedient. Hence it has appeared expedient to modify the rules whereby (1) it is justifiable to kill a person who does not make resistance, but *flies*, after having committed a felony or having given a dangerous wound. (1 Hale 489, 490; 1 Hawk, P.C., c. 28, s. 11; Fost. 271; 4 Black Comm. 179); . . . With respect to the first-mentioned rule, we have made an important limitation of the law, by confining the justification to prevent escape, where there is no resistance, to cases where the party flying lies under a capital charge. The great alterations which have occurred since the rules on this subject were originally established in the definitions and punishment of offences, and the shadowy distinctions between many felonies and misdemeanours seem to require that the justification for taking away life in cases of flight should be confined in the manner provided for in the text. Besides which, all felonies in the cases in which the rule was allowed to operate, were originally punishable with death" (p. 31).

This report was presented to Parliament in the year 1846. A draft of a bill embodying the recommendations of this Fourth Commission is contained in their Fourth Report. This bill was introduced into the House of Lords in 1848 by Lord Brougham, but was not further proceeded with.

Many subsequent attempts were made to codify the criminal law, and various amendments were, from time to time, made therein; but the above suggestions were not given effect to.

In the year 1878 a Commission was appointed to inquire into and consider the provisions of a Draft Code relating to indictable offences, and a Draft Code was subsequently prepared by the Commissioners and presented in their report. This code, which was not adopted by the Imperial Parliament, is the basis of the Criminal Code of Canada. The provisions contained therein on the point under discussion are substantially the same as are to be found in the Canadian Code. The Commissioners do not seem to have approved of the change recommended by the Fourth Commission above referred to; they do not, at any rate, embody them in their Draft Code, or suggest their adoption.

Sir James Stephen, who was a member of this last Commission, says:—

"As to the degree of force which may be used in order to arrest a criminal, many questions might be suggested which could be answered only by way of conjecture. Two leading principles, however, may be laid down with some confidence, which are also to be collected from Hale. The first is that if a felon flies or resists those who try to apprehend him, and cannot otherwise be taken, he may lawfully be killed." (History of the Criminal Law (1883), I p. 193). In a note to this page, Stephen says: "This rule seems to overlook the distinction between taking a man a prisoner and taking possession of his dead body, for it is difficult to see in what sense a pick-pocket can be said to be taken if he is shot dead on the spot. The rule would be more accurately expressed by saying that a man is justified in using any violence to arrest a felon which may be necessary for that purpose, even if it puts, and is known and meant to put, his life in the greatest possible danger, and is inflicted by a deadly weapon, and does in fact kill him." (Ib.)

In the latest edition of Russell on Crimes, the common law rule is stated in substantially the same terms as by Sir James

Stephen. "And again though where a felon flying from justice is killed by the officer in the pursuit, the homicide is justifiable if the felon could not be otherwise overtaken; yet where a party is accused of a misdemeanour only and flies from the arrest, the officer must not kill him, though there be a warrant to apprehend him, and though he cannot otherwise be overtaken, and if he do kill him, it will in general be murder; but, under circumstances, it may amount only to manslaughter, if it appear that death was not intended." (Vol. III., 6th ed., p. 130. See also, Archbold's Criminal Pleading (23rd ed.), p. 812; Roscoe's Criminal Evidence (13th ed.), p. 642; Burns' Justice (30th ed.), vol. I., p. 303.)

(*b*) *American Authorities.*

The rule of the common law is laid down in similar terms in American textbooks. "By the common law it is lawful to kill a fleeing felon where he cannot otherwise be taken, flight being tantamount to resistance. And statutes making homicide justifiable when necessarily committed in arresting a felon fleeing from justice are merely declaratory of the common law, and warrant killing a fleeing felon when he cannot otherwise be taken. And generally an officer, in making an arrest in a case of felony may use such force as is necessary to capture the felon even to killing him when in flight. Even a private person is justified in killing a fleeing felon who cannot otherwise be taken, if he can prove that the person is actually guilty of the felony." (Wharton on Homicide, 3rd ed., p. 492.) See *Jackson* v. *The State*, 66 Miss. 89.

So also says Mr. Bishop (Criminal Law, 7th ed., vol. II., secs. 647, 648).

"In cases of felony the killing is justifiable before an actual arrest is made, if in no other way the escaping felon can be taken.

"Gabbett has stated the law, with apparent correctness, as follows:—

"'In cases of felony, if the felon fly from justice, or if a dangerous wound be given, it is the duty of every man to use his best endeavours for preventing an escape; and if in the pursuit the felon be killed where he cannot be otherwise overtaken, the homicide is justifiable; and the same rule holds if the felon, after being legally arrested, break away and escape. But if he may be taken in any case without such severity, it is at least manslaughter in him who kills him, and the jury ought to inquire whether it were done of necessity or not.'" 1 East. P.C. 298; 1 Gab. Criminal Law, 482.

"Homicide committed by a public officer or a private citizen while attempting in a lawful manner to arrest or prevent the escape of a felon, whether in fleeing from arrest or in attempting to escape after he has been taken, is justifiable where otherwise the arrest cannot be made or the escape prevented." (21 Cyc., p. 796*b*.)

"The officer who kills one for whom he has a warrant for felony, must satisfy the jury trying him for the homicide that he tried in good faith, and with reasonable prudence and caution, to make the arrest, and was unable because of the flight of the person to secure him, and that he resorted to the severe means employed when other proper means had failed, and when, as determined by the state of things as between him and the fleeing felon the arrest could not be made without a resort to the means employed." (*Jackson* v. *State*, supra.)

III. The Criminal Code.

It is necessary to consider, in the next place, what change, if any, has been made by the Code in these well-settled doctrines of the common law. Sections 41-43 (R.S.C. c. 146) are the ones material. By section 14 the distinction between felony and misdemeanour is abolished, and this distinction, and these terms are no longer used in the Code. Section 41 defines the powers of a peace officer in preventing escape from arrest for the major,

or more serious, offences as follows: "Every peace officer proceeding lawfully to arrest, with or without warrant, any person for any offence for which the offender may be arrested without warrant, and every one lawfully assisting in such arrest, is justified if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by such flight, unless such escape can be prevented by reasonable means in a less violent manner." Section 42 defines the powers of a private person in similar cases: "Every private person proceeding lawfully to arrest without warrant any person for any offence for which the offender may be arrested without warrant is justified, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by flight, unless such escape can be prevented by reasonable means in a less violent manner, if such force is neither intended nor likely to cause death or grievous bodily harm."

It will be seen that there is a sharp distinction drawn between the powers of a peace officer and those of a private person in such cases. The latter is precluded from using force which is "likely to cause death or grievous bodily harm." There is no such limitation upon the powers of the peace officer; he is justified in case of the flight of the criminal in using "such force as may be necessary to prevent his escape by such flight, unless such escape can be prevented by reasonable means in a less violent manner." This is just as at common law; the peace officer may clearly use force "likely to cause death or grievous bodily harm" if under the circumstances he cannot by other means prevent the escape.

The officer in such cases, if death ensues, will have to "satisfy the jury trying him for the homicide that he tried in good faith and with reasonable prudence and caution, to make the arrest, and was unable because of the flight of the person to secure him." (*Jackson* v. *State*, supra), but he would seem to have the clear right to use firearms to accomplish the arrest if "as between him and the fleeing felon the arrest could not be made without a resort to the means employed." (Supra.)

Section 646 enumerates the cases in which "any person may arrest without warrant any one who is found committing any of the offences" therein mentioned. These are very numerous and include not only crimes of violence and injury to the person, but all the more serious crimes.

By section 647, "a peace officer may arrest without warrant, any one who has committed any of the offences mentioned in the last preceding section" and also those mentioned in other sections enumerated in section 647.

By section 648, "a peace officer may arrest, without warrant, anyone whom he finds committing any criminal offence. 2. Any person may arrest, without warrant, anyone whom he finds committing any criminal offence at night."

By section 649, "Anyone may arrest, without warrant, a person whom he, on reasonable and probable grounds, believes to have committed a criminal offence and to be escaping from, and to be freshly pursued by, those whom the person arresting, on reasonable and probable grounds, believes to have lawful authority to arrest such person."

(See further on this subject sections 650-652.)

Section 43 deals with preventing escape in cases other than those referred to in sections 42 and 42, and says: "Everyone proceeding lawfully to arrest any person for any cause other than an offence in the last section mentioned is justified, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by flight, unless such escape can be prevented by reasonable means in a less violent manner, if such force is neither intended nor likely to cause death or grievous bodily harm."

In cases coming under this section not even a peace officer would be justified in shooting at a person flying from arrest. It must be remembered in dealing with these sections that "every one authorized by law to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess" (section 66).

In the recent case of *King* v. *Smith* (supra) the facts were as follows: The accused, being a peace officer, was endeavouring to arrest, without a warrant, one Gans, a man whom he, on reasonable and probable grounds, believed to have been guilty of stealing valuable furs from the shop of a merchant tailor. Gans, on catching sight of the accused, ran away. The accused pursued him and in an endeavour to effect his arrest fired several shots from his revolver with the view of intimidating him and inducing him to surrender. Gans still continued his flight and the accused becoming exhausted and, believing, as he alleged, that Gans was about to escape, fired at him then being about twenty-five yards in advance, intending to wound him in the leg. The revolver was unintentionally pointed too high and the bullet struck the deceased in the head killing him instantly. The accused was then indicted for manslaughter. The head note to the case states the result of it as follows: "When a peace officer, pursuing a fugitive whom he had a right to arrest without warrant, found that the fugitive was, in his opinion, likely to escape owing to superior speed, it is a question for the jury, on the trial of the officer for manslaughter in killing the fugitive by a shot intended only to wound and so to stop his flight, whether under all the circumstances, the officer was justified under section 41 of the Code in shooting or whether the officer should not have taken other means. "On flight to avoid arrest, the force justifiable in the pursuing officer, under Code section 41, relates to the present pursuit without regard to the probability of the fugitive being subsequently discovered should he escape."

In this case it was not suggested, either by judge or counsel, that the officer was absolutely precluded from using firearms to prevent the escape. The sole question was as to the reasonableness of using the revolver under the circumstances.

The right to shoot in a proper case was conceded; but this right was limited to the very last resort, to be exercised only in the last extremity in order to prevent the escape of the accused person who is attempting to escape by flight.

The accused was acquitted.

The present condition of the law therefore would seem to be as follows:—

(1) Where any person is found committing any of the offences specified in section 646, he may be arrested without warrant by any one whether peace officer or private person.

So also an arrest may be made without warrant under sections 648 and 649.

(2) If the criminal takes to flight to avoid arrest the officer is bound to prevent such escape, and, if necessary, may fire at the criminal while endeavouring to escape (section 41 supra).

(3) A private person may arrest, without warrant, in such cases, and may use force to prevent an escape by flight, but he may not use force likely to cause death or grievous bodily harm (section 42), therefore he may not use firearms.

(4) A peace officer may arrest without warrant anyone who has committed any of the offences mentioned in section 646, or any of the further offences mentioned in sections 647, 648, 649, and may, in such cases, stop a fleeing criminal, by shooting at him if that be necessary under the circumstances.

(5) But in no other case is anyone, whether officer or private person, justified in using firearms when a person to be arrested simply takes to flight.

N. W. HOYLES.

THE GRANTING OF CHARTERS.

A controversy has arisen in the party press in regard to the duty of the Secretary of State in granting letters patent under the Dominion Companies Act. This has been stirred up by the issue of letters patent at Ottawa to the Metropolitan Racing Association, Limited, and some new and rather startling legal doctrines are being evolved. Advocacy may sometimes seek to put a strain on legal interpretation, but for a dislocation of all its joints and sinews one may apparently look to the leader writer of a party organ.

The Dominion Companies Act provides that the Secretary of State "may by letters patent grant a charter" to any number of persons not less than five who apply therefor. Subsequent sections of the Act specify the requirements in regard to incorporators, capital, shares, etc., and the schedules of the Act contain forms of petitions, agreement and stock-book, notice, etc.

It is true that the word "may" is commonly held to confer an enabling and discretionary power. In a number of cases, however, the word has been construed as obligatory, the principle laid down in these cases being that where a power is reposed in a public officer for the purpose of being used for the benefit of persons who are specifically pointed out and with regard to whom a definition is adopted by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised: *Julius* v. *Bishop of Oxford,* 5 A.C. 235.

In the present instance, in view of the detailed conditions set out in the Companies Act which must be complied with by applicants for a charter, it might well be contended that no discretion is intended to be reposed in the Secretary of State, and that his duties are ministerial only; at any rate the matter is not free from doubt. Had it been the intention of the legislature to confer a broad discretionary power such as Parliament would have, it might easily have inserted such words as "when he deems expedient." Assuming that the duties are ministerial a mandamus would lie to the Secretary of State compelling him to issue letters patent under his seal of office: *In re Massey Manufacturing Co.,* 13 A.R. 446.

If there is a discretion on the part of the Secretary of State no jurist would approve of an absolutely free and unfettered discretion at the whim of the tenant of the office for the time being. Such a practice would be intolerable. We are afraid that even the enthusiastic supporter of unfettered powers in the present instance who writes for the *Toronto Mail and Empire* would not approve of a discretion which might refuse charters to

political opponents of the present Secretary of State. What then must be the limitations? Obviously, a due regard to existing laws and principles of government, and equal rights to all applicants. It must not be overlooked that carrying on a race track is a legitimate business under the existing laws. The system of betting at the race tracks of incorporated associations is expressly recognized by the law. Those who administer the law are entitled to assume that the laws represent the wishes and views of the majority of the people.

It is asserted by the above writer that the Province of Ontario revoked the charter of the York Riding & Driving Club because the province did not want to encourage gambling or to give multiplied opportunities for that form of speculation. Not finding any power in the Ontario Companies Act to cancel a charter upon such grounds as these we were led to examine the proceedings in this particular case. This examination fails to disclose any other reason save that the charter of the York Riding & Driving Club had fallen into disuse for a period, and that the corporation had failed to file its annual returns with the Government. In the light of this fact the claim that the Secretary of State has insulted the province by granting a new charter appears to be simply so much fireworks.

The writer above referred to appears to be putting his friends, the Provincial government, in an embarrassing position by his vigorous if not altogether logical declarations. For example, he states that that government revoked a racing charter because it did not want to encourage gambling. If that were the case it would seem that the government must cancel all other racing charters or else lay themselves open to a charge of discriminating between their own subjects, all of whom are equal under the law.

APPEALS IN ONTARIO.

The last report of the Inspector of Legal Offices shews that during last year the total number of cases tried by judges of the High Court was 1,153. It also shews that there were 1,465 applications of various kinds made to judges of the High Court in Chambers and 949 in Weekly Court, and 544 in Divisional Court. The total number of appeals from judgments at trials to a Divisional Court was 180, and of these 130 were dismissed, 37 allowed, 10 varied and 3 not disposed.

It is said that the total number of appeals from Weekly Court and Chambers was only 68. Of these 52 were dismissed, 9 allowed and 5 varied, and 2 remained undisposed of. Out of the sum total of 544 cases heard by the Divisional Court (which includes the 180 appeals from judges at the trials) there were only 43 appeals to the Court of Appeal, and of these 23 were dismissed, 11 allowed, 3 varied, and 6 remained undisposed of. The appeals from judges at trials direct to the Court of Appeal numbered 62, and of these 28 were dismissed, 14 allowed, 8 varied, and 12 remained undisposed of. Out of a total of 1,153 cases tried, therefore, there were appeals in less than one-fourth, viz., 180 to Divisional Courts and 62 direct to the Court of Appeal, and of these appeals only 69 were successful, with 15 cases yet to be disposed of; and inasmuch as out of the whole number of cases heard by Divisional Courts there were altogether only 43 appeals to the Court of Appeal it is manifest that in very few cases indeed could there have been a double appeal.

This condition of affairs is far from shewing any urgent need for upsetting the present appellate procedure in Ontario, as is proposed to be done by the recent Act which awaits the Lieutenant-Governor's proclamation. It may be said, therefore, that the Government would be well advised if it suffered the Act in question to remain indefinitely in abeyance.

No dislocation of a judicial system, such as is proposed to be made by the recent statute, can possibly be accomplished without

manifold inconveniences and expense, all of which would have to be borne by suitors, and would probably be quite out of proportion to any possible benefit to be obtained, if indeed any benefit at all would result from the proposed change.

ALIENS ACT STATISTICS.

The third annual report of His Majesty's inspector under the Aliens Act, 1905, which deals with the year 1908, contains some very interesting information. During last year the total number of alien passengers who landed in the United Kingdom was 570,168 of whom 399,289 came from ports in Europe or the Mediterranean Sea, while the total number who embarked was 542,979, of whom 419,767 were destined for ports in Europe or the Mediterranean. It will thus be seen that the arrivals exceeded the departures by 27,189, the corresponding figure for 1907 being 34,954. It is curious to notethat, whereas in 1907 the European traffic shewed an excess of arrivals of 144,811, and the extra-European traffic an excess of departures of 109,857, in 1908, as regards the European traffic, the passengers outwards exceeded the passengers inwards by 20,478, while, on the other hand, as regards the extra-European traffic, the passengers inwards exceeded the passengers outwards by no less than 47,667.

Leave to land was refused by the immigration officers to 724 persons in all—to 456 on the ground of want of means, to 267 on medical grounds, and to one passenger who returned to the United Kingdom in contravention of an expulsion order. Against these refusals there were 321 appeals, and, of these, 112 were successful, and of the 612 persons to whom leave to land was finally refused, 189 were Russians, 109 Italians, 96 Greeks and Ottomans, and 93 French. As compared with 1907, the number of original rejections shews a decrease of 251, and the number of final rejections of 190.

Perhaps the most important part of the report is that section

which deals with the expulsion of aliens under sec. 3(1) of the Act of 1905. During 1908, so far as convicted or criminal aliens are concerned, 360 recommendations for their expulsion were received by the Secretary of State, and, of these, 344 came from the courts in England and Wales. This total shews an increase of seventy as compared with the 290 recommendations made in 1907, but are less by eighty-eight than the recommendations of 1906. As the inspector points out, the proportion of recommendations to the number of convicted aliens received into prison during 1908 is still remarkably low—namely, 11.11 per cent. for the whole kingdom, or 11.47 per cent. for England and Wales. Taking the provincial courts, recommendations for expulsion were made in the case of but 5.68 per cent. of the aliens convicted and sent to prison, the percentage for 1907 being 4.53. In the metropolitan courts the percentages were 15.50 in 1907 and 17.58 in 1908, from which it will be seen that outside the metropolis the powers conferred on the courts do not seem to have been made use of to the extent that they were in London. There is no doubt, however, that the expulsion provisions might be made use of far more frequently than they have been in the past, for it is difficult to understand the desirability of retaining in the United Kingdom practically 88 per cent. of the convicted aliens. During 1908 the question of expulsion was determined by the Home Office in 335 cases, which included cases recommended in 1906 and 1907 in which the sentences ran on into 1908, as well as cases recommended last year. Expulsion orders were made in 319 cases, and, of these, 229 belonged to the metropolis, eighty-three came from the rest of England and Wales, five from Scotland, and two from Ireland.

As the report points out, sufficient time has now elapsed to enable some judgment to be formed as to the effect of these expulsion provisions on alien crime, and the statistics of convicted prisoners, although by no means an absolute index, yield clear indications that the liability to expulsion is exercising considerable influence on the criminal alien. In 1904 the alien prison

population reached its highest point, in that year the aliens numbering 2.22 per cent. of all the convicted prisoners received into prisons. By 1907 this proportion of aliens to the whole had fallen to 1.60, and although in 1908 there was an increase of 5.76 per cent. in the total number of convicted prisoners, and this was reflected in the number of aliens, the increase in the proportion of aliens was only up to 1.62 per cent. Of course, it is impossible with any certainty to say that this decrease in alien prisoners is entirely due to the Act of 1905, for this can only be proved by the experience of future years; but, at any rate, there is no doubt that there has been a substantial reduction since the statute came into force, and we certainly think that, if its provisions were made use of more freely by the courts throughout England and Wales, still further improvement might be made in the elimination of the alien criminal.—*Law Times.*

The enterprise, if it may be so called, of the newspaper press in so industriously stirring up the filth dumps of society in order to discover, if possible, something that will pander to the morbid curiosity of the people, often exposes them to serious liability by reason of their quick conclusions and careless investigation. The good name and character of a man cannot be recklessly squandered away by a newspaper even indirectly and without intention to offend. The occasion for these serious reflections is the recent decision of the Supreme Court of New York in the case of *Burkhardt* v. *Press Publishing Co.*, 114 N.Y. Supp. 451. In this case appellant saw visions of a sensational article involving a woman of evil reputation. It sent a reporter to the woman's family to secure her photograph and received two pictures, one on a tin type and the other on a button. The latter picture, however, was not the picture of the evil woman but of respondent. The button picture, however, was published in connection with the sensational story as the picture of the "woman in the case." Respondent recovered punitive damages in the lower court and the

judgment was upheld in the appellate tribunal on the ground that the dissimilarity was so great that a person of ordinary intelligence, before using the button picture, in connection with the article, would have made further investigation. And, in order to prove how careless and reckless the action of the publishers had been in the matter, and thus to impose upon them in the jury's discretion, punitive damages, the court permitted the respondent to introduce in evidence the two photographs.—*Central Law Journal.*

In *Ingraham* v. *Stockamore*, 118 N.Y. Supp. 399, Justice Spencer, of the New York Supreme Court, holds that the owner of an automobile who permits his machine to be taken out and driven by another person is liable for injuries caused by the negligence of the latter in operating the machine. It appeared that at the time of the accident in question the chauffeur was in charge of the machine, with the consent of the owner, and was taking a pleasure trip or "joy ride" with some boon companions, when he negligently ran into a vehicle on the street, causing the injuries complained of. A verdict was rendered against the owner under an instruction that a verdict might be found against him if the machine was being used with his consent, the charge being in these words: "I am going to charge you that the owner of an automobile should be responsible for injuries caused by it by the negligence of any one whom he permits to run it in the public street." The legal proposition contained in this instruction is said to be a novel one, but is declared to find full justification in the novelty of the situation. The statute requiring the registration of the names of the owner and chauffeur and number of each automobile and the display of the number on the back of each car is held to shew that the legislature regarded automobiles as dangerous machines, and the court arrives at this conclusion: "An automobile being a dangerous machine, its owner should be held responsible for the manner in which it is used; and his liability should extend to its use by any one with his consent. He may not deliver it over to any one he pleases and not be responsible for the consequences."

REVIEW OF CURRENT ENGLISH CASES.

ADMIRALTY — SHIP — COLLISION — ADMISSION OF CONTRIBUTORY NEGLIGENCE BY DEFENDANT—BURDEN OF PROOF—RIGHT TO BEGIN.

The Cadeby (1909) P. 257. This was an action in admiralty to recover damages for a collision alleged to be wholly due to the defendant's fault. The statement of claim alleged specific acts of negligence by the defendants, and charged breaches of the regulations for preventing collisions. The defendants by their defence charged the plaintiffs with specific breaches of the regulations, and counterclaimed for damages for the collision. By their reply the plaintiffs joined issue with the defence, and denied the allegations in the counterclaim. Subsequently, by letter, the defendants admitted that the collision was due to contributory negligence on their part. Bigham, P.P.D., held that on the pleadings as they stood, and even when coupled with the defendants' letter, the onus was on the plaintiffs and they were entitled to begin.

COMPANY—WINDING UP—PREFERENCE SHARES—DISTRIBUTION OF ASSETS—UNDECLARED PREFERENTIAL DIVIDENDS.

In re Accrington Corporation Steam Tramways Co. (1909) 2 Ch. 40. In this case a joint stock company incorporated by special Act which incorporated the provisions of the Companies Act, 1845 (8 & 9 Vict. c. 16), s. 120, was being wound up, and the question arose on the distribution of the assets, whether the preferential shareholders were entitled to any priority of payment in respect of either the capital or the fixed preferential dividend. Eady, J., held that they were entitled to no priority either as to capital or dividends: and that where the assets are insufficient, the preference shareholders are not entitled to arrears of undeclared preferential dividends out of the undistributed profits, but the whole assets are distributable among all shareholders (preferential and ordinary) in proportion to the shares held by them.

RAILWAY CROSSING—ALTERATION OF USER—INCREASE OF BURDEN.

Taff Vale Railway Co. v. *Canning* (1909) 2 Ch. 48. This was an action to restrain the defendants from using the level cross-

ing which had been constructed across the plaintiffs' line for the purpose of connecting agricultural lands which were severed by the railway, for any purpose other than agricultural purposes in connection with the defendant's lands on either side of the railway. When the line was constructed and the crossing was originally made it was used for the occasional passage of sheep and cattle, the keys of the gates being borrowed from a neighbouring signal man, who kept the signals at danger till the animals had crossed, latterly the neighbourhood had changed its character and the owner had let a field to a tennis club who climbed the gates and used the crossing daily in large numbers. Eady, J., held that the defendant, although not restricted to the user of the crossing for strictly agricultural purposes, was not entitled to use it so as substantially to increase the burden of the easement, and that whether or not the burden was increased was a question of fact, and it being proved that owing to a large main line traffic, and the shunting from an adjoining colliery, the user of the crossing by the members of the tennis club was exceedingly dangerous to them, and would subject the railway to a greatly increased burden in watching this line and managing their traffic so as to avoid accidents, he held that this user was unwarranted and might be restrained by injunction.

LANDLORD AND TENANT—LEASE AT RACK RENT—COVENANT BY LESSOR TO PAY TAXES—SUB-LEASE AT A PROFIT—INCREASE OF TAXES CONSEQUENT ON SUB-LEASE—LIABILITY OF LESSOR.

Solaman v. *Holford* (1909) 2 Ch. 64. A summary application was made to the court to determine the following question. The plaintiff had let to one Singer four upper floors of a building at a rack rent, the lessee consenting not to alter the premises or sub-let without the lessor's consent, and the plaintiff covenanting to pay all rates and taxes now payable or hereafter to become payable in respect of the said premises. The lessor, with the plaintiff's consent, sub-let each floor at a profit, and in consequence of the lessee having sub-let at a profit the assessment to rates and taxes was increased, and the question was whether the plaintiff in these circumstances was liable for the increased taxes thus occasioned; Neville, J., held that he was, and that his liability was not limited to the assessment existing on the date of the lease.

PATENT—REVOCATION OF PATENT—NON-MANUFACTURE OF PATENTED ARTICLE IN UNITED KINGDOM—PATENT ACT (7 EDW. VII. c. 29), ss. 24, 27—(R.S.C. c. 69, s. 38).

In re Hatschek (1909) 2 Ch. 68. An application was made to revoke two patents of invention for non-manufacture of patented article within the United Kingdom, under the Patent Act, 7 Edw. VII. c. 29, ss. 24, 27 (see R.S.C. c. 69, s. 38). The patent was granted in respect of a process for manufacturing imitation stone slabs. The invention was in commercial operation in Germany, France and Belgium, but was never worked in the United Kingdom. The patentee devoted himself to the establishment abroad of industries in which the patented process was carried on, and had granted to a Belgium company an exclusive license for the United Kingdom of selling patented articles manufactured by the company in Belgium. Parker, J., held that the Act had not been complied with and the patents must be forthwith revoked, although in July, 1908, the Belgium company had published advertisements expressing their willingness to sell rights to manufacture the goods in England.

TRADE MARK — REGISTRATION OF TRADE MARK — GEOGRAPHICAL NAME—"DISTINCTIVE" MARK.

In re California Fig Syrup Co. (1909) 2 Ch. 99 an application was made by a company carrying on business in San Francisco to register as a trade mark the words "California Syrup of Figs." It was shewn that for the past thirteen years the applicants had continuously sold a preparation manufactured by them, under that designation, and at the present time it distinguished the syrup of figs prepared by the applicant from the syrup of figs prepared by any other persons, but Warrington J., held that the words "California Syrup of Figs" were not of themselves "adapted to distinguish" the applicants' goods from those of other persons, and therefore that the application to register them as a trade mark must be refused.

WILL—CONSTRUCTION—TENANT FOR LIFE AND REMAINDERMAN—INCOME—UNAUTHORIZED SECURITIES—WASTING SECURITIES.

In re Nicholson, Eade v. *Nicholson* (1909) 2 Ch. 111. Two points were involved in this case—(1) Whether a tenant for life under a testator's will was entitled to the actual income of invest-

ments forming part of the testator's estate at the time of his death, and retained by the trustees as they were empowered to do, but which would be unauthorized trustee investments, and (2) assuming he was so entitled, whether that right extended to the income of "wasting," as distinguished from "unauthorized," securities. Warrington, J., was of the opinion that the tenant for life was entitled to the actual income received from both classes of investments.

ARBITRATION—AGREEMENT TO REFER—STAYING ACTION—STEP IN PROCEEDINGS—SUMMONS FOR DIRECTIONS—ARBITRATION ACT, 1889 (52-53 VICT. C. 49), S. 4—(9 EDW. II. C. 35, S. 8 AND ART.).

Ochs v. *Ochs* (1909) 2 Ch. 121 was an application to stay the action on the ground that the parties had agreed to refer the matters in question to arbitration. Before applying, the defendant, without protest, had attended on a summons for directions, and had given an undertaking to furnish an account as a term of an adjournment. Warrington, J., held that this was taking a step in the action, and the defendant was thereby precluded from applying to stay the proceedings.

CONFLICT OF LAWS—LAND IN FOREIGN COUNTRY—CONTRACT RELATING TO LAND IN FOREIGN COUNTRY—CAPACITY TO CONTRACT—LEX SITUS.

Bank of Africa v. *Cohen* (1909) 2 Ch. 129. In this case the plaintiffs, who carried on business in London and Africa, entered into an agreement with the defendant, a married woman domiciled in England, whereby she bound herself to execute in favour of the plaintiffs a mortgage on certain lands owned by her in the Transvaal, by way of security for a debt due to the plaintiffs by her husband. The action was brought to enforce the agreement and was tried by Eve, J., who dismissed the action, holding that the transaction relating to immoveables was governed by the lex situs, and that according to the law of the Transvaal the plaintiff was incapable of binding herself as surety for another unless she expressly renounced the provisions of the law protecting her from liability, which she had not done. The Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.JJ.) affirmed his decision.

TRADE UNION—BRANCH OF TRADE UNION—SECESSION OF BRANCH OF UNION—THREATENED DISTRIBUTION OF FUNDS—ULTRA VIRES—ACTION BY HEAD TRUSTEES FOR INJUNCTION AND PAYMENT OVER OF FUND—"DIRECTLY ENFORCING AGREEMENT"—TRADE UNION ACT, 1871 (34-35 VICT. C. 31) S. 4, SUB-S. 3(A); S. 8—(R.S.C. C. 125, S. 4(A); S. 16).

Cope v. *Crossingham* (1909) 2 Ch. 148 was an action to restrain a branch of a trade union from distributing the funds of the union in its hands, and to compel payment of the same to the plaintiffs as head trustees of the union. The defendants were a branch union which had decided to secede from the main body, and proposed to distribute the funds in its possession among the members of the branch. The rules of the union made no provision for any secession, and under them the funds collected by the branch were to be paid over to the plaintiffs as head trustees of the union. It was objected that the court had no jurisdiction to entertain the action, on the ground that it was in effect an action for the application of the funds of a trade union to provide benefits to members, but Eve, J., who tried the action overruled this objection and made a declaration that the proposed distribution of the funds was ultra vires, and he granted an injunction restraining the distribution, but he refused to order payment to the plaintiffs, and this judgment was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.JJ.), the court holding that the action, apart from the claim for payment, was not instituted to enforce an agreement for the application of the funds to provide benefits for the members within s. 4, but to preserve the fund by preventing it from being misapplied, without in any way administering it—and from the construction of the rules the court held that the plaintiffs had a sufficient interest in the property of the branch to entitle them to maintain the action.

SOLICITOR AND CLIENT—BILL OF COSTS—APPLICATION BY CLIENT TO TAX—COMMON ORDER TO TAX—SUBMISSION TO PAY—ITEMS BARRED BY STATUTE OF LIMITATIONS—WAIVER OF STATUTE—SOLICITORS ACT, 1843 (6-7 VICT. C. 73), S. 37—(ONT. RULES, 1184(B), 1185; R.S.O. C. 174, S. 35).

In re Brockman (1909) 2 Ch. 170. The Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.JJ.) have

overruled the decision of Warrington, J. (1909) 1 Ch. 354, noted ante, p. 284, and held that under the common order for taxation obtained by a client within a month from delivery of his solicitor's bill, it is competent for him to raise the defence of the Statute of Limitations as to any of the items included in the bill, and that the taxing officer has jurisdiction to deal with such questions. The Court of Appeal held that a submission to pay is not a necessary part of a common order to tax; but in Ontario the Rule 1185(*e*) provides that the order shall involve a direction to pay what is found due.

PROBATE—REVOCATION OF PROBATE—MESNE ACTS OF EXECUTORS—SPECIFIC LEGACY—SUBSEQUENT DISCOVERY OF CODICIL REVOKING LEGACY AND MAKING NEW BEQUEST—RECOVERY OF SHARE—COMMON LAW ACTION.

In re West, West v. *Roberts* (1909) 2 Ch. 180 was an action to recover a legacy which had been paid to defendant in the following circumstances. Probate of the will of the testatrix was granted to the executors named therein, who paid to the defendant a legacy bequeathed to her by the will. Subsequently a codicil was discovered revoking the legacy to the defendant and bequeathing it to the plaintiff, whereupon the original probate was revoked and a fresh probate, including the codicil, was granted to the same executors, who assented to the legacy bequeathed to the plaintiff by the codicil. Eady, J., in these circumstances, held that the legacy having been assented to by the executors, the legal right to sue for the legacy at common law became thereby vested in the plaintiff, and he could therefore recover the legacy and the mesne income from the defendant, who had improperly received the same.

COMPANY—PREFERENCE SHARES—WINDING UP—DISTRIBUTION OF ASSETS.

In re Espuela Land & Cattle Co. (1909) 2 Ch. 187. This was a winding-up proceeding, and the question arose as to the proper mode of distribution of surplus assets as between the ordinary and preference shareholders. It was contended that where preference shareholders have a preference as to repayment of capital they can have no further share in any surplus assets, but Eady, J., was of the opinion that there is no general rule to

that effect, and that it depends on the articles and memorandum of association and if no provision is made thereby to the contrary preference shareholders are entitled rateably with the ordinary shareholders to any such surplus. In this case the company which was incorporated in 1884 had issued 28,222 ordinary and 26,905 preference shares of £5 each; the preference shares were entitled to a cumulative preferential dividend of 10 per cent. out of "the divisible profits of the company in each year" and "a preferential right to be repaid the amount paid up thereon and interest out of the assets if the company should be wound up." The company never paid any dividend except one of 3 per cent. on the preference shares in 1905. In 1900 the capital was reduced by writing down the ordinary shares to £1 per share. In 1908 the company's assets were sold for a sum sufficient to pay all its liabilities, repay the capital of both classes, and leave a large surplus. This surplus Eady, J., held was not "divisible profits," and the preference shareholders were consequently not entitled to have it applied in payment of cumulative dividends; but they were entitled to have their capital repaid with interest at 5 per cent. per annum from the date of the winding-up order; and the surplus after paying the ordinary shareholders their reduced capital of £1 per share he decided must be divided among the preference and ordinary shareholders in proportion to the nominal value of their shares.

ELECTION—BEQUEST BY MARRIED WOMAN OF HUSBAND'S PROPERTY TO A THIRD PERSON—MARRIED WOMEN'S PROPERTY ACT, 1882 (45-46 VICT. C. 75), S. 1(1); S. 5—(R.S.O. C. 163, S. 3).

In re Harris, Leacroft v. *Harris* (1909) 2 Ch. 206. In this case a married woman by her will had purported to dispose of a watch which was not her separate property, but which belonged to her husband, who had acquired it in her right; and by the same will she had given an annuity to her husband. Parker, J., held that this had the effect of putting the husband to an election, whether he would take the bequest in his favour, and affirm the bequest of the watch, or whether he would reject the bequest to himself and disaffirm the bequest of the watch. The circumstances under which a case of election arises in such a case are discussed at length, and the necessity for the property disposed of being clearly identified as that of the husband is shewn. When the wife bequeaths property in general terms, e.g., all her

plate, china, etc., even if she have none, such a bequest will not carry property of that description which her husband has acquired in her right, and consequently in such a case the husband would not be put to his election.

PATENT OF INVENTION—MANUFACTURE OF PATENTED ARTICLE CARRIED ON PRINCIPALLY OUT OF UNITED KINGDOM—FAILURE TO MANUFACTURE ADEQUATELY IN UNITED KINGDOM—PATENT AND DESIGNS ACT, 1907 (7 EDW. VII. c. 29), ss. 24, 27—(R.S.C. c. 69, ss. 38, 39).

In re Bremer (1909) 2 Ch. 217. This was an application to revoke a patent of invention, for non-manufacture of the patented article in the United Kingdom. The application was made under the provisions of the Act of 1907, 7 Edw. VII. c. 29 (see R.S.C. c. 69, ss. 38, 39). Two patents held by different parties for the manufacture of arc lights were in question and the grounds alleged in excuse for the non-manufacture of the patented articles in England were the existence of litigation as to the validity of the patents, and the difficulty of successfully competing with rival makers of similar lamps and also with alleged infringers of the patent. Parker, J., held that the Act of 1907 was not intended to penalize patentees for want of success where they do their best to comply with its provisions, and that in this case they had sufficiently excused themselves.

RESTRICTIVE COVENANT—COVENANT FOR "HIMSELF, HIS EXECUTORS, ADMINISTRATORS AND ASSIGNS"—BREACH BY ASSIGN—COVENANT RUNNING WITH THE LAND—CONTINUING BREACH.

In *Powell* v. *Hemsley* (1909) 2 Ch. 252 the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) have affirmed the judgment of Eve, J. (1909) 1 Ch 880 (noted, ante, p. 401, where the defendant's name is misprinted *Henesley*). The Master of the Rolls points out that the breach of the covenant in question took place before the plaintiff became owners, and as such entitled to sue on covenants running with the land, and they had not obtained any assignment of the right to sue for past breaches of the covenants, which alone was a fatal obstacle to their recovering. He and the rest of the court were agreed that the continuance of a building which is erected in breach of a covenant, cannot be regarded as a continuing breach of the covenant, the covenant being broken once for all on the erection of the building.

WARD OF COURT—MARRIAGE OF WARD WITHOUT THE LEAVE OF THE COURT—CONTEMPT OF COURT—COMMITTAL OF WARD—JURISDICTION.

In re H., H. v. *H.* (1909) 2 Ch. 260. In this case a young gentleman of seventeen, a ward of court, had married a girl also under 21 without the leave of the court. He had misrepresented his age as 21 and given a wrong address, in giving instructions for the publication of banns and for filling up the marriage register. Proceedings were taken to commit the wife for contempt and upon the return of the motion the clergyman and witnesses were also ordered to attend, but on it being made to appear that they were ignorant that the infant husband was a ward of court, and that they had not promoted the marriage the clergyman and witnesses were exonerated, and the wife also proving that she was ignorant of the fact of the husband being a ward of court, and also that she had not entered into the marriage for any mercenary object, she also was exonerated; but the court ordered the infant husband to be committed to prison for his contempt until a proper scheme should be devised for his future life, which was done three days thereafter when he was discharged.

WILL—CONSTRUCTION—FORFEITURE—GIFT UNTIL "DEPRIVED OF THE PERSONAL ENJOYMENT OF THE INCOME OR ANY PART THEREOF"—NOTICE TO PAY INCOME TO THIRD PERSON—WITHDRAWAL OF NOTICE BEFORE INCOME PAYABLE.

In re Mair, Williamson v. *French* (1909) 2 Ch. 280. The question was whether a gift under a will had been forfeited. By the will in question the testator gave his residuary estate in trust inter alia to pay the income of part thereof to a certain person during her life unless and until some event shall have happened or shall happen whereby if the same income belonged absolutely to her she would be deprived of the personal enjoyment thereof or any part thereof. Before an instalment of income fell due the legatee wrote to the acting trustee of the will: "I owe Mrs. Pritchard £260. I have arranged to find her £100 this week and I want you to pay direct to her the balance out of the next dividend due to me out of the B. tea shares," part of the trust estate; but before the dividend became due the legatee paid off Mrs. Pritchard and withdrew the letter. Neville, J., in these circumstances held that there had been no forfeiture on the ground that the

legatee had not in fact deprived himself of the income or any part thereof, nor would she have been so deprived if she had been the absolute owner thereof.

PRACTICE—RECEIVER—INJUNCTION—PROCEEDINGS AGAINST RECEIVER—GOODS IN POSSESSION OF COMPANY UNDER HIRE-PURCHASE AGREEMENT.

In re Maidstone Palace, Blair v. *Maidstone Palace* (1909) 2 Ch. 283. In this case which was a debenture-holder's action against a theatre company, a receiver had been appointed on the application of the plaintiff of the property of the company. In the company's possession under a hire-purchase agreement made with the Electric Power Company was some electrical plant. Under the direction of the court the receiver for a time carried on the business of the theatre company and in so doing used the electrical plant. The Electric Power Company subsequently recovered judgment against the theatre company for the amount of their claim, and for a return of the electrical plant. The assets of the first company were sold and the purchasers bought part of the electrical plant from the Electric Power Company, and the rest of it was returned to that company. The Electric Power Company then claimed rent from the receiver for the use of the electrical plant by him, and threatened to bring an action therefor in the King's Bench Division, whereupon the receiver applied to the court to restrain them from so doing, and ordering them to bring in their claim in the debenture-holder's action. The Electric Power Company contended that the receiver was never appointed receiver of the electrical plant because it did not belong to the theatre company, and as to that, therefore, the receiver was a mere trespasser. But Neville, J., held that the receiver was entitled to protection, and that if any wrong had been done by him the court would see that justice was done to the plaintiffs, he therefore ordered the Electric Power Company to bring in its claim in the debenture-holder's action within a limited time, and restrained them from taking proceedings against the receiver.

POWER—APPOINTMENT—"DURING COVERTURE BY DEED OR WILL"—EXECUTION OF WILL DURING COVERTURE—DEATH OF TESTATRIX DISCOVERT—EXERCISE OF POWER.

In re Illingworth, Bevir v. *Armstrong* (1909) 2 Ch. 297. In this case the facts were that by a marriage settlement made in

1878 trustees were to hold a certain fund upon trust after the death of the wife for such persons as she should "during coverture by will or deed appoint" and in default of appointment then in trust for her next of kin. By her will made in 1884 in the lifetime of her husband she appointed the fund to her five brothers. The husband died in 1886. In 1898 the widow made a codicil to her will making the plaintiffs executors of her will and in other respects confirming her will. She died in 1908 discovert. The question was whether the will was a valid appointment of the fund, and Eve, J., held that it was, that the will had been executed during coverture, and the fact that the testatrix subsequently died discovert did not have the effect of nullifying the appointment thereby made.

HUSBAND AND WIFE—JOINT AND SEVERAL PROMISSORY NOTE OF HUSBAND AND WIFE FOR DEBT OF THIRD PARTY—INFLUENCE OF HUSBAND—ABSENCE OF INDEPENDENT ADVICE—LIABILITY OF WIFE.

Howes v. *Bishop* (1909) 2 K.B. 390 is a case which will naturally attract attention, inasmuch as it bears on a point recently much discussed in Canadian courts. The facts were simple, the plaintiff had obtained judgment against a debtor, and it was agreed that the defendants in the present action, who were husband and wife, should give the plaintiff their joint and several note payable in instalments for the amount of the judgment. The husband, who had business relations with the judgment debtor, procured his wife to sign the note, without any independent advice, but the jury found that the transaction was sufficiently explained to her and that she understood, and that she knew she was signing a promissory note and incurring a possible liability for the benefit of the judgment debtor. The jury found that the signature of the wife was procured by the influence of the husband, but could not agree as to whether or not he had exercised undue influence. Upon these findings Jelf, J., gave judgment for the plaintiffs; and the Court of Appeal (Lord Alverstone, C.J., and Moulton and Farwell, L.JJ.) affirmed his decision. Lord Alverstone, C.J., and Moulton, L.J., were of the opinion that there is no general rule of universal application that the rule of equity as to confidential relationships necessarily applies to the relation of husband and wife so as to cast on the husband, or person who is suing the wife, the onus of disproving

an allegation of undue influence, and on the contrary they hold the onus is on the party impugning the transaction to prove that undue influence was exercised. Moulton, L.J., agrees with the view expressed by Cozens-Hardy, M.R., in *Barron* v. *Willis* (1899) 2 Ch. 578, that the relation of husband and wife is not one of those to which the doctrine of *Hugenin* v. *Baseley*, 14 Ves. 273 applies, notwithstanding a contra dictum of Lord Penzance in *Parfitt* v. *Lawless*, L.R. 2 P. & M. 462, at p. 468. It may be useful to compare this decision with *La Banque Nationale* v. *Usher*, 13 O.W.R. 896; *Euclid Avenue Trust Co.* v. *Hohs*, *ib.* 1050, and *Sawyer-Massey Co.* v. *Hodgson*, *ib.* 980; *Stuart* v. *Bank of Montreal*, 41 S.C.R. 516.

RAILWAY—LEVEL CROSSING—ROAD RAISED ON EITHER SIDE OF RAILWAY—REPAIR OF ROADWAY.

In *Hertfordshire* v. *Great Eastern Ry.* (1909) 2 K.B. 403 the Court of Appeal (Lord Alverstone, C.J., and Moulton and Farwell, L.JJ.) agree with the decision of Jelf, J. (1909) 1 K.B. 368 (noted ante, p. 283), to the effect that where a railway in pursuance of its statutory powers lays its track across a public highway at a higher level than the highway, and in order to bring the roadway up to the level of the track, constructs two inclined planes on either side of the track, there is imposed by the common law on the company an implied liability to keep the roadway in repair upon the whole of such approaches, including that part which lay outside of the railway fences.

SHIP—AGREEMENT WITH CREW—STIPULATIONS CONTRARY TO LAW—MERCHANT SHIPPING ACT, 1894 (57-58 VICT. C. 60) S. 114.

Mercantile Steamship Co. v. *Hall* (1909) 2 K.B. 423. The plaintiffs sought to enforce an agreement made by their master with the crew of the plaintiffs' ship, whereby it was agreed that for absence by the defendants without leave deductions should be made from their wages differing in amount, and enforceable in a different manner from the deductions provided in such a case by the Merchant Shipping Act, 1894; and it was held by Pickford, J., such an agreement is "contrary to law" within the meaning of s. 114 of the Act, and is therefore not permissible.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] McKeown *v.* Toronto R.W. Co. [Sept. 20.

Fatal Accidents Act—Death of child of four years by negligence of defendants—Pecuniary loss of parent—Reasonable expectation of benefit—Damages.

The plaintiff sued under the Fatal Accidents Act to recover damages for the death of his son, aged 4 years and 3 months, occasioned by the negligence of the defendants, and obtained a verdict for $300. This verdict was affirmed by a Divisional Court, and the defendants obtained leave to appeal to the Court of Appeal, on the sole question whether there could be a recovery of damages, the child being of such tender age, and no special circumstances touching the question of the right of damages appearing or being found by the jury.

Held, per Osler, J.A.:—It is the extreme youth of the child . . . which alone causes hesitation in maintaining the plaintiff's right to recover. The damages recoverable under the Act cannot be founded on sentimental considerations, but are to be given in respect of some pecuniary loss only, and that not merely nominal, caused by the death. Here the child was an infant of 4 years of age, healthy, intelligent, and with as good a prospect of prolonged life as any infant of that age can be said to have. Was its death a damage to the parent within the meaning of the Act? Having regard to the position in life of the latter, I cannot hold that in point of law it was not, or that, in the case of a child of that description, damages to be estimated by such considerations as the decided cases warrant may not be sustained. The question is for the jury, upon the evidence. It is settled that pecuniary benefit or advantage need not have been actually derived by the beneficiary previous to the death, and therefore the then present inability of the deceased to confer such benefit or advantage is not conclusive against the right to recover. The probability of the continuance of life and the reasonable expectation

that in that event pecuniary benefit or advantage would have been derived are proper subjects for consideration. I am on the whole of opinion that on the evidence a recovery is warranted by the rules or principles established in *Pym* v. *Great Northern R.W. Co.*, 2 B. & S. 759, and in such cases as *Franklin* v. *South Eastern R.W. Co.*, 3 H. & N. 211; *Dalton* v. *South Eastern R.W. Co.*, 4 C.B.N.S. 296; *Duckworth* v. *Johnson*, 4 H. & N. 653; *Wolfe* v. *Great Northern R.W. Co.*, 26 L.R. Ir. 548; *Blackley* v. *Toronto R.W. Co.*, 27 A.R. 44*n*; and others. The cases of *Renwick* v. *Galt, etc., R.W. Co.*, 12 O.L.R. 35, 37; *Clark* v. *London General Omnibus Co.* [1906] 2 K.B. 645, and *Jackson* v. *Watson* [1909] 2 K.B. 193, may also be referred to. The damages, though they err on the side of liberality, as they usually and perhaps inevitably do in these cases, not being capable of being estimated with exactitude, are not so large as to invite interference; and I would therefore affirm the judgment and dismiss the appeal.

Per GARROW, J.A.:—If it appeared that the infant was a cripple or an imbecile, or if its age was so tender that there could be no reasonable evidence given of its mental or physical capacity or condition, it would be otherwise. But in the present case the evidence clearly discloses that the infant killed was a bright and capable boy, both mentally and physically; and I therefore agree—reluctantly, I admit—that there was evidence which could not have been withdrawn from the jury, and the judgment must therefore be affirmed.

MAGEE, J., who sat for Meredith, J.A., concurred. MOSS, C.J.O., and MACLAREN, J.A., dissented.

W. Nesbitt, K.C., and *M. Lockhart Gordon*, for defendants. *J. McGregor*, for plaintiff.

HIGH COURT OF JUSTICE.

Divisional Court—King's Bench.] [Sept. 7.

WOODBURN MILLING CO. v. GRAND TRUNK RY. CO.

Railway—Animal killed on track—Agreement for use of siding—Construction—Protection of railway from animals—Negligence—Leaving gate open—Duty of railway company—Implication of terms in contract.

The action brought in the County Court of Middlesex for the value of a horse killed upon the defendants' railway, owing, as

alleged, to the negligence of the defendants. The jury found that the horse was killed by the negligence of the defendants' servants in "leaving open the gate across the switch line leading to the plaintiffs' mill."

MACBETH, Co. C.J., dismissed the action, holding that the defendants were protected against any such liability for damage to animals of the plaintiffs by clause 10 of a special agreement between the parties: "The contractor (plaintiffs) shall protect the railway of the company from cattle and other animals escaping thereupon for such portion of the said siding as may be outside of the lands of the company . . ."

It appeared from the agreement that the defendants owned the siding, and that the plaintiffs asked the defendants to allow them to use it. The agreement embodied the terms upon which the user was permitted.

Held, per RIDDELL, J., who delivered the judgment of the court:—Clause 10 means that the plaintiffs should keep animals from escaping from that part of their land occupied by the siding to the property of the defendants. The object is plain; the defendants desired to be secured against animals coming upon their railway; that object could only be attained by keeping animals off the railway, which the plaintiffs agreed to do. The defendants owed no duty to the plaintiffs to keep their animals away from the line of railway; and the placing of the gate by the defendants, their custom to have it closed from time to time, and the complaints of the plaintiffs that it had been found open after being used by some of the defendants' crews, could not create such a duty: *Coggs* v. *Bernard*, 1 Sm. L.C. (6th ed.) 177; *Skelton* v. *London and North Western R.W. Co.*, L.R. 2 C.P. 631, 636; *Soulsby* v. *City of Toronto*, 15 O.L.R. 13. The opening of the gate was necessary for the common business of the plaintiffs and defendants, and the non-closing was a neglect to perform a voluntary act. "There is no such thing as negligence in the abstract, negligence is simply neglect of some care which we are bound by law to exercise towards somebody:" *Daniels* v. *Noxon*, 17 A.R. 206, 211; *Thomas* v. *Quartermaine*, 18 Q.B.D. 685, 694; *Le Lievre* v. *Gould* [1893] 1 Q.B. 491, 497. No duty existing on the part of the defendants towards the plaintiffs to keep any gate or fence at the point in question, and none to keep a gate closed or to close it if opened, there can be no negligence on the part of the company in respect of the plaintiffs, and so the action should fail.

Any argument which could import here a condition imposed upon the agreement of the plaintiffs, so that they would be relieved from the agreement if the defendants left the gate open, must be equally effective in *Yeates* v. *Grand Trunk R.W. Co.*, 14 O.L.R. 63, to import a similar condition relieving the plaintiff in that case from the effect of the agreement of his landlord if the trains of the defendants were run too fast or without proper signals. Nor is there any rule forbidding any person or company from making a contract relieving them from the consequences of negligence on the part of their employees. The practice of importing implied terms into a contract is a dangerous one: *The Queen* v. *Demers* [1900] A.C. 103; *Hill* v. *Ingersoll and Port Burwell Gravel Road Co.*, 32 O.R. 194; *Churchward* v. *The Queen*, L.R. 1 Q.B. 173, 195; *Ogdens Limited* v. *Nelson* [1903] 2 K.B. 287, 297. Appeal dismissed with costs.

FALCONBRIDGE, C.J., concurred. BRITTON, J., dissented.

J. C. Elliott, for plaintiffs. *W. E. Foster*, for defendants.

DIVISION COURT—COUNTY OF ELGIN.

MILLER *v.* MCKENZIE.

Fence viewers—Right of two out of three to act—Consent.

Three fence viewers were notified to attend, but only two came and considered the matter and joined in the award. There was not sufficient evidence that the plaintiff consented to the two proceeding in the absence of the third.

Held, The duties of fence viewers are analogous to those of arbitrators and there being no consent to the contrary the parties were entitled to the joint conference of the three.

[ST. THOMAS, Aug. 25.—Ermantinger, Co. J.]

This was an appeal from the award of two fence viewers. The Line Fences Act requires a reference in a case such as this to three fence viewers. Three were notified, but two only attended and viewed the premises, considered the matter, and joined in the award. By s. 7 of the Act (R.S.O. c. 284) any two of the fence viewers may sign the award, but the previous section clearly states that the fence viewers—that is to say, the three—shall examine the premises and, if required, hear evidence,

etc. No evidence was given that the third fence viewer refused to act, nor as to the cause of his absence.

The appellant, in person. *W. L. Wickett*, for respondent.

ERMATINGER, Co.J.:—I look upon the duties of fence viewers under the Act as analogous to those of arbitrators (see s. 4, where the expression "to arbitrate" is used). As to these I find this statement of the law in Russell on Awards, 6 ed., 226: "When there is no positive refusal to act, two cannot make a good award, without first taking the opinion of the third. If after discussion he refuse to concur with them in the award, they may then execute it, and it will be binding." In *Re McCluny* v. *Motley*, 6 U.C.L.J. 93, McLean, J., says: "If any one of the three refuses to act, the other two, on being satisfied of that fact, may proceed without him—and if two take upon themselves by consent of all parties to decide upon all matters referred in absence of the third arbitrator, it does not afterwards rest with either of the litigants to object to that which has taken place, and would not have taken place, but for his concurrence." To the same effect is the judgment of Robinson, C.J., in *Sloan* v. *Holden*, 14 U.C.R. 496. See also *Rioux* v. *The Queen*, 2 Exch. Rep. 91.

I think Mr. Miller was entitled to the joint conference of three fence viewers, or at least to positive evidence of the refusal of the third to act, when possibly, if there were no other available, duly appointed fence viewer, the other two might make an award. That it is, however, open to a fence viewer, who is a public officer, to refuse to act, as a private arbitrator may, may be questioned—and I do not wish to be understood as so deciding.

I do not consider that there is evidence of Mr. Miller's consent to the two fence viewers proceeding in the absence of the third.

The award is set aside, but without costs.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] COTTER *v.* OSBORNE. [Sept. 16.

Equitable execution—Receiver—Trade union—Dues and assessments payable by members.

If there is nothing in the constitution or rules of a trade union importing a contract express or implied on the part of the mem-

bers to pay dues or assessments, a receiver will not be appointed to collect them by way of equitable execution to satisfy a judgment against the union, as a receiver could not recover such dues and assessments by action. *Cochran* v. *Boleman*, 1 Am. & Eng. Ann. Cases 388, and *In re Ontario Insurance Act*, 31 O.R. 154, followed.

Blackwood, for plaintiffs. *Knott*, for defendants.

Metcalfe, J.] ROBINSON v. C. N.R. Co. [Sept. 17.

Railway company—Spur track facilities—Damages for refusal to supply—Limitation of time for bringing action for—Board of Railway Commissioners—Jurisdiction.

Action for damages for taking away spur track facilities formerly enjoyed and refusing to restore same for plaintiffs' use on their land adjoining the railway yards.

The Board of Railway Commissioners had, by order dated Feb. 19, 1906, made under ss. 214 and 253 of the Railway Act, 1903, found as a fact that the defendants had refused to afford "reasonable and proper facilities" as required by s. 253 and directed the defendants to restore these spur track facilities within four weeks, which order was affirmed by the Supreme Court of Canada (37 S.C.R. 541).

Held, 1. An action lies for such damages under the circumstances, the finding of fact by the Board being conclusive under s. 42(3) of the Act, and this Court has jurisdiction to find and assess the damages.

2. Plaintiffs are entitled to damages from the date of the breach and not merely from the date of the Board's order.

3. No claim for damages having been made in the proceedings before the Board and no order as to damages having been made by it, the plaintiffs are not estopped from bringing this action by any adjudication of the Board.

4. Damages should be allowed during the time taken up by the appeal to the Supreme Court, and *Peruvian Guano Co.* v. *Dreyfus* (1892) A.C. 166 does not apply.

5. Sec. 242 of the Act, limiting the time for bringing "all actions or suits for indemnity by reason of the *construction* or *operation* of the railway," does not apply to an action for a breach of a statutory duty in neglecting and refusing to supply reasonable and proper facilities.

Hudson, for plaintiff. *Clark*, K.C., for defendants.

Province of British Columbia.

SUPREME COURT.

Morrison, J.] MACPHERSON *v.* CITY OF VANCOUVER. [Sept. 10.

Municipal law—Defective sidewalk—Accident—Injury arising from—Duty of municipality to safeguard—Misfeasance — Nonfeasance—Damages.

Plaintiff was injured by stepping on a wooden grating in a sidewalk, which grating, when put in, was found on the evidence to be structurally defective. The grating was put in by the owners of the abutting property under a permit from the corporation.

Held, that notwithstanding the statutory provision as to notice to the corporation of accidents so happening, the corporation must be taken to have had knowledge of the originally defective construction of the grating, and were therefore liable.

J. A. Russell, for plaintiff. *W. A. Macdonald,* K.C., for defendant corporation.

Martin, J.] IN RE THOMPSON. [Sept. 17.

Criminal law—Justice of the peace—Statement to, by offending party—Summons issued thereon—Illegal issue of—Illegal issue—Crim. Code, ss. 654, 655.

A constable before the expiration of his term of imprisonment released from custody an Indian who had been convicted and sentenced to fourteen days' imprisonment. The constable then went before one of the convicting magistrates and told him that acting upon instructions from the Superintendent of Indian Affairs at Ottawa he had released the Indian. The magistrate thereupon had a summons issued and served upon the constable calling upon him to appear in answer to a charge of unlawfully releasing the Indian. The constable appeared before two justices of the peace upon said charge and by his counsel objected that the magistrates had not jurisdiction to deal with the matter as there was no sworn information. The magistrates over-ruled the objection, held a preliminary enquiry, and committed the accused for trial.

Held, that accused could not set up s. 654 of the Code providing that a sworn information was necessary before the magistrate could issue a summons.

Bodwell, K.C., for applicant. *Maclean*, K.C., D.A.G., for the Crown.

Morrison, J.] [Sept. 20.

RUSSIA CEMENT CO. *v.* LE PAGE LIQUID GLUE CO.

Trade name—Sale of good-will—Similar name—True personal name—Trade name of article—Tendency to deceive—Imitation—Fraud—Injunction.

While there is no property in the name of a manufactured article, yet where a particular article has for many years been manufactured and sold under a particular name, other persons fraudulently taking advantage of such name will be restrained.

A firm had for a number of years been manufacturing glue under the name of Le Page. They sold out their business and good-will to a company which continued the manufacture and name of the article. A member of the original firm, named Le Page, subsequently formed a company and manufactured and sold glue under the old name.

Held, that the term or name "Le Page" as applied to glue had acquired a trade distinctiveness, and that the plaintiffs were entitled to the relief asked for.

A. D. Taylor, K.C., for plaintiff. *Kapelle*, for defendant.

Book Reviews.

The Mining Law of Canada. BY ALFRED B. MORINE, K.C., LL.B., of the Bar of Nova Scotia, Newfoundland and Ontario. 1909. Toronto: Canada Law Book Company, Limited, 32-34 Toronto Street. Philadelphia: Cromarty Law Book Company, 1112 Chestnut Street. 701 pages. Price, half calf, $7.50.

This book is the only attempt within the last ten years to set forth the common and statute mining law of Canada.

During that time the Dominion and the provinces have adopted new statutes or materially modified existing acts, and

the courts have given many decisions on their interpretation. As the mining industry grows older, and titles become more involved, the common law principles applicable to mining contracts become progressively more important, and the decisions setting them forth, whether of British or Canadian Courts, increase in vital import to investors. The author treats, therefore, of both the statute and the common law of Canada, and incorporates references to decisions which seem applicable in this country. The statutes of the Dominion and the provinces in which mining transactions are most active are set forth in an Appendix, and the text contains the author's digest of the scope and effect of these statutes. In discussing the common law as to contracts, and other subjects, Mr. Morine has purposely set forth the primary or fundamental principles to a degree which, for the use of an experienced counsel, might seem unnecessary, but the book is evidently written, and properly so, to aid an inexperienced practitioner, or even a layman, as well as to be of assistance to lawyers who are familiar with this branch of law.

In successive chapters the book treats of mining terms, laws in force, Crown titles, rights of owners, partnerships and corporations, contracts, licenses, profits à prendre, leases, taxation, registration, wrongful abstraction and criminal liability, and employers' liability. A glossary is added, and there is not only an index to each statute in the Appendix, but an unusually complete index to the contents of the whole book. We congratulate both the author and the publishers upon the book before us.

Lawyers' Reports Annotated. A digest of cases in these reports in new series, volumes 13 to 18, and a full index to the annotations in the whole of the new series to date, vols. 1 to 18. Rochester, U.S. 1909.

It will be a great convenience to those who subscribe for this excellent series of reports to bring the entire index to the annotations together under a single arrangement as is done in the volume before us. Consisting as it does of 734 pages, we obtain some idea of the amount of legal lore in these volumes.

A Complete Guide to Solicitors' County Court Costs. By Samuel Freeman, Solicitor. London: Butterworth & Co., 11 and 12 Bell Yard.

Whilst this book is necessary as part of a well equipped law

library it is not of much practical use in this country, except indeed that it would be suggestive to the powers that be to the increase of solicitors' fees in this province.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Charles Howard Barker, of the City of Nanaimo, in the Province of British Columbia, barrister-at-law, to be the judge of the County Court of Nanaimo, in the said province, vice His Honour Eli Harrison, resigned. (Aug. 28.)

Flotsam and Jetsam.

Two justices of the peace in a province down by the sea should receive thanks of the profession for their efforts to bring grist to their mills. This advertisement of the Dogberrys is a curiosity. It reads thus: "Legal writings of all kinds such as Deeds, Mortgages, Bonds, Bills of sale, Agreements, Wills, Leases, etc. Collections a specialty. Prompt attention and remittance guaranteed. Write for terms."

The immense profit realised by the sale of the pictures of the late Mr. Justice Day—a collection gathered together for a total sum of £43,850, and bringing in the auction room no less than £94,946 —will recall to mind the fact that the wine cellar of the Right Hon. Abraham Brewster, who was Lord Chancellor of Ireland from 1867 till 1868, having previously filled the office of Lord Justice of Appeal in Ireland, and who prided himself on his knowledge of wines and judgment in their selection, was sold for many thousands of pounds sterling in advance of the sum originally paid.

"Your act," stated the lawyer, "is charged to be deliberate, intentional, wilful, obstinate, evil, anarchistic, wanton, malicious, autocratic and menacing." "Golly," faltered the teamster who had blocked traffic for a few moments, "better lemme go to jail, boss. You can't clear me of all that."