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EFFECT OF THE EXPRESSION "IN TRUST" IN A CONVEYANCE.

A case of great interest to real property owners came before our Courts in the year 1919. Re McKinley and McCullough, 51 D.L.R. 659, 46 O.L.R., p. 585.

Its nature and the final decision of the Court of Appeal are best indicated by the following extract from the head-note of the reported case:—

"In a conveyance of land, dated 1st May, 1888, from C. to T., the words "in trust" followed the name and description of the grantee: but there was nothing in the Conveyance and nothing registered to shew what the trust was. Subsequently T. sold and conveyed the land, the deed from him giving no indication of what the trust was, and the title came through intermediate purchasers and under registered conveyances to McK., who agreed to sell to McC. The latter considered that he should not accept the title without some evidence that, as trustee, T. had a right to sell and convey. McK. was unable to furnish any evidence of what the trust was. It was thereupon held upon an application under the Vendors and Purchasers Act, that only actual notice will affect a purchaser whose conveyance is registered, that the notice which the conveyance to T., by the use of words "in trust," gave was constructive notice only, and that the subsequent registered owner was therefore not affected by it."

It may be remarked that the above report is somewhat misleading, in so far as it seems to convey the idea that there was no actual notice of the trust. For the purpose of arriving at a true appreciation of the point involved in this case, it is, it seems to us, important to distinguish two quite different ideas.

It will be observed that the words "notice of the trust"

in the above sentence are capable of a double meaning. They may mean either (a) Notice that T., the grantee in the above mentioned Conveyance took the land as trustee, or (b) notice of the terms of the trust upon which T. took the land.

It seems quite clear that everyone dealing with the title of this land subsequent to the registration of the above-mentioned deed had actual notice of the fact that T. took the land merely as trustee.

That seems to be admitted in the judgments both of Mr. Justice Middleton in the Court below, where the words are (page 537): "Here all that the registered owner had notice of is the fact that Turner who bought in 1888 and sold shortly thereafter was in fact a trustee," and also of Chief Justice Meredith in the Court of Appeal where the following words occur, page 540: "Now the purchasers subsequent to the conveyance had actual notice not of any instrument declaring or evidencing a trust but only, at the most, that the land was conveyed to the grantee in trust."

The case was dealt with by, in all, six Judges, of whom five, including Mr. Justice Middleton in the Court below, were of the opinion that the vendor was entitled to force the title upon the unwilling purchaser.

Mr. Justice Magee in the Court of Appeal alone entertained a different opinion.

The point is one which by reason of its frequent occurrence in Ontario titles is of unusual importance.

We confess that, were it not for the very great weight which attaches to the opinion of the eminent jurists who coincide in decision in this case, we should have been inclined to consider the view expressed by Mr. Justice Magee as the correct one.

We should have been inclined to think that the Registry Act which is extensively quoted in the judgments does not help the matter.

It does not seem to us to be a question of excluding or nullifying an equitable interest by a subsequent registered deed, but rather of whether a certain grantor in the chain

of title had power to sell and convey the fee simple (legal and equitable) as he has purported to do.

It will be admitted that the word "trustee" is equivocal, so far, th · ' is, as indicating what powers of sale and alienation are vested in the person so defined. Until the terms of the trust are known it is impossible to say whether the trustee has or has not power to sell and convey. The mere fact that land is conveyed to A as trustee therefore means that A's position is as follows, namely, either that of (a) a trustee with power to sell, or (b) a trustee without power to sell.

Now if that is the case, and if, as in the present case all that is known is that the land is conveyed to A as trustee, surely the purchaser has the right to say "Prove to me that A occupied the former and not the latter of the above positions before asking me to accept the title."

As the matter stands there is, it seems to us, no more reason for assuming in the present case that T occupied the first mentioned position than the last mentioned.

And yet that seems to be what the Court of Appeal have done by their judgment.

They have apparently assumed in favour of the vendor that when T executed the deed in question he had the power to do so, so as to pass the fee (legal and equitable) to the purchaser, a power he could not have unless it were conferred on him by the terms of the trust. In other words the Court seems to have supplied the missing trust by assuming that it included in its terms power to the trustee to sell and convey.

One would, it seems to us, with all possible deference to the learned Judges who have spoken, have been inclined to suppose that if a proposition of that kind was to be put forward, the onus of proving it would be upon the vendor asserting it, and that in the absence of such proof he would not be entitled to compel the purchaser to accept the title.

We think Mr. Justice Magee puts the case very fairly when he says, p. 542, "The matter must, I think, be looked at just in the same light as if Turner were now alive, and

as if he were now the vendor and seeking to force the title upon the purchaser without any explanation of the nature of the trust. The lapse of thirty years may render it improbable that any claim under the trust, whatever it was, exists, but it does not alter the law as to whether such a title could at any time be forced upon a purchaser without more."

On the law, as it at present stands, as established by the case under discussion, it would seem that the following might very well occur.

A, who received the land as trustee sells to B. B's solicitor says, "I shall make no inquiry as to the terms of the trust. I shall not even enquire whether A has power to sell—I shall only see that the purchase money is not paid until the deed from A is actually registered. Then my client will be absolutely safe."

It is true that in the judgment of the Court of Appeal some stress is laid upon the fact that there had been a considerable lapse of time since the execution of the deed in question, but the judgment does not seem to depend upon that fact.

The case of London and Canadian Loan and Agency Company v. Duggan (1893) A.C. 506, which is the authority chiefly relied on by the Court, seems to differ in important particulars from the present.

Indeed Mr. Justice Magee does not seem to put the matter too strongly when he says, p. 545, "That case I would consider a strong authority in favour of the purchaser here that there is notice that Turner held in trust for some one else, and that a purchaser is put upon inquiry as to his right to sell."

The position there seems to have been that, while the parties were undoubtedly put upon their enquiry by the words "manager in trust" there used, any obligation so raised to enquire into the nature of the trust was satisfied by the presumption arising from the words employed, viz., "manager in trust" which, as said by Lord Watson (p. 509) "according to their natural construction" imported that the official in question held in trust for his employers, and

as Mr. Justice Magee says (p. 544) "were not calculated to suggest that he stood in a fiduciary relation to any other person."

Here the exact opposite is the case. The words "T, in trust" indicate clearly that T is a trustee only, and there is nothing whatever to indicate the beneficiary or the nature of the trust.

The obligation to enquire therefore which in the Duggan case was held to be satisfied, is here wholly unsatisfied.

Mr. Justice Kelly in the case of Re Thompson and Beer (1919), 17 O.W.N. 4, in which the circumstances are precisely similar to the present case, delivered what seems to us to be a very admirable judgment in the following words, "The use of the word 'trustee' after her name, in the conveyance to her, was notice to subsequent purchasers that she took in the capacity of trustee. A purchaser is entitled to proof of the nature and extent of the trusts on which she took, and who are the cestuis que trust or persons otherwise interested, and whether these trusts include a power to sell either by herself or with the consent of others or otherwise; and, if the terms of the trust confer a power of sale, he may insist on proof that it is properly exercised."

Mr. Justice Magee, at p. 542, has very aptly pointed out the dangers which may attend a dubious title of this character, "All this would be quite consistent with the existence of a very simple trust giving rise to no occasion for claim or question during the life of someone yet living—so that the absence of claim affords no assurance of the non-existence of a very substantial right. On the other hand, of course, the trust, if any, may have been a trust to sell."

It is of course obvious that at the time the deed was made there must have been someone interested as cestui que trust in the land—possibly more than one. If after this title has been forced upon the present purchaser, one or more of these persons should see fit to endeavour to enforce their rights by an action, the purchaser would of course be put to the trouble and expense of defending his title. If such a thing should occur, it would seem rather

a hardship on the purchaser, who had protested on this very ground against being compelled to accept the dubious title.

It will of course be borne in mind that the position is not by any means the same as though the ownership or the title of the vendor were being attacked by a stranger.

The question under the present case is simply whether the title that the vendor has is such a one as the Court will force on an unwilling purchaser.

In regard to this position we might refer to the first of the rules laid down by the late Vice Chancellor Turner in the well known case of Pyrke v. Waddingham, 10 Hare 8 (approved by Lord Romilly in Mullings v. Trinder, L.R. 10 Eq. 449), as resulting from the authorities on the subject, viz.:—

"That the Court will not hold a title to be good, even though its now opinion may be favourable, when other competent persons might reasonably entertain a different opinion, or when the purchaser, if compelled to take the title, might be exposed to substantial and not merely idle litigation; and that in determining each case, it must not be lost sight of that the Court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion should turn out not to be well founded; and that in cases where the title may be affected by rights which may hereafter arise, it is the duty of the Court to act as if those rights had actually arisen and were in the course of active litigation."

We think it cannot but be admitted that serious uncertainties attach to the title of the vendor in the present case.

One can easily conceive circumstances under which the title of the vendor would be undoubtedly bad, for instance, suppose that, at the time the deed in question was made to T, another deed was also executed, declaring the trusts on which T. was to hold the property.

Suppose the property were to be held in trust for A, for life, and after his decease in trust for B in fee. Suppose A were to die within a year or two of the present time, and

B were to bring an action to recover the land; suppose moreover that, in that action, B were to prove that, at the time the deed in question was executed, T had actual notice of the Trust Deed and its contents, and that all the subsequent grantees of the land to the present time had similar notice. As the Registry Act is of no avail as against actual notice, it would seem that B must succeed in his action. The result would be that the present purchaser, who has protested to the extent of his ability against having this dubious title forced upon him, would lose his land in toto.

It may be said that the probability of the occurrence of the suppositious case above mentioned is extremely remote, but the position of the purchaser, of course, is that he should not be compelled to assume any risk whatever in the matter, however remote.

On the whole the present judgment seems to carry the law upon the matter distinctly beyond any previous decision.

London, Ontario.

F. P. BETTS,

UNIFORMITY OF LEGISLATION.

The excellent work done by the commissioners and representatives of the Provinces of Canada for the purpose of promoting uniformity of legislation in Canada appears in the report of the proceedings of that body as presented at their fourth annual meeting.

This Commission which is really a child of the Canadian Bar Association has adopted a title similar to that given to a similar branch of legal service in the United States, viz., The National Conference of Commissioners on Uniform State Law. It is unnecessary to dilate upon the importance of this subject; it is recognised by all. A sketch of objects and methods and a summary of what has been done appears in the Report of proceedings and is as follows:—

The independent action of the various provincial legislatures naturally results in a certain diversity of legislation. In some cases diversity is inevitable, as, for instance, when

the Province of Quebec legislates upon subjects within the purview of the Civil Code of Lower Canada and according to principles derived from the old law of France, and the other provinces legislate upon similar subjects according to principles derived from the common law of England. In such cases the problem of securing uniformity is confined to the common law provinces. There are, however, many other cases in which no principle of either civil law or common law is at stake, with regard to which the problem of securing uniformity is the same in all the provinces. Both these classes of cases include subjects of legislation as to which it is desirable, especially from the point of view of merchants doing business in different parts of Canada, that legislation should be made uniform throughout the provinces to the fullest extent possible.

In the United States work of great value has been done by the National Conference of Commissioners on Uniform State Laws. Since the year 1892 these commissioners have met annually. They have drafted uniform statutes on various subjects, and the subsequent adoption of these statutes by many of the state legislatures has secured a substantial measure of uniformity. The example set by the state commissioners in the United States was followed in Canada when, on the recommendation of the Council of the Canadian Bar Association, several of the provinces passed statutes providing for the appointment of commissioners to attend an interprovincial conference for the purpose of promoting uniformity of legislation.

The first meeting of commissioners and representatives of the provinces took place at Montreal on the 2nd of September, 1918, and at this meeting the Conference of Commissioners on Uniformity of Legislation in Canada was organised. The second annual meeting of the Conference took place at Winnipeg on the 26th, 27th, 28th and 29th of August, 1919, the third at Ottawa on the 30th and 31st of August and the 1st, 2nd and 3rd of September, 1920, and the fourth at Ottawa on the 2nd, 3rd, 5th, 6th, 7th and 8th of September, 1921.

In 1919 the Conference considered and adopted a report on legislative drafting, containing a carefully prepared

selection of extracts from books written by the leading authorities on the subject, and directing attention to many important rules to be observed by draftsmen of statutes.

In 1919 and 1920 the Conference secured the adoption of the Sale of Goods Act, 1893, and the Partnership Act, 1890, in those common law provinces which had not already adopted them, and these two codifying statutes are now in force in all the provinces of Canada except Quebec.

In 1920 the Conference revised and approved model uniform statutes relating to legitimation by subsequent marriage and to bulk sales.

In 1921 the Conference revised and approved model uniform statutes respecting fire insurance policies and warehousemen's liens.

Draft statutes relating to conditional sales, reciprocal enforcement of judgments and life insurance have been considered by the Conference, and it is hoped that in 1922 model uniform statutes on these subjects will be revised and approved.

Other subjects which have been considered by the Conference or which have been referred to committees for report are: companies, devolution of estates, wills, succession duties, mechanics' liens, workmen's compensation for injuries and fraudulent conveyances.

Statutes have been passed in some of the provinces providing both for contributions by the provinces toward the general expenses of the Conference and for payment by the respective provinces of the travelling and other expenses of their own commissioners. It is hoped that similar statutes will be passed by the other provinces. The commissioners themselves receive no remuneration for their services.

It seems desirable to direct attention to the fact that the appointment of commissioners does not bind any province to accept any conclusions arrived at by the Conference, and that such uniformity of legislation as may be secured by the labours of the Conference will depend upon the subsequent voluntary acceptance by the provincial legislatures of the recommendation of the Conference.

CHEQUES AND PITFALLS.

It is an interesting event for a budding financier of the legal or any other fraternity and one that gives him a sense of importance to open a bank account and handle a cheque book; but we would warn him that there are pitfalls on the road to opulence which must be avoided.

Firstly as to issuing cheques. It is scarcely necessary to say that it is not desirable to give a cheque unless there is money to the credit of the drawer's account—carelessness in this respect has landed men in a Police Court on a charge of fraud. Issuing a cheque to pay a debt when there are no funds or not sufficient funds to meet is not necessarily a fraud. There may not have been any fraudulent intent (see Crim. Code. sec. 404), but serious consequences might result. If the drawer had no account at the bank named in the cheque fraudulent intent would be hard to displace. In a recent case there was a conviction by a Police Magistrate who seemed to think that the simple act of giving a cheque when there were no funds to meet it was a fraud and the careless youth who did it was convicted. The Magistrate was wrong in his law as there was shown to be a reasonable excuse, but the offender saw the inside of a prison all the same.

A different pitfall is dug for a novice when the holder of a cheque delays the presentment of it. This feature of the law affecting cheques is discussed in a recent number of our English contemporary The Law Times as follows:—

Delay in Presenting Cheques.

"Persons who cash cheques for friends who have no banking accounts—which might be described as an everyday occurrence—should make a point of presenting such cheques without delay, otherwise they may find themselves unable to recover the money paid. A cheque is a bill of exchange drawn upon a banker, payable on demand (Bills of Sale Act 1882, s. 73), and should be presented within a reasonable time of its issue. What is a reasonable time is a question of fact in each case, regard being had to the nature of the instrument, the usage of trade and of bankers,

and the facts of the particular case: (Ibid., s. 74 (2). In most cases more than a day or two should not be allowed to elapse. If there is unreasonable delay in presenting the cheque, the drawer, if he had funds to meet it at the bank on which it is drawn, is discharged from liability upon it if in the meantime the bank suspends payment, and the payee's only right is to prove as a creditor against the bank. He cannot ask the drawer to make good his loss. His own negligence is the cause of it: (Ibid., s. 74 (3). It does not follow from the above that a cheque has no value if not presented within a reasonable time. It can be cashed any time within six years if nothing has happened to the bank and the drawer is solvent, because the drawer sustains no damage by delay, as it is his duty to have enough to his credit to meet all cheques drawn by him: (Robinson v. Hawksford, 1846, 9 Q.B. 52). There would, however, be considerable danger in cashing a stale cheque for the holder apart from the drawer's or the banker's insolvency, because anyone doing so is deemed to have notice of all defects in title attaching to it, and it might have been stolen. Bankers generally refuse to cash stale cheques although their right to do so has never been judicially sanctioned. If a cheque is not presented within a reasonable time the drawer is liable on the cheque, but not on the original consideration—that is to say, if one accepts a cheque in payment of a debt due to him from the drawer and does not cash it promptly, the debt is discharged and he can only sue on the cheque. If the cheque be indorsed in favour of someone who pays cash for it and that person unduly delays presenting it, and when he does present it it is dishonoured, he loses his money as the indorser is discharged by the delay: (Ibid., s.. 45 (2). The person cashing the cheque is supposed to have given the money for it knowing that if he delayed in presenting it he might be the loser, and he has no legal remedy against the person he obliged. If he had presented the cheque without delay, he could on its being dishonoured have sued the indorser or the drawer after serving prompt notice of dishonour."

CRIMINAL RESPONSIBILITY FOR NEGLIGENCE IN MOTOR CASES.

The invasion of our roads and streets by motor vehicles of every sort and description and for all purposes of travel and traction has brought in its train litigation both civil and criminal.

One of these cases, The King v. McCarthy, reported fully in 59 D.L.R. 206, was carried to the Supreme Court of Canada from the Saskatchewan Appellate Court and will be found in 61 D.L.R. at p. 170. The finding of the Supreme Court was to the effect that a person driving an automobile on a public street is under a legal duty to use reasonable care and diligence to avoid endangering human life. If he fails to perform that duty without lawful excuse he is criminally responsible for the consequences.

This liability would seem to be so obvious as not to require a judicial pronouncement. It served however to bring forth a collection of authorities on the subject, which will be found in the following annotation in a recent number of the Dominion Law Reports which reads as follows:—

The first statutory enactment in Canada declaring the criminal responsibility of persons in charge of dangerous things was that contained in the Criminal Code of 1892, (Can.), ch. 29, sec. 213. That section was carried into the Criminal Code of 1906 as section 247, and reads as follows.—

"247. Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty."

This enactment appears to have been intended to declare the criminal liability already existing at common law. Sir James Fitzjames Stephen in his Digest of the Criminal Law of England states the related proposition based upon the common law as follows:—

"It is the legal duty of every one who does any act which without ordinary precautions is or may be dangerous to human life, to employ those precautions in doing it." Stephen's Digest of Criminal Law, 6th ed., article 237.

Sec. 247 of the Criminal Code declares criminal responsibility for the consequences of omitting to take reasonable precautions against and to use reasonable care to avoid endangering human life, provided the omission so to do is without "lawful excuse."

Secs. 16 to 68, inclusive, of the Criminal Code, 1906, deal with matters of justification and excuse. By sec. 16 "All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are hereby altered or are inconsistent herewith."

The common law is not abrogated by the Code, and will still be applicable in cases for which no provision has been made in the Code as well to their prosecution and defence. Even in cases provided for by the Code the common law jurisdiction as to crime is still operative except where there is a repugnancy in which event the Code will prevail. R. v. Cole (1902), 5 Can. Cr. Cas. 330, 3 O.L.R. 389; R. v. Walkem (1908), 14 B.C.R. 1 at p. 7.

Culpable homicide, not amounting to murder, is manslaughter. Cr. Code sec. 262.

And, with certain limitations as to the time of death being within a year and a day of the cause of death (Cr. Code sec. 254), homicide is culpable when it consists (inter-alia) in the killing of any person by an omission without lawful excuse to perform or observe any legal duty. Cr. Code sec. 252. The legal duty referred to is presumably a duty qua the criminal law which is the subject of the Code and does not refer to such civil rights as are, in general, outside of the legislative jurisdiction of the Dominion Parliament and are delegated to the legislative control of the Provincial Legislatures by the British North America Act 1867 Imp., ch. 3.

The decision in the McCarthy case, supra, affirms in the result the majority opinion of the Saskatchewan Court of Appeal; see R. v. McCarthy (1921), 57 D.L.R. 93, 14 Sask.

L.R. 145. It may be taken as establishing that there was no substantial wrong or miscarriage in the direction by the trial court that in a criminal case the degree of negligence which renders a man culpably negligent is greater than in a civil case; but while so affirming the result in the trial court and in the Saskatchewan Court of Appeal, some of the opinions in the Supreme Court of Canada contain dicta which would support the proposition that there is no such difference between negligence involving criminal responsibility and negligence which results in civil responsibility at least in the Province of Saskatchewan which was the jurisdiction appealed from. The questions of criminal responsibility becoming enlarged or diminished under Cr. Code sec. 247 because of differences in the various provincial laws dealing with civil negligence was not considered. The reference to "reasonable" precautions in Code sec. 247 gives room for much difference of opinion as to the scope of criminal responsibility and as to how far the question of reasonableness of the precaution or care referred to in Code sec. 247 may, on the one hand, be a question of fact only for the jury and, on the other hand, a question of law for the court.

The development of the Criminal Code of Canada (with the exception of the practice clauses) from the draft English Criminal Code which did not become law in England, tends to show that Code sec. 247 was framed solely with reference to the criminal responsibility under the English common law as applied to crimes, and that it may be treated as a definition of what is sometimes termed "gross negligence" and sometimes "negligence per se" in the criminal courts.

Carelessness is criminal and, within limits, supplies the place of direct criminal intent. Bishop on Criminal Law 313.

In Sir James Fitzjames Stephen's History of the Criminal Law of England (1883) it is said in reference to manslaughter by negligence that the legal and popular meanings of the word are nearly identical as far as the popular meaning goes; but in order that negligence may be culpable "it must be of such a nature that the jury think that a person who caused death by it ought to be punished; in

other words it must be of such a nature that the person guilty of it might and ought to have known that neglect in that particular would, or probably might, cause appreciable positive danger to life or health, and whether this was so or not must depend upon the circumstances of each particular case." Vol. 2 Stephen's History of Criminal Law, p. 123.

Although it is manslaughter, where the death was the result of the joint negligence of the prisoner and others, yet it must have been the direct result wholly or in part of the prisoner's negligence, and his neglect must have been wholly or in part the proximate and efficient cause of the death, and it is not so where the negligence of some other person has intervened between his act or omission and the fatal result. R. v. Ledger (1824), 2 F. & F. 857.

If a person is driving a cart at an unusually rapid rate, and drives over another and kills him, he is guilty of manslaughter though he called to the deceased to get out of the way, and he might have done so, if he had not been in a state of intoxication. Reg. v. Walker (1862), 1 C. & P. 320.

In the application of the English common law, the prevailing rule is to exclude contributory negligence on the part of the deceased as an excuse in a criminal case. Reg. v. Jones (1870), 11 Cox C.C. 544, disapproving Reg. v. Birchall (1866), 4 F. & F. 1087; Reg. v. Swindall (1846), 2 Cox C.C. 141; Reg. v. Dant (1865), 10 Cox C.C. 102; Reg. v. Hutchinson (1864), 9 Cox C.C. 555.

And in a recent Canadian case it was held that contributory negligence is no defence to the criminal prosecution under Cr. Code secs. 247 and 284, of a light and power company for causing grievous bodily injury by omitting without lawful excuse to take reasonable precautions against endangering human life in the care of the company's electric wires, R. v. Yarmouth Light and Power Co. Ltd. (1920), 56 D.L.R. 1, 53 N.S.R. 152, 34 Can. Cr. Cas. 1, and see annotation to that case, 56 D.L.R. at p. 5.

In cases of homicide the rule is established in many of the United States that one who wantonly or in a reckless or grossly negligent manner does that which results in the death of a human being, is guilty of manslaughter although

he did not contemplate such a result. Commonwealth v. Hawkins (1893), 157 Mass. 551, 553, 32 N.E. 862. His gross negligence in exposing another to personal injury by intentionally doing the act, makes his intention criminal. Commonwealth v. Hawkins, supra; Banks v. Braman (1905), 188 Mass. 367, 74 N.E. 594.

Criminal negligence is sometimes referred to as negligence per se. Such negligence has been defined as "the omission to do what the law requires or the failure to do anything in the manner required by law." Babbitt's Law of Motor Vehicles, 2nd ed., sec. 954; St. Louis, etc., Ry. v. Keokuk (1887), 31 Fed. Rep. 755, at p. 756.

"Negligence per se" has been described as an act or omission which the law has commanded or prohibited, the occurrence of which is, of itself and independent of its result, as matter of law declared a failure of duty rendering the culprit liable to public punishment, and this irrespective of all questions of the exercise of prudence, diligence, care or skill in case a fellow being is injured. Thompson Commentaries on Negligence, 2nd ed., secs. 10, 204; Babbitt's Law of Motor Vehicles (1917), 2nd ed, sec. 955; Cocchi v. Lindsay (1910), 1 Boyce 185 (Del.), 75 Atl. 376; Robinson v. Simpson (1889), 8 Houst. 398 (Del.), 32 Atl. 287.

"When the imperfection in the discharge of duty is so great as to make it improbable that it was the result of mere inadvertence, then in proportion to such improbability does the probability of negligent injury diminish and that of malicious injury increase." Wharton on Negligence, 2nd ed., sec. 22.

If one is grossly and wantonly reckless in exposing others to danger, the law holds him to have intended the natural consequences of his act, and treats him as guilty of a wilful and intentional wrong. It is no defence to a charge of manslaughter for the defendant to show that, while grossly reckless, he did not actually intend to cause the death of his victim. In these cases of personal injury, there is a constructive intention as to the consequences which, entering into the wilful intentional act, the law imputes to the offender in this way a charge which would be mere negligence becomes, by reason of a reckless disregard of probable consequences, a wilful wrong. Banks

v. Braman, 188 Mass. 367, 74 N.E. 594. That this constructive intention to do an injury in such cases will be imputed in the absence of an actual intent to harm a particular person, is recognised as an elementary principle in criminal law. Banks v. Braman, supra; and see Commonwealth v. Pierce (1884), 138 Mass. 165; Commonwealth v. Hartwell (1880), 128 Mass. 415; Bjornquist v. Boston & Albany Railroad (1904), 185 Mass. 130, at p. 134.

If the operator of a motor vehicle, with reckless disregard for the safety of others, so negligently drives his vehicle in a public highway as to cause the death of a person thereon, he is guilty of criminal homicide. Davids' Law of Motor Vehicles (U.S.A. 1911), sec. 237; State v. Goetz (1910), 83 Conn. 437, 76 Atl. 1000; State v. Campbell (1910), 82 Conn. 671 at p. 677, 74 Atl. 927, 135 Am. State Rep. 293.

Individuals as well as corporations, in the use and operation of dangerous machines, should have a due regard to the preservation of the rights of the public in the use of the public streets, as well as the protection of persons using such streets from injury; and if they fail in this and should in the operation of a vehicle which is always attended with more or less danger negligently, carelessly and recklessly destroy human life, it is but in keeping with the proper and impartial administration of justice, that penalties should be suffered for the commission of such acts. State v. Watson (1909), 216 Mo. 420, 115 S.W. Rep. 1011, at p. 1015.

THE LAW RELATING TO THE AIR.

O. M. Biggar, K.C.

The legal problems presented by the navigation of the air have for some time been the subject of consideration, although it is only very recently that they have become of practical importance, and even yet very few cases have arisen involving their discussion in Court. The balloon was discovered by the brothers Montgolfier only in 1783, and although during the next century ballooning under-

went considerable development, it was not until after the beginning of the twentieth century that the development of gas engines of large power and small proportionate weight has permitted the purposeful navigation of the air. The airship has come into existence, and, serious accidents notwithstanding, the highest hopes are entertained of its ultimate wide usefulness, though it is rather to the aeroplane that public attention has been directed. It was only in 1903 that men first left the earth supported by an apparatus displacing less than its weight of air, and Bleriot's famous flight across the Channel only thirteen years ago is still fresh in everybody's memory. Perhaps public attention has been rather attracted to the heavier-than-air machine by its striking use during the war, which doubtless altered the direction of the development of air navigation. It is said that *inter arma leges silent,* but the statement contains only a half-truth. So far as air navigation is concerned the law did intervene in the war, but only to prohibit civil flying, with the result that the war's conclusion found a developed air interest with which it was necessary for the law to deal not merely negatively but constructively. Last summer there were in Canada twenty-nine commercial companies owning or operating aircraft, and in addition the Air Board was, with great success, carrying out surveying, patrol and other operations for purely administrative purposes with twenty-four machines operated from six stations, of which the most westerly was Vancouver and the most easterly Halifax. The number of commercial companies interested in aviation has since slightly increased.

The legal problems air navigation presents are primarily divisible into two classes: those which relate only to municipal and those which relate to international law. It will be convenient to consider the first class independently of the provisions of the Convention relating to International Air Navigation, although these have an important bearing upon purely domestic legal problems. All that is necessary to say at this point is that while before 1914 the fundamental question of national jurisdiction over the air space had been the subject of debate both by diplomatic and

international juridical bodies, and an early attempt at an international air convention had failed by reason (as I was told in Paris) of the denial by Great Britain that national sovereignty extended to the air, the proposition that every Power has complete and exclusive sovereignty over the air above its territory is now generally conceded.

In a country with a federal constitution it is necessary at the outset to consider whether the sovereignty so established is exercisable by the federal or by the provincial or state authorities, and this question has been much debated in the United States. It presents, however, little difficulty in Canada. The necessity for governmental interference on any cognate subject did not exist in 1867, and in the absence of any subject of exclusively provincial legislation expressed in section 92 and necessarily including the use of the airways, that subject would fall within the residuum of powers given to the Dominion. Even the residuary clause need not, however, be alone relied on. The tenth of the classes of subjects allotted to the Dominion, namely, navigation and shipping, seems clearly to include it. The air is like the sea in pathlessness. In its relation to land surface it perhaps approximates more closely to a navigable river, but control of the use of both has, so far as legislative jurisdiction in Canada is concerned, been confided to the Dominion. There appears to be no reason for refusing to extend the application of the words of the British North America Act to include everything comprehended within their common signification, and the common terms relating to navigation have all been applied to the navigation of the air with the same meanings as they bear in relation to the navigation of the waters of the earth. Even if neither the residuary powers of the Dominion nor the words "navigation and shipping" were sufficient to confer jurisdiction over the air on the Dominion, section 132 of the British North America Act, conferring upon the Dominion all "powers necessary or proper to performing the obligations . . . arising under Treaties between the Empire and . . . foreign countries," would, as it will appear later, in view of the ratification of the Convention relating to International Air Navigation, give wide powers to the Dominion.

The next question of outstanding importance is the relation between the rights of navigators of the air and the rights of the owners of the ground over which they fly. Heretofore the law has been concerned with the rights of men in the use of the surface of the earth. During the process of the definition of those rights in the development of the English common law the maxim *cujus est solum ejus est usque ad coelum* has been laid down and applied. The maxim itself is first found in Coke (1) who cites in support of it three cases from the Year Books, of which the earliest is in 22 H.VI., and the latest in 14 H.VIII. In the most important of them (2) a landlord who had reserved the woods and underwoods was held not to have reserved the "herons and shovelers" nesting in them, but, on the contrary, that the lessee took in height all the air which nourished the trees and all the profits which came from them. The limitation upon the height to which the rights extended is not without significance. The rule, however, was stated in its broadest terms by James, V.C., in 1870 (3). He said "The ordinary rule is that who ever has got the solum—whoever has got the site—is the owner of everything up to the sky and down to the centre of the earth." His statement of the rule was made, however, for the purpose of giving effect to a partial exception from it, while in 1884, Brett, L.J., referred to the extension of a surface owner's rights to the centre of the earth as being a "fanciful phrase" and added that "usque ad coelum" was to his mind "another fanciful phrase" (4). In the same case Bowen, L.J., said he would be loath to suggest or to acquiesce in a suggestion that an owner of land has not the right to object to anyone putting anything over his land at any height in the sky, but his emphasis is upon the word "putting" which seems to involve the idea of construction and permanency, rather than the use of the air for support

(1) Co. Litt. 4a.

(2) 14 Hy. VIII., 12.

(3) Corbett v. Hill (1870), L.R. 9 Eq. 671.

(4) Wandsworth Board of Works .. United Telephone Co., (1884) 13 Q.B.D. 904, at p. 915.

in navigation or rights of ownership extending upwards indefinitely into space. Indeed it is only when "coelum" is supposed to connote a definite limiting blue vault that the phrase *usque ad coelum* can be given any meaning, and since the suggested connotation is admittedly false some further explanation and definition of the maxim is obviously necessary. Broom's translation of it is "He who possesses land possesses also that which is above it." Possession, however, involves control, and the statement is certainly not true of the air which blows across the land as wind. Moreover, projections from adjoining lands appear always to have been dealt with rather as interferences with user than as giving rise to any possessory rights. Momentary interferences with rights of ownership, such as for example, shooting across a parcel of land (1) seem equally to be properly regarded as interferences with user. There are indeed no cases in any books extending the rights of an owner of the surface beyond the space above it necessary to its reasonable use.

On the other hand, Lord Ellenborough in 1815 (2) said: "I do not think it is a trespass to interfere with the column of air superincumbent on the close. If this board overhanging the plaintiff's garden be a trespass it would follow that an aeronaut was liable to an action *quare clausum fregit* at the suit of every occupier of a field over which his balloon passes in the course of his voyage. Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded." His remark was fifty years later referred to by Blackburn, J., in the course of an argument as "the old query of Lord Ellenborough as to a man passing over the land of another in a balloon," and he added, "I understand the good sense of that doubt, but not the legal reason of it." (3) Lord Ellenborough's denial of the importance of the element of

(1) Clifton v. Bury (1887), 4 Times L.R. 8; Whittaker v. Stangwick (1907), 100 Minn. 386. See also Ellis v. Loftus Iron Co. (1874), L.R. 10, C.P. 10; Hannablson v. Sessions (1902), 116 Iowa 457.
(2) Pickering v. Rudd (1815), 4 Campbell 219.
(3) Kenyon v. Hart (1865), 6 B. & S. 249, at page 252.

time may be open to criticism, but it is simpler to confine the rights of the surface owner to that portion of the superincumbent space which he may conceivably make use of with the surface.

We then reach a situation not unlike that of the owner of land on the bank of a navigable river, and parallels exist between the rights of such an owner in respect of the water of the river and the rights of the owner of any land to the air in passage over it. For example, the one is entitled to have the water and the other the air come to him unpolluted. It is not difficult to extend this analogy and to assimilate the rules of law relating to the use of the air spaces for passage to those which govern the use of a navigable river. The owner of land on the bank of a navigable river, like the owner of land abutting on a public road, has the right to compel a reasonable use of the highway. Jessel, M.R., in an action (1) for an injunction to restrain the owner of a wharf from permitting to tie up at the wharf a ship of such a length that she projected in front of the adjacent property, refused the injunction on the ground that the user in question was in fact a reasonable user of the river, and referred to the case of a carriage stopping at one of two adjacent front doors. Such a stoppage was in itself, as he pointed out, without question a reasonable use of the highway, notwithstanding that the adjacent front door might be momentarily blocked. Equally, it was not unreasonable for the carriage to wait, but if, while waiting, the adjacent owner drove up, it was the duty of the waiting carriage to give him place, and a refusal would make the user of the highway unreasonable. The question, he said, was, in all cases, one of the reasonableness of the conduct in question. Thus it has been held in England that cattle grazing on a public highway may be restrained damage feasant (2); that a plaintiff using a highway to interfere with a pheasant drive has no action if he is forcibly prevented from doing so (3), and that a racing tout has no right to use a highway for the purpose of spying upon a running of race horses upon the land of the adjacent owner (4). None of these forms of user are reasonable,

having regard to the purposes of the highway, which is for passage and for all that that implies, but for no other purpose.

Apart altogether from statute, therefore, it would appear reasonably clear that the law is not inadequate to insure the proper user of the air for navigation of aircraft, or to protect the right of the surface proprietor to the peaceable enjoyment of the surface, including of course in the expression "surface" such an area immediately above the ground as can reasonably be made use of by men supported directly or indirectly upon it. There is no difficulty in insisting that, apart from statute, a landowner could prevent by injunction, or recover damages for, the unreasonably low flight of an aircraft or its hovering unreasonably above his land.

The point just discussed has not, in England, been left to forensic discussion and determination. The Air Navigation Act, 1920, contains a very long section (5) providing, to begin with, that no action shall lie in respect of the flight on an aircraft at a reasonable height above the ground, having regard to all the circumstances of the case. But it also deals with another aspect of the subject. No aircraft can take the air or leave it without making use of land or water surface, and the force of gravity may on occasion result in interference from the air with the rights to the surface. Such interference may be due to stress of weather, to accident resulting in the fall of an aircraft, or to the dropping of some heavy object by accident or design. The English Act provides that "where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in such aircraft, or by any article falling from such aircraft, to any person or property on land or water, damages may be recovered from the owner of the aircraft" (or in certain circumstances, from the lessee of the aircraft)—"without proof of negligence" unless there has been contributory

(1) Original Hartlepool Colliery Co. v. Gibb (1877), 5 Ch. D. 713.
(2) Dovaston v. Payne (1795), 2 H. Bl. 527.
(3) Harrison v. Duke of Rutland (1893), 1 Q.B. 142.
(4) Hickman v. Maisey (1900), 1 Q.B. 752.
(5) 10-11 Geo. 5 c. 80, s. 9.

negligence on the part of the person injured, and with, in the defendant, a right over against any other person who may have been solely responsible. The section is unsatisfactory in that part of it consists in an attempt to state compendiously, and therefore dangerously, some fundamental propositions of law of whose application, in the circumstances, there would be no doubt, by its apparent omission to cover cases of wreck, and by the imposition of liability independently of responsibility.

There is no lack of analogies by reference to which, if it is equitable to do so, the Courts may apply to cases which may come before them such presumptions and rules of law as the justice of the case requires, and if the Courts do not reach a conclusion that a liability to the surface owner arises from the fact of damage being caused by him from the air, or that this liability is to be imposed on the owner, whatever that may mean, of an aircraft even if it was at the time under the control of a thief, it will only be because it appears unreasonable and unjust to do so. There is authority, if circumstances require reliance upon it. The principle of Rylands v. Fletcher (1) might suffice, but as early as 1822 it was held in the United States that both the direct damage caused by the fall of a balloon and that resulting indirectly from the concurrence of the curious public could be recovered from the balloonist apart from negligence on his part (2). The longer final decision on the applicability of this rule is delayed, the less likely its adoption will become, and it seems, on the whole, much more satisfactory to leave the principles to be worked out on the facts of individual cases than to attempt to deal with the subject by statute. There is always danger, on subjects of this kind of falling into the error into which the British Parliament fell in 1865 when it directed that every vehicle propelled by steam or any other than animal power should be in charge of at least three men employed to drive and con-

(1) (1868) L.R. 3 H.L. 330.
(2) Guille v. Swan (1822), 19 Johns (N.Y.) 381. See also Canney v. Rochester (1911), 76 N.H. 60.
(3) 28-29 Victoria, c. 83, s. 3.

duct it, and should be preceded sixty yards in advance by a man bearing a red flag. (3). It was only in 1896 that an exception was made from these provisions in favour of motor cars—the exception in fact extending to all locomotive vehicles under three tons in weight. (1). We shall probably find that no legislation on the subject of liabilities arising from air navigation is immediately necessary; certainly any general legislation we could now pass would not only be incomplete, but would probably adversely affect the development of air navigation.

The Convention relating to International Air Navigation was drafted in Paris in 1919 during the peace negotiations by a Commission set up by the Conference. The problems involved were very thoroughly discussed at a series of meetings in some of which I had the honour of taking part as one of the British representatives. The Convention has been signed by twenty-six of the Allied and Associated Powers, and is about to be ratified by fourteen of these and two other States. After recognizing national sovereignty over the air spaces, the Convention provides that each state will accord freedom of innocent passage above its territory to the aircraft of other contracting states, except over specified prohibited areas, and even without landing, unless reasons of security or customs otherwise require. It forbids permission to pass being granted to aircraft not possessing the nationality of one of the contracting states, and further forbids any state to grant nationality to aircraft not belonging either to its nationals as individuals or to incorporated companies of which the president or chairman and at least two-thirds of the directors are its nationals. An Annex provides for the method in which registration is to be effected, and prescribes the registration marks to be adopted by each country. The Convention further requires that certificates of air worthiness shall be issued to any aircraft engaged in international navigation, and that certificates of competency shall likewise be issued to its officers. It and its Annexes also in-

(1) 59-60 Victoria, c. 36.

clude requirements as to the papers and logbooks to be carried; rules of the road, including signals; regulations as to the laying out of aerodromes, as to the minimum qualifications for certificates to pilots and others, as to weather reports and other like matters, and also a prohibition of the carriage in international traffic of explosives, or, except with special permission, of wireless apparatus. It follows that these subjects must be legislatively dealt with in each country, and that the legislation must apply not only to aircraft engaged in international air navigation but to all aircraft. The same rules of the road must apply to all. The same arrangement of aerodromes must be made for all, and indeed it would be impossible to comply with the provisions of the Convention without including domestic aircraft within the scope of the local regulations. The effect of the enforcement of the Convention will be that, so far as concerns the contracting states, the air will become almost as free as the sea.

Contemporaneously with the discussions in Paris the Canadian Parliament assumed jurisdiction. By the Air Board Act (1), assented to on the 6th of June, 1919, the Governor in Council was authorised to establish an Air Board of seven members, of whom the Chairman was required to be a Minister of the Crown, and two of the members were to be appointed as representatives of the Department of Militia and Defence and the Department of the Naval Service respectively, all of the members to hold office for a term of three years. The Board to be thus constituted was by the statute given administrative jurisdiction with respect to all matters, civil and military, relating to aircraft, and power was conferred upon it to make regulations relating to the licensing of personnel, aircraft and air-harbours, and to the navigation of the air generally, as well as to submit regulations for the governance of a military air force. The Board was constituted shortly after the passing of the Act, and the Air Regulations, 1920, regulating civil aviation, were approved by the Governor in Council on the last day of 1919.

(1) 9-10 Geo. V., c. 11.

These regulations, speaking generally, followed the provisions of the International Convention which had already been signed on behalf of Canada although not yet ratified. Under them no aircraft is allowed to fly in Canada unless it has been registered either here or in one of the other contracting states, and unless it bears the proper nationality and registration marks. The marks on Canadian aircraft consist of a group of five letters of which the first not only in Canada but throughout the British Empire is G. It is followed by a hyphen and four more letters of which, in the case of any Canadian aircraft, the first is C. The mark is so printed as to be legible from the ground, without a glass at low altitudes, or at high altitudes with one, and it also appears on the upper surface of the upper plane. The nationality marks also appear on both sides of the tail fin. Apart altogether therefore from any knowledge of the shapes of machines, any machine flying in Canada can be thus identified from the ground or from the air.

Equally, no pilot is allowed to fly, except for instruction, unless he has received a certificate to obtain which involves a medical examination, repeated every six or twelve months, and the successful passing of tests. Following the Convention, the regulations lay down detailed rules of the road and detailed instructions for the laying out and marking of aerodromes, the marks being such as to indicate from the air the size of the aerodrome, the direction of the wind, and, at night, any projections involving possible danger to navigation.

The United States, although it signed the Convention, has not ratified it, and has not passed any general legislation on the subject. Certain of the states have made regulatory provisions, but the general situation is still chaotic. In agreeing to the ratification of the Convention, power has been reserved to the ratifying states (with the consent of the International Commission for Air Navigation when this has been set up under the terms of the Convention) to make special arrangements with the signatory powers who have

not ratified and certain other countries, and, as regards the United States, Canada has, pending action by Congress, made a special exception in favour of American machines by virtue of which they are permitted to fly north of the Canadian boundary if an American nationality mark assigned by the Canadian Air Board is painted upon them and they are registered with the Board. The pilot in charge must be a qualified war pilot. This special exception has already been renewed twice, on each occasion for six months, but no application for a further renewal has been received since the last renewal period expired on November 1st.

It has not been expressly determined whether, in the event of a cause of action arising wholly in an aircraft having a nationality other than that of the state over which it at the time is, the laws of the country of its nationality apply either at all or to the exclusion of the laws of the country which whose air space the actionable conduct took place. So far as respects breaches of provisions of the Convention, it itself imposes upon the contracting states the duty of punishing infractions occurring as well on one side as the other of its boundary. It is suggested by a recent writer (1) that contraventions of local fiscal and like laws would be punishable only in the state enacting them, while crimes and torts might be cognisable by either of the states whose nationality the aircraft possesses or by that above which it was flying at the time. He moreover suggests that where difficulties arise in determining whether a given act has been done on the one or the other side of a frontier, both the adjacent states should be considered as exercising a condominium. Cases are bound to arise in which it is impossible to determine with accuracy on which side of a boundary line a given event occurred, but it is very difficult to see how the nationality of the craft can, in view of the Convention's declaration of national sovereignty over the air space over it, have any such legal effect as the nationality of a ship except when the aircraft is flying over the high seas. This, however, like many other

(1) J. M. Spaight: Aircraft in Peace and the Law, Macmillan, 1919.

difficult problems, remains to be worked out by judicial decision and if, as everyone familiar with the subject expects, the navigation of the air becomes a matter of every-day life, there will be many problems which will require consideration and decision by the Courts.

MIXED ARBITRAL TRIBUNAL.

The following announcement is made by the Custodian respecting the Anglo-German Mixed Arbitral Tribunal:—

The Mixed Arbitral Tribunal to be established between the United Kingdom, on the one hand, and Germany on the other hand, under article 304 of the Treaty of Versailles has been constituted and is about to begin work in London. The President of the Tribunal is Professor Eugene Borel, a Swiss jurist and Professor of Public and International Law in the University of Geneva. The British and German members are respectively Mr. R. E. L. Vaughan Williams, K.C., of Lincoln's Inn, and Dr. jur. Adolph Nicolaus Zacharias, Senatsprasident of the Hanseatic Oberlandesgericht.

A great part of the work of the Tribunal is to decide as to debts under article 296 of the treaty where a difference has arisen between an enemy debtor and an enemy creditor or between the British and German clearing offices. Under article 297 the Tribunal can determine compensation to be borne by Germany in respect of damage or injury inflicted on the property, rights or interests of British Nationals in German territory as they existed on August 1, 1914, by the exceptional war measures or measures of transfer mentioned in the annex to that article. The other matters within the jurisdiction of the Tribunal are set out in articles 299, 300, 302, 304, 305 and 310 of the treaty.

The procedure before the Tribunal is to some extent regulated by sections III to VII of Part X of the treaty, but the Tribunal has settled further and more detailed rules dealing with the manner in which claims must be submitted. Printed copies of these Rules of Procedure may be procured from the Government Printing and Stationery Office. They should be

read in conjunction with the provisions of the Treaty of Peace (German) Order, 1920.

The British Government has provided a court for the meetings of the Tribunal and an office for the Secretariat at 21, St. James's Square, London, S.W.1. Mr. Harold Russell, barrister-at-law, has been appointed by the Foreign Office to act as British Secretary, and the German Government is also appointing a Secretary, the two to act together as joint Secretaries of the Tribunal.

The High Contracting Parties under the Treaty have agreed that their courts and authorities shall render the Mixed Arbitral Tribunal, direct, and all the assistance in their power as regards transmitting notices and collecting evidence. The decisions of the Tribunal are final and conclusive. The place and time of sitting will be determined by the President of the Tribunal, and may be in London, Germany or elsewhere as the convenience of the parties or witnesses may require. The sittings will be public.

Time for Presentation of Claims.

1. The time within which claims are to be submitted to the Tribunal shall be as follows:—

(a) Appeals under Article 296, Annex, paragraph 20.

Within thirty days of the communication of the joint decision of the two clearing offices to the appellant.

(b) Claims under Article 297.

Within twelve months from the date of the publication of these rules in the place at which such claimant is residing, or within six months from the date on which the claimant learnt that damage or injury had been inflicted on his property, rights or interests, or within six months from the date on which the claimant learnt that restitution under section (f) of the said article had been made or refused, which ever period is the longer.

(c) Claims under Article 305.

Within twelve months of the publication of these rules in the place at which such claimant is residing, or within twelve months of the date on which the decision was given,

or within six months of the date on which such decision came to the knowledge of the claimant, whichever period is the longer.

(d) In all other cases.

Within twelve months from the date of the publication of these rules in the place at which such claimant is residing, with the exception of those cases provided for in rule 22, where the limitations of time imposed by these rules are stated not to apply.

After the expiration of the time prescribed by this rule, no claim will be accepted without the special leave of the Tribunal.

2. All claims, answers and other written proceedings must be delivered or sent to the Custodian Department of the Secretary of State.

REVIEW OF CURRENT ENGLISH CASES.

Motor Car—Driving "recklessly and at a speed dangerous to the public"—Conviction—Two offences—Duplicity—Motor Car Act 1903 (2 Edw. VII., c. 36), s. 1—(R.S.O., c. 207, s. 11 (2)).

The King v. Jones, 1921, 1 K.B. 632. The defendant was convicted of driving a motor car on a highway "recklessly and at a speed dangerous to the public having regard to all the circumstances of the case including the nature, condition and use of the said highway and to the amount of traffic which actually was at the time or might reasonably have been expected to be on the said highway." It was contended that the conviction was bad for duplicity on the ground that the statute created two distinct offences in driving recklessly—and at a speed dangerous to the public—but the Divisional Court (Lord Coleridge, Avery, and Salter, JJ.) held that the driving the car was an indivisible act which might constitute both offences charged and they dismissed the appeal.

Contract—Auction sale of government stores—Agreement by intending purchasers for a "knock-out"—Legality—Restraint of trade—Public policy.

Rawlings v. General Trading Co. (1921), 1 K.B. 635. This was an appeal from the judgment of Shearman, J. (1920), 3 K.B. 30, holding that it was illegal at an auction sale of government stores for persons to agree not to bid against each other, and that if the goods were purchased by one of them that they should be equally divided between them, the agreement being for what is in England called a "knock out." The majority of the Court of Appeal (Bankes and Atkin, L.JJ.) held that the agreement was not illegal and reversed the decision of Shearman, J., but Sutton, L.J., dissented.

Admiralty—Salvage—Misconduct of master and crew of salving vessel—Forfeiture of salvage—Owners of salving vessel.

The Kenora (1921), P. 90. This was a claim for salvage. The defence was that the master and crew of the salving vessel had been guilty of larceny of stores and effects of the vessel salved and that the right to salvage was thereby forfeited. Hill, J., however, held that the owners, who had in no way contributed, or been parties to the misconduct in question, were not thereby deprived of their right to salvage.

Admiralty—Salvage—Rescue of vessel from Bolsheviks—Status of Bolsheviks—Comity of Nations.

The Lomonosoff (1921), P. 97. This was an action for salvage of a vessel in the following circumstances. The plaintiffs, two British and two Belgian officers, were in Murmansk and in danger of being captured and shot by Bolsheviks,—whereupon they took possession of the vessel in question, and which was also in danger of being captured by the Bolsheviks, and by means of the vessel escaped to a Norwegian port where they delivered up the vessel to the owners' representative. Hill, J., held that notwithstanding the plaintiffs in saving the vessel they were also effecting their own escape did not disentitle them to salvage—that the Bolsheviks were not acting with

the authority of a politically organized and recognized society and that the danger of the vessel was not that of passing from one form of government to the control of another, but was analagous to a rescue from pirates or mutineers, and that there was nothing in the comity of nations which compelled the Court to treat the rescue as a rescue from lawful authority, and the claim for salvage was therefore allowed.

Practice—Parties to action—Joinder of defendants—Alternative relief against two defendants—Different causes of action—Common question of fact—Rule 126—(Ont. Rule 67).

Payne v. British Time Recorder Co. (1921), 2 K.B. 1. The plaintiff in this case sold to one of the defendants goods which the plaintiff had bought from the other defendant. The plaintiff vendee claimed that the goods supplied were not up to sample, and the plaintiff claimed that if they were not up to sample then their vendors had broken their contract with them and they claimed relief alternatively against one or the other of the defendants. Applications by the defendants to have their names struck out were refused by the Master and his decision was affirmed by Lawrence, J., and the Court of Appeal (Lord Sterndale, M.R., and Warrington and Scrutton, L.JJ.) held that the Court had a discretion to allow the joinder under Rule 126 (Ont. R. 67) to allow the joinder and that as there was common question of fact to be tried, namely, whether the cards were in accordance with the specimen supplied, that discretion had been rightly exercised.

Practice—Claim and counter claim successful—Costs—Taxation—Apportionment of costs.

Christie v. Platt (1921), 2 K.B. 17. In this case both claim and counter claim were allowed with costs and the question in dispute was as to how in such circumstances the costs should be taxed. In taxing the plaintiff's bill the Master allowed the costs of a brief at the trial, fees to counsel and costs and expenses of witnesses. In taxing the defendant's bill he allowed nothing in respect of these

items. Roche, J., held that he had proceeded on a wrong principle, and that costs incurred in supporting the claim and opposing the counter claim ought to be apportioned and the apportioned parts attributed to the claim and counter claim respectively, and similarly mutatis mutandis as to the defendant's costs, and the Court of Appeal (Atkin and Younger, L.JJ.) agreed that this was the proper method.

Money lender—Action against borrower—No defence of non-registration—Evidence of registration—Onus of proof—Money Lenders Act 1900 (63-64 Vict., c. 51), ss. 2, 3—(R.S.O., c. 175, ss. 11, 12).

Lipton v. Powell (1921), 2 K.B. 51. This was an action by a money lender to recover money lent. There was no defence of non registration and the question was raised whether the plaintiff could recover without proving registration as required by the Money Lenders Act 1900 (63-64 Vict. c. 51) (see R.S.O. c. 175, ss. 11, 12). The County Court Judge held that the plaintiff was bound to give strict proof of registration, but a Divisional Court (Lush and McCardie, JJ.) held that as there was nothing on the face of the transaction to suggest that the plaintiff was not registered and her agent at the trial had sworn she was registered, and the defendants did not attempt to shake his evidence by cross-examination or otherwise, and the defendant not having given notice of any such defence, they were precluded from setting it up, and that it was unnecessary for the plaintiff to give any formal proof of registration by an examined or certified copy thereof.

Charterparty—Construction—Provision for cesser of hire—Ejusdem generis rule.

S.S. Magnhild v. McIntyre (1921), 2 K.B. 97. This was an appeal from the decision of McCardie, J. (1920), 3 K.B. 321 (noted ante vol. 57, p. 41). The Court agreed with Roche, J., as regarded the non-applicability to the particular clause of the charter party to which he referred; but reversed his decision on the ground that by a subsequent clause in the charter party the particular cause of delay was thrown

upon the charterers. This clause stated—"but should the steamer be driven into port or to anchorage by stress of weather, or from any accident to the cargo or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing obstruction to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterer's account." The vessel while making its way to port up a river grounded on soft clay and was thereby delayed. This the Court of Appeal (Bankes, Warrington and Atkin, L.JJ.) held was within the clause above quoted and therefore occasioned no cesser of hire, and the judgment of McCardie, J., was therefore reversed.

Criminal law—Bigamy—Honest belief that former marriage dissolved—Offences against Person Act 1861—(24-25 Vict., c. 100, s. 57—(Crim. Code, s. 307).

The King v. Wheat (1921) 2 K.B. 119. This was a prosecution for bigamy and the question for the Court of Criminal Appeal (Bray, Avory, Shearman, Salter and Greer, JJ.) was whether the accused's bona fide belief that he had been divorced from the bond of his first marriage was a sufficient defence in view of the fact that that belief was ill-founded. The Court held that it was not a defence and the conviction was affirmed. It may be observed that the jury found as a fact that the accused had the belief, but the Court of Appeal held that there was no evidence on which the jury could so find, but even if the finding were well founded it would be no defence. The Court in arriving at its conclusion discussed the case of Rex v. Tolson, 23 Q.B.D. 168, and disagreed with the general principle there laid down by Cave, J. In that case the second marriage had taken place in the bona fide belief that the husband of the first marriage was dead, and there was consequently no intention on the part of the accused to enter into a second marriage while her first husband was living, but in the present case there was that intention, based on the erroneous supposition of the first marriage having been legally dissolved. The case, in their Lordships' opinion, was governed by Rex v. Lolley, 2 Clk. & F. 567n, Earl Russell's Case (1901), A.C. 446.

Railway—Carriage of goods—Special contract—Owner's risk—Wilful misconduct—Loss of goods—Inference from conduct.

Smith v. Great Western Ry. (1921), 2 K.B. 237. The plaintiff in this action claimed to recover from the defendant company for damages for the loss of goods delivered to it for carriage. The terms of carriage were that the company should not be liable for loss, damage, misconveyance, delay or deterioration except upon proof that the loss, damage, etc., arose from the wilful misconduct of the company's servants. The parcel in question was never delivered to the consignee. After the lapse of 19 days the plaintiffs wrote to the company to complain, and were told the matter would have immediate attention. Having heard no more for three months, their solicitor wrote to the company, and they were again informed the matter should have immediate attention. A fortnight later the solicitor wrote threatening an action unless he received by return of post some account of what had become of the parcel, and were informed by the company that the reason of delay was because all the papers in reference to the matter had been lost and that as soon as possible a definite reply would be given. A week later an action was commenced in the County Court. In answer to interrogatories the defendant company stated that it had no knowledge whether the goods had been dispatched from the place where they were received or whether they had ever arrived at their destination, that there was no record of their having been so received, and that it was believed that the goods had been lost. At the trial the defendant company offered no evidence, and contended that it had no case to answer inasmuch as there was no evidence of any wilful misconduct on the part of the company's servants. The Judge of the County Court gave judgment for the plaintiff, which was reversed by a Divisional Court (Salter and Roche, JJ.) and this was an appeal from that decision, and the Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.) dismissed the appeal.

Company—Shares—Action for calls—Defence of misrepresentation in prospectus—Laches.

First National Reinsurance Co. v. Greenfield (1921), 2

K.B. 260. This was an action for call on shares of a limited company, and the defendant set up that he was induced to buy the shares by reason of misrepresentations contained in the company's prospectus. At the trial it was submitted on behalf of the company that even if there had been misrepresentations in the prospectus the defendant had allowed his name to remain on the register and had taken no steps to have it removed and was now by reason of his laches precluded from taking any such steps. The Judge who tried the case gave effect to this contention, and a Divisional Court (Lush and McCardie, JJ.) upheld his judgment.

Will—Real estate—Equitable limitations—First estate tail not in esse—Interim acceleration of life estate in remainder.

In re Conyngham, Conyngham v. Conyngham (1921), 1 Ch. 491. In this case the testator devised real estate in trust to pay his brother a certain annuity for his life with remainder to his issue in tail with remainder for life to the defendant, with remainders over. The brother was married but had no children. The Court of Appeal (Lord Sterndale, M.R., and Warrington and Scrutton, L.JJ.), affirming Astbury, J., held that until a child was born to the brother the remainder of the defendant was accelerated as to the surplus income of the estate.

Copyright—Infringement—Musical play authorship—Film production—Copyright Act 1911 (1-2 Geo. V., c. 46), ss. 1, 5, 8, 16 (3), 35.

Tate v. Thomas (1921), 1 Chy. 503. This was an action to restrain the infringement of copyright of a musical play by production of a film thereof. The plaintiffs were collaborators in the production of musical plays, and were applied to by one Peterman to compose the music and words of a play of which he supplied the name of the play, the leading characters, and the plot. On the completion of the work it was agreed that the plaintiffs were to be announced as the authors of it, but Peterman was to be at liberty to exhibit it on payment of certain royalties to the plaintiffs. On the completion of the work Peterman claimed to be the author, and gave a license to his co-defendent to produce a film of the play. Eve, J., who tried the action, held that

nothing which Peterman did in reference to the play was the subject of copyright, and that he was neither author, nor joint author of it with the plaintiffs; the learned Judge therefore granted the injunction.

Donatio mortis causa—Registered victory bonds—Incomplete gift—Executors—Registration of donee as owner.

In re Richards Jones v. Rebreck (1921), 1 Ch. 513. In this case the question was whether a gift of registered victory bonds made in the following circumstances was a valid donatio mortis causa. On Oct. 18, 1919, a testator suffering from various ailments and about to undergo a serious operation gave two registered victory bonds of £100 each to a lady who had been his close friend, saying to her, "Will you take them home and take charge of them until such time as I am able to go to London. But if anything happens to me you are to keep them for yourself." The testator was unable to undergo the operation and died on October 20, 1919. The victory bonds were registered in the name of the testator and each bond expressed all the terms on which the money was held and shewed the whole contract between the Government and the lender. Eve, J., who tried the action, held that there had been a good donatio mortis causa inasmuch as there was clear evidence that the testator intended that this lady should retain the bonds for herself in the event of his death and that the gift was not conditional on his death from any particular cause. Also that the bonds were a good subject for such a gift and that it was the duty of the executors of the testator to give effect thereto by executing such transfer as would enable the donee to be registered as the owner — the case being governed on this point by In re Dillon, 44 Ch. D. 76.

Foreign judgment—Enforcement of foreign judgment—Affiliation order against deceased putative father's estate.

In re Macartney; Macfarlane v. Macartney (1921), 1 Ch. 522. This was an action to enforce an affiliation order made in Malta against the estate of the putative father of an illegitimate child after his death. Astbury, J., who tried the action, held that the order was one that could not be

enforced in an English Court (1) as being contrary to public policy, inasmuch as the order recognised the right of an illegitimate child to perpetual maintenance out of the estate of the putative father; (2) because such a claim was a cause of action unknown to English law, (3) because the judgment was not final, but subject to be varied or terminated according to the child's circumstances. The action was therefore dismissed.

Company—Directors—Misfeasance—Transaction ultra vires the company—Honest error of judgment—Counsel opinion—Companies Act 1908 (8 Edw. VII., c. 69), s. 279.

In re Claridge's Patent Asphalte Co. (1921), 1 Ch. 543. This was a summary proceeding against a director of a limited company to recover damages for alleged misfeasance in office. By s. 279 of the Companies Act (8 Edw. VII., c. 69) a director may be relieved from liability for negligence or breach of trust "if he has acted honestly and reasonably and ought fairly to be excused." In this case the transaction impeached was wholly ultra vires the company but which the director acting on counsel's considered opinion honestly and reasonably thought to be intra vires, and Astbury, J., held that he was exonerated from liability.

Landlord and tenant—Sale of Reversion in two lots—Notice by purchasers to quit on several days.

In re Bebington; Bebington v. Wildman (1921), 1 Ch. 559. In this case a landlord sold part of his reversion to one person and part to another. Each purchaser gave the lessee notice to quit, one of them at one period and the other at another. The tenant had not attorned to either. This was a summary application to determine whether or not either notice was of any validity, and Peterson, J., who heard the application, decided that neither was valid.

Vendor and purchaser—Title—Devise to heir at law "absolutely"—Words of limitation or purchase—Rule in Shelley's case.

In re Hussey; Hussey v. Semper (1921), 2 Ch. 567. In this case the construction of the will of a testator was in question. By the will he devised real estate in trust to

William Hussey for his life and afterwards in trust "for his heir at law absolutely." The question was whether the rule in Shelley's case was applicable so as to give William Hussey the fee simple. Lawrence, J., was of the opinion that it did not apply, but that the case was within the exception established by Archer's case (1597), 1 Rep. 66b, and therefore that William took only an equitable estate for life and his heir at law took by purchase an equitable estate in fee simple.

Landlord and tenant—Covenant not to assign without consent—Covenant not to withhold consent unreasonably—Company—Voluntary liquidation reconstruction—Assignment to reconstituted company—Refusal of consent.

Ideal Film Renting Co. v. Nielsen (1921), 1 Ch. 575. This was an action for a declaration that the plaintiffs, who were under-lessees of the defendant, were entitled to assign the under leases under which they held without the consent of the defendant in the following circumstances. The under leases contained a covenant on the part of the plaintiffs not to assign without the consent of the defendant and also a covenant by the defendant that he would not withhold his consent unreasonably. The plaintiffs carried on a film producing business, but for want of the necessary capital with a view to a reorganization on a larger scale went into voluntary liquidation and a new company with a largely increased capital fully paid up was formed, to which the liquidator of the plaintiff company proposed to assign the under leases—to which the defendant refused to consent on the ground that it was a new company and had done no business. Eve, J., who tried the action, held this to be no reasonable ground for refusal, and the fact that the qualification of the lessees' covenant taking the shape of an express covenant by the lessor did not put the lessee in any worse position than if there had been an express qualification of his own covenant, but gave him further remedy against the lessor for breach of his covenant. The learned Judge therefore held that in the circumstances the plaintiff was entitled to make the proposed assignment of the leases without the consent of the lessor.