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THE PEDESTRIAN AND THE STREET CAR.

The Chancellor of Ontario neatly sums up in the case of *Jones* v. *Toronto Ry. Co.* (1911), 23 O.L.R. 331, what I take to be the consensus of the leading Canadian, English and United States authorities, thus:—

"1. The public have a right to cross the street and go over the street-car track for that purpose, and such people have an equal right to be there with the cars.

"2. The motorman is in control of a forceful propelling power which, if carelessly used, may endanger life and limb.

"3. The specific business of the man driving a car is to be on the look-out for any one in danger or likely to be in danger from the movement of the car, and is to use a commensurate degree of care to avoid such danger.

"4. This is emphatically so when the person on or near the track and heading that way as if to cross the track appears to be unconscious of the imminent danger.

"5. If the motorman sees the exposed condition of the traveller and proceeds without giving warning or using his best endeavours to stop, this negligence is excessive and criminal.

"6. The circumstances may be such as to warrant the jury in finding that there is culpable negligence in the motorman if he should have timeously seen the dangerous situation, unless he satisfies them that he has good reason for his want of maintaining an effective look-out."

In the same case Mr. Justice Middleton states the law in similar terms: "The principle, which I venture to think, governs this case is, that where a person or corporation is permitted to operate a dangerous vehicle upon a highway, that permission carries with it a corresponding duty of great care and incessant watchfulness to avoid injury to others who are using the high-

way. From those to whom much is given much is rightly required. The great privileges accorded to those operating dangerous vehicles upon a highway require the court to exact from them a corresponding degree of care. This is only the familiar test of "what is reasonable under the circumstances." A man in charge of a dangerous instrument is reasonably required to exercise great watchfulness, because a reasonable man would expect to do so. The user of the highway for rapid transit purposes, though lawful and expressly sanctioned by the Legislature, is, nevertheless, so perilous to the wayfarer that those in charge of the rapidly moving vehicle ought at all times to watch for the unwary and negligent foot-passenger—and they cannot escape from this duty by asserting that they did not in fact perceive the plaintiff's danger. Adapting the language of *Davies* v. *Mann*, they are bound to go along the highway at such a pace and with such vigilance as to prevent mischief."

The judgment of the Divisional Court in the *Jones* case was reversed in appeal,[1] the written reasons being those of Mr. Justice Garrow and Mr. Justice Meredith, the other judges expressing their concurrence. Mr. Justice Meredith thought that the opinion of the Judges in the Divisional Court did not put sufficient emphasis upon the duty of the pedestrian. "No reasonable fault," he says, "can be found with the expression of opinion given in the Divisional Court, as to the duty of persons operating a railway along the surface of a public road; but fault should be found, I think, with the failure to give expression to the corresponding duty of others also using the highway, for the expressions, as to the duty of the railway company, apply at least equally to all persons making use of such a road; care is as much the duty of the one as the other; and the common expression, the greater the danger the greater the care, applies, not to one side alone, but to all alike; and I am quite unable to agree in the proposition that all persons have a right equal to that of the railway company to occupy that part of the highway where the company's tracks are laid; that would render the

1. (1911) 25 O.L.R. 158.

purpose of such railway—rapid transportation—unattainable, and would be opposed to the natural law of self-preservation; if one on foot, or in a vehicle, or otherwise, making lawful use of the highway, could saunter at will across the tracks, obliging the drivers of the company's cars to be constantly stopping or slowing down to avoid any infringement of such rights, rapid transit would be impossible, the purposes of the railway would be practically destroyed. The very necessity of the thing requires that the company's cars should have the right of way, and that those driving, or walking, along the tracks, or even crossing them only, should take reasonable care to clear the way for the passage of the cars. One on foot can stop, or turn in any direction, almost instantaneously; and any one driving can do so speedily; but not so with the cars, they cannot move except upon the rails, they can but go ahead or back up on them; and it takes some time to stop them, and a longer time to reverse their movement. It would reduce to a farce the railway service, for the benefit of the public, if the right of way were not accorded to the cars; which, as I have before mentioned, the law of self-preservation makes necessary. Such a right of way is in fact provided for in the provincial enactment respecting electrical railways. See R.S.O. 1897, c. 209, s. 40."

It is to be noted that the reasons of Mr. Justice Meredith are apparently merely the expression of his individual views. Mr. Justice Garrow remarking in his reasons that the case turned not upon the law but on the facts As the expression of his own views the argument of Mr. Justice Meredith is, however, of importance, not only because of that learned judge's reputation for clear thinking, but because I have not found in any other reported judicial opinion so explicit a statement of the theory of the paramount right of the street car.

It is in that view that it becomes important to examine the two opposing views of the law, namely, that of equality of rights as stated by the Chancellor and Mr. Justice Middleton on the one hand, and that of paramount right of the street car as stated by Mr. Justice Meredith, on the other.

Let us test the conflicting views by a hypothetical case:—

Suppose a street car to be moving east along King Street, approaching Spadina Avenue, an intersecting street, and a loaded dray to be moving south on Spadina Avenue, approaching King Street. Suppose further that the motorman and the driver of the dray each sees the other in ample time to avoid a collision, and that the driver of the dray having first reached the point of intersection proceeds to cross the track upon which the street car is approaching, notwithstanding the ringing of the motorman's gong. But the motorman also proceeds, and the street car collides with the rear end of the dray, with the result that the driver of the dray is injured and the front of the car is smashed. Then the driver of the dray brings action against the railway company, and the railway company counterclaims for damages to its car. Now let us apply the doctrine of equality of rights.

If the doctrine of equality of rights as between the motorman and the drayman is to prevail, then, clearly whichever of them was first in possession of the point of intersection was entitled to cross without molestation from the other. It follows that the drayman having been first in possession of the point of intersection had a right to cross free from interference from the motorman. More than that, the circumstances of the collision make a prima facie case for the drayman. The fact that the street car ran into the rear of the dray is proof that the dray was there first.

But this kind of a collision is so improbable as to be almost unheard of, for a street car motorman who approaches a loaded dray incautiously, incurs great risks both to his car and to himself. He consequently shews a profound respect for the drayman.

But, suppose that instead of a loaded dray, it is a pedestrian that is moving south on Spadina Avenue towards the car approaching on King Street. The pedestrian has the car in full view and the motorman has the pedestrian in full view. The pedestrian reaches the point of intersection of the lines of advance before the car and proceeds to cross. Then just as the

pedestrian steps off the track the projecting corner of the car hits him and he is injured. What then? What is the law applicable to this state of facts?

Here again it is obvious, if there is to be a true equality of rights, that the pedestrian being first in possession of the point of intersection of the lines of advance, is entitled to cross without molestation from the street car. That he was first in possession is shewn by the fact that he had all but cleared the right of way when struck.

I am, of course, putting aside the cases where the pedestrian makes some movement or gesture from which the motorman is justified in inferring an intention to let the street car pass ahead. I am assuming a case where the pedestrian makes no sign at all from which the motorman can infer any intention other than to exercise his full legal rights. In other words, the question is, Is the pedestrian under a legal obligation to stop or to jump when the gong sounds? It is true that pedestrians have been acting largely on that assumption, both in respect to street cars and to automobiles, on the principle, I suppose, that it is not the part of wisdom to trade off one's limbs or life for the doubtful chance of a verdict in one's favour or in favour of one's widow. But that is not the point. We are discussing legal rights. The drayman didn't jump when the gong sounded. Was the pedestrian under any obligation to do so?

It is one thing to say that the pedestrian ought not to incur the risk of being killed in the event of the motorman being negligent or taking an unwarranted view either of the law or of the facts. But, of course, that is nothing more than saying that the pedestrian owes a duty to himself. Clearly the railway company will not be able to shelter itself behind that. The question is not, what duty the pedestrian owed to himself, but what duty, if any, he owed to the railway company? The pedestrian was not bound to take precautions against the possible negligence of the motorman.[2]

The argument of Mr. Justice Meredith is based on the as-

2. *Jones* v. *Toronto Railway Co.* (1895), 24 S.C.R. 582.

sumption of the paramount right of the railway company over its right of way. Beyond question the street railway company has a right of action against persons who obstruct it. But no one would say that a motorman would be justified in shooting or even assaulting a man who placed himself or his dray on the track and refused to move. In the absence of a policeman the railway company's servant might doubtless lawfully use sufficient force to remove him out of the way, and afterwards he might be hailed before the Police Magistrate. But if the motorman cannot lawfully assault an obstructing pedestrian or drayman, can he lawfully run him doyn and kill him, just because whilst crossing the street according to his wont time out of mind, he fails to obey the peremptory summons of the motorman's gong?

What do the books have to say about this matter apart from the *Jones* case? As might be expected they have most to say in the United States in many of whose cities the chief purpose in life appears to be to get there; and least to say in England where people still manage to get about and yet respect the ancient rights of the man on his legs. Our own books, too, present a goodly number of instances.

1. Dealing first with *The English cases:*—

The *McAlpine* case[3] has lately been put for forward as authority for the proposition that the law of England is that a person is bound to look before crossing a railway track, and that failure to do so is per se negligence. But "that case lays down no such doctrine."[4] The *McAlpine* case goes no further than to say what the law of England is not in respect of the rights of pedestrians at steam railway crossings.

In the only English tramway case on the point which I find reported in the books the Court of Appeal found on the facts that the pedestrian was wholly to blame.[5] The report says:—

3. *McAlpine* v. *Grand Trunk Ry. Co.* (1913), 29 Times L.R. 674.

4. *Ramsay* v. *Toronto Railway Co.* (1914), 5 O.W.N. 556; and *Myers* v. *Toronto Railway Co.* (1914), 5 O.W.N. 587.

5. *Allen* v. *North Metropolitan Tramways Co.* (1888), 4 Times L.R. 561.

"There was clear evidence that the plaintiff's conduct caused the accident. He walked into the tram car, when if he had looked he must have seen it. Then, even though the plaintiff was negligent, could the driver have avoided the accident by the exercise of reasonable care? They could find no evidence that the driver could have avoided the accident."

2. Then as to the *Canadian Cases:*—

The only other case I have found in the English books, dealing directly with the question under consideration is the *King* case, which originated not in England but in Toronto.[6] In the Ontario Court of Appeal[7] Mr. Justice Meredith expressed views similar in their import to those put forward by him subsequently in the *Jones* case. He said: "No reasonable and unprejudiced man could say that the deceased acted with ordinary care, or that the accident would have happened had he taken such care. He knew the locality well; he knew that he was about to cross the tracks of the railway in the very heart of the city, where cars were constantly passing up and down, and that it was a busy hour of the morning, when many were hurrying to their work; and that he was in a bread waggon, which much obscured his view. In these circumstances he drove rapidly along until his waggon had almost, if not quite, crossed the down track, and was upon the up track, when it was struck by a car moving on the up track, and he was thrown down upon the pavement falling upon it in such a manner as to cause his death. When approaching the place of the accident, the car was going at less speed than the waggon, and there was nothing to have prevented the deceased seeing the car, except in so far as the construction of the cover of his waggon may have done so. He, therefore, must have seen and risked the danger, or else have neglected to look, and so, with perhaps as great fault, also risked the danger, taking his chances of injury or death. The facts of this case make concise logic of this character applicable and unanswerable, though it may be found fault with—as

6. *Toronto Railway Co.* v. *King* (1908), A.C. 260, and 12 O.W.R. 40.

7. (1906), 8 O.W.R. 507.

it was—in cases in which other circumstances intervene, or as a rule of general application. It may be said that the man may have seen the car, and not unreasonably, though mistakenly, have thought that it was about to stop, or that if its speed were not increased, he would have time to cross; but there is nothing in the evidence to indicate this, and it was a want of care to risk hurt or loss on conjecture as to what the driver of the car would do. There was, therefore, no reasonable evidence to support the finding of the jury to the effect that the deceased was not guilty of any negligence."

The learned judge thought there ought to be a new trial. With this view Chief Justice Moss and Mr. Justice McLaren agreed. Mr. Justice Osler and Mr. Justice Garrow took an even stronger view against the plaintiff. They thought the action ought to be dismissed with costs, Mr. Justice Garrow expressing the opinion that there was not a particle of evidence reasonably proper for the jury.

The railway company not being content to have the action retried appealed to the Judicial Committee of the Privy Council. The plaintiff cross appealed, asking that the judgment at the trial against the railway company should be restored. The appeal was dismissed and the cross appeal allowed.

Advising His Majesty the Board said: "Their Lordships are further of opinion that the deceased, in attempting to cross in front of the tram-car, as the driver of the latter in the above-quoted passage says he did (the man, unfortunately, cannot speak for himself), was not clearly guilty of the "folly and recklessness" causing his death which Lord Cairns, in his judgment in *Dublin, Wicklow, and Wexford R.W. Co.* v. *Slattery* (at p. 1166), refers to as sufficient to entitle the defendants to a direction. It is suggested that the deceased must have seen, or ought to have seen, the tram-car, and had no right to assume it would have been slowed down, or that its driver would have ascertained that there was no traffic with which it might come in contact before he proceeded to apply his power and cross the thoroughfare. But why not assume these things? It was the driver's duty to do them all, and traffic in the streets would be

impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets. To cross in front of an approaching train, as was done by the deceased in Slattery's case, is one thing; to cross in front of a tram-car bound to be driven under regulations such as those above quoted, at such a place as the junction of those two streets, is quite another thing."

The reasons of the judges in the Ontario Court of Appeal appear to have been based upon the recognition of some right in the street car superior to that of the bread waggon on the street. The Judicial Committee appears to have put them upon an absolute equality.

But though I have not found that the argument for the paramount right of the street car was ever made in set terms to an English court, I have found that it was not put forward for the first time in a Canadian court in the *King* case. In the *Ewing* case[8] eminent counsel for the railway company argued that the object of the introduction of electric railways is to obtain quick transit, and the convenience of the individual must give way to that of the public; that the cars run on fixed rails and are limited to the space in which the rails are, while vehicles and pedestrians have the whole road; that the cars thus being limited as to space and having the right of way, vehicles and pedestrians must give unobstructed passage to them, and must get out of their way; that the motorman as the car proceeds along sees from time to time numbers of vehicles and pedestrians on the street at various distances ahead of him; that he properly assumes that they will get out of the way of the car; and if they fail to do so they take upon themselves the risk of an accident, which is the consequence of their own act; that in any event he cannot be called upon to make the attempt to stop or slow up the car until he finds that they are not getting out of the way, and that quick transit would be impossible if the motor-

8. *Ewing* v. *Toronto Railway Co.* (1894), 24 O.R. 694.

man were obliged to stop or slow up every time he saw a vehicle ahead of him; and it would be unreasonable that a car full of passengers should be delayed by the unnecessary obstruction of the track by vehicles or pedestrians.

No English or Canadian authority was cited for these propositions, and the Divisional Court to which the argument was addressed refused to give effect to it and dismissed the appeal.

Then in the *Gosnell* case[9] the same counsel tried to get the Court of Appeal to adopt their view that the railway company was "quite outside the principles of the common law as to speed," and "have an absolute right of way" and so on as in the *Ewing* case. But there again the argument failed, Mr. Justice Osler remarking: "Granting that the statute gives the defendants the right of way it does not give them the exclusive right of way or the right to run their cars along the streets at any rate of speed they please without regard to the rights the public also have in the use of the streets. Nothing has made it unlawful for other vehicles to travel upon the track, across it or lengthwise. The company's right cannot be compared to that of an ordinary railway company propelling its trains along its own railway track."

The railway company not being content appealed to the Supreme Court of Canada.[10] The appeal was dismissed, the court holding that persons crossing the street railway tracks are entitled to assume that the cars running over them will be driven moderately and prudently, and that if an accident happens through a car going at an excessive rate of speed the street railway company is responsible. The argument for the railway company's contentions was thus dealt with by Mr. Justice Taschereau: "The appellants would contend that they are not bound by any particular rate of speed, that they can go as fast as they please, that persons entering upon, crossing, or otherwise using portions of any roadway covered by their tracks do so at their own peril, caveat viator. These astounding proposi-

9. *Gosnell* v. *Toronto Railway Co.* (1894), 21 O.A.R. 553.

10. Supra.

tions, it is not surprising, have not found the assent of a single judge out of the eight who had to pass on the case in the courts below, and it is not complimentary to this court, that the appellants must be assumed to have believed that we might here countenance their contentions. They were wrong, however, and they will have to abandon such unreasonable claims, and act accordingly in the future."

And finally the doctrine has been restated in the very latest case in the Ontario courts,[11] the Second Appellate Division declaring that "the street car has no right paramount to the ordinary vehicle. Both must travel on the street and each must exercise its right to the use of the street with due regard to the rights of others."

3. The *United States Cases* are to the like effect.

Though as has been already intimated the theory of the paramount right of the street car over ordinary vehicles has never received any countenance in English courts, it did for a while get some recognition in the courts of the United States. But in the country of its origin it has been long since discredited. The Appellate Court of Maryland deals with it in a judgment where the law is stated in clear terms[12]:—

"The court below was asked to say that a street car has a right of way on that portion of the street upon which alone it can travel paramount to that of ordinary vehicles. The doctrine had at one time found expression in some of the courts of this country, but a just sense of criticism has caused it to be abandoned. It would be both unjust and unwise to permit such a doctrine to prevail in our courts. It makes no difference how street cars are propelled, whether by animal power, electricity or otherwise. The vice of the doctrine contended for does not involve the subject of motor power. It is solely a question of the mutual rights of street car companies and of individual citizens to use the streets of the city. Neither has a superior right to the other. The right of each must be exercised with due

11. *Durie* v. *Toronto Railway Co.* (1914), 5 O.W.N. 829.

12. *Lake Rowland & Elevated Co.* v. *McKewen* (1895), 80 Maryland Reports, p. 593.

regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner so as not to unreasonably abridge or interfere with the rights of the other."

The Supreme Judicial Court of Massachusetts is committed to the same doctrine.[13] Mr. Justice Holmes, speaking for the court, thus disposed of the railway company's argument for a paramount right: "The defendants asked for an instruction that if the plaintiff had an unobstructed view of the approaching car, and there was nothing to prevent the plaintiff turning off the track, the driver of the car had a right to assume that the plaintiff would reasonably turn off the track to avoid accident. This was refused, and we are of opinion that the refusal was correct. We do not suppose that the instruction asked was intended as a proposition of fact based on the practice and experience of the community. In some parts of the State at least, it is well known that drivers of vehicles wishing to cross a track, assume that electric cars will look out for them, at least as much as they look out for the cars. But suppose that the request was intended to embody a statement of the rights of electric cars irrespective of practice, and to put street railways on very nearly the footing of steam railroads. Whatever may be the law as to the latter, there is great difference between the two cases. Electric cars are far more manageable, and more quickly stopped than trains upon steam railroads. Their tracks are in the highway, where all vehicles have a right, not merely to cross but to travel. In view of the inability of the cars to leave their tracks, it is the duty of free vehicles not to obstruct them unnecessarily, and to turn to one side when they meet them, but subject to that and to the respective powers of the two, the car and waggon owe reciprocal duties to use reasonable care on each side to avoid a collision. See *Galbraith* v. *West End Street Railway*, 165 Mass. 572, 580. Neither has a right to assume that the other will keep out of the way at its peril, although the electric car has a right to demand that the waggon shall not obstruct it by un-

13 *White* v. *Worcester Consolidated Street Ry. Co.* (1896), 167 Massachusetts Reports 43.

reasonable delay upon the track." The law in New Jersey,[14] as laid down by the Court of Errors and Appeals is to the same effect: "But, as has been stated, the jury might have found the circumstances to have been those before stated, and upon those circumstances adjudged it impossible to acquit the motorman of gross negligence, for having deliberately, in broad day-light, with full opportunity to perceive that the plaintiff did not heed any signals of the gong, if it was rung, or any notice derived from the rumbling of the car, run the plaintiff down and did him the injury complained of. It could not be contended that such conduct was not negligent."

Then as to the doctrine of *Contributory Negligence*:—

The course of the cases in Canada indicates clearly enough that, even after the confirmation of the law as laid down by the Supreme Court of Canada in the *Gosnell* case in 1895, by the judgment of the Privy Council in the *King* case in 1908, the street railway companies did not abandon their contention as to paramount rights on the streets, and, as has already appeared in this article, they appear to have made some headway with their argument. This has been more especially so in the cases where contributory negligence has been found against the plaintiff. Some of the cases appear to be based upon the assumption that the presence of negligence on the part of a plaintiff, contributing to the accident, relieves the defendant company from observing the caution which they are bound to observe in the case of a person who is not negligent. I have nowhere found the doctrine of the courts on this branch of the law, as laid down in the leading judgments in this country, in Great Britain and in the United States more clearly stated than in the judgment of Mr. Justice Middleton in the *Sim* case[15]:—

"In cases of this kind it is, I venture to think, a mistake to seek for what is called primary negligence. There may be negligence in the first instance on the part of the defendant. If there is, the plaintiff has a duty to avoid, if possible, by the exer-

14. *Buttelli* v. *Jersey City, etc., Railway Co.* (1896), 59 N.J.L.R.

15. *Sim* v. *Port Arthur* (1911), 2 O.W.N. 864.

cise of reasonable care and diligence, the consequence of that negligence, and, if he fails to discharge that duty, he cannot recover unless the defendant, after he becomes aware of the plaintiff's position of peril arising from his own negligence, is guilty of a breach of the duty which then arises, to avoid, by the exercise of reasonable care and diligence, the consequence of the plaintiff's negligence. This duty is one which arises quite apart from the existence of any primary negligence. Where there is primary negligence, and contributory negligence is set up, the plaintiff may seek to avoid the consequences of such contributory negligence by shewing ultimate negligence; but his position, if there is contributory negligence, would be quite as strong, as a matter of law, if he did not allege any primary negligence at all, and began his case by stating that being in a position of peril as the result of his own negligence, the defendant, knowing of his peril, inflicted the injury by his failure to endeavour to avoid the accident. In other words, the obligation of the defendant to avoid injuring a negligent plaintiff is no greater and no less because there has been some earlier negligence.

"If a motorman runs over a man sleeping upon the tracks, whom he has seen in ample time to enable him to stop the car, any inquiry as to the speed of the car before the discovery is irrelevant.

"The point of difficulty which sometimes arises, and which has occasioned difference of opinion, is this. Could such a plaintiff say, 'Before you discovered my peril, you were negligent in running your car at too high a speed, and, though you discharged every duty devolving upon you, and made every endeavour to avoid the accident after the discovery of my peril, so that there was no ultimate negligence, those endeavours were rendered fruitless by your earlier negligence in running at excessive speed,' and so justify a recovery? The answer is, no; there has been no breach of the new duty which arose on the discovery of the danger, and the original negligence was not the sole cause of the accident. It was the result of the negligence of both parties. This is what is meant by saying that the same act cannot be both primary and ultimate negligence."

This is, of course, only an amplification of the well known rule to which all subsequent cases hark back, laid down by Lord Penzance in the *Radley* case[16]: "Though a plaintiff may have been guilty of negligence and although that negligence may in fact have contributed to the accident which is the subject of the action, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

The *Brenner* case[17] contains a very interesting discussion of the law of contributory negligence with a review of the authorities, by Mr. Justice Anglin. The conclusion reached by the Divisional Court in that case was that negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute "ultimate" negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. This judgment was reversed in appeal, but the judgments of the Court of Appeal[18] and the Supreme Court of Canada[19] turned not upon the law of contributory negligence, but upon the question of the sufficiency of the judge's charge to the jury.

In the *O'Leary* case[20] the Ontario Court of Appeal divided equally, Chief Justice Moss and Mr. Justice Osler being of the opinion that the plaintiff whom the jury found had by his negligence contributed to the accident, was nevertheless entitled to recover, and Mr. Justice Garrow and Mr. Justice MacLaren being of the contrary view. Mr. Justice Osler re-states the doctrine of the *King* case and of the *Gosnell* case, that is to say, the doctrine of equality of rights, in these terms:—

"If the motorman ought to have seen from the course the deceased was taking and from the surrounding circumstances,

16. *Radley* v. *London & N.W. Ry.* (1876), 1 A.C. 754.

17. *Brenner* v. *Toronto Railway Co.* (1907), 13 O.L.R. 423.

18. 15 O.L.R. 195.

19. 40 S.C.R. 540.

20. *O'Leary* v. *Toronto Railway Co.* (1908), 12 O.W.R. 469.

i.e., the lie of the ground, the narrowing of the road, etc., either that he was probably about to cross the track or would approach dangerously near to it, and saw this far enough away to have reduced the speed of the car or even to have stopped it, before reaching the spot where the deceased would enter the track or approach dangerously near to it, it was his duty to have done whatever was then in his power to so manage the car as to avoid injuring him."

Mr. Justice Garrow, on the other hand, re-states the doctrine of paramount right thus: "They (that is the railway company) were not bound to slow down until it became apparent that the deceased had resolved at all hazards to cross." It is to be observed that this decision which was handed down in June, 1908, followed in point of time the judgment of the Judicial Committee in the *King* case which was handed down in March, 1908.

The *O'Leary* case went to the Supreme Court of Canada where again it had the misfortune to divide the court equally, with the result, under a rule of that court, that it was not reported.

It is sometimes said that where the accident is the result of the "joint negligence of the plaintiff and the defendant there can be no recovery."[21] But as pointed out by the Chancellor in the *Jones* case, the cases in which that doctrine is properly applicable are "those in which there were concurrent and simultaneous negligences of equal character by both parties in which the defendants had no possible opportunity of avoiding the consequences of the plaintiff's carelessness." Such were the facts in the English case already cited[22] and in the *Omnibus* case,[23] which is always cited in support of the proposition that there can be no recovery where the negligences of the parties are equal, concurrent and simultaneous.

In the *Herron* case[24] Mr. Justice Hodgins contrasts the view

21. Per Boyd, C., in *Rice* v. *Toronto Ry. Co.* (1910), 22 O.L.R. 446.

22. *Allen* v. *North Metropolitan Tramways Co.* (1880) 4 Times L.R. 561.

23. *Reynolds* v. *Thomas Tilling Limited* (1903), 19 Times L.R. 539, 20 Times L.R. 57.

24. *Herron* v. *Toronto Railway Co.* (1913), 28 O.L.R. 59.

of Mr. Justice Anglin in the Divisional Court in the *Brenner* case with the view of Mr. Justice Duff in the Supreme Court in the same case. Mr. Justice Anglin had propounded the question thus:—

"Assuming that the degree of momentum which the motorman found himself unable to overcome should be ascribed to his failure to shut off power at an earlier point of time, and that such omission should be deemed negligence, can that omission, which occurred before the plaintiff's danger manifested itself, though its operation and effect continued up to the very moment of injury, be deemed negligence which renders the defendants liable, notwithstanding the plaintiff's contributory negligence, because in the result of the former might, but for this continuing though anterior negligence, have avoided the mischief?"

This question Mr. Justice Anglin had, after an exhaustive review of the authorities, answered as follows:—

"Not without hesitation, because of the volume of American authority opposed to this view, and of the manifest difficulty which it may occasion in some cases in drawing a clear distinction between primary and ultimate negligence, I have reached the conclusion that negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute "ultimate" negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. Such anterior default of the defendant is, in my opinion, "ultimate" negligence, when it renders inefficient to avert injury to the plaintiff means employed by the defendant after danger became apparent, and which would otherwise have proved adequate to prevent the mischief, or renders the defendant wholly incapable of employing such means, though time was afforded for his using them efficaciously but for such disabling negligence."

Later, in the same case in the Supreme Court, Mr. Justice Duff had put the matter in this way:—

"The principle is too firmly settled to admit, in this court,

any controversy upon it, that in an action of negligence, a plaintiff, whose want of care was a direct and effective contributory cause of the injury complained of, cannot recover, however clearly it may be established that, but for the defendant's earlier or concurrent negligence, this mishap, in which the injury was received, would not have occurred."

As between these conflicting views Mr. Justice Hodgins preferred that of Mr. Justice Duff.

With great deference I venture to suggest the inquiry whether Mr. Justice Duff has not stated the proposition too broadly. Take the case of a man crossing the street at an intersection and negligently paying no attention to the street traffic. If he is struck by the near corner of a street car, as he is about to step upon the track, he would probably not be entitled to recover, however negligently the car may have been driven. There would be "concurrent and simultaneous negligences of equal character by both parties." But I venture to suggest that different considerations will apply if he was struck as he was stepping off the track. In that case he was first in possession of the point of intersection of his line of advance and that of the street car, and his right was, notwithstanding his negligence, to cross without molestation from the street car. If under these circumstances the motorman runs him down, having approached the crossing at an excessive speed and negligently, though he did everything he could do to avoid the accident after discovering the pedestrian's peril, will the railway company not be liable? The negligences were concurrent, but they were not equal, in that the pedestrian had for the moment the right of possession of the spot where the accident happened superior to that of the street car. He had a right to assume that his legal right would be respected. The Judicial Committee proceeded upon this assumption in the *King* case, as the Supreme Court had done in the *Gosnell* case. The "disabling negligence" referred to by Mr. Justice Anglin would include, as I apprehend it, such a case as I have indicated, that is to say the case of a motorman approaching a street crossing where pedestrians are passing back and forth, at an excessive speed

Ought not then Mr. Justice Duff's proposition to be limited as indicated by the subsequent language of the Chancellor in the *Jones* case above quoted, that is to say, to cases in which "there were concurrent and simultaneous negligences of equal character by both parties, in which the defendant had no possible opportunity of avoiding the consequences of the plaintiff's carelessness!"

Cases of great authority in which the plaintiff's negligence was a direct, effective and concurrent contributory cause of the accident and in which the plaintiff was nevertheless given judgment, appear to call for an answer in the affirmative.[25]

W. E. RANEY.

INTOXICATION AS A DEFENCE.

A writer in the University of Pennsylvania *Law Review* discusses the subject of "Intoxication as a defence to an express contract." He thus summarizes the conclusions he arrives at:—

"If at the time of making the contract, the party seeking to avoid it was in such a state of intoxication that he was incapable of assenting to the agreement and has not ratified the transaction in his sober senses, the obligation is voidable, especially if any advantage has been taken of the intoxicated person and fraud or imposition has been practiced by the other party to the contract. A contract which may be invalidated by reason of intoxication can be ratified by the intoxicated party when sober and will thereafter be binding. Intoxiation of the maker of a negotiable note may invalidate it as against a bonâ fide holder with knowledge of the circumstances, but is not available as a defence against a bonâ fide endorsee for value, without notice of the circumstances of the transaction. A drunkard may be held liable upon implied contracts for his actual necessities. If the intoxication was procured by the contrivance of the other party,

25. *Halifax Street Railway Co.* v. *Inglis* (1900), 30 S.C.R. 256; *Toronto Railway Co.* v. *Mulvaney* (1906-1907), 38 S.C.R. 327; *The Sans Pareil* (1900), P. 267; *Tuff* v. *Warman* (1857), 2 C.B.N.S. 741, (1858) 5 C.B.N.S. 573.

or if either fraud or imposition has been practiced by or through the party benefited, the intoxicated party may institute a suit in equity for the cancellation or rescission of the obligation; but before a court of equity will grant the relief the party seeking this aid must return the consideration he has received. Intoxication may be pleaded by the intoxicated party, his personal representative or heirs, but cannot be pleaded by a third person."

THE ANCIENT RULE THAT BAGGAGE IS NOT SUCH UNLESS IT ACCOMPANIES A PASSENGER.

The Supreme Court of Alabama held, that, where one purchases a passenger ticket and by it procures the checking of his baggage to the destination named in the ticket, it is not necessary that he go upon the same train or go upon the ticket at all for the baggage to be deemed baggage in the same sense as had be gone. *Alabama G. S. R. Co.* v. *Knox,* 63 So. 538.

In this case the baggage was lost and the railroad claimed that, as to a gratuitous bailee the evidence shewed no liability, verdict should have been for defendant, because baggage is carried only in performance of a contract to carry the passenger to whom it belongs, or who is its bailee.

The court speaks of the persistent clinging by text writers to the ancient rule that, in order to fix liability upon a carrier for the loss or destruction of baggage, as a carrier of baggage, as distinguished from a carrier of freight, the owner must be a passenger and accompany his baggage.

It was said the old rule was upon the theory of the owner of baggage being able to keep his eye on it and point it out along the journey and when the check system and separate cars were not used, as in steamboat and stage-coach travel. It is said that now, the reason of the rule having ceased, the rule itself should cease—the passenger having really no opporunity to see his baggage at all and it not being a mere matter of grace now, as was probably the case formerly, for a passenger to have his baggage carried. Now it is said the purchase of a ticket gives a

double right—one to have passenger carriage, and the other to have the baggage carried. Also it is said there is no possible way of the carrier being prejudiced by the ticket purchaser not accompanying his baggage.

It is admitted, however, that there is conflict even among modern cases on this subject and to our mind there are many reasons for the old rule surviving, and we believe there was as much of double right in the old contracts as in the new.

In the first place, we doubt whether the old rule originated in the thought of passengers on a journey watching their baggage. That might be fairly possible in stage coach travel, but in steamboat travel it would be as greatly out of the question as in railroad travel. In either case it would have been a singular plea for the carrier to make, that the passenger should have watched his baggage and notified the carrier that it was not on board. By the carrier's contract he engaged to put it on board, and carry it as it should be carried. The court's theory of the old rule seems founded more on fancy than on fact.

But there is another consideration the court overlooks. Rates for passenger travel presumes baggage as baggage. One cannot contract for its carriage by paying passenger rates, he and the carrier knowing that there is to be no carriage of the passenger, because it would be illegal to charge any other rate than that prescribed for freight. And even were it the same rate, one might not have the right to demand the fast service, which goes with passenger transportation, for the transportation of freight. This might constitute discrimination. May the purchaser of a ticket obtain by concealment what he would have no right to obtain openly?

Furthermore, all regulation of common carriers goes upon the absolute necessity of both the carrier and the customer entering understandingly into their contracts of transportation. There is more the idea of a relation by the carrier to the public than ever before in the history of transportation. The least departure from this idea is condemned with more emphasis now

than ever before. And the least infraction is presumptively a serious offence.

It would seem, therefore, that this rigid idea excludes what regulation does not provide for, especially if the thing attempted to be done may seem to be covered by a particular regulation. Is not the carrying of baggage provided for by a particular regulation? And is it not carefully differentiated from freight?

This being true, is it any answer to say, that the carrier has no heavier burden on him when he does not really carry a passenger to whom the baggage belongs, than when he only carries his baggage? A customer is allowed to enter into a certain contract with a public agency. If he enters into one not prescribed, then he knows that he and the carrier are violating law. Does not the carrier, therefore, become, at most, but a gratuitous bailee?

We look at this under the view of what is public policy as to carriers, and this policy says, in effect, that baggage must be hauled as baggage and freight must be hauled as freight. When one tries to pay a passenger rate for something pretending to be baggage when it is not baggage, he pays and the carrier unlawfully receives a rate he is not allowed to charge. In other words it violates the statute, and the payee is conusant of the violation. It is easily to be seen, that allowing one to send articles in this way opens up a means of sending things not to be classed as baggage at all, and certainly it has been decided, that a railroad is not liable for what is not baggage, when properly it cannot be so classed, even where the passenger accompanies it. This may greatly proceed on the idea that thus he is avoiding paying freight, but under rate laws it is as bad to pay too much or too little freight as it is to pay no freight at all. —*Central Law Journal.*

REVIEW OF CURRENT ENGLISH CASES.

VETERINARY SURGEON—USE OF DESCRIPTION BY UNQUALIFIED PERSON—DESCRIPTION OF PREMISES WHERE BUSINESS CARRIED ON —"CANINE SURGERY"—VETERINARY SURGEONS' ACT, 1881 (44-45 VICT. C. 62), S. 17, S.-S. 1.

Royal College of Veterinary Surgeons v. *Kinnard* (1914) 1 K.B. 92. In this case the defendant was prosecuted for having inscribed on a lamp over the entrance door to the premises where he carried on business, the words "A. E Kinnard, Canine Surgery," and on a brass plate on the wall of the premises, "Canine Surgery, A. E. Kinnard"—he not being a duly qualified veterinary surgeon. The Veterinary Surgeons' Act, 1881, s. 17, provides that any unqualified person who "takes or uses . . . any name, title, addition, or description stating that he is a practitioner of veterinary surgery, or of any branch thereof or is specially qualified to practise the same," shall be liable to a fine. It was contended that the words on the lamp, and brass plate, constituted a breach of the Act; but on a case stated by magistrates the Divisional Court (Ridley, Scrutton, and Bailhache, JJ.) held that they did not, because they referred not to the person but to the place where the business was carried on. The court appeared to think that *Royal College of Veterinary Surgeons* v. *Robinson* (1892), 1 Q.B. 557, where it was held that "Veterinary forge" applied to premises by an unqualified person was a breach of the Act, had been practically overruled by the Court of Appeal in *Bellerby* v. *Heyworth* (1909), 2 Ch. 23.

NOTICE TO BE AFFIXED TO FACTORY—PROOF OF CONTENTS—OMISSION TO GIVE NOTICE TO PRODUCE—SECONDARY EVIDENCE—EVIDENCE.

Owner v. *Bee-hive Spinning Co.* (1914) 1 K.B. 105. This was a case stated by justices, and turns on a point of practice. A prosecution was instituted against the defendants for breach of the provisions of the Factory & Workshop Act, 1901, which requires the owners of factories to post up a notice on their premises stating the times allowed for meals, and prohibits any woman or child, during the time allowed for meals, from being employed in the factory or workshop or being allowed to remain in a room in which a manufacturing process is then being carried

on. The prosecutor had omitted to give notice to produce the notice posted up in the factory and offered secondary evidence of its contents. The magistrates held that the notice could have been produced, and was subject to the ordinary rules of evidence and that as no notice to produce it had been given, secondary evidence of its contents was inadmissible; but the Divisional Court (Ridley, Scrutton and Bailhache, JJ.) thought that the document in question was within the exception to the rule, as being a case in which the production of the original document would be physically impossible or highly inconvenient; because the Act required that the notice in question should be kept constantly on the walls of the factory and a breach of that provision rendered the occupier of the factory liable to a fine. The magistrates were, therefore, held to have erred.

ADMIRALTY—DAMAGE TO CARGO—BREACH OF CONTRACT—THROUGH BILL OF LADING—TRANSHIPMENT—UNSEAWORTHY LIGHTER—"SHIPPERS' RISK"—SHIP'S EXPENSE—SHIPOWNERS' LIABILITY.

The Gallileo (1914) P. 9. This was an action against a shipowner to recover for loss of cargo in the following circumstances. The goods in question were shipped at New York on board the defendants' steamship to be carried to Hull and there transhipped into another of the defendants' steamships for conveyance to a port in Sweden. The through bill of lading contained among other conditions the following, "to be delivered in like good order and condition at the port of Hull, to be thence transhipped, at ship's expense and at shippers' risk, to the port" in Sweden. "It is mutually agreed that the carrier shall have liberty to convey goods in craft or lighters to and from the steamer at the risk of the owners of the goods. That the carrier shall not be liable . . . for risk of craft, hulk, or transhipment," and "the goods are subject to any further clauses in the bills of lading in use by the route beyond Hull and the liability of each carrier is limited to its own line." The goods arrived in good order at Hull and were there transferred to a lighter whilst waiting to be transhipped to another of the defendants' steamships for conveyance to Sweden. The lighter proved to be unseaworthy and sank with the plaintiffs' goods. The question, therefore, was whether having regard to the terms of the bill of lading the defendants were liable for the loss, and the Court of Appeal (Lords Parker and Sumner and Warrington, J.) affirming

Deane, J., held that they were, and that the words "at shippers' risk" referred to other risks, than that of the fundamental obligation of the shipowner in respect of seaworthiness of the lighter.

ADMIRALTY—SHIP—COLLISION—TOW AND THIRD SHIP TO BLAME——DIVISION OF LOSS—MARITIME CONVENTIONS ACT, 1911 (1-2 GEO. V. c. 57), s. 1.

The Cairnbahn (1914) P. 25. In this case, which was one of collision between a barge in tow and a steamship, for which the tug and the steamship were found to be to blame; the Court of Appeal (Lords Parker and Sumner, and Warrington, J.) have affirmed the judgment of Evans, P.P.D., that such a case is not governed by the common law as to there being no contribution between joint tort feasors, and, therefore, applying the principles laid down by s. 1 of the Maritime Conventions Act, 1911 (1-2 Geo. V. c. 57), the owners of the steamship were entitled as against the owners of the tug, to one-half the amount of the damage sustained by steamship, including therein half the amount of the damage sustained by the barge—the latter having recovered the whole of her damage against the steamship.

TRUSTEE—BREACH OF TRUST—RELIEF OF TRUSTEE FROM LIABILITY—STATUTE OF LIMITATIONS—TRUSTEE ACT, 1888 (51-52 VICT. c. 59), s. 8—JUDICIAL TRUSTEES ACT, 1896 (59-60 VICT. c. 35), s. 3—(TRUSTEE ACT, 1 GEO. V. c. 26, s. 36, ONT.—LIMITATIONS ACT, 10 EDW. VII. c. 34, s. 47, ONT.).

In re Allsop, Whittaker v. *Bamford* (1914) 1 Ch. 1. This is an important decision as to the effect of the Trustee Act, 1888 (51-52 Vict. c. 59) (see 1 Geo. V. c. 26, s. 36, Ont.), and the Judicial Trustees Act (59-60 Vict. c. 35) (see 10 Edw. VII. c. 34, s. 47, Ont.). The facts of the case were that a testatrix, who died in 1887 bequeathed her residuary estate to trustees, upon trust to pay the income in equal third parts to her two nephews and her niece during their respective lives, and, subject thereto, to hold the capital and income of the whole in trust for the children of her said nephews and niece who might be living at the time of the failure of the trust thereinbefore contained. Upon the death, in 1896, of one of the nephews, leaving a widow and children, the trustees acting upon the erroneous advice of their solicitor as to the effect of the will paid the income of the

deceased nephew's share to his widow for the maintenance of his children. In 1910 it was declared by the court that the period of distribution was at the death of the testatrix's nephews and niece, that there was an implied trust for the accumulation of the income of the third share from the death of the deceased nephew until the period of distribution, which trust, however, under the Thellusson Act came to an end twenty-one years after the death of the testatrix, viz., in 1908, and an inquiry was then directed as to the person entitled to that part of the testatrix's estate as to which she died intestate and Sarah Whitaker was found to be the sole next of kin, whose personal representative was the plaintiff in the present action, and who claimed an account of the accumulations of the income of the deceased nephew's share from the time of his death until 1908, and an order that the trustees make good all moneys improperly paid to the widow of the deceased nephew. The trustees set up the defence of the Statute of Limitations, Trustee Act, 1888 (51-52 Vict. c. 59), s. 8 (see 10 Edw. VII. c. 34, s. 47, Ont.), and they also claimed the benefit of the Judicial Trustees Act, 1896 (59-60 Vict. c. 35) s. 3 (see the Trustee Act, 1 Geo. V. c. 26, s. 36, Ont. . Warrington, J., who tried the action, came to the conclusion that the case fell within s. 8, sub-s. 1, of the Trustee Act, 1888 (see 10 Edw. VII. c. 34, s. 47, Ont.) as being one where no existing Statute of Limitations applied, but that by virtue of the proviso at the end of par. (*b*) time did not begin to run against the plaintiff until 1908, when her interest fell into possession, with which the Court of Appeal (Cozens-Hardy, M.R., and Hamilton and Eady, L.JJ.) agreed; but their Lordships were of the opinion that the Judicial Trustees Act, 1896, s. 3 (see the Trustee Act, 1 Geo. V. c. 26, s. 36, Ont.), is not confined to cases where the breach of trust arises from some executive or administrative blunder, but may extend to cases where money is paid to a person not entitled according to the true construction of an instrument; and that in the present case the trustees could not be said to have acted "unreasonably" merely because they had, under legal advice, taken a wrong view as to the construction of the will, and as there was no question as to their having acted "honestly" they ought to be relieved from liability for the breach of trust, and in this respect they reversed the decision of Warrington, J.

MORTGAGE — REDEMPTION—COLLATERAL SECURITY—FRAUDULENT PLEDGE OF COLLATERAL SECURITY BY MORTGAGEE—RIGHT OF MORTGAGOR TO REDEEM AS AGAINST ASSIGNEE—ASSIGNEE OF MORTGAGE BOUND BY EQUITIES BETWEEN MORTGAGOR AND ORIGINAL MORTGAGEE.

De Lisle v. *Union Bank of Scotland* (1914) 1 Ch. 22 This was an action for redemption of a mortgage of real estate in which the facts were somewhat complicated by the fraud of a solicitor. The mortgage in question was made by the plaintiff to his solicitor Crick, on real estate, and the plaintiff at the same time transferred to him by way of collateral security £3,000 of debenture stock. Crick represented that he was getting the money from the defendant bank on the same security and fraudulently induced the plaintiff to sign a memorandum of charge on the stock, not only for the advance of the £4,000, but of all other sums which the bank should advance to Crick, and the stock was transferred to the bank, who had no notice of the fraud. Crick subsequently sub-mortgaged the land to the bank by way of equitable deposit to secure his general indebtedness and afterwards executed a legal transfer of the mortgage. Crick afterwards became bankrupt, owing the defendant bank a great deal more than the £4,000. The plaintiff claimed to redeem the mortgage on payment of £1,000, being the amount due less the value of the collateral security. The bank contended that he could only redeem on payment of the full £4,000. The Court of Appeal (Cozens-Hardy, M.R., Eady, and Phillimore, L.JJ.), affirming Warrington, J., held, that although the defendants were entitled to apply the collateral security on the general indebtedness of Crick, yet that as assignees of the mortgage they had no greater right than Crick, and, therefore, could not resist the plaintiff's right to redeem on payment of £1,000, as claimed. If, when the defendants became sub-mortgagees, they had inquired of the plaintiff and he, in ignorance of Crick's dealing with the collateral security had admitted that there was £4,000 due on his mortgage the case might have had a different result, but it appeared the defendants took their sub-mortgage without inquiry.

VENDOR AND PURCHASER—RESTRICTIVE COVENANT FOR BENEFIT OF ADJOINING LANDS—SALE OF ADJOINING LANDS PRIOR TO COVENANT.

In *Milbourn* v. *Lyons* (1914) 1 Ch. 34, the question to be determined was whether a restrictive covenant given in the fol-

lowing circumstances was still operative. In 1898 the owner of a hotel, who also at that time owned adjoining land, agreed to sell it to the plaintiff's predecessor in title. The contract provided that the deed should contain a restrictive covenant by the grantee, her heirs and assigns, for the benefit of the adjoining lands, then owned by the vendor. The sale was not completed till 1899 and the deed contained the restrictive covenant stipulated in the contract; but prior to 1899 the vendor had sold all the adjoining lands then owned by him without any reference to the restrictive covenant by the grantee of the hotel premises. In 1912 the owner of the hotel having entered into a contract to sell the hotel premises, the purchaser objected that the restrictive covenant was a defect in the title. The present action was brought to compel specific performance of the covenant. Neville, J., held that as at the date of the deed in 1899, the vendor had no land to which the benefit of the restrictive covenant could attach and, therefore, that the hotel premises were not subject to the covenant.

COMPANY—WINDING UP—FLOATING CHARGE—DEBENTURES—PARI PASSU CLAUSE—INTEREST PAID TO SOME DEBENTURE HOLDERS TO A LATER DATE THAN OTHERS—DISTRIBUTION OF ASSETS—EQUALIZATION OF PAYMENTS.

In re Midland Express, Ltd., Pearson v. *The Company* (1914) 1 Ch. 41. This was a winding up proceeding in which Sargant, J., decided (1913 1 Ch. 499 (noted ante, vol. 49, p. 452), that in the distribution of the assets of the company among debenture holders whose debentures were a floating charge and on some of which interest had, prior to the liquidation, been paid to a later date than on others, the proper method was to ascertain what was due on each debenture having regard to the prior payments and then distribute the assets pro rata, and that in the absence of any contract to that effect the debenture holders were not entitled to have the assets first applied to equalize the payments on the debentures. This decision is now affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Eady and Phillimore, L.JJ.).

WILL—TRUST FOR SALE—ABSOLUTE AND UNCONTROLLED DISCRETION AS TO SALE—SHARE VESTED—RIGHT OF BENEFICIARY TO INSIST OF SALE.

In re Kipping, Kipping v. *Kipping* (1914) 1 Ch. 62. In this case a testator had willed his residuary estate to trustees on

trust to sell, with power in their absolute and uncontrolled discretion to postpone the sale, and they were to stand possessed of the proceeds in trust for the testators' children who should attain 21, in equal shares, "provided . . that the capital of my residuary estate shall not be divisible amongst my children . . until my youngest surviving child shall attain the age of twenty-one years." One of the children attained twenty-one years and claimed that his share was vested in possession, and that he was entitled to be paid his share or to have it appropriated to him. The trustees objected to sell owing to the difficulty of effecting a sale except at a sacrifice. Warrington, J., who tried the case held that the plaintiff, notwithstanding the direction in the will that the capital should not be divisible until the youngest child attained twenty-one, became entitled on attaining twenty-one years to a vested share, but he held that so long as the trustees bona fide determined to postpone the sale of the estate he was not entitled to have his share paid or appropriated to him, and from that part of the decision denying his right to a sale or appropriation of his share the plaintiff appealed, but the Court of Appeal (Williams, Buckley, and Kennedy, L.JJ.) upheld the judgment of Warrington, J.

VENDOR AND PURCHASER—CONDITION OF SALE NEGATIVING RIGHT TO COMPENSATION—CONVEYANCE—PLAN—FALSA DEMONSTRATIO—IMPLIED COVENANTS FOR TITLE—LIABILITY OF VENDOR.

Eastwood v. *Ashton* (1914) 1 Ch. 68. In this case the Court of Appeal (Cozens-Hardy, M.R., Eady and Phillimore, L.JJ.) have reversed the decision of Sargant, J. (1913) 2 Ch. 39 (noted ante, vol. 49, p. 494). The action was brought to recover damages for an alleged breach of covenant. The plaintiff brought the property known as Bank Hey Farm, containing 84 ac. 3r. 4p., or thereabouts, subject to a condition that any incorrect statement should not entitle him to compensation. The property was conveyed according to a plan indorsed on the deed. This plan shewed that there was included in the property purported to be conveyed a strip of 100 feet long by 36 feet wide, which had originally been part of the farm, but as to which, to the vendor's knowledge, an adjoining proprietor had acquired title by possession. Sargant, J., held that the plan could not be treated as falsa demonstratio and that the strip was included in the parcel conveyed, and the defendant having no title thereto was liable in damages. The Court of Appeal, however, took the view that

on the true construction of the conveyance the strip in question was not included in the land conveyed, which was accurately and completely described as being in the occupation of two tenants; the measurements were correct and the reference to the plan was, therefore, merely a falsa demonstratio which did not vitiate the description.

WILL—CONSTRUCTION—BEQUEST TO UNMARRIED DAUGHTERS OF A. AND B.

In re Harper. Plowman v. *Harper* (1914) 1 Ch. 70. Suits for the construction of wills are interesting for the curious uncertainties of language which they manifest. In this case a lady by her will gave a moiety of her residuary estate "to be divided equally between the unmarried daughters of my brother-in-law, Dr. H. and Dr. G. equally." It will be seen at a glance how many constructions may be placed on these words. It may mean that the bequest is to the daughters of H. and G. equally. Or to G. and the daughters of H. equally. Or half to G. and half to the daughters of H. equally. In such cases, as Sargant, J., who tried the case, remarked, the decision must be in the nature of guesswork—and his guess as to the probable meaning of the testatrix was that the bequest was to G. and the daughters of H. equally, and that G.'s own daughter was not entitled at all.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] DORAN v. JEWELL. [Feb. 3.

Appeal—New right of appeal—Application to pending actions.

An Act of Parliament giving a right of appeal to the Supreme Court of Canada which did not exist before does not apply to a case in which the action was instituted before the Act came into force. *Hyde* v. *Lindsay*, 29 Can. S.C.R. 99, and *Colonial Sugar Refining Co.* v. *Irving*, [1905] A.C. 369, followed.

Motion to affirm jurisdiction dismissed.

W. L. Scott, for motion. *Caldwell*, contra.

Province of Nova Scotia.

SUPREME COURT.

Sir Charles Townshend, C.J., and Russell, and Ritchie, JJ.] [15 D.L.R. 40.

ALBERT *v.* MARSHALL.

Bills and notes—Presentment—Note payable at bank—Necessity of presentation at.

An action cannot be maintained against the makers of a promissory note which was not presented for payment at a bank designated in the body of the instrument as the place of payment.

Warner v. *Simon-Kaye Syndicate*, 27 N.S.R. 340, followed; *Sanders* v. *St. Helens Smelting Co.*, 39 N.S.R. 370, distinguished; *Merchants Bank* v. *Henderson*, 28 O.R. 360, considered.

W. F. O'Connor, K.C., and *A. D. Gunn*, for appellant. *H. Mellish*, K.C., for respondent.

ANNOTATION ON ABOVE CASE.

The Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 183, provides as follows:—

"183. Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place.

"(2) In such case the maker is not discharged by the omission to present the note for payment on the day that it matures: but if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in the discretion of the Court.

"(3) If no place of payment is specified in the body of the note, presentment for payment is not necessary in order to render the maker liable."

Sub-sec. 1 of sec. 87 of the English Act reads: "Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case presentment for payment is not necessary in order to render the maker liable."

And by section 52 (2) of the English Act, where a note is payable on a day certain, the maker will not be discharged because the note is not presented on that day: Chalmers, Bills of Exchange, 7th ed., 300.

Falconbridge, on Banking and Bills of Exchange, 2nd ed. (Can.), 791, says: "The provisions of the English Act, just referred to are declaratory of the common law, as interpreted in *Rhodes* v. *Gent*, 1821, 5 B. & Ald. 244, and *Anderson* v. *Cleveland*, 1769, 13 East. 430, namely, that the presentment at the place named before action is essential, if a note is made payable at a particular place, although the maker is not discharged by any delay in such presentment short of the period fixed by the Statute of Limitations; but in the case of a note payable generally, no presentment or request for payment is necessary to charge the maker of a note; he is bound to pay it at maturity, and to find out the holder for that purpose: *Walton* v. *Mascall*, 1844, 13 M. & W., at 458, 4 R.C., at 488.

It has been held that the omission of the words "in order to render the maker liable" from the Canadian Act, have not the effect of making it unnecessary to shew presentment as against the maker, and that presentment at the proper place or facts excusing such presentment must be averred and proved: *Croft* v. *Hamlin*, 2 B.C.R. 333.

There has been, however, great diversity of opinion in regard to the meaning and effect of the latter part of sub-sec. 2. This clause, which was added to the bill in the Senate, is immediately preceded by words which excuse presentment on the day of payment but not presentment at the place of payment. It refers to a suit or action before presentment, and yet does not provide for such a case in unambiguous terms. If it means that an action may be successfully brought before presentment, it makes a distinct change in the law. In *Croft* v. *Hamlin*, *supra*, the Court held that the clause had not effected such a change. The same conclusion was reached by the Supreme Court of Nova Scotia, which laid stress upon the peremptory terms of sub-sec. 1: *Warner* v. *Simon-Kaye*, 27 N.S.R. 340; followed by Newlands, J., in *Jones* v. *England*, 5 W.L.R. 83. According to the view adopted in these cases a note payable at a particular place must be there presented before action brought. As against the

endorser it must be presented on the day it falls due. As against the maker it may be presented at any time before action brought, but presentment at some time before the commencement of the action must be proved or the action fails.

The provision as to costs means, according to these cases, that if the maker succeeds, on the ground that no presentment is proved, the Court may deprive him of the costs usually given to a successful suitor. Russell, on Bills of Exchange (Can. 1909), p. 299, calls this explanation of the provision as to costs "ingenious, but far-fetched." Falconbridge, as to this says (page 792): "One may perhaps agree with him in regard to this remark and yet find it difficult to believe that the Legislature has effected an important change in the law by the insertion of words of such profound obscurity. It is not easy to see why the Legislature did not express itself more clearly if it intended to do away with the necessity for the presentment which is so clearly directed in sub-sec. 1. On the whole it is as easy to accept the explanation above indicated as to the costs as it is to reconcile sub-sec. 1 with the view that the maker may be sued, although no presentment before action takes place."

A different view of the meaning of the section has been taken in some of the cases.

In *Merchants Bank* v. *Henderson*, 28 O.R. 360, a note payable at a particular place was not presented for payment until some time after its maturity, and a few days before action brought against the maker. A judgment for the plaintiff with costs was affirmed by a Divisional Court with costs, on the ground that it was the maker's duty to have the money to meet the note at the particular place and to keep it there from the maturity of the note until presentment. Armour, C.J., at p. 364, pointed out what the law was in England prior to the passing of the Act, and that in Ontario, by virtue of the Upper Canada statute, 7 Wm. IV. ch. 5, a note payable at a particular place without further expression in that respect was to be deemed and taken as a promise to pay generally. At p. 365, he expressed the opinion that, under the present Act an action might have been brought against the maker without any presentment at the particular place, the plaintiff, in such case running the risk of having to pay the costs of the action in case the maker should shew that he had the money at the particular place to answer the note at maturity, and thereafter. "But," he added, "it may be that the effect of this provision is that as far as the maker of such a promissory note is concerned, the promissory note is to be deemed and taken to be a promise by him to pay generally; but it is unnecessary to determine the effect of this provision in determining this case." This *obiter dictum* of Armour, C.J., was adopted by Riddell, J., in *Freeman* v. *Canadian Guardian Life Ins. Co.*, 17 O.L.R. 296, at 302.

With a similar result, in *Sinclair* v. *Deacon*, 7 E.L.R. 222, the judgment of the Supreme Court of Prince Edward Island was delivered by Fitzgerald, J., who gives an interesting analysis of the section, and construes it as follows, at 224: "You must present the note at the par-

ticular place it is made payable, not necessarily, as against the maker, on the day of its maturity, nor indeed, before suit; but if presentment is not made before suit, the costs being in the discretion of the Court, the maker will be protected from costs should, for instance, the funds to meet the note have been duly placed by him at the place named."

This view of the section recognizes that it was intended to change the law in one particular only, namely as to presentment before suit, but at the same time so protecting the maker that at most he would be required to pay the debt without costs, if there was no default on his part: see also *Union Bank* v. *MacCullough*, 7 D.L.R. 694, 4 A.L.R. 371.

The question was raised before the Court of Appeal in Manitoba, in *Robertson* v. *Northwestern Register Co.*, 19 Man. L.R. 402, without conclusive result, Richards, J.A., holding that the action failed because of non-presentment before action, Cameron, J.A., holding that presentment was not essential, and Perdue, J.A., holding that presentment was sufficiently proved in fact.

Province of British Columbia.

SUPREME COURT.

Hunter, C.J.] [15 D.L.R. 189.

RE THIRTY-NINE HINDUS.

Deportation—Immigration restrictions—Asiatics from British territory—Asiatic "origin" or Asiatic "race"—Jurisdiction —Habeas corpus.

1. Where a statute authorizes the regulation of the immigration of persons of the "Asiatic race" by orders-in-council, an order-in-council purporting to regulate the immigration of persons of the "Asiatic origin" is ultra vires as exceeding the statutory authority, the words "Asiatic origin" being wide enough to include persons of the British race born in Asia who would not be within the words "Asiatic race" used in the statute.

2. Where a person is ordered to be deported out of the country, the reason for the deportation should be clearly stated in the order, and it is not a compliance merely to refer, under the heading of "reasons," to the section number of the statute under which the order purported to be made.

3. A discharge on habeas corpus may be ordered in respect of a deportation order against Asiatics under an order-in-council which exceeds in its scope the powers conferred by Parliament;

the orders-in-council P.C. 920 and 926 are both invalid as exceeding the prohibition of the statute as to persons to be debarred from entering Canada.

Re Rahim, 4 D.L.R. 701, referred to.

4. A requirement under an immigration law that the immigrant shall have, on arrival, a stated sum in his own right, does not alone demand that the money shall be in his actual and personal possession, and would be satisfied by his having the money on deposit in a Canadian bank.

J. E. Bird, for application. *W. J. Taylor*, K.C., contra.

ANNOTATION ON ABOVE CASE.

This case, in itself, merely decides that two Dominion orders-in-council are invalid because they exceed the powers given by the Dominion Immigration Act on which they purport to be based. But read in connection with the Dominion order-in-council passed a few days after the judgment, which prohibits until March 31 next, the landing at ports in British Columbia of any immigrant who is an artisan, or skilled or unskilled labourer, it brings up the general question of Canada and the other self-governing Dominions refusing to British subjects the right of entry. Hindus from British India are as much British subjects as Canadians; whether they are equally British citizens, or whether a distinction can be usefully drawn between "British citizens" and "British subjects," is a point which has been recently mooted, but need not be discussed here. Immigration and agriculture are the only two matters over which the British North America Act explicitly confers concurrent jurisdiction on the Dominion Parliament and the provincial Legislatures, but with the proviso that provincial legislation shall have effect so long and so far only as it is not repugnant to any Act of the Parliament of Canada. The Dominion Parliament has very properly undertaken to regulate immigration for as Mr. Joseph Chamberlain, then Secretary of State for the Colonies, said in a despatch to Lord Minto, of January 22, 1901, "the whole scheme of the British North America Act implies the exclusive exercise by the Dominion of all national powers, and, though the power to legislate for promotion and encouragement of immigration into the provinces may have been properly given to the provincial legislatures, the right of entry into Canada of persons voluntarily seeking such entry is obviously a purely national matter, affecting as it does the relation of the Empire with foreign states" (Provincial legislation, 1899-1900, p. 139). And the federal Government regards with jealousy any attempt at provincial legislation in relation to immigration in view of the Dominion legislation on that subject, and has quite recently exercised the veto power against it: (Provincial legislation, 1867-1895, pp. 634-5; 1899-1900, at pp. 134-8; 1901-1903, pp. 64, 74-5).

But what is of more importance in connection with this subject

is that the Imperial Government has officially conceded the right of this Dominion, and the other self-governing Dominions to legislate for the exclusion of immigrants, though British subjects. Lord Crewe, Secretary of State for India, speaking at the last Imperial conference, said: "I fully recognize, as His Majesty's Government fully recognize, that as the Empire is constituted, the idea that it is possible to have an absolutely free interchange between all individuals who are subjects of the Crown, that is to say, that every subject of the King, whoever he may be, or wherever he may live, has a natural right to travel or still more to settle in any part of the Empire, is a view which we fully admit, and I fully admit as representing the India Office, to be one which cannot be maintained. As the Empire is constituted it is still impossible that we can have a free coming and going of all the subjects of the King throughout all parts of the Empire. Or to put the thing in another way, nobody can attempt to dispute the right of the self-governing Dominions to decide for themselves whom, in each case, they will admit as citizens of their respective Dominions."

As Sir Samuel Griffith, Chief Justice of Australia, and a member of the Judicial Committee of the Privy Council, has recently said, the following propositions seem to correctly express the existing state of the law:—

1. British nationality confers upon the holders of the status of British nationals the right to claim the protection of the British Sovereign as against foreign powers.

2. It does not, of itself, entitle the holder to any political rights or privileges within any part of the Empire, but it may be a condition of the enjoyment of such rights and privileges.

3. In the absence of any positive law to the contrary, a British national is probably entitled to claim the right of entry into any part of the British Empire.

4. A competent legislative authority of any part of the Empire may, by positive law, restrict or deny that right of entry.

So another writer, who has held the Governorship of the Windward Islands, in a collection of papers recently published in England under the title of "British Citizenship," says: "If a man of colour who is a British subject seeks to enter and settle in Australia, he finds that he is subject to certain disabilities by reason of his colour; his rights as a British subject do not include the right to enter and remain in every part of the Empire on the same terms as if he were a pure white. And it is impracticable to prevent a self-governing colony from imposing disabilities on persons of colour seeking to enter it, whether they are British subjects or not."

But in truth we are in a region other than—perhaps we should say higher than—that of mere law. We are dealing with matters which will find their ultimate settlement not in the provisions of any statute, but as the final resultant of varying sentiments, conflicting interests, and competing patriotisms. The exclusion of British subjects, whatever their colour,

from any part of British soil, will at best be regarded as a lamentable necessity by those who have the interests of the Empire at heart. It will call for the exercise of the highest statesmanship, and much mutual forbearance, to adjust these matters without disturbing the pax Britannica.

Book Reviews.

A Treatise on the Modern Law of Evidence. By CHAS. FREDERIC CHAMBERLAYNE, of the Boston and New York Bars. 4 volumes. Albany, N.Y.: Matthew Bender Company. 1911-13. 4,956 pages. Price, $28.

Whilst every book must eventually succeed on its own merits it is always interesting to know something of the author, his antecedents and his qualifications for the work he undertakes. Mr. Chamberlayne is known to the profession as having edited an American edition of Best's Principles of Evidence, which was adopted as the text book of the Harvard Law School on that subject. He subsequently edited an international edition of the same work. In 1897 he edited an American edition of Taylor on Evidence. In 1905 he completed the larger part of the article on Evidence in Cye. Since then he has been continuously occupied in the preparation of the monumental work now before us, so much so that he was compelled to give up a large practice and devote all his time to this great work. These volumes (the last just received) are the worthy outcome of the training, experience, industry and mental attainment necessary for so great a presentation and compilation of the law on this—perhaps the most important of all branches of law, and the one requiring the largest range of learning, research and logical thought.

The lawyer has many books on Evidence, such as the three well-known volumes of Taylor on Evidence, and Professor Wigmore's exhaustive and luminous treatise, certainly the best so far; but the work before us will be a keen competitor for professional favour, and it also is of a cosmopolitan character.

It will be entirely beyond our space to refer at length to the immense mass of matter contained in the 5,000 pages appearing in these four volumes. All we can do is to extract a short sum-

mary of the contents so as to give an idea of the large scope of the work and the general treatment of the subject.

The exhaustive character of the work and the extent of the information given may partly be gathered from the fact that the index covers no less than 315 double column pages, and the table of contents occupying 78 pages of closely printed matter.

Vol. I. has as a general heading "Administration." The first chapter is devoted to the preliminary discussion as to the law of evidence, definitions, subdivisions, etc. Subsequent chapters deal with matters of fact, law and fact, court and jury and their various functions, the principles of administration, the protection of substantive rights, the furtherance of justice, judicial knowledge, common knowledge, special knowledge, etc., each of these being discussed under appropriate sub heads and numerous subdivisions, and the authorities thereon cited and criticised; the author giving also his own views and suggestions.

Vol. II. appears under the general head of "Procedure" and discusses at great length and under various sub-heads the subjects of burden of proof, burden of evidence, presumptions and inferences of fact, presumptions of law, pseudo presumptions, admissions judicial and extra-judicial, also by conduct, compromise, confessions, duress, former evidence, etc.

Vol. III. deals with the general nature of proof, judicial reasoning, relevancy, incorporation of logic, probative relevancy, reasoning by witnesses, inference from sensation, estimates, value, hand-writing, conclusions from observation both as to facts and law, expert judgment, hypothetical questions, probative form of reasoning. This volume being largely concerned with the mind and the reasoning of witnesses.

Vol. IV., under the head of "Relevancy," continues the same general subject dealt with in the previous volume, and then under numerous subheads and subdivisions speaks of sworn statements, independent relevancy, hearsay evidence, declarations against interest, declarations as to matters of public and general interest, dying declarations, entries in course of business, declarations concerning pedigree, hearsay as primary evidence, relevancy of similarity, moral uniformity and character, etc.

It will easily be understood from this general statement of contents that the author has treated the subject not only exhaustively (as will appear by an examination in detail), but also in a scientific, analytical and logical manner.

The author has established a reputation for himself, which will, we venture to think, grow as his work becomes better

known. The cast of his mind, his intimate knowledge of his subject, his facility of expression and remarkable industry have enabled Mr. Chamberlayne to give to the profession a presentation of the law of evidence of the greatest value to all practitioners. A reviewer thus aptly refers to the author's style of mode of treatment: "It is refreshing to make acquaintance with a work which sees things from its own point of view and evinces a power of lucid expression and profound analysis rare in legal treatises. The author's facility in original analysis is marked, but not less striking than his intellectual aptitude for so large an undertaking is his mastery of the literary implements of scientific investigation, and his ability to clothe his ideas in the medium of a strong and supple terminology."

The value of the work to us is largely increased by the citation of the English authorities and a large number of those in the Canadian courts. We have in conclusion no hesitation in recommending Mr. Chamberlayne's great work to our readers as a mine of information of most easy access. The only addition we can suggest and would like to see is a table of the cases cited—no small job, by the way, when there are said to be some 75,000 of them—but this, we are told, may be forthcoming later.

Canadian Banking Practice. Compiled by JOHN T. P. KNIGHT. 3rd edition. Published by Fred Wilson-Smith, Montreal. 1913.

This book has been found very useful to bankers and their customers. In the routine of banking questions are constantly arising which necessitate a reference to some authority for guidance, and this book largely meets the need.

The information given is by way of question and answer, under appropriate headings. These questions are over 600 in number and are followed by Clearing House rules and other information to bankers and business men.

Flotsam and Jetsam.

This is an old story, but may be told again. Four Hindus, partners in business, bought some cotton bales. That the rats might not destroy the cotton, they purchased a cat. They agreed that each of the four should own a particular leg of the cat, and each adorned with beads and other ornaments the leg thus apportioned to him. The cat, by an accident injured one of its legs. The owner of that member wound around it a rag soaked in oil. The cat, on going too near the hearth, set this rag on fire, and being in great pain rushed in among the cotton bales, where she was accustomed to hunt rats. The cotton thereupon took fire and was burned.

The three other partners brought suit to recover the value of the cotton against the fourth partner, who owned this particular leg of the cat. The native judge examined the case.

"The leg that had the oiled rag on it was hurt; the cat could not use that leg; in fact, it held up that leg and ran with the other three legs. The three unhurt legs, therefore, carried the fire to the cotton, and are alone culpable. The injured leg is not to be blamed. The three partners who owned the three legs with which the cat ran to the cotton will pay one-quarter of the value of the bales to the partner who was the proprietor of the injured leg."—*Green Bag.*

A famous Chicago lawyer once had a singular case to settle. A physician came to him in great distress. Two sisters, living in the same house, had babies of equal age, who so resembled each other that their own mothers were unable to distinguish them when they were together. Now it happened that by the carelessness of the nurse the children had become mixed, and how were the mothers to make sure that they received back their own infants?

"But, perhaps," said the lawyer, "the children weren't changed at all."

"Oh, but there's no doubt that they were changed," said the physician.

"Are you sure of it?"

"Perfectly."

"Well, if that's the case, why don't you change them back again; I don't see any difficulty in the case."—*San Francisco Argonaut.*