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AGREEMENTS BETWEEN SOLICITORS AND CLIENTS AS TO COSTS.

In a recent case in which a solicitor was concerned the Chancellor of Ontario reprobated, in strong terms, an agreement made by the solicitor with his client to the effect that the latter would prosecute an action for personal injury to the client on the terms that the solicitor should receive, over and above his taxable costs, a sum equal to twenty-five per cent. of the amount recovered, and also a further sum of $200, for which the solicitor stipulated, as a condition of arguing an appeal from the judgment pronounced at the trial of the action. The first part of the agreement was held to savour of champerty and the second was characterized as a "stand and deliver outrage" which could not be tolerated.

The definition of champerty in the old statute of Edw. I., now embodied in R.S.O. vol. 3, c. 327, is as follows: "Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains," and the statute makes void all champertous agreements.

This definition seems to import that the champertor must move (i.e. promote) the suit. Does it apply to the case of a client who comes to a solicitor with his suit? Clearly not, otherwise it is hard to conceive that any litigation could be lawful, unless the costs were prepaid. In every suit that is brought, the solicitor hopes to have part of "the gains," if that word includes the costs. But probably "the gains" is intended to refer to the subject of the litigation irrespective of costs; and even if so, in many cases the solicitor has to look to those

"gains" for reimbursement of his costs, or such part of them as may not be recoverable from the opposite party. Yet that could hardly be considered to be champertous even though it were the subject of an express agreement.

In the case under consideration it does not appear that the solicitor sought out the client or was in any way the original promoter or mover of the suit; but simply that when the client came with his case, the bargain was made for remuneration over and above the taxable costs, proportioned to the amount which might ultimately be recovered. Did that constitute a bringing of the suit at his own proper costs to have part of the "gains"? Again, it can scarcely be said that to proportion costs to the amount recovered is in itself champertous, inasmuch as the Court has itself sanctioned what the Chancellor thus calls champerty by fixing the costs of administration and partition proceedings on the basis of the value of the estate in question. We must therefore dissent from the finding of the learned Chancellor as to the alleged champertous aspect of the case.

The method of regulating remuneration by the amount of the property or damages involved has, moreover, been expressly sanctioned in the Province of Ontario by the legislature in regard to conveyancing and other non-contentious business. R. S.O. c. 174, s. 52, authorizes the judges of the Supreme Court of Judicature to make rules as regards the remuneration of solicitors for non-contentious business and expressly provides that this may be "according to a scale of rates of commission or percentage." To fix costs proportionately to the amount recovered has therefore, in these later years, received both legislative and judicial sanction. Let us assume that the case referred to in the beginning of this article had been settled without litigation, the agreement would have been valid under section 54, and the only question would have been whether or not, under the circumstances, it was reasonable. To bargain for more than taxable costs may be illegal, but it cannot be said to be necessarily champertous, even though such extra costs

are to be paid out of the fruits of the litigation. If there is any other reason for illegality it is not suggested in the judgment referred to.

We think it would not be for the benefit of litigants, nor would it be fair to solicitors, to lay down too strict a rule regarding the right of a solicitor to bargain with his client for something more than taxable fees. Such bargains, it is needless to say, are made by reputable solicitors every day with well-to-do clients, as every judge knows from his own professional practice.

Ought there be any different rule where the client is a poor man and unable to supply his lawyer with any funds to prosecute his case? He asks the solicitor to meet all the disbursements of what may be a protracted litigation, and to go to great trouble and expense in preparing the case for trial, for which trouble taxable costs would be a ridiculously inadequate return under the present low tariff. Means should, in some way, be given to enforce any legal right. It surely cannot be the law that because a man is poor and unable to pay a lawyer the necessary fees, his rights should be lost or his wrongs remain unvindicated. But if the above judgment be sound he may practically be helpless, inasmuch as a solicitor may not, without incurring the possible censure of the Court, stipulate for any remuneration whatever over and above his taxable costs, and must run the risk, not only of getting nothing, but also of being out of pocket, and few reputable lawyers would take such risks for merely tariff fees.

If the client is a man of means the solicitor may require to be paid a retainer in cash, and if it is paid, and the nature of the demand properly explained to the client, the Court will not require the solicitor to refund it; but why this should be an unimpeachable transaction, and a bargain to pay at a future time wrong and unenforceable, is one of those anomalies which tend to make one question the reasonableness of the rule now laid down. If the latter transaction be illegal, the demand and payment of a retainer over and above taxable costs ought also

to be illegal, which it is not. Again if you may fix the costs of an administration or partition action at a percentage on the amount realized, why should it not be equally lawful to fix the costs of other actions on the same or a like basis. Clients, of course, should be fully protected against unreasonable bargains, but surely solicitors are also entitled to some protection.

When solicitors are allowed (as they are) to make bargains regarding their remuneration for non-contentious business, and the only test of their validity is their reasonableness, it is difficult to see why they should not have a similar power in regard to matters of litigation. It may be said that the client and solicitor are not always on equal terms in discussing remuneration, for instance, in actions of tort, as the lawyer is much more likely to know the probable result of the suit than the client. But, on the other hand, it is notorious that in such cases clients seldom tell all the facts or correctly state them to their lawyer, and when the case is tried the evidence is often entirely different from the statement given to the solicitor, and consequently, the case is lost.

In *Ford* v. *Mason*, 16 P.R. 25, it was held by Ferguson, J. that R.S.O. c. 174, s. 54, only applies to non-contentious business, and that, therefore, the statute only authorises agreements as to costs for business of that character, but in view of the recent decision of the Court of Appeal in *Clark* v. *Joseph* (1907) 12 K.B. 369, noted ante, p. 651, it would seem that, altogether apart from the statute, there is nothing illegal in a solicitor making a bargain with his client as to his remuneration even in matters of litigation.

We are not convinced that *Ford* v. *Mason* is a correct interpretation of these ill-drawn sections.

The English statute from which R.S.O. c. 174, ss. 52-54 is derived explicitly applies to all kinds of business, and we see no sufficient reason why the Ontario Act should not be amended to correspond with it. If so extended, the statute would afford every necessary safeguard, to the client, when it provides that such agreement must be reasonable and must be in writing.

Under the Manitoba statute such agreements are expressly authorized.

In any view of the matter the sections of R.S.O. c. 174, above referred to, are in their present shape open to doubt, and it is to be hoped that before the statute is again revised the law on the subject may be more clearly and definitely expressed.

EX PARTE AND CONSENT APPLICATIONS.

In the case of *Conway* v. *Fenton*, 40 Ch. D. 518, Kekewich, J., remarked, "I know nothing which requires more careful exercise of judicial power than the deciding on, or granting applications, when there is no real argument; the consent business of the Court being according to my experience, as a rule even more difficult than the contentious business."

What the learned judge there said concerning consent business, is even more true regarding much business which is taken *ex parte*, either where no person is notified, or, being notified fails to attend. But when we sit in the Weekly Courts in Toronto and elsewhere in Ontario and watch how business is there transacted, we are sometimes tempted to wonder whether the presiding judge is always conscious of the difficulty and importance of what he is doing. In mere matters of procedure, much harm may not be done by the slap-dash methods which often prevail; but where a judge is asked to construe wills, or make other orders affecting the substantial rights of parties, we fear there is not now, as there used to be, that solicitous investigation by the judge to see that all proper persons have been duly and properly notified, or that the order asked for is intrinsically right, and proper to be made in the circumstances. We also sometimes wonder whether the part which counsel play in such matters is always quite consistent with their duty to the Court.

It is needless to say that it is no part of the duty of counsel to get orders made which ought not to be made. It is no part

of their duty, nay, they are committing a serious breach of duty, in asking the Court to make orders on obviously insufficient evidence; or to ask the Court to make orders which they know, or ought to know, ought not to be made. The duty of counsel is to assist the Court to come to a right decision in every case which they present to the Court. If all proper parties are not before the Court they should bring that fact to the Court's attention, not that that duty on the part of counsel is any reason why the Court itself should re-lax its vigilance. The Court must take into account the fact that all counsel are not equally learned and capable of giving the Court proper assistance; and that there are some whom it would be no libel to declare to be absolutely ignorant not only of elementary law, but even of their duty to the Court.

We are inclined to fear that it may be found in the future that the present method which some judges have of dealing with business may be productive of some litigation, and probably much hardship to innocent persons. The complaisant judge, anxious to save himself trouble, may then be discovered to have been the suitor's worst enemy and to have lulled those who have waited at his judgment seat into a false security, and on the other hand he may be found to have done gross injustice to innocent parties.

Let us take for instance the case of the construction of a will, where an easy-going judge has undertaken to construe the instrument, in a case where it is open to the heirs to contend that there is an intestacy, and they are not notified, or required to be notified. What may happen is this,—the judge may determine that a doubtfully worded devise is effective. The parties may deal with the property on the faith of that decision and the supposed devisee may sell to a *bonâ fide* purchaser. It may be thought that perhaps the heirs not having been notified would not be bound by the decision, and could assert their rights against the purchaser; if it were so, it would be hard on the purchaser, but it would seem that, under the Jud. Act, s. 58(11) as against a *bonâ fide* purchaser, the order

could not be successfully impeached on the ground of "want of jurisdiction or want of concurrence, consent, notice, or service." So far as the land itself was concerned, therefore, the heirs might have no remedy, even though the decision were absolutely erroneous, and they had had no opportunity of being heard in support of their claim. As regards those who had obtained the order, the heirs might possibly obtain some relief if they happened to be worth anything, but if they were not, the heirs would lose their rights by the action of the Court itself, and be without any redress.

Surely considerations such as these ought to make all judges who are inclined to be hasty or careless a little more considerate, and mindful of the words of Kekewich, J., which we have quoted.

CRIME IN CANADA.

Not by way of boasting of superior virtue, but of warning against imminent danger, we call attention to some figures recently published shewing an alarming increase of crime among people in the United States. Living side by side with a people far greater in wealth and population, but governed by the same laws, speaking the same language, under similar social conditions, and with very close personal relations, it would be only natural that we should be liable to the same temptations, fall into the same errors, and suffer from the same influences which have been the cause of so much alarm on the south-side of the border.

The criminal records of the United States have, therefore, for us a warning which we cannot safely disregard. A writer in the August number of *Case and Comment* makes the following statement. "The record of crime in the United States has gone on increasing in blackness until it has made us conspicuously alone among the civilized nations of the world." And again he says: "This nation standing well-nigh at the head of all the nations in the world in most of the elements of civili-

zation stands far below the worst of them all in its horrible record of crime." In support of this terrible indictment the following figures are given, the city of London being taken as the standard of comparison: "In proportion to population, homicides in New England are 12 times as numerous as they are in London; in California they are 75 times as numerous as in London; while in Nevada they are about 245 times as numerous as in London. That is to say, New England, with nearly a million less inhabitants than London, has 254 homicides annually, while London has only 24; California, with less than one-fourth the population of London, has 422 homicides against 24 in London."

These figures seem scarcely credible, but they have been compiled by the Alabama State Bar Association, and must be accepted as reliable. They refer only to cases of homicide, and we need not assume that the same proportion exists as regards crimes of less serious character. How will this country stand the test of a similar comparison? Taking the criminal statistics of the Dominion officially published for the year 1905, the only ones available, we find that in that year the number of cases of murder which came to trial was 40, and the number of cases of manslaughter was 29. Putting these together under the American designation of homicide we can show 69 cases against 24 in London, the population in each case being sufficiently near for the purpose of comparison. Thus in this favoured country, with all our material prosperity, our freedom from poverty and all such incentives to crime, and our common boast of the law-abiding character of our people, we have to admit a record of this particular crime nearly three times as numerous as that of London with its poverty, degradation, and enormous population of recognized criminals.

From the province of Ontario, in which we have a more settled state of affairs than in the Western provinces, the figures for the years 1905 and 1906 are as follows: cases of murder, 40, and of manslaughter, 29, the numbers of both class of crimes being more numerous in the former year than in the latter.

Thus for a population of a little over two millions we have for the two years mentioned an average of thirty-one homicides while London with more than double the population had only twenty-four!

That we are not so bad in this respect as the New England States with, in proportion to population, twelve times as many cases of homicide as London, is not any matter for congratulation. Our case is bad enough to call for careful consideration and enquiry into the cause of such a serious state of things. We cannot, as the Americans to some extent may, lay the blame upon our foreign population, for the foreigners who come to our shores are not largely of the criminal class. Some other reason must be sought.

Asking this question with regard to themselves the American writer says: "Probably the chief cause of our extraordinary multiplication of crimes is in the insufficiency of our criminal procedure, coupled with the widespread lack of respect for law and its enforcement." The administration of justice in America is contrasted with the certainty and swiftness of justice in England, very much to the advantage of the latter. The administration of justice in this country has, so far, been both swift and sure as compared with that in the United States, but, as regards respect for law, and a determination that it shall be enforced, we cannot speak with the same complacency. That there is growing up in this country a generation unused to restraint, and unwilling to submit to it, to whom law and order are terms without meaning, allowed from childhood to do as they like, and even taught to shew their independence by disregard of social obligations, we have too much reason to know. Disobedience to parents, disrespect for elders, rudeness to strangers, rowdyism, especially in country districts where there are no police to restrain it, may not bring the offenders within the grasp of the law, but they all tend to create a disrespect for it. Familiarity with disorder causes contempt for order, and prepares the mind for the conception and, in due time, for the execution of crime.

Not only is the ground thus prepared for the growth of a crop of ordinary criminals, but the very foundations of society are undermined by the idea that every man is a law to himself —that he may do what is good in his own eyes, or rather what will serve his own interests—regardless of law and be ready to violate it whenever it may suit his purpose to do so. If there is no sense of moral responsibility there can be no hope for the maintenance of order except in the very strictest enforcement of the letter as well as the spirit of the law.

RUSTICUS.

THE CRIMINAL LIABILITY OF BANK DIRECTORS.

The following extracts from the charge of the Lord Justice Clerk to the jury in the trial of the City of Glasgow Bank Directors which so clearly defined what is the law as to the criminal liability of bank directors will doubtless be interesting to many of our readers:—

"A director of a bank is generally a man who has other avocations to attend to. He is not a professional banker. He is not expected to do the duty of a professional banker. He is a man respected for his position, his character, and the influence he may bring to bear upon the welfare of the bank, for the personal confidence which is reposed in his integrity and in his general ability. Gentlemen, I need not say that it is not part of his duty to take charge of the accounts of the bank. He is entitled to trust the officials who are appointed for that purpose; and as long as he has no reason to suspect their integrity, it is no matter of blame to him that he has done so. It is, indeed, clear that he must to a very great extent trust to the statements of the officials of the bank, acting within the proper duties of the department which has been entrusted to them. Gentlemen, you may assume that it does, however, follow, that where special circumstances arise to bring within the notice of the directors particular interests, that they

have an obligation for inquiry, and an obligation for action which might not be necessarily inferred from the nature of the position they hold. Secondly, as to their knowledge that these balance sheets were fabricated. Now, what the prosecutor has undertaken to prove is,—not that the directors were bound to know the falsity of the statements in the balance sheets, not that they were under obligations to know it, not that they had the means of knowing it, but,—that in point of fact, they did know it. And that is what you must find before you can convict the prisoners on any part of the evidence presented to you. You must be able to affirm, in point of fact—not that they had a duty to do, and they neglected it; not that they had the means of information in their power, and failed to use them, but—that, as a matter of fact, when these balance sheets were issued, they knew that the statements in them were false. Constructive knowledge might be quite sufficient if we were dealing here simply with an action for a civil debt, of a civil reparation;—what a man is bound to know in that case, he is held to have known it. But that is not this case. When a man is charged with crime his crime is guilty knowledge, and nothing else. You must be quite satisfied that not merely it is probable or likely that he knew; but in point of fact, he did know, of the falsification of which he is accused."

Some very able lawyers seem strangely ignorant that there is a third volume of the Revised Statutes of Ontario, 1897, or if not ignorant of its existence, at all events strangely ignorant of what it contains; nor have the law reporters concerned set them right, for we notice that in a recent number of the Ontario Law Reports 22-23 Car. II. c. 10, is referred to as an operative statute, whereas, of course, this reference should have been to R.S.O. c. 335. In a still later judgment a judgment turns on the effect of 13 Edw. I. c. 34, whereas R.S.O. c. 330, s. 9, the really operative statute, is not even mentioned. We may say for

the benefit of anyone who is similarly afflicted, that all the Imperial statutes affecting property and civil rights which had been incorporated into our Provincial law are now to be found in vol. 3, R.S.O. The Imperial statutes above referred to are no longer operative in their original form in this Province. In another recent judgment we notice that 14 Geo. III., c. 78, s. 86, is referred to as though it was in force; whereas the Ontario statute, 7 Edw. VII., c. 23, s. 41, is the operative one.

Whilst we have no love for an elective judiciary, it must be admitted that a much better condition of things in regard to appointment of judges exists in at least one of the States of the Union than in this Dominion. In the State of New York the political parties have come to an understanding that certain of the judges are to be re-elected by acclamation. One is a Democrat and the other a Republican, but both are said to be men of great learning and large judicial capacity as well as of the highest personal character. This simply means that the appointment of these men is taken out of the hands of the politicians. When will that happy time come in Canada? It would be well for the country if the best available men were chosen without reference to politics. The present condition of things is notoriously unsatisfactory. The saying that "to the victor belongs the spoils" should have no place when the appointment of a judge of the land is under discussion. It is a relic of barbarism. Surely a Government so strong as that at present in power might well follow the example of the State of New York especially in view of the fact that their political opponents in days gone by, under the leadership of Sir John A. Macdonald, did appoint eminent men as judges from the ranks of his then political opponents. Looked at merely from the standpoint of expediency in party politics the Government would gain vastly more than it would lose by following the example referred to. Sir John A. Macdonald was not only a patriot, but a sagacious political leader as well.

The Lord Chancellor of England is congratulated by the legal journals there upon his judicial appointments, which, up to the present time, are said to have been most satisfactory to the profession and to the public. The last is that of Lord Coleridge, K.C., to the High Court Bench, as an extra judge to the King's Bench Division. The *Law Times* remarks: "That a grandfather, father and son should become judges of the High Court is probably unprecedented, and we feel sure that the present judge will well sustain the high reputation of two previous generations." This Canada of ours is but a new country, and we cannot as yet point to anything like that; but, a few weeks ago, there was called to the Bar of Ontario the son of one of the greatest of Canadian lawyers, and the grandson of one who was pre-eminent as a judge as well as a statesman. The names of Chief Justice Sir John Beverley Robinson and Christopher Robinson are household words, and they may well be kept prominently before the profession as models for all those who join our ranks. May their high reputation be worthily sustained by this their successor in the third generation.

Lord Brampton, better known as Sir Henry Hawkins, passed off the scene on the 6th ult. He was born Sept. 14, 1817, the son of a solicitor at Hitchin, Hertfordshire. He was well known to the profession and to the public in many important cases, such as the defence of Simon Bernard, who was charged as accessory in a conspiracy against the life of Napoleon III.; in the case of *Roupell* v. *Waite*, in which forgeries to the amount of £350,000 were concerned, and in the defence of various defendants in the Overend and Gurney prosecutions; but the two cases in which he achieved his highest distinction were the Tichborne trials and the case bringing up the will of Lord St. Leonards. He was raised to the Bench in 1876. His severity in many cases gave him the soubriquet of "the hanging judge." Though in many respects an excellent judge, it was at the Bar that he attained his great reputation.

Mr. Geoffrey Hawkins, a brother of the deceased peer, about forty years ago practised in Toronto in partnership with Mr. Columbus Greene.

LUNATICS AND THE RACE PROBLEM.

The report of the Commissioners in Lunacy in England is not very comfortable reading. The commissioners themselves, it is true, strike a somewhat cheerful note, but their figures are hardly reassuring. The percentage of insane patients continues to increase. As regards numbers only, there was a rise in 1906, though it was smaller than in the three previous years. On the basis of population, however the ratio of officially declared insane subjects was higher than in any other recorded year.

The number under care on the 1st January of this year was 123,988 or 2,009 more than on the corresponding day of last year. The increases for the past few years over each preceding one have been respectively 2,150, 2,630, and 3,235; and the annual average increase for the last ten years has been 2,462, for the last five 2,655.

Again, the ratio of notified insane persons per 10,000 of the population shews a progressive increase. For the year 1906 it was 35.48, which represented an increase of 0.48 on the ratio of the preceding year. In other words, the total number of certified insane persons in England and Wales stood to the estimated population in the proportion of one in 282, whilst the actual numerical increase was 1.64 per cent. Taking the decennial period, the increase in the whole population during the decade was 12.1 per cent., and in the numbers of certified insane it was 24.8 per cent. Lunacy, therefore, seems to be growing faster than the population; but here the commissioners deliver a warning.

There are factors, to be considered (they say), which render it impossible to determine whether the actual proportion of

"occurring" insanity is really increasing in the community; and, if it be so, to what extent? It is probable that far more care is taken to segregate persons suffering from the milder forms of insanity than used to be the case, fitness for such detention being considered to imply the need for treatment of a disease quite as much as the fact that the insane person requires protection from himself, or that the community has to be protected from him; and, again, in the case of the aged, whose numbers go to swell the list of "first attacks," removal to asylums is well known to be on the increase. Hence it happens that, without any actual marked increase in the prevalence of mental disorder, many such defectives are now being notified who, a generation or two ago, would have been left outside the pale of official recognition.

Our readers must extract what comfort they can out of this. The fact cannot be escaped from that since 1859, when records first began to be kept, down to the present time, the statistics of certified insanity in England and Wales have been steadily mounting. Figures given in the report shew that on the 1st of January, 1859, the total number of certified insane under care was 36,672. The figures for 1906 we have already given; they shew the astonishing rate of increase of 237.2 per cent. During the same period, moreover, the population has increased by 77.5 per cent.

Of the 123,988 insane persons at this moment under care, 91,160 are in county or borough asylums, 4,323 in registered hospitals, 1,685 in metropolitan licensed houses, 1,846 in provincial licensed houses, 164 in naval and military hospitals, 817 in criminal lunatic asylums (of which there are now two, an establishment having just been opened at Parkhurst convict prison), 1,125 in ordinary workhouses, 6,679 in metropolitan district asylums, 494 private single patients, and 5,595 out-door pauper patients, and 9,889 private patients. The criminal lunatics (736 males, 227 females) have increased by forty-two, the total under care on the 1st of January, 1907, being 963, of whom 147, or 15.2 per cent., were in county and borough asylums, where there was one more patient than last year. The

opening of the Parkhurst Asylum accounts for the additional forty-one in excess of last year's figures, all of these being males.

As regards the geographical distribution of the increase, the six counties in which the highest annual increases have taken place for the last five years are London (630), Middlesex (115), Essex (108), Glamorgan (seventy-three), Kent (sixty-eight), and Surrey (sixty-seven). Glamorgan excepted, these, it will be perceived, are all metropolitan counties. Among the boroughs, the highest average annual increase has been in Manchester (seventy-two), West Ham (forty-six), Liverpool (forty-two), Salford (forty-one), Leeds (thirty-six), and Plymouth (thirty-four).

It is hard for a nation to recognize, and still harder for it to admit, a decay of mentality, but facts have to be met in the long run. The progress of insanity in this country during the past fifty years is a problem that ought not to be shirked. The longer it is evaded the more serious is it likely to become. The figures of the commissioners' report are not of a kind to create general alarm, but they are unquestionably bad, and if the situation they reveal is persistently neglected it must grow worse. A medical man attached to the staff of a public lunatic asylum, interviewed the other day on the subject of this report, asserted that the explanation of the increase of lunacy is to be sought elsewhere than in national drinking, or in the rush and worry and strenuousness of modern life. "The real cause, I consider," said he, "is the care we take of degenerates. In savage countries there are no lunatics, because the savages knock on the head the physically unfit, or leave them to perish by the wayside. We do all we can to preserve them, to restore them, if possible, to their homes and companions."

This goes to the root of the matter. We are all familiar with the suggestion of another very eminent medical man, that in certain cases the unfit should be disposed of in the lethal chamber. This the public will not stand; but the authority just cited observes that if we refuse to put out of the way the physical and mental degenerates who are multiplying every year, we

should at least do our utmost to prevent them from coming into the world. "People should not be allowed to get married unless they can produce a certificate of health."

The commissioners state in their report that "by far the majority of the discharged left the asylum within two years of being admitted." Now, there is nothing in the law to prevent ex-patients of lunatic asylums, public or private, from getting married and bringing into the world children who must be in some degree diseased. But this is a monstrous abuse of the privilege of marriage, and a very dangerous one to the community. We should restrain by all the means in our power the marriage of the degenerate. Every sound theory of race culture is inimical to it; yet we spend annually upon the up-keep of the insane and degenerate over £30,000,000—an enormous sum that is wholly unproductive. We have between 18,000 and 19,000 married and widowed imbeciles and feeble-minded; while the educated and "high-grade degenerates"—who are far more harmful to the race than the irreclaimable idiot—are increasing among us. "He who is born into this sad heritage," writes a modern expert, "leaves hope behind. We cannot cure what is not disease but defect, and that which the cradle rocks the spade will cover." Dr. Reid Rentoul has well said that breeding from degenerates has never yet paid a nation and never will pay. "The existing conditions compel thinking men and women to agree to this—that the preservation of the supposed rights of individual idiots, imbeciles, epileptics, lunatics, feeble-minded, and habitual criminals, in order that they may beget offspring, is but of very secondary importance when considered in connection with the future welfare, the mental and physical strength of our nation." And as long as we are engaged in polluting at its source the river of national health, we cannot expect to be greatly flattered by the reports of the Commissioners in Lunacy.—*Law Times.*

The reports of the prison chaplains—Church of Ireland, Roman Catholic, and Presbyterian—which form an appendix to the annual report of the General Prisons Board in Ireland, make what will probably seem to the cynical very amusing reading. If one is to judge from these reports, there is no more God-fearing, devout, and religious body of men than the convicts who filled the Irish prisons last year. They, without exception, appear to be extraordinarily attentive to their religious duties, and particularly responsive to religious instruction. One of the chaplains says boldly: "I look upon it as a blessing for some people to be put in prison, because it is the only time they make any attempt to attend to their religious duties." Another says: "It is, I think, greatly to be desired that longer sentences were imposed by the magistrates. As matters are now, a prisoner has not time to have the drink craze eliminated from his system before his 'time is up,' and he goes out to get a new drink and incur a fresh sentence." A third chaplain says: "There is hardly another congregation so critical as convicts. Men, who whilst at liberty rarely enter a church, become quite fastidious in their taste, and profess themselves actuated with singular zeal for the beauty of God's house, when they have become by their crimes the inmates of a jail." The board in their report refer very appositely to the new Habitual Criminals Act of New South Wales, which provides that when a person has been convicted on indictment four times in respect of similar classes of offences, he may, on the occasion of the fourth conviction, be declared to be an habitual criminal, and be treated accordingly. It is satisfactory to observe that the proportion of the total daily average of prisoners in Irish prisons to 100,000 of the population fell from sixty-four in 1898 to fifty-eight in 1906.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

WILL—CONSTRUCTION—VESTED LEGACIES—INTEREST UNTIL PAYMENT—GIFTS TO PERSONS BORN BEFORE DATE OF WILL—INFANT EN VENTRE SA MERE—PAYMENT INTO COURT BY TRUSTEES—TRUSTEE ACT, 1893, (56-57 VICT. C. 93) S. 42—(R.S.O. C. 336, S. 4(3)).

In re Solaman De Pass v. *Sonnenthal* (1907) 2 Ch. 46. The testator had left a number of legacies of £500 to each of his great nephews and great nieces "born previously to the date of this my will." He then gave his residuary estate to trustees upon trust for sale or conversion, and, after payment of debts and testamentary expenses, to divide the surplus as therein mentioned. A large number of the legatees were infants, and the will declared that all legacies should carry 4 per cent. interest. The trustees were desirous of appropriating a certain part of the estate to meet the legacies, and they also desired the opinion of the Court as to whether a great niece, who was en ventre sa mère at the date of the will, was entitled to a legacy; and Kekewich, J., held that the trustees could not free the residuary estate by setting apart proper securities to meet the legacies, but they could pay the legacies into Court under s. 42 of the Trustee Relief Act, 1893. (R.S.O. c. 336. s. 4(2)) when the clause as to interest would cease, and as to the child en ventre sa mère, he held that she was not entitled to a legacy, as the persons whom the testators intended to benefit, were persons of whose existence he knew, and who in the ordinary sense of the word were "born" at the date of his will.

WILL—EXPRESS TRUST OF RESIDUE—PARTIAL FAILURE OF BENEFICIAL INTEREST—NEXT OF KIN—ADVANCEMENTS BY TESTATOR TO CHILDREN—HOTCHPOT—STATUTE OF DISTRIBUTION (22-23 CHAS. II. C. 10) S. 5—(R.S.O. C. 335, S. 2.).

In re Roby, Howlett v. *Remington* (1907) 2 Ch. 84. The doctrine that the Statute of Distribution, s. 5 (R.S.O. c. 335, s. 1), does not apply in cases where there is only a partial intestacy, was reaffirmed by Neville, J., in this case. By a will

a testator bequeathed the residue of his estate to his executors in trust, as to £1,500 (part thereof) to invest and pay the income to his daughter, E. M. Clark, for her life, and after her death, to divide the capital amongst her issue; there was no gift over of the £1,500. E. M. Clark died without issue, and there was, consequently, an intestacy as to the £1,500 which, accordingly, passed to the next of kin, who were four daughters and some grandchildren of the testator. These daughters had received large advances from the testator, and if they were brought into hotchpot the £1,500 would all go to the grandchildren, but Néville, J., held, that there being only a partial intestacy, the Statute of Distribution did not apply, and the advances were not liable to be brought into hotchpot; and he also held, that the case was not within the Executor's Act, 1830, as the £1,500 was held by the executors not as executors, but as trustees.

EMPLOYER AND WORKMAN — INJURY TO WORKMAN CAUSING DEATH—AGREEMENT BETWEEN EMPLOYER AND WORKMAN—CLAIM BY DEPENDENT.

Williams v. *Vauxhall Colliery Co.* (1907) 2 K.B. 433 is also a case under the English Workmen's Compensation Act, 1897, which may also be useful in considering the Fatal Accidents Act (R.S.O. c. 166). In this case after an accident in the course of his employment the workman made an arrangement with his employer out of Court whereby he received for a certain time after the accident a weekly payment, and then, believing himself to have recovered, returned to work, nothing being said on either side as to the continuance or cessation of the compensation. He subsequently died from the effects of the injury. These circumstances the Court of Appeal (Cozens-Hardy, M.R. and Barnes, P.P.D. and Kennedy, L.J.) held afforded no evidence that the workman had abandoned his right against his employer to further compensation; and, even assuming that the workman had abandoned his right, his dependents had a separate right to compensation of which he could not deprive them. But, subject to this, the Court held that the employer was not liable for more than the maximum compensation allowed by the Act, and was entitled to credit for the sums advanced to the deceased workman.

SHERIFF — EXECUTION — FIERI FACIAS — SEIZURE — MONEY BROUGHT INTO HOUSE AFTER SHERIFF IN POSSESSION.

In *Johnson* v. *Pickering* (1907) 2 K.B. 437 it became necessary to determine whether or not certain money of an execution debtor was to be deemed to have been taken in execution. Under a fieri facias the sheriff had seized all the goods in the debtor's house, and while the sheriff was in possession the debtor, unknown to the sheriff, brought into the house and deposited in a drawer in his bedroom £395 in bank notes. Subsequently the debtor died, and an order was made for administration of his estate. The sheriff being unaware of the existence of the bank notes had done no overt act of seizing the same. In these circumstances Lawrance, J., held that the sheriff must be deemed to have taken the money in execution, as his overt act at the date of the seizure shewed an intention to seize all the goods, and coupled with his remaining in possession, was enough to constitute a seizing and taking of goods subsequently brought on the premises whilst he was in possession.

WILL—CONSTRUCTION—GIFT TO CHILDREN AS A CLASS—SUBSTITUTIONAL GIFT TO ISSUE—"SHALL PREDECEASE ME"—ISSUE OF CHILD DEAD AT DATE OF WILL.

Gorringe v. *Mahlstedt* (1907) A.C. 225 is a case known in the Courts below as *In re Gorringe*, *Gorringe* v. *Gorringe*, and was for the construction of a will whereby the testator gave legacies to the children of one of his sons whom he described as "my deceased son;" and he gave the residue to his children who should be living at his death, "provided that in case any one or more of my children shall predecease me having any child or children living at my death, then such child or children of my deceased child shall take the share which the parent would have taken if such parent were living at my decease." The simple question for decision was whether or not the children of the son, who was dead at the date of the will, were entitled to share in the residue. Joyce, J., held that they were not, (1906) 1 Ch. 319 (noted ante, vol. 42, p. 338). The Court of Appeal reversed his decision, Romer, L.J., dissenting (1906) 2 Ch. 341 (noted ante, vol. 42, p. 712). The House of Lords, (Lords Halsbury, Macnaghten, James, and Atkinson), have reversed the Court of Appeal and restored the judgment of Joyce, J.

COMPANY—REDUCTION OF CAPITAL—DISCRETION OF COURT, HOW TO BE EXERCISED.

Poole v. *National Bank* (1907) A.C. 229 was an application to the Court to sanction the reduction of the capital of a limited company, which, in view of the recent Companies Act, 7 Edw. VII. c. 34, s. 13(O), it may be useful to note, though, under the latter Act, the application for reduction is to be made to the Lieutenant-Governor and not to the Court. The proposed reduction had been sanctioned by Farwell, J., and his decision had been affirmed by the Court of Appeal. The House of Lords have now affirmed the decision, holding that on such applications it is not essential to shew that the capital which the company proposes to cancel has been lost, and that where creditors are not concerned, the questions to be considered on such applications are: (1) whether out of regard to the public, who may be induced to take shares, the sanction should be refused, and, (2) whether as between the different class of shareholders the proposed reduction is fair and equitable.

ADMIRALTY—COLLISION—DREDGER—MEASURE OF DAMAGES.

Mersey Docks v. *Marpessa* (1907) A.C. 241 was an action in the Admiralty Court to recover damages for a collision, and the sole question on this appeal to the House of Lords was what was the proper measure of damages. The plaintiffs' vessel was a dredger, used in dredging sand in a harbour, and was injured by a collision with the defendants' ship, which was in fault. The dredger cost much to maintain and earned nothing, it was rendered useless for nine days. Besides the cost of repair the plaintiffs claimed for the value of the work which would have been done by the dredger but for the damage to it, and also a sum for owner's profit; but the House of Lords agreed with the Courts below that though the plaintiffs would have been entitled to recover the cost of hiring another vessel to do the work, they, not having done so, were not entitled to claim anything for owner's profit; but, besides the cost of repair, they were entitled to recover the value of the services of the dredge, which might be reasonably estimated at the amount of the daily cost of operating it for nine days.

SHIP—CHARTERER—BILL OF LADING INCREASING LIABILITY OF SHIPOWNER—INDEMNITY BY CHARTERER.

Kruger v. *Moel Tryvan Ship Co.* (1907) A.C. 272 is the case known in the Courts below as *Moel Tryvan Ship Co.* v. *Kruger* (noted ante, pp. 215 and 498). It may be remembered that the question was whether the charterers of a ship were bound to indemnify the shipowners in respect of a liability occasioned by the master having signed, at the request of the charterers, a bill of lading imposing on the shipowners a liability from which, under the charter party, they were exempt. The Courts below held that they were, and the House of Lords (Lord Loreburn, L.C. and Lords Halsbury and James) have affirmed their decision.

AGREEMENT NOT TO ERECT "UNSEEMLY" BUILDING.

Murray v. *Dunn* (1907) A.C. 283, although an appeal from a Scotch Court, is, nevertheless, deserving of attention. The action was to enforce an agreement whereby the defendant had bound himself not to erect an "unseemly" building on his premises adjoining those of the plaintiffs. The House of Lords (Lords Halsbury, Hereford, Robertson, and Atkinson) affirmed the judgment of the Scotch Court, that the agreement was too vague and uncertain to be enforced in a Court of law.

INTERIM INJUNCTION TOO WIDE—MEASURE OF DAMAGES.

The Clippens Oil Co. v. *Edinburgh & District Water Co.* (1907) A.C. 291 is also an appeal from a Scotch Court. Applying to the case the language of English law, the facts were that the respondents had obtained what in English law is called an injunction against the appellants working certain minerals within forty yards of the respondents' water pipes. The injunction continued in force eleven months and was then dissolved. The appellants' capital was limited and prices were low, and the appellants were unable to obtain minerals from any other source which would have been profitable. In these circumstances, they closed their works, their machinery deteriorated, their business connections were lost, and it was found impossible to resume business after the dissolution of the injunction. They claimed £137,000, and were allowed £27,000, which they contended was inadequate. It may be mentioned

that the respondents were entitled to an injunction against the appellants working the minerals in question so far, only, as it would interfere with the support of their water pipes, but the injunction granted restrained the appellants from any working at all within the specified area. In the circumstances the House of Lords (Lord Loreburn, L.C., and Lords James, Robertson, Atkinson, and Collins), considered that it was like the common case where a jury is asked to assess damages with no fixed rule, and few ascertained facts to guide them, and though some of their Lordships appear to have doubted whether the damages allowed were not excessive, nevertheless, they refused to interfere with the assessment of the Court below.

ONTARIO ACT, 55 VICT. C. 99—TORONTO STREET RAILWAY—CONSTRUCTION.

Toronto v. *Toronto Railway* (1907) A.C. 315 is a case which has been much discussed in the daily press of Toronto. As is well known, it turns upon the construction of the Toronto Street Railway Act, 55 Vict. c. 99, giving parliamentary sanction to the agreement entered into between the railway and the city. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, and Collins, and Sir A. Wilson) have determined that the railway is not compellable to extend its tracks beyond the limits of the city as they existed at the date of the agreement. Secondly, that it cannot be compelled by the city to lay down tracks even within that area, and is not liable in damages for refusing to do so, but that the sole penalty for their refusal is that stipulated in the agreement, viz, that they thereby forfeit the exclusive right in any street in which they refuse to lay down tracks when called on to do so by the city; and thirdly, that the exclusive right to operate the railway conferred on the company involves the right to determine the routes of the cars and the places at which stops are to be made, which could not be interfered with by the city. The second point is one of general interest, and is important.

HIGH TREASON—RESIDENT ALIEN'S DUTY OF ALLEGIANCE.

In *De Jager* v. *Attorney-General of Natal* (1907) A.C. 326 the Judicial Committee of the Privy Council (The Lord Chancellor and Lords Macnaghten and Atkinson and Sir A. Wilson) hold that where an alien resident within British territory

assists invaders during the absence of the British forces, he is guilty, and may properly be convicted, of high treason; and that there is no law relieving an alien from his duty of allegiance because an enemy temporarily makes good his military occupation of the district in which the alien resides.

NUISANCE—STATUTORY POWERS.

Demerara Electric Co. v. *White* (1907) A. C. 330. This was an appeal from the Supreme Court of British Guiana. The point in contention was whether the appellants were liable in damages for a nuisance caused by the vibration and noise of their machinery. The appellants acquired on the same day, under a colonial ordinance, and for the same local area, exclusive power to generate electricity for lighting and supplying electric energy for all purposes, public and private, and also under another license power to generate electricity, wherewith to operate an electric railway. The first license expressly declared that the appellants were to be liable for any nuisance caused by them, the tramways license, however, did not contain any similar stipulation, and the appellants contended that under the second license they were exercising statutory powers, and were exonerated from liability for any nuisance which might be occasioned by their so doing. But their Lordships of the Judicial Committee of the Privy Council (The Lord Chancellor, and Lords Macnaghten, and Davey, and Sir A. Wilson) say: "It is quite true that the condition imposed by section 66 of the lighting order is not repeated in the license. It appears to their Lordships, however, impossible to infer from this circumstance that in connection with one of the two main purposes for which electricity was required by the appellants they are, by implication, relieved from any obligation imposed by a contemporaneous instrument, and accepted by them as applying to the production of electricity for every purpose, motive power, as well as lighting and heating."

LEAVE TO APPEAL—SPECIAL TERMS IMPOSED.

Commissioners of Taxation v. *Mooney* (1907) A.C. 342 deserves attention as illustrating the special conditions which may be imposed on granting special leave to appeal to His Majesty in Council. By an Australian statute, for the purpose

of taxation, persons are required, if called on by the proper authority, to make a return of their income, and in default of making a return, the municipal authority may make a default assessment which is to be conclusive. The respondent had failed to make a return of his income when called on, and the plaintiffs had assessed him in default of such return, on which he was taxed £225, which amount the action was brought to recover. The Court below had held that the default assessment was not conclusive, and it was against this judgment that leave to appeal was given. The Judicial Committee, although allowing the appeal, and holding the respondent legally liable for the taxes so assessed, yet made it a condition of their judgment allowing the appeal, that the plaintiffs' judgment should be reduced to a nominal sum, and that they should pay the respondent's costs of the appeal as between solicitor and client.

JUSTICES—QUARTER SESSIONS—JURISDICTION OF HIGH COURT—PRACTICE—STATED CASE—DECISION OF JUSTICES FINAL.

In *Kydd* v. *Watch Committee of Liverpool* (1907) 3 K.B. 591, a statute provided that in certain cases specified the party aggrieved might appeal from the decision of a police board to the Court of Quarter Sessions, whose decision should be final. On such an appeal being brought the Recorder decided in favour of the appellant, but gave his decision in the form of a special case. The Divisional Court (Lord Alverstone, C.J., and Darling and Phillimore, JJ.) held, that there was no jurisdiction to entertain the case, relying on *Westminister* v. *Gordon Hotels* (1907) 1 K.B. 910, but the Court of Appeal (Williams, Moulton, and Buckley, L.JJ.) considered that the case was not governed by that decision which was the case of a case stated by magistrates, which they considered differed from a case stated by quarter sessions and governed by a different statute, and they therefore reversed the decision of the Divisional Court.

WATER—SUPPLY FOR DOMESTIC PURPOSES—WATER FOR WASHING MOTOR CAR USED IN BUSINESS.

In *Harrisgate* v. *Mackay* (1907) 2 K.B. 611, on a case stated by justices, a Divisional Court (Lord Alverstone, C.J., and Darling, and Lawrence, JJ.) held that water supplied to and used by a medical man for washing a motor car used in the practice of his profession, was water supplied for "domestic purposes" within the meaning of a statute.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] LOGAN *v.* LEE. [Oct. 3.

Evidence—Provincial laws in Canada—Judicial notice by Supreme Court of Canada—R.S.C. (1906) *c.* 145, *s.* 17.

As an appellate tribunal for the Dominion of Canada, the Supreme Court of Canada requires no evidence of the laws in force in any of the provinces or territories of Canada. It is bound to take judicial notice of the statutory or other laws prevailing in every province or territory in Canada, even where they may not have been proved in the courts below, or although the view of the judges of the Supreme Court of Canada may differ from the evidence adduced on those points in the courts below. *Cooper* v. *Cooper*, 13 App. Cas. 88, followed.

Atwater, K.C. and *Duff*, for appellant. *Lafleur*, K.C. and *Paget Aylmer*, for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX *v.* ARMSTRONG. [Sept. 23.

Criminal procedure—Evidence of girl under 14*—Understanding the nature of an oath.*

Upon a stated case the question was whether a girl under the age of 14 years appeared sufficiently to understand the nature of an oath to justify the magistrate in receiving her

testimony under oath. The magistrate st ted that having examined the girl regarding her knowledge of the nature of an oath he found that she did understand it, and there was nothing in her answers, as reported, to questions addressed to her by the magistrate and counsel, to indicate that she did not understand. It appeared that she had been attending school and the handwriting of her signature to the depositions was good.

Held, that there is no good reason for saying that the magistrate was wrong in receiving the girl's evidence under oath, and the fact that she had been instructed on the subject a few days before the trial afforded no sufficient ground for holding that her testimony was not to be admitted under oath.

W. G. Wilson and *F. M. Field*, for the accused. *Cartwright*, K.C., for the Crown.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P., MacMahon, J., Magee, J.] [Sept. 16.

HAMILTON *v.* HAMILTON, GRIMSBY, AND BEAMSVILLE ELECTRIC R.W. Co.

Costs—Taxation—Counsel fee—Trial or assessment of damages—Interlocutory judgment—Items 152, 153, *of tariff of costs.*

In an action for damages for personal injuries, the defendants entered no appearance and filed no statement of defence. Interlocutory judgment was not signed, and there was no admission of the liability of the defendants. Notice of assessment was served by the plaintiff by posting it up in the office of the Court. Both the plaintiff and defendants issued commissions and took evidence abroad, and the defendants obtained an order for the examination of the plaintiff by medical practitioners. On the opening of the case at the trial (or assessment) counsel for the defendants admitted that they did not intend to contest liability, and the only matter tried out was the quantum of damages.

Held, that the plaintiff was not limited, in taxing costs against the defendants, to the counsel fee mentioned in item

152 of the tariff as appropriate upon a mere assessment of damages, but was entitled to a counsel fee as upon a trial, as provided in item 153; the assessment referred to in item 152 being that which follows upon an interlocutory judgment.

Semble per MEREDITH, C.J.C.P., that the paragraphs which follow items 152 and 153 in the tariff are intended to give the taxing officer a discretion to increase the fee for the brief both for the assessment of damages and for the trial.

Order of FALCONBRIDGE, C.J.K.B., affirmed.

Gauld, for defendants. *Duff*, for plaintiff.

Meredith, C.J.C.P., MacMahon, J., Magee, J.] [Sept. 17.

LOUDEN MANUFACTURING COMPANY *v.* MILMINE.

Infant—Action against, for price of goods—Acknowledgment—Ratification—Repudiation—Liability for value of goods—Amendment—Costs.

Held, affirming the judgment of RIDDELL, J., 14 O.L.R. 532, that the letter relied upon by the plaintiffs as a ratification, after majority, of the defendant's contract made when he was an infant, was not sufficient; but, in this reversing the judgment, that the defendant was liable for the value of the goods which he had in possession at the time he repudiated the contract; and the plaintiffs were allowed to amend by setting up an alternative claim for such value, and to enter judgment for the amount thereof without costs.

McKinnon, for plaintiffs. *Farmer*, for defendant.

Cartwright, Master.] [Oct. 1.

COATES *v.* THE KING.

Petition of right—Amendment—Consent of Crown.

Held, on an application by the suppliants for leave to amend the petition of right under rule 929, that the rules as to amend-

ments do not apply, as the Court has no power to amend a petition of right without the consent of the Crown and that any proposed amendment must be first submitted to the Lieutenant-Governor and approved of by him.

F. Aylesworth, for suppliant. *N. Ferrars Davidson*, for the Crown.

Mulock, C.J. Ex., Anglin, J., Clute, J.] [Oct. 4.

RE VILLAGE OF NEWBURGH AND COUNTY OF LENNOX AND ADDINGTON.

Municipal law—Liability of county for maintenance of bridge.

Appeal by the county from the judgment of the county judge who found that the county was required to build and maintain certain bridges crossing the Napanee River in the Village of Newburgh. The river in question, where it passes through the Village of Newburgh, divides into two channels, which re-unite, enclosing an island. These two channels at that point constitute the river. The river is more than 100 feet in width above and below the island. The road, which it is admitted, is a highway leading through the county, passes over these channels by bridges. The channel crossed by one bridge is 38 feet in width, and the channel crossed by the other bridge is 80 feet in width. The island contains 5 or 6 acres. The question was, whether, under the Act, the county council had exclusive jurisdiction over these bridges. The statute declares that the county council shall have exclusive jurisdiction over all bridges crossing streams or rivers over 100 feet in width.

Held, that the statute has reference to the width of the river, and not to the length of the bridge. The two channels of the river being together, admittedly over 100 feet in width at the place where it is crossed by the bridges in question, the matter is concluded. The case is one clearly within the purview of the statute. See *Regina* v. *County of Carleton*, 1 O.R. 277.

McIntyre, K.C., for appellants. *Whiting*, K.C., for village corporation.

Falconbridge, C.J.K.B., Britton, J., Riddell, J.] [Oct. 4.

MAXON *v.* IRWIN.

Bills and notes—Alteration—Word "renewal" in margin erased —Bills of Exchange Act, s. 145.

Action in a Division Court, County of Essex, on a promissory note which had been altered by erasing the word "renewal" in the margin. Appeal to a Divisional Court.

Held that as the note was in the hands of a holder in due course the plaintiff should recover under s. 145 of Bills of Exchange Act.

Per FALCONBRIDGE, C.J.K.B.:—The alteration in the note was material: *Pigot's Case*, 11 Co. 27; *Master* v. *Miller*, 4 T.R. 320; *Davidson* v. *Cooper*, 13 M. & W. 343; *Suffell* v. *Bank of England*, 9 Q.B.D. 555; *Knill* v. *Williams*, 10 East 431; *Garrard* v. *Lewis*, 10 Q.B.D. 30. But the alteration was not apparent: *Leeds Bank* v. *Walker*, 11 Q.B.D. 84; *Scholfield* v. *Earl of Londesborough* (1896) A.C. 514; *Cunnington* v. *Peterson*, 29 O.R. 346.

J. H. Rodd, for plaintiffs. *Clarke*, K.C., for defendant.

Riddell, J.] KING *v.* BARTELS. [Oct. 5.

Habeas corpus—Escape of prisoner—Recapture—Issue of writ.

If a prisoner who has applied for a writ of habeas corpus, escape after the issue of such writ and pending the argument upon its return, and thus himself puts an end to the detention, he thereby waives all right which he might have had under the writ, and no order can be afterwards made for his release.

If, however, in such a case he be recaptured or surrender himself again into custody the Court is precluded from granting him another writ of habeas corpus under proper circumstances.

Dewart, K.C. and *Sommerville*, for prisoner. *T. D. Cowper*, for the State of New York.

Boyd, C., Maclaren, J.A., Mabee, J.] [Oct. 22.

McCLELLAN *v.* POWASSAN LUMBER COMPANY.

Way — Private way — Easement — Extinguishment by unity of ownership—Revival on severance—Implied reservation—Land Titles Act.

Unity of ownership or seisin in fee extinguishes all pre-existing easements or private rights of way over one part of the land for the accommodation of another part; and an easement so extinguished can only be revived by a fresh grant, and then the right granted is of a new thing; the severance again of the land in respect of which an easement formerly existed over one part for the benefit of the other does not *per se* revive the extinguished easement, if the dominant part is first granted and the servient part retained by the owner who made the severance. *Wheeldon* v. *Burrows*, 12 Ch.D. 31, followed.

Previous to 1891 two adjoining parcels of land, known as the grist mill property and the saw mill property, were in different holders, and there was on the land, well defined on the ground, a road leading from the highway to the grist mill over a part of the saw mill property. In 1891 the two properties became united in the same owners, who, in 1894, conveyed all the land, excepting certain lots, on one of which stood the grist mill. In the document of transfer there were no words to indicate that any right of way over the rest of the land conveyed was also excepted. The grist mill property was afterwards conveyed to the plaintiff, who claimed the right to use the road over the saw mill property as marked upon the ground:—

Held, that when the transfer of 1894 was made, the road was not a subsisting easement or right of way, though it was marked upon the ground as a former right of way, which continued to be used for the convenience of the owner of the whole property after he became such owner; failing an express reservation in the transfer of 1894, none was to be implied; and the fact that the title to all the lands in question had been brought under the Land Titles Act made no difference, there being nothing in the provisions of section 26 or other sections to affect the result in the plaintiff's favour; Mabee, J., dissenting.

Judgment of Teetzel, J., reversed.

Armour, K.C., and *J. McCurry*, for defendants. *Laidlaw*, K.C., for plaintiff.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] SLATER *v.* RYAN. [Oct. 1.

Trade name—Imitation—Defendant using his own name—Injunction.

Appeal from judgment of Mathers, J., noted ante, p. 293.

The Court, while expressing the opinion that the advertisement, in the form in which it had appeared, would, if persisted in, have meant an infringement of the plaintiffs' trade name, held, that the appeal should be dismissed on the ground that the action had been commenced before any complaint was made and sixteen days after the defendant had, of his own accord, withdrawn the advertisement, and that it had not been inserted by the defendant himself, but by his advertising agent, and that the defendant had withdrawn it as soon as it came to his knowledge. Under such circumstances the discretion the trial judge had exercised in refusing an injunction should not be disturbed.

No costs of the appeal to either party.

Hoskin, for plaintiffs. *Aikins*, K.C., for defendant.

Full Court.] THE KING *v.* EDWARDS. [Oct. 8.

Criminal law—Criminal Code s. 386—*Summary trial by police magistrate under s.* 777—*Punishment—Previous conviction as ground for increasing term of imprisonment.*

The prisoner elected to be tried summarily before the police magistrate of the City of Winnipeg and pleaded guilty of theft of a sum exceeding two hundred dollars. The magistrate then asked him if he had been previously convicted of theft and he admitted that he had, whereupon the magistrate sentenced him to ten years' imprisonment in the penitentiary. There was no reference to such former conviction in the information upon

which the prisoner had been arrested. The prisoner then, pursuant to sub-s. 2 of s. 1016 of the Code, moved the Court of Appeal to pass a proper sentence, alleging that the sentence of ten years was one which could not by law be passed.

Held, by analogy to the procedure on indictments, the magistrate had no right to take the previous conviction into account, as it had not been referred to in the information, and the Court of Appeal could now pass what it considered should be a proper sentence. That, when there has been no reference to a previous conviction in an indictment or information, neither a magistrate nor a judge, in considering what sentence, within the ordinary maximum, he should impose upon a convicted prisoner, can properly take into account any previous convictions or allow the Crown prosecutor to give any proof of them.

The prisoner was then asked whether he had anything to say why sentence should not be passed upon him according to law. In addressing the Court in reply the prisoner admitted the previous conviction referred to, but said that he had received a full pardon very shortly afterwards. The Court then intimated that the sentence should be as upon the first offence only, and sentenced the prisoner to two years' imprisonment in the penitentiary.

Patterson, for the Crown. *Potts* and *Bonnar*, for the prisoner.

KING'S BENCH.

Richards, J.] CALLOWAY v. PLATT. [August 29.

Title—Evidence required to prove adverse possession—Claim set up by wife living with husband—Amendment to aid claimant.

This was an issue directed to be tried under the Real Property Act, R.S.M. 1902, c. 148, to determine whether the plaintiff had acquired title to the lots in question by ten years' adverse possession under R.S.M. 1902, c. 100, as against the defendants who had the paper title. The evidence of the plaintiff and her family went to shew exclusive possession of the property by

either the plaintiff, her husband, or tenants under leases, for over twenty years. The lots were part of a field which was surrounded by a fence placed there by a former owner of the field prior to the twenty years and before the plaintiff and her husband had begun to exercise any acts of adverse possession. The plaintiff had in 1882 acquired title to three of the lots and to a dwelling thereon and she and her family had lived in that house until 1891 when it was destroyed by fire. They rebuilt on the three lots in 1900 and lived there again from that time onwards. The plaintiff's husband had from time to time made slight repairs to the fence referred to. The taxes had been paid by the defendants or their testator. There was very little evidence outside of that of the plaintiff and her husband and other members of the family to corroborate their statements as to the alleged possession.

Held, 1. A party asserting a title to land by adverse possession should prove it most clearly. Although there is no statutory requirement that the evidence of such parties and of the members of their families must be corroborated, unless such evidence appears to be correct beyond reasonable doubt, it would be unsafe to hold that a title by possession has been gained in the absence of strong additional evidence of disinterested witnesses; and the evidence in this case was not sufficient for that purpose.

2. Permission should not be given, even if the judge had power to allow it, to amend the issue by setting up that the husband had acquired a title by possession and had given the plaintiff a quit claim deed of the property, for no one claiming a title by length of possession is entitled to any such indulgence from the Court.

Sanders v. *Sanders*, 19 Ch.D. 373, distinguished.

Hough, K.C., and *Robson*, for plaintiff. *Machray*, and *Dennistoun* for defendants.

Mathers, J.] CAMPBELL v. IMPERIAL LOAN CO. [Sept. 14.

Mortgagor and mortgagee—Redemption—Real Property Limitation Act—Constructive possession by mortgagee of vacant land—Acknowledgment to prevent statutory bar.

Action for redemption of a mortgage in fee of the lands in question given by plaintiffs' predecessor in title. The mortgage

became in default Jan. 1, 1892. The land was vacant, and by the terms of the mortgage the mortgagor's right to possession ceased upon default, but the mortgagees had not taken actual possession.

Held, following *Rutherford* v. *Mitchell*, 15 M.R. 390, that the mortgagees should be deemed to have "obtained possession" of the land within the meaning of section R.S.M. 1902, c. 100, s. 20, at the time of the default, and that the right to redeem was barred in ten years from that time.

Held, also, that the posting up on the lands, in September, 1903, of a notice of exercising the power of sale contained in the mortgage, even if it could be treated as "an acknowledgment in writing of the title of the mortgagor or of his right to redemption" within the meaning of the same section, would not have the effect of reviving the plaintiff's title or right to redeem which had already been barred. *Show* v. *Colter*, 11 O.R. 630.

A. J. Andrews and *Burbidge*, for plaintiff. *Aikins*, K.C., *Haggart*, K.C., *Caldwell*, K.C., *Kilgour*, and *Sullivan*, for respective defendants.

Mathers, J.] CHATWIN v. ROSEDALE. [Sept. 14.

Municipality—Construction of drain causing damage to plaintiff's land.

In 1893 the council of the defendant municipality caused the construction of a ditch and breakwater which diverted large quantities of water from a creek called Snake Creek into a smaller creek called Eden Creek, running through plaintiff's land. The capacity of Eden Creek was in some years not sufficient to carry the additional load thus put upon it, and in 1902 and in 1904, it overflowed and flooded plaintiff's land. This would not have happened but for the ditch and breakwater referred to.

Held, that the municipality was liable for the damages thus suffered by the plaintiff which were fixed by the judge at $400.

Wilson, and *Davis*, for plaintiff. *Haggart*, K.C., and *Howden*, for defendant.

Mathers, J.] EMERSON v. WRIGHT. [Sept. 14.

Costs—Charges of fraud not proved—Apportionment of costs when some issues proved.

Re-argument by consent of the question of the costs of the action. See note of this case, *ante* p. 378.

MATHERS, J.:—Further argument has convinced me that in depriving the plaintiffs of all costs I did them an injustice. The statement of claim does contain a number of damaging allegations which the plaintiffs made no attempt to prove and which I am satisfied were unfounded, but they did succeed in establishing some of the issues raised. It would be unfair to make the defendant pay all the costs, and at the same time it would be unfair to deprive the plaintiffs of the costs of the issues on which they succeeded. *Pocock* v. *Reddington*, 5 Ves. 800, is an authority for apportioning the costs under such circumstances. In my opinion justice will be done by allowing the plaintiffs one-half the costs of suit up to and including the trial, and I therefore vary my former judgment accordingly.

Minty, for plaintiffs. *Laird*, for defendant.

Mathers, J.] WINTHROP *v.* ROBERTS. [Sept. 14.

Mortgagor and mortgagee—Redemption—Deed absolute in form but intended as security only—Acknowledgment obtained from mortgagor by duress.

The plaintiff, having squatted on the land in question which belonged to a railway company, applied in 1899 to purchase it, and the company agreed to sell it to him at $3.00 per acre, allowing him to remain in possession. Being indebted to the defendant under a chattel mortgage which the latter was about to foreclose, and having made no payment on the land, the plaintiff, in 1901, gave him a quit claim deed of the land as a security for the debt. Subsequently, the defendant filed the quit claim deed with the company and made payments to it from time to time until Feb. 4, 1903, when he paid the company in full. Prior to this last payment, the plaintiff, at the instigation of the defendant, applied to a mortgage company for a loan of $1,000 for the purpose of paying off the defendant and the loan was accepted at $900. The defendant claimed that the amount due to him was $930, and the plaintiff paid the odd

$30 and the costs of the loan in cash to the solicitor who was acting for defendant. The plaintiff then gave the defendant an order on the loan company for the whole proceeds of the loan, and when paid the land was to be conveyed by the defendant to the plaintiff's wife. The loan was delayed several months waiting for the patent from the Crown, and when it did arrive the defendant demanded a further sum to cover interest on his claim in the meantime. The additional sum was not paid and a short time afterwards the defendant notified the plaintiff that if he wanted the farm he would now have to pay $2,000 for it. In November, 1903, the plaintiff went to the defendant's office and received from him a letter written by the defendant, addressed to the plaintiff's wife, offering to sell the farm to her upon certain conditions for $2,000, and the defendant, at the same time, procured the plaintiff to sign a letter agreeing to leave the place and all his improvements if the option to purchase was not exercised before the first day of November, 1904. When this last letter was signed, the plaintiff was told by the defendant that he must do so or leave the place.

Held, that this transaction was, on its face, most unfair, and extortionate and having been obtained by duress, could not be allowed to stand in the way of the plaintiff's right to redeem, which, before it was entered into, was clear upon the evidence that the quit claim deed he had given was only intended as a security.

Ford v. *Olden*, L.R. 3 Eq. at p. 463, followed.

Judgment for redemption with costs as defendant had disputed the right to redeem.

Haggart, K.C., for plaintiff. *Wilson* and *Haffner*, for defendant.

Province of British Columbia.

SUPREME COURT.

Morrison, J.] [Aug. 1.

CHINESE EMPIRE REFORM ASSOCIATION *v.* CHINESE DAILY NEWSPAPER PUBLISHING CO.

Company—Non-trading corporation created under the Benevolent Societies Act, R.S.B.C., 1897, *c.* 13—*Libel of.*

A non-trading corporation, having the right to acquire pro-

perty which may be the source of income or revenue, the transaction of the business incidental thereto creates a reputation, rights and interests similar to those of an individual or a trading corporation, and must have the same protection and immunities, and be given the same remedies, in case of injury as a trading corporation.

Davis, K.C., for plaintiffs. *Sir C. H. Tupper*, K.C., and *Boak*, for defendants.

Full Court.] [Aug. 1.

NORTHERN COUNTIES INVESTMENT TRUST *v.* CANADIAN PACIFIC RY. CO.

Railways—General and special legislation—Dominion and Provincial—Damages caused by sparks from engine—Negligence—Limitation of action—"By reason of the railway."

In an action for damages caused by sparks from a railway engine, the railway company claimed the benefit of s. 27 of Con. Railway Act, 1879, which was incorporated into their charter by Parliament. Sec. 27 provides in part that all suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months next after the time of such supposed damage sustained.

Held, on appeal (IRVING, J., dissentiente) that by virtue of section 20 of the Interpretation Act (Dominion) the Railway Act, 1903, governs the Canadian Pacific Railway Company.

Mc[illegible]in, K.C., for appellant (plaintiff company). *Davis*, K.C., and *McMullen*, for respondent (defendant railway company).

Clement, J.] REYNOLDS *v.* [illegible]IL. [Sept. 21.

Practice—Stay of execution pending appeal to Full Court—Security for costs.

On a motion for a stay of execution pending an appeal to the Full Court on giving security for the amount of the judgment debt,

Held, that under order 58, rule 16 of the Supreme Court Rules, 1906, the granting of a stay of execution pending an appeal is a matter of discretion to be exercised upon the facts of each particular case.

A. D. Taylor, for the motion. *J. A. Russell*, contra.

Book Reviews.

The Law relating to Covenants in Restraint of Trade, Second Edition, by J. B. Mathews, and H. M. Adler, M.A., LL.M., Barristers-at-law. London: Sweet & Maxwell, Limited, 3 Chancery Lane, 1907.

This book contains a consideration of all the cases worth referring to in connection with the above subject since the *Maxim-Nordenfeldt case*, decided in 1894, which somewhat crystalized the nebulous and uncertain law relating to restraint of trade. The last case noted is the very recent one of *Dottridge Brothers* v. *Crook*, reported in the *Times* of June 22, 1907. After discussing the subject under various appropriate headings the author gives, by way of a digest, a collection of all the cases decided from the date of *Mitchell* v. *Reynolds*, 1 P. Wms. 181, 1 Sm. L.C. 11th ed., 406, to the present time, with occasional notes. Both editors and publishers have done excellent work in this volume.

The Principles of Mercantile Law, by JOSHUA SLATER, of Gray's Inn, Barrister-at-law. Third Edition, London: Stevens & Haynes, 13 Bell Yard, Temple Bar, 1907.

A useful summary of the leading features of mercantile law prepared for the use of beginners and for those of the general public who desire elementary information on this vast subject. Some of the latter may possibly learn enough from this book to think that they are competent to do their own business. A probable want of success in that endeavour will bring grist to the legal mill. However, Mr. Slater has done his best within the compass of 292 pages, at the cost of 6s. 6d.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Hon. Auguste Tessier, of Quebec, to be puisne judge of th Supreme Court of the Province of Quebec in the room of Mr. Justice Larue, retired. (Oct. 11, 1907.)

Frederick W. Howay, of New Westminster, B.C., barrister-at-law, to be judge of the County Court of New Westminster, in the room of his Hon. W. N. Bole, resigned. (Oct. 14, 1907.)