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## *THE DEFENCE OF INSANITY IN MURDER CASES—DEMENTIA AMERICANA.*

"The long nightmare of the Thaw trial" as it has been aptly called, has at length come to a close, and it is to be hoped that the daily papers will no longer be filled with the nauseating details of the case. Three months of time and hundreds of thousands of dollars have been spent without producing, so far as at present appears, any notable contribution to the elucidation of the knotty problems connected with the defence of insanity in murder cases. The trial will probably be longest remembered for the cynical boldness with which the counsel for the defence, after spending weeks in the examination of medical experts, and expressly disclaiming the intention of resting his case upon anything but the "written law," chose in the closing sentences of his long and impassioned address to the jury, practically to change his plea to one of justification, defining his client's insanity as a species, which though it may be unknown to "learned alienists," "has been recognized in every court in every State in this Union from the Canadian border to the Gulf of Texas." "It is," he tells the jury, "the species of insanity which if you desire to give it a name, I will ask you to label it 'dementia Americana'."

It is unnecessary to state in detail how the orator imported by the defence from the Pacific slope proceeded to elaborate his definition, the general scope of which may be gathered from the astounding peroration in which he spoke of his client as being "an instrument in the hands of Providence," and with that lack of good taste and reverence which are everywhere conspicuous in his address compared him to Jonathan who wrought "great salvation in Israel!"

The counsel for the prosecution, as might have been expected, commented in very severe and sarcastic terms upon this extra-

ordinary plea, which, he said, had "no status east of the Mississippi." Jury addresses, however interesting to the public and effective for their special purpose, have not in general much value from a purely legal standpoint, and we only refer to the matter in order to point out that the law of the State of New York, as laid down by the presiding judge in his careful charge to the jury, appears to be very much in line with our own, on this confessedly difficult subject. Judge Fitzgerald evidently looks upon "dementia Americana" very much as a Canadian judge would regard a plea of "dementia Canadensis" in a similar case. It may be noticed also that the theory of the medical experts for the defence, who speak of an insanity described as "brain storm" or irresistible impulse, inciting to, and excusing homicide, receives as little countenance from the New York judge as it would in a Canadian tribunal. In fact the legal principles laid down in the charge are practically identical with those formulated in the provisions of the Canadian Criminal Code, the 11th section (sub-s. 1) of which reads as follows: "No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such act or omission was wrong." With this may be compared the following paragraph of the judge's charge: "The so-called irresistible impulse has no place in the law, and is not an excuse, nor is every person of disordered mind excused. As the burden of proof of insanity is on the defendant, he is also entitled to every reasonable doubt on the subject. If the defendant knew the nature or the quality of his act, or knew that the act was wrong, then he committed a crime."

The doctrines of the remaining sub-sections of s. 11 of the Canadian Code, asserting the legal presumption of sanity, and limiting the extent to which a specific delusion will excuse a man who is otherwise sane, were also referred to in the charge as being part and parcel of the American law.

As is well known, these provisions of the Canadian Code

are based upon what must be still regarded, in spite of much adverse comment, as the most authoritative exposition of the English law upon this subject, viz., the answers of the judges to the questions put to them by the House of Lords in *McNaghten's Case* (1843) 4 St. Tr. N.S. 847, from which we would make the following quotation as being particularly relevant to the case which has so exercised the minds of our neighbours during the past three months: "Notwithstanding the person accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime, that he was acting contrary to law; by which expression we mean the law of the land."

This dictum of the English judges is of special interest to Canadians, as on its application chiefly turned the fate of the accused in the celebrated case of *R.* v. *Riel* (1885) 1 Terr. R. 23. In that case it was argued with great skill and persistence by the present Chief Justice of Canada and the counsel associated with him in the defence of the unfortunate leader in the North-West Rebellion, that his treasonable acts were excused by insane delusions to which he was said to be subject, nor was there lacking the element of difference in opinion among the medical experts called as witnesses, which has been so prominent a feature in the Thaw case and others of the same kind. The opinions of the Canadian judges before whom the case came on appeal contain a very full and instructive discussion of the law as it then stood, which as already stated is very much the same as it is to-day under the Code.

It should be remarked, even in so slight a discussion as this, of a subject so vast and complex as the criminal responsibility of the insane, that the doctrines of the judges in *McNaghten's Case* have been vigorously assailed as being at all events incomplete in their scope, and it must be admitted that they seem to deal too exclusively with what may be called mental or intellect-

ual insanity, and to take little or no account of that equally real, and still more terrible form of the disease to which the name of "moral insanity" has sometimes been given. There is undoubtedly much force in what is alleged by a well-known authority on mental disease, when he says that "no one who has had much to do practically with insanity has the least doubt that a person labouring under it is constrained sometimes by his disease to do what he knows to be wrong having perhaps gone through unspeakable agony in his efforts to withstand the morbid impulse before he yielded to it at the last." It is obviously, however, difficult, if not impossible, to give legal form by statute or otherwise to considerations of this kind, to which, moreover, the common sense and humanity of judges and juries, and the application of the principle that the accused person is entitled to the benefit of any reasonable doubt, will as a general thing be found to allow the weight to which they are fairly entitled.

GOODWIN GIBSON.

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## *IMPUTED NEGLIGENCE.*

The doctrine of Identification in Negligence was first laid down in 1849, in the well-known case of *Tarogood* v. *Bryan*, 8 C.B. 115. Although unfavourably commented upon, on different occasions, it was followed, in 1875, in the case of *Armstrong* v. *L. & Y. Railway Co.*, L.R. 10 Ex. 47, and finally over-ruled, in 1888, in the leading case of Mills v. Armstrong, L.R. 13 App. Cas. p. 1, better known as the "Bernina" case. Lord Watson, in his judgment, at page 18, says: "I am of opinion that there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified to any extent whatever with his negligence. He is the servant of the owner, not their servant: he does not look to them for orders, and they have no right to interfere with his conduct of the vehicle except, perhaps, the right of remonstrance.

when he is doing, or threatens to do, something that is wrong and inconsistent with their safety. Practically they have no greater measure of control over his actions than the passenger in a railway train has over the conduct of the engine-driver. I am, therefore, unable to assent to the principle upon which the case of *Thorogood* v. *Bryan* rests. In my opinion an ordinary passenger by an omnibus, or by a ship, is not affected, either in a question with contributory wrongdoers or with innocent third parties, by the negligence, in the one case, of the driver, and in the other of the master and crew by whom the ship is navigated, unless he actually assumes control over their actions, and thereby occasions mischief. In that case, he must, of course, be responsible for the consequences of his interference. Counsel for the appellants endeavoured to support *Thorogood* v. *Bryan* upon a totally different principle from that assigned by the learned judges who decided the case. They argued alternatively that the maxim 'respondeat superior' does not apply; and that passengers are affected by the wrongful acts of the driver, not because he is in any sense their servant, or subject to their control, but by reason of their being for the time under his dominion."

This doctrine of "identification" in negligence has been called the most curious instance that exists in the history of judge made law. The doctrine of "imputed" negligence has been termed a remnant of "identification" in negligence. Imputed negligence briefly expressed means, that the negligence of a person, to whose care a child is properly committed, is imputed by a fiction of law to the child as its own negligence, since the latter is incapable of either diligence or negligence. Or in other words, contributory negligence by the guardian or custodian of a child, without which the accident would not have happened, debars the child from recovering damages for injury sustained by the alleged negligence of a third party. The doctrine of imputed negligence dates from the case of *Waite* v. *North Eastern Railway Co.* (1858), E.B. & E. p. 719, and affirmed in the Court of Exchequer Chamber, E.B. & E. p. 728.

The facts of this case were simply these. The plaintiff, an infant of five years, was in the care of its grandmother. By the alleged negligence of the railway company the child was severely injured and its grandmother killed. The jury, in answer to questions put to them by the learned trial judge, Martin, B., found the defendants were guilty of negligence, also the grandmother of the child was guilty of negligence which contributed to the accident, and assessed the damages at £20. There was no negligence, nor was any suggested, on the part of the infant plaintiff. The judge on these findings directed a verdict to be entered for the plaintiff for the damages assessed, with leave to the defendants to move to enter a verdict for them or for a non-suit. Lord Campbell, in delivering the judgment of the Court of Queen's Bench on appeal, said: "In this case we think that the rule ought to be made absolute for entering a verdict for the defendants, or for a nonsuit. The jury must be taken to have found that Mrs. Park, the grandmother of the infant plaintiff, in whose care he was when the accident happened, was guilty of negligence without which the accident would not have happened; and that, notwithstanding the negligence of the defendants, if she had acted upon this occasion with ordinary caution and prudence, neither she herself nor the infant would have suffered. Under such circumstances had she survived, she could not have maintained any action against the company; and we think that the infant is so identified with her that the action in his name cannot be maintained. The relation of master and servant certainly did not subsist between the grandchild and the grandmother; and she cannot, in any sense, be considered his agent; but we think that the defendants, in furnishing the ticket to the one and the half ticket for the other, did not incur a greater liability towards the grandchild than towards the grandmother, and that she, the contracting party, must be implied to have promised that ordinary care should be taken of the grandchild."

The judgment of the Court of Queen's Bench was sustained on appeal in the Court of Exchequer Chamber. Most of the

judges on appeal put the case on the ground, that it was not a mere case of simple wrong, but one arising from the contract of the grandmother, on the part of the plaintiff, that the child was to be conveyed subject to due and proper care on the part of the person having it in charge. Williams, J., however, did not rely merely upon an implied contract, but emphatically laid down the rule, that the person who had the charge of the child was identified with it, illustrating his view of the case in the following terms: "If a father drives a carriage in which his infant child is, in such a way that it incurs an accident which by the exercise of reasonable care he might have avoided, it would be strange to say, that, though he himself could not maintain an action, his child could."

The doctrine has been received with disfavour in many of the States in the American Union. Fully one-half of the American Courts have repudiated it altogether. In the State of New Jersey, in 1890, it was held, in the case of *Newman* v. *Phillipsburg Horse Car Ry. Co.*, that the negligence of the sister could not be imputed to an infant so as to defeat the right of action arising from the negligence of the company when the plaintiff, a child of two years, was in the custody of a sister of twenty-two and when, by the negligence of the latter, the child got on the track of the defendant company and was run over by a horse car, the driver at the time being occupied with the collection of tickets.

The rule of imputed negligence, as laid down in English cases, does not extend beyond the class of cases, in which the parent or custodian is actually present and exercising control over the movements of the child.

In some of the States of the Union, however, the doctrine has been carried to the extent of preventing the recovery of damages by an infant for injury sustained by the negligence of a third party, on the ground of the imputed negligence of the parent or custodian of the infant in allowing it to go on the street unattended. Such was the decision of the Court of Massachusetts, in 1862, in *Wright* v. *Malden and Melrose Railroad Co.*, 4 Allen,

p. 283. A child two years old, passing unattended across Sudbury Street, Boston, was run over by a car of the defendant company, whereby his leg was broken and other injuries sustained, from the effects of which he subsequently died. An action of tort was brought to recover damages for said injuries to the plaintiff's intestate. The ground of alleged negligence on the part of the company was, that the car, when the accident occurred, was being driven at a rate of speed unauthorized by law. On behalf of the company it was contended, the negligence of a parent in permitting a child of so tender an age to go on a public street unattended was imputed to the child as its negligence and under the rule such contributory negligence as would debar the right of recovery. Under the direction of the trial judge the jury returned a verdict for plaintiff. Exceptions having been filed to the judge's charge, Mr. Justice Hoar, in delivering the judgment of the Court on appeal, defined the law in these words: "We think the fact that a child of two years old in passing unattended across a public street, in a city traversed by a horse railroad, is in and of itself, necessarily, prima facie evidence of neglect in those who have it in charge. But in and of itself, standing alone, unexplained and unaccounted for, it is sufficient to authorize a jury to find that the child was not properly taken care of, and to entitle the defendants to a verdict."

The rule in the State of New York is as broad as that laid down in Massachusetts. Mason, J., in *Mangam* v. *Brooklyn Railroad Co.*, 38 N.Y., pp. 455, 459, says: "This rule applies to infants, in their relations to society, who are of such tender age that they are incapable of self-control and personal protection. An infant in its first years is not sui juris. It belongs to another to whom discretion in the care of its person is exclusively confided. The custody of the infant of tender years is confided by law to its parents, or those standing in loco parentis; and not having that discretion necessary for personal protection, the parent is held, in law, to exercise it for him, and in cases of personal injuries received from the negligence of others the law imputes to the infant the negligence of the parent. The infant

being non sui juris, and having a keeper, in law, to whose discretion in the care of his person he is confided, his acts, as regards third persons, must be held, in law, the acts of the infant; his negligence, the negligence of the infant."

Under the rule both in New York and Massachusetts great difficulty has arisen in defining the age at which a child becomes subject to the rule of imputed negligence, and also in defining the age at which it will be deemed negligence on the part of a parent to suffer the child to go abroad unattended or attended only by a very young person. It seems to be a mixed question of law and fact, and as a consequence great diversity of opinion exists as to the limit.

In *Robinson* v. *Cone*, 22 Vermont, p. 213, the Court held a directly opposite view in these words: "We are satisfied that, although a child or idiot or lunatic may to some extent have escaped into the highway, through the fault or negligence of his keeper, and so be improperly there, yet if he is hurt by the negligence of the defendant, he is not precluded from his redress. If one know that such a person is on the highway, or on a railway, he is bound to a proportionate degree of watchfulness, and what would be but ordinary neglect in regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger."

In some of the States of the Union a distinction is drawn between a case, brought by the parent to recover damages for he technical loss of service of the child, and an action brought by the child to recover damages, in its own behalf, for injuries sustained by the negligence of defendant. The distinction between the two cases is illustrated in two Ohio decisions. A child brought an action in its own behalf for injuries sustained, and the Court held, that the father's contributory negligence was no defence. The father brought another action for the same injuries to recover for loss of service, and the same Court held his contributory negligence to be a complete answer. See *Bellefontaine Ry. Co.* v. *Snyder, Jr.*, 18 Ohio 399 and *Bellefontaine Ry. Co.* v. *Snyder, Sr.*, 18 Ohio 670.

Sir Frederick Pollock holds, that in the case of a child not old enough to use ordinary care for its own safety, which from negligence on the part of its custodian is allowed to wander alone to a place of danger, the antecedent neglect of the one charged with its care makes no difference as to the legal result. He inclines to the view, that the defendant's duty is measured by his notice of special risk and his means of avoiding it. (1) defendant is liable, if so negligent, that an adult in the plaintiff's position could not have saved himself by reasonable care. (2) he is liable, if he is aware of plaintiff's helplessness, and fails to use such special precaution as is reasonably possible. He is not liable: (1) if he did not know, and could not with ordinary diligence have known, the plaintiff to be incapable of taking care of himself, and has used such diligence as would be sufficient towards an adult. (2 he is not liable if, being aware of the danger, he did use such additional caution as he reasonably could. (3) he is not liable if the facts were such that no additional caution was practicable, and there is no evidence of negligence according to the ordinary standard.

While there is no English case in which the negligence of the parent, in allowing a child to go unattended upon a public street or in a place of danger, has been imputed to the negligence of the child as such contributory negligence as would disentitle it to recover for injuries sustained through the negligence of a third party, the point was taken, in Scotland, in 1887, in *Martin* v. *Ward*, 14 Rettie 814. In this case two children, aged three and five respectively, were run over, the driver being negligent. In an action by the father it was contended, that his negligence contributed to the accident by allowing such young children to be in a place of danger without some one in charge of them. This was held to be no defence.

Mr. Beven inclines to the view, that in principle there is no reason why the child should be disentitled to recover for injuries sustained by the negligence of defendant, by reason of the parent's negligence in placing it or permitting it to be, in a position in whch it has sustained injury. He is of the further opin-

ion, that the reason why the point has not been taken directly, in any English case, arises from the fact that probably juries have taken the matter into their own hands in cases where the defendant has been negligent, and negatived the issue of contributory negligence.

SILAS ALWARD.

ST. JOHN, N.B.

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## *THE RAYNER AND THAW TRIALS.*

The trial of Horace George Rayner for the murder of Mr. Whiteley ended yesterday in the conviction of the prisoner, who was thereupon sentenced to death. The issue was simple, the case for the prosecution irresistible. The murder was committed in open day before more than one person, and the circumstances attending the crime were described with precision by eye-witnesses. The stories circulated as to the relationship between the prisoner and his victim were, to say the least, most doubtful. He was stated by his aunt not to be the son of Mr. Whiteley or in any way related to him. If her evidence was true the statement in the paper found on the prisoner, "William Whiteley is my father, and has brought upon himself and me a double fatality by reason of his refusals made personally," was a piece of clap-trap and a fiction, except so far as it admitted in effect an attempt to blackmail. The evidence of his aunt was that he was born in 1879, his mother being Emily Turner, a single woman, who was then living with a man named Rayner, and his birth was registered in the name of Rayner. The sister Louisa became afterwards Mr. Whiteley's mistress; and no doubt he came to know the other sister, but not, it was said, until the accused was four or five years old. It is true that the cross-examination of the counsel for the defence tended to throw doubts on the accuracy of some points in the witness's evidence. At all events, the trial revealed a disagreeable episode in the past life of Mr. Whiteley, but one which, if the prisoner's own ac-

count of it were correct, did not materially affect the character of the crime.

The one real question in the case was whether Rayner was insane at the time when he fired the shots. Insanity was the sole defence set up, and there was, as the Lord Chief Justice ruled, not a particle of evidence to support it. That Rayner was in desperate straits, that he had led a shiftless life and was at the end of his resources, that he was in perplexity how to live from day to day is true. His counsel spoke of him as a degenerate, and there was a suggestion that his mother, grandmother, and great-grandfather were of drunken habits. He was, it would seem, of no great capacity; and it is not improbable that he brooded much over the relationship of his aunt to Mr. Whiteley. But there can be no doubt that he went to Westbourne-grove with the deliberate intention—if he did not get money—of shooting Mr. Whiteley and of bringing about, to quote from the paper found upon him. "a double fatality." Neither lawyers nor doctors are in these days so confident as they once were as to the test of insanity. The subject is seen to be much more complex and obscure than it appeared to the judges who formulated the famous rule as to responsibility in *McNaughten's Case*. Psychologists and experts in mental diseases tell us that it assumes many forms; that in some the knowledge of right and wrong is dimmed, that in others the will is enfeebled; that some ideas possess so much influence that the subject of an overmastering obsession is powerless to resist, and that he is swept along to some crisis in which he is really passive. There was yesterday no such complex or obscure case before the jury. They were assured by doctors who examined him that he was not insane; and they had to judge of the conduct of one who, at war with extreme poverty, thought as a last resource to go to a well-known man of wealth and by threats of exposure of a scandal in his past life extort from him a sum of money. Rayner was prepared, if he met with a refusal, to shoot both Whiteley and himself. We get into a world of phantasy and break

away from elementary distinctions if we treat such conduct as necessarily indicative of insanity. Raynor was insane only in the sense in which those who mean to have money at all costs are insane. Fortunately English juries still cling to some simple fundamental ideas on this question, and English counsel have not learned, or disdain, the art of obscuring them.

The trial, one cannot help remarking, presents a remarkable contrast with that which has for weeks been going on in New York. The subject matter of the two inquiries has not a few points of strong resemblance. In both the affairs of a millionaire come before a jury. In both there is a question as to the relations of men of wealth and position with certain women. In both there was an opportunity for the Yellow Press of the two countries to publish or insinuate scandalous tales about the antecedents of the two dead men. In the inquiry at the Old Bailey, and to all appearance in that going on in New York, the sole question to be determined was the state of mind of the accused. The circumstances of the crimes and the question for the juries were curiously similar. The contrast between the procedure in the two trials could not be greater. The long nightmare of the Thaw trial still goes on, and the end is still indefinitely distant. It began as far back as January 23. Days were occupied in impanelling the jury, and the amount of time spent in heated combats between counsel about immaterial points passes comprehension. The trial of Rayner for much the same offence as that with which Thaw is charged is completed in a short day of about five hours. Even if Rayner had been wealthy, and if we can conceive medical evidence called on his behalf, the trial could not have been protracted beyond a second day. An eminent American lawyer has lately said, with respect to the administration of criminal justice in his own country, "The machine has become unworkable." We should not have ventured to use so strong a phrase. But the facts of the Thaw trial and the contrast which we have drawn suggest that this judgment, though harsh, may

be true. We may be thankful that so far we have small experience of trials which are almost as mischievious to society as the crimes which are investigated.—*Times.*

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We feel like apologizing for devoting any space to the trial which, with its disgusting details and its hysterical surroundings, has delighted the modern daily press which increasingly grows lower in tone, more and more "yellow," and more and more panders to that which makes for evil rather than for good in the community. But as the trial of the murderer of Stanford White has some points of interest from a legal aspect, we shall be expected to refer to it, especially as the trial of the murderer of William Whiteley in England took place during the long drawn out continuance of the Thaw trial and under circumstances in many respects very similar. The difference in the conduct of these trials is commented on in an article which will be found in another place copied from the columns of *The Times*. As to the mode of conducting the administration of criminal justice in the United States case, we are glad to be able to speak favourably as to the manner in which Judge Fitzgerald discharged duties always difficult in such serious cases and under the practice in that country, but rendered doubly difficult by the (to us in England and Canada) unheard of methods of the counsel engaged—we refer here especially to the leading counsel for the defence, whose "wild and whirling words" would in British Courts of justice provoke derision or disgust; and would probably, to quote a comment from an English journal, "call forth an indignant remonstrance from the prisoner himself."

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A somewhat singular point recently came up for decision in the Appellate Division of the Supreme Court of New York. One Peter McCullough died in that city and his loving nephew, having a due regard to the time honoured institution of the

country from which he came, provided refreshments in honour of his deceased uncle to the amount of $71.25. There was, in fact, an old fashioned "wake." The bill was sent to the executors of the deceased who refused to pay it. The judge before whom the matter came considered the claim an improper one and threw it out. The Appellate Division of the Supreme Court, however, reversed this decision, one member of the Court dissenting. This judge, who seems to have been a plain matter of fact man, devoid of sentiment, urged that the executors should not be called upon to supply provisions, liquors and cigars at funerals, and that refreshments on such an occasion were not the right either of the friends or relatives of the departed. The list of articles supplied to these weeping mourners included:—Scotch, Irish and rye whiskey, port and sherry wines, soda water, cigars, ham, corned beef, steak, eggs, butter, potatoes, bread, rolls, cake, etc. The majority of the Court evidently took a lofty view of the solemnity of the occasion and held that "the word 'funeral' embraces not only the solemnization of interment, but the ceremonies and accompaniments attending — ceremonies prompted by affection—determined by the religious faith and sentiment of the friends of the deceased, and varying from the simple bier to the imposing catafalque; from the informal liturgical services or scriptural reading for the humble, to the elaborate services attending the obsequies of the renowned."

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Lord Justice Davey, Baron Davey of Fernhurst, died last month in his 74th year. He was called to the Bar in 1861, taking silk in 1875. In 1886 he was appointed Solicitor-General by Mr. Gladstone; and in 1893 went on the Bench as Lord Justice of Appeal. The English Bench has, in Lord Davey, lost one of its most learned members. He was a success both at the Bar and as a judge. As said in the English *Law Times*:—"His arguments at the Bar were appeals to reason and learning alone, and his judgments from the Bench were always marked by quiet dignity and logical expression."

## *REVIEW OF CURRENT ENGLISH CASES.*



SHIP—SALVAGE AGREEMENT—PRINCIPAL AND AGENT—MASTER.

*The Crusader* (1907) P. 15 is a somewhat curious case. The defendants were owners of a ship which ran aground in the Maldives. The plaintiffs were their agents at Colombo, and at the request of the master sent a tug from Colombo to the ship to tug her off, under an arrangement whereby the tug was to be paid charges amounting altogether to £60 a day. A clerk of the plaintiffs went on the tug, when the master, who was firmly of the opinion that the ship could not be got off, refused to accept the services of the tug, except on a "no cure no pay" agreement and ultimately the master signed a letter agreeing to pay the plaintiffs £4,000 provided the vessel was got off, which was assented to by the plaintiffs' clerk, but without any instructions from them. After about 4 days' work the ship was hauled off by the tug. On the defendants being subsequently informed of the agreement to pay £4,000 they refused to ratify it. The plaintiffs claimed £4,000, or in the alternative, such an amount of salvage as to the Court might seem just. Barnes P.P.D., held that they were entitled to neither, and that the defendants were entitled to insist on the arrangement made by the plaintiffs for the hiring of the tug being carried out, and that the plaintiffs were therefore only entitled to recover what they had paid on the basis of that agreement together with any other proper disbursements and a commission on their disbursements for their own services, their commission being fixed at 5 per cent. on the amount disbursed by the plaintiffs.

SHIP—MORTGAGE OF SHIP WITH POLICIES OF INSURANCE THEREON —AVERAGE LOSS — REPAIRS BY MORTGAGOR — MORTGAGEE'S RIGHT TO INSURANCE MONEYS—MORTGAGEE NOT LIABLE TO EXPEND INSURANCE MONEY IN REPAIRS—ASSIGNMENT BY MORTGAGOR.

*Swan* v. *Maritime Insurance Co.* (1907) 1 K.B. 116 disposes of two or three questions of interest. The owners of a ship mortgaged it together with a certain subsisting policy of insurance thereon. The ship suffered a particular average loss within the policy; so that there became payable under the policy in respect of general average loss £121 4s. 3d. and for salvage loss £94 3s.

11d. The mortgagor had the vessel repaired by Cleland Co. and assigned to that company any claim they were entitled to under the policy. In the meantime a firm of Holman & Sons, as agents, for the mortgagor had paid the amount of the salvage award. After the assignment to Cleland, Holman & Sons applied to the insurance company and obtained payment of the £94 3s. 11d. payable in respect of salvage loss. The right of Holman & Sons to this money was disputed by Cleland and the right to the £121 4s. 3d. was contested by the mortgagee and the trustee in bankruptcy of the mortgagor. Channel, J., who tried the action held that the mortgage being in default for a sum exceeding the amount payable for the general average loss, the mortgagee was entitled to the whole of the amount payable for that loss and was not under any liability to apply any part of it for repairs, and as between Cleland and Holman & Sons that the prior assignment to Cleland of which the insurance company was duly notified entitled Cleland to the £94 3s. 11d. and that the insurance company having paid the money to the wrong hand was liable to pay it over again.

INFERIOR COURT—PROHIBITION—ALTERNATIVE REMEDY BY MOTION TO SET ASIDE PROCEEDINGS.

In *Channel Coaling Co.* v. *Ross* (1907) 1 K.B. 145 the Divisional Court (Lord Alverstone, C.J., and Darling, J.), granted a prohibition to a County Court against further proceedings in an action founded on an alleged breach of contract within the district, where the defendant being resident in Scotland, the County Court judge had (contrary to the County Court Rules) made an order for service of the defendant in Scotland; the Divisional Court holding that the fact that the defendant had an alternative remedy, by motion to the County Court judge to set aside his order, was no ground for withholding the prohibition.

SOLICITOR AND CLIENT—DELIVERY OF UNSIGNED BILLS—BILLS AGREED TO BY CLIENT—CARRYING AMOUNT OF BILLS INTO CASH ACCOUNT—MORTGAGE BY CLIENT FOR ADMITTED BALANCE AND COVENANT TO PAY—SPECIAL CIRCUMSTANCES—TRUSTEE IN BANKRUPTCY—TAXATION OF COSTS.

*In re Van Laun* (1907) 1 K.B. 155 was an appeal by a solicitor from the rejection of his proof against the estate of his

client who was bankrupt. The solicitor had from time to time delivered unsigned bills to his client who after examination had signed "I agree this account." On the third occasion the client gave the solicitor a mortgage with a covenant for payment to secure the balance admitted to be due. More than twelve months afterwards the client became bankrupt, and the solicitor filed a claim for the principal and interest due under the covenant in the mortgage less the value of the security, and he also claimed to prove for the same principal sum on an account stated. The trustee rejected the proof and claimed the right to satisfactory evidence that the claim for costs represented a genuine debt. Bigham, J., while conceding that as between the solicitor and client it was competent for the client to waive the delivery of a signed bill and to agree to the amount claimed, and that what had taken place would be binding as against the client, and that there were no special circumstances shewn which would entitle the client to a delivery of a bill or to a taxation, yet considered that the trustee as representing the general body of creditors was entitled to go behind the mortgage and require satisfactory evidence that the claim for costs represented a genuine debt.

FOREIGN JUDGMENT—PARTNERSHIP—COLONIAL FIRM—PARTNER RESIDENT IN ENGLAND—AGREEMENT TO SUBMIT TO FOREIGN JURISDICTION—JUDGMENT BY DEFAULT.

*Emanuel* v. *Symon* (1907) 1 K.B. 235 was an action on a judgment obtained in Australia by default against the defendant then residing in England. The defendant contended he was not subject to the jurisdiction of the Australian Court, and that the judgment was not binding upon him. The facts were, that the defendant while residing in Australia in 1895 entered into partnership with the plaintiffs for working a gold mine owned by the partnership in Australia. In 1899 he left Australia and went to reside in England. In 1901 the plaintiffs commenced an action in the Supreme Court of Western Australia where the mine was situate for the dissolution and winding up of the partnership. The defendant was personally served with the writ in England, but entered no appearance. The action proceeded against him by default, and in the result a balance was found due by him to the plaintiffs which by the judgment of the Australian Court he was ordered to pay, and to enforce which judgment the present action was brought. Chan-

nell, J., who tried the action held that the defendant by entering into the partnership relating to real estate in Australia, had impliedly agreed to submit to the jurisdiction of the Colonial Court as to disputes arising during or on the termination of the partnership, and was therefore bound by the judgment.

SHIP—BILL OF LADING—DURATION—LIMITATION OF LIABILITY IN BILL OF LADING NULLIFIED BY DEVIATION.

*Thorley* v. *Orchis SS. Co.* (1907) 1 K.B. 243 emphasizes an important point of mercantile law, namely: That all clauses in a bill of lading limiting the liability of the ship owner are nullified in the event of the ship deviating from her contemplated voyage. This at first sight seems a somewhat harsh and almost unreasonable rule, but as Channell, J., says, if the principle on which it proceeds is that by deviation the merchant is deprived of the benefit of the insurance he effects on his goods, then that is a practical point which indicates that here may be a very good reason for the rule.

TREASURY NOTE OF FOREIGN GOVERNMENT PAYABLE TO BEARER—NEGOTIABLE INSTRUMENT—PROMISSORY NOTE.

*Speyer* v. *Commissioners of Inland Revenue* (1907) 1 K.B. 246 although a revenue case deserves a passing notice. A foreign government issued a series of instruments called "gold coupon treasury notes" each contained a promise to pay the amount of the note in gold to the bearer in two years from date, and coupons were attached for payment of the interest on the note abroad or in England at the option of the bearer. The notes were redeemable at par at the option of the issuing government upon their giving sixty days' notice: the notes gave no security to the holder beyond the promise to pay, and they were marketable, though not readily salable, on the London Stock Exchange. The question was whether the instruments were promissory notes, or whether they were "a marketable security." The Court of Appeal (Collins, M.R., and Cozens-Hardy and Farwell, L.JJ.) held that they were both promissory notes and "marketable securities" and that to constitute a marketable security it is not necessary that the instrument should afford security by way of hypothecation or otherwise for the money payable thereunder.

PEERAGE—SURRENDER OF PEERAGE TO SOVEREIGN—GRANT OF SURRENDERED PEERAGE.

*Earldom of Norfolk* (1907) A.C. 10 may be briefly noticed as of interest from a constitutional point of view. It is a decision of the committee of privileges of the House of Lords to the effect that a peerage cannot be surrendered. The claimant in the present case claimed that the Earldom of Norfolk had been surrendered in 1302 to Edward I., and that in 1312 Edward III. regranted the earldom to one Thomas de Brotherton through whom the claimant derived title. The committee resolved that both the surrender of 1302 and the regrant of 1312 were invalid.

CONTRACT OF RE-INSURANCE—IMPORTATION OF CLAUSES FROM ORIGINAL POLICY INTO CONTRACT FOR RE-INSURANCE—UNREASONABLE CLAUSE.

*Home Insurance Co.* v. *Victoria-Montreal Life Insurance Co.* (1907) A.C. 59. This was an appeal from the Supreme Court of Canada. The action was brought on a policy of re-insurance. The re-insurance was effected by attaching to the ordinary printed form of policy a typewritten slip or rider containing the special terms of the re-insurance. The printed form was altered by the insertion of the syllable "re" before "insure" and in other respects was in the usual form of a policy of insurance and included inter alia a clause, "No suit or action on this policy for the recovery of any claim shall be sustainable in any Court of law or equity until after full compliance by the insured with all the foregoing requirements nor unless commenced within twelve months next after the fire." The action was not brought within the time limited, and the defendants set this up as a bar to the action. The judge at the trial held that the limitation clause was inapplicable to re-insurance and the Court of Review unanimously affirmed that decision; but the Supreme Court of Canada, by a majority of three to two, reversed this judgment. The majority holding that the clause being de facto a part of the contract, the question of its inapplicability, or the fact that it produced results which the parties had not contemplated was their misfortune, but they were none the less bound by the express terms of the contract to which they had agreed. Their Lordships of the Judicial Committee of the Privy Council (Lords Macnaghten, Dunedin, and Atkinson and Sir A. Wilson and Sir A. Wills), agreed with the judge at the trial,

and the Court of Review, and came to the conclusion that, according to the true construction of the instrument, "so awkwardly patched and so carelessly put together," the condition in question was not to be regarded as applying to the contract of re-insurance. To hold otherwise in their opinion would be to adhere to the letter without paying due attention to the spirit and intention of the contract.

POWER OF DOMINION PARLIAMENT—B. N. A. ACT. 1867, s. 92 (13)—4 EDW. VII. c. 31(D).

*Grand Trunk Ry.* v. *Attorney-General of Canada* (1907) A. C. 65. This was an appeal from the Supreme Court of Canada touching the validity of 4 Edw. VII. c. 31, s. 1(D). This statute provides in effect that it shall not be possible for railways to contract themselves out of the liability to be sued by their employees for damages for personal injuries sustained in the course of their employment. The Supreme Court of Canada upheld the validity of the Act, and the Judicial Committee of the Privy Council (Lords Macnaghten, Dunedin, and Atkinson, and Sir A. Wilson and Sir A. Wills) have affirmed the decision. The validity of the Act was contested on the ground that it was not legislation touching railways, but was legislation concerning civil rights and was therefore ultra vires of the Dominion Parliament. But the Judicial Committee rather cruelly cite the appellants' own factum which claimed that such legislation would prove very injurious to the proper maintenance and operation of the railway and would tend to negligence on the part of the employees and injurious results to the public as being really a conclusive argument against the appellants and as shewing that the legislation was properly ancillary to railway legislation.

SEPARATE SCHOOLS ACT (R.S O. c. 294) s. 36—QUALIFIED TEACHERS—EXEMPTION OF TEACHERS FROM EXAMINATION.

*Brothers of the Christian Schools* v. *Minister of Education* (1907) A.C. 69. This is the case which was known in the Court below as *Grattan* v. *Ottawa*, 8 O.L.R. 135; 9 O.L.R. 433, and the question at issue was whether the members of certain Roman Catholic orders known as the Christian Brothers and the Grey Nuns were eligible for employment as teachers in the public separate schools of Ontario without first obtaining certificates

of qualification. The High Court and Court of Appeal for Ontario held, that according to the proper construction of the Separate School Act (R.S.O. 1897, c. 294) s. 36, the exemption of members of the communities in question from examination only applied to those who were members at the time of the passing of the B.N.A. Act, 1867, and not to any who subsequently became members; and this decision has now been affirmed by the Judicial Committee of the Privy Council (Lords Macnaghten, Dunedin and Atkinson and Sir A. Wilson and Sir A. Wills).

EXPROPRIATION OF LAND FOR PUBLIC PURPOSES—OCCUPANT HAVING ONLY POSSESSORY RIGHT—COMPENSATION.

*Perry* v. *Clissold* (1907) A.C. 73, was an appeal from the High Court of Australia which involves a simple point viz., whether a person without a paper title who is in actual occupation of land expropriated for public purposes is entitled to compensation. The evidence as to possession was that the occupant entered on the property when vacant, that he enclosed it with a substantial fence and held exclusive possession and paid the taxes for ten years. The possession was not sufficient to extinguish the claim of the rightful owner, but he was unknown and had made no claim. The Judicial Committee of the Privy Council (Lords Loreburn, L.C., Macnaghten, Halsbury, Davey, Robertson and Atkinson and Sir Ford North and Sir Arthur Wilson) agreed with the High Court that the occupant was entitled to compensation notwithstanding that under the Act which authorized expropriation the appellant not only acquired the right of the occupant but also that of the owner of the paper title.

AUSTRALIA CONSTITUTION ACT (63 & 64 VICT. C. 12)—POWER OF STATE LEGISLATURE TO IMPOSE TAX ON SALARY OF FEDERAL OFFICIAL.

In *Webb* v. *Outrim* (1907) A.C. 81 the Judicial Committee of the Privy Council (Lords Halsbury and Macnaghten and Sir A. Wilson and Sir A. Wills) reversed the judgment of the Supreme Court of Victoria. Contrary to the opinion of the Colonial Court their Lordships held that there is nothing in the Australian Constitution Act which prevents any of the Australian State Legislatures from imposing taxes on the salaries of officers of the Commonwealth. The contrary conclusion was arrived at in Ontario: see *Leprohon* v. *Ottawa*, 2 A.R. 522.

COURTS MARTIAL—SPECIAL LEAVE TO APPEAL.

In *Tilonko* v. *Attorney-General of Natal* (1907) A.C. 93 an application was made for special leave to appeal from the decision of a Court martial in Natal. The local legislature had passed an Act of indemnity expressly affirming all sentences passed by any Court martial and confirming all acts done thereby during the late war. In these circumstances the Judicial Committee of the Privy Council (Lords Halsbury, Macnaghten, Davey and Atkinson and Sir A. Wilson) held that no leave to appeal could possibly be given. Lord Halsbury points out that so-called "martial law" is really no law at all, and that any attempt to make military officers administering summary justice analogous to regular proceedings of Courts of justice is quite illusory. Such acts of justice are justified by necessity by the fact of actual war—and the committee held it had no power to inquire into the propriety of the Act of the legislature giving validity to the acts of the Court in question.

FIRE INSURANCE—NOTICE REQUIRED OF ADDITIONAL INSURANCE—PREMIUM FOR ADDITIONAL INSURANCE UNPAID.

*Equitable Fire & Accident Office* v. *Ching Wo Hong* (1907) A.C. 96. This was an appeal from the H.M. Supreme Court for China and Corea, and the point involved is a very simple one. A policy of insurance provided that it should become void if the insured effected additional insurance and omitted to give notice thereof to the insurers. The insured had applied for additional insurance in another company and a policy therefor had been issued but it contained a provision that the insurers were not to be liable thereon before the premium or deposit on account thereof was actually paid. No notice was given, but no premium had in fact been paid—there was, however, a receipt for the premium in the body of the policy and this with the delivery of the policy to the insured it was contended established that the insurers had given credit for the amount of the premium. The Court below held that the fact of the non-payment of the premium prevented the second policy taking effect and therefor that there was no breach of the condition as to further insurance, and the Judicial Committee of the Privy Council (Lords Macnaghten, Davey, Robertson and Atkinson) agreed with that conclusion, and dismissed the appeal.

LIABILITY OF DIRECTOR—OVERDRAFTS OF CUSTOMERS IMPROPERLY ALLOWED BY CASHIER OF BANK—FAILURE TO DETECT ERRORS IN AUDITED ACCOUNTS—NEGLIGENCE.

*Prefontaine* v. *Grenier* (1907) A.C. 101. This was an action by the shareholder of a bank against the president for alleged negligence in making reports concerning the affairs of the bank which contained misrepresentations, relying on which the plaintiff purchased shares. One alleged misrepresentation was the statement that the bank had a reserve fund of $600,000, but although the report did allege that there was a reserve to that amount, it did not suggest or allege that there was any specific assets representing that fund, and the statement was held to mean only that it was an estimated amount and not that it had any separate or specific existence as a separate and distinct investment. Certain overdrafts by customers which had been improperly allowed by the cashier were included under the head of "Loans and discounts current" whereas the plaintiff contended they should have been included in the item "Notes and bills overdue" but the plaintiff's claim based on that alleged misrepresentation was held to be untenable. The overdrafts above referred to had caused the collapse of the bank and the plaintiff charged the defendant with negligence in permitting such overdrafts, and not exercising proper control. But as to this it was held that as the cashier was the principal executive officer of the bank and there was no reason for the defendant to suspect either his ability or good faith, and, the accounts of the bank were from time to time audited by independent auditors, and correctly shewed the total assets and liabilities, but were so made up as to conceal the existence of the improper overdrafts; this was sufficient to exonerate the defendant. Another charge of negligence was based on the evidence of an inspector of the bank who testified that in the course of his duty he had discovered some irregularities and had suggested that he should be authorized to make a comp. inspection, but that the defendant rejected the idea that the inspector should be authorized to supervise the work of the head official of the bank. But it was held that it was not negligence to sanction a system of inspection inconsistent with the ordinary method of conducting the affairs of the bank, and especially as it was not shewn that there was any connection between the matters excepted to by the inspector and the fatal overdrafts. The Judicial Committee of the Privy Council (Lords Macnaghten, Davey, Robertson and Atkinson)

agreed with the Court of King's Bench (Que.), and dismissed the appeal which goes to shew that the principal security of shareholders must be in the capacity and honesty of the chief executive officer, and not in the president and directors.

SUPREME COURT ACT (1906) s. 59—IMPERIAL COLONIAL COURTS OF ADMIRALTY ACT (1890) s. 6—RIGHT OF APPEAL IN ADMIRALTY CASES.

*Richelieu & Ontario Navigation Co.* v. *Cape Breton* (1907) A.C. 112. In this case the Judicial Committee of the Privy Council (Lords Macnaghten, Davey, Robertson and Atkinson and Barnes, P.P.D., with nautical assessors, Admiral Lloyd and Capt. Coborne, affirmed a judgment of the Supreme Court of Canada, but the case is reported apparently principally for the decision of the committee on a preliminary point taken by the respondents that no appeal would lie from the Supreme Court of Canada without special leave and no such leave had been obtained. The respondents relied on what is now s. 59 of the Supreme Court Act. The appellants on the other hand relied on the Imperial Colonial Courts of Admiralty Act, 1890, s. 6, which provides that the appeal from a judgment of any Court in a British possession in the exercise of the jurisdiction conferred by that Act either where there is, as of right no local appeal, or after a decision on local appeal, "lie, to Her Majesty the Queen-in-Council" and by s. 15 the expression "local appeal" means "an appeal to any Court inferior to Her Majesty-in-Council," and their lordships held that this enactment overrode the provision of the Supreme Court Act and that the appellants had an appeal as of right to the King-in-Council from the decision of the Supreme Court.

# REPORTS AND NOTES OF CASES.

## Dominion of Canada.

### SUPREME COURT.

Ont.] SAUNDERS *v.* THE KING. [March 13.

*Criminal law—Disorderly house—Common betting house—Betting booth—Race course of incorporated association.*

A perambulating booth used on the race course of an incorporated racing association for the purpose of making bets is an "office" or "place" used for betting between persons resorting thereto as defined in s. 197 of Crim. Code, 1892 (Crim. Code, 1906, s. 227).

Sub-s. 2 of s. 204 of the former Code (now s. 235) which exempts from the provisions of the main section (dealing with the recording or registering of bets) bets made on the race course of an incorporated association does not apply to the offence of keeping a common betting house. DAVIES, J., dissenting.

Judgment of the Court of Appeal (12 O.L.R. 615) affirmed, DAVIES, J., dissenting. Appeal dismissed with costs.

*Ritchie*, K.C., and *Godfrey*, for appellant. *Cartwright*, K.C., for respondent.

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N.B.] IN RE RICHARD. [March 21.

*Canada Temperance Act — Conviction — "Criminal case"—Habeas corpus—Penalty "not less than* $50"*—Conviction for* $200.

A commitment on conviction for an offence against Part II. of the Canada Temperance Act is a commitment in a criminal case under s. 32 of R.S.C. s. 135 (R.S. 1906, c. 139, s. 62) which gives a judge of the Supreme Court of Canada power to issue a writ of habeas corpus.

By 4 Edw. VII. c. 41 (R.S. 1906, c. 152, s. 127) for a first offence against Part II. of the Canada Temperance Act a fine

may be imposed of "not less than $50" and for a second offence of "not less than $100."

*Held*, that for a first offence the justices cannot impose a fine of more than $50. MACLENNAN, J., dissenting.

On application to a judge for a writ of habeas corpus he may refer the same to the Court which has jurisdiction to hear and dispose of it. IDINGTON and MACLENNAN, JJ., dissenting. Prisoner discharged.

*Masters*, K.C., and *C. L. Hanington*, for application. *J. A. Ritchie*, contra.

# Province of Ontario.

## COURT OF APPEAL.

From Teetzel and Anglin, JJ.] [Feb. 26.

IN RE PORT ARTHUR AND RAINY RIVER ELECTION.
PRESTON *v.* KENNEDY.

*Provincial Election—Voters' list—Finality of—Scrutiny.*

*Held*, affirming the decision of the rota judges that, upon a scrutiny, the voters' lists are final and conclusive evidence of the right of the persons named therein to vote; and no enquiry can be then entered into respecting the votes of persons on the lists, as, for example, that the voters were aliens or under age. Such questions of fact are, under Ontario Voters' Lists Act, R.S.O. 1907, c. 7, to be tried and determined before the voters' list is finally settled, revised, and transmitted. The only exceptions are those mentioned in s. 24 of the Act.

*Mowat*, K.C., for appellants. *Hellmuth*, K.C., and *W. J. Elliott*, for respondent.

## HIGH COURT OF JUSTICE.

Anglin, J.] [Jan. 4.

VANO *v.* CANADIAN COLOURED COTTON CO.

*Discovery—Next friend of infant plaintiff—Right to examine.*

The next friend of an infant plaintiff is not "a party to the action or issue, whether plaintiff or defendant," under Con.

Rule 439; nor is he a person for whose immediate benefit an action is prosecuted or defended under Con Rule 440, being in the action merely for the protection of the infant's interests and with the object of guaranteeing the payment of the costs by him; and so he is not examinable for discovery.

The distinction between our rules and English Order XXXI., Rule 29, pointed out.

The order was made by a local judge ordering such examination was therefore set aside.

*Counsell*, for plaintiff. *C. W. Bell*, for defendant.

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Mulock, C.J. Ex.D., Teetzel, J., Anglin, J.] [Jan. 25.

BAXTER *v.* GORDON IRONSIDES CO.

*Malicious prosecution—Termination of proceedings favourable to plaintiff—Maintenance of action.*

In order to maintain an action for malicious prosecution based upon proceedings in a criminal matter the plaintiff must shew that the termination of the proceedings taken against him was such as furnishes prima facie evidence that the action (proceedings) was without foundation. The plaintiff was charged with disposing of his property with intent to defraud his creditors, arrested and taken before a police magistrate where as the result of a suggestion he gave up $300 found on his person and signed notes for the balance of the defendants' claim and the prosecution was withdrawn and the police magistrate endorsed on the information "settled out of Court" and plaintiff was allowed to go.

*Held*, that he could not maintain an action for malicious prosecution.

*Wilkinson* v. *Howell* (1830), Moody & Malkin, 495, p. 496, followed. English and American cases reviewed. Judgment of BOYD, C., reversed.

*H. L. Drayton*, for defendants' appeal. *Middleton*, contra.

Cartwright, Master.] FALLIS *v.* WILSON. [March 11.

*Attachments of debts—Police constable's pay—Service on treasurer—Payment to agent—Debt due—When—Payment in advance.*

On a motion to make absolute an order attaching all debts due by a municipal corporation to the defendant, a police constable, which was issued on the 27th of February and served on the treasurer of the corporation at 3 o'clock in the afternoon of the same day, and it appeared the defendant's salary was $900 a year payable monthly at the end of each month.

*Held*, that although the defendant was not a servant of the corporation the treasurer was the proper person to serve.

*Held*, also, that the cheque for the defendant's pay for the month of February, which according to custom had been delivered to a messenger to leave at the police station for the defendant, but on service of the order had been stopped by telephone and brought back to the treasurer had not come into the hands of the defendant's agent before service of the order: But

*Held*, also, that there was no debt due (nothing debitum in praesenti) as the month's salary was not due until the end of the month and that there is no law which forbids an employer to pay servants in advance and the order was discharged but without costs.

*B. N. Davis*, for judgment creditor. *Phelan*, for judgment debtor. *Fraser*, for garnishee.

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# Province of Manitoba.

## KING'S BENCH.

Mathers J.] SLATER *v.* RYAN. [Jan. 15.

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

Motion for injunction.

The plaintiff company had for some years carried on the manufacture and sale by wholesale, of boots and shoes, styled "Slater Shoes" or "Slater" boots and shoes, and advertised

extensively as such. The founder of the business was George T. Slater, after whose death the plaintiffs acquired the busi and good will from the executors. They had obtained a spe trade mark consisting of a representation of a wooden frame, with the words "The Slater Shoe" inscribed on the slate, and their goods had a large sale in Winnipeg at a store where they were exclusively sold. The defendant, who carries on a retail boot and shoe business in Winnipeg, about September, 1904, took the agency for the sale of boots and shoes made by George A. Slater, another wholesale manufacturer, whose goods also were extensively advertised and sold in Canada as "The George A. Slater Shoe" and the "Invictus Shoe." The advertisement complained of appeared in a Winnipeg newspaper, on the 2nd and 3rd of April, 1906, and consisted of a cut of a shoe, underneath which in display type were the words "We sell the celebrated George A. Slater Invictus shoes for men. The words "George A." and "Invictus" were in considerably smaller type than the words "Slater" and "shoes" but still were quite prominent and easily seen, and the Court was satisfied that the insertion of the advertisement in that form, was by the defendant's advertising agent without his knowledge, and that the defendant discontinued the advertisement, as soon as the form of it came to his notice, and before plaintiffs took any exception to it.

This action was not commenced until April 19, 1906, the Court being asked to restrain the defendant from advertising or offering for sale or selling boots and shoes, not made by the plaintiffs as "Slater Shoes" or "Slater Goods," or by any other name or names under which the public might be led to believe that the shoes handled by the defendant, were made by the plaintiffs.

*Held*, that the defendant had a right to advertise and sell shoes under the name "George A. Slater," as that was the real name of his principals and there was nothing to shew that he had been doing so dishonestly, or in such a way as to falsely represent the goods as those of the plaintiffs, and that the injunction should be refused.

*Burgess* v. *Burgess*, 3 De G.M. & G. 896, followed. *Reddoway* v. *Banhour* (1896) A.C. 199 distinguished.

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

Mathers, J.] TELLIER *v.* SCHILEMANS. [Jan. 31.

*Administrator pendente lite—Court of King's Bench, jurisdiction of, over Surrogate Court matters—Referee's jurisdiction.*

*Held*, 1. In Manitoba the power to appoint an administrator pendente lite is vested solely in the Court of King's Bench by virtue of the provisions of The King's Bench Act conferring upon it the jurisdiction of all the Superior Courts in England having cognizance of property and civil rights including the Court of Probate, also by virtue of the express enactment in s. 39 of The Surrogate Courts Act, R.S.M. 1902, c. 41.

2. By virtue of Rule 449 of The King's Bench Act, a judge in Chambers would have power to appoint such administrator.

3. Notwithstanding that the power to make such appointment is not one of the matters excepted, by Rule 27 the King's Bench Act, from the jurisdiction of the Referee in Chambers, the latter has no jurisdiction to make such appointment.

Appeal from refusal of the Referee to make such appointment dismissed with costs.

*O'Connor*, for plaintiff. *Haggart*, K.C., for defendants.

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Mathers, J.] RE HUNTER. [Feb. 18.

*Certiorari—When judge in Chambers may grant certiorari.*

*Held*, that, when the Full Court is not sitting, a judge in Chambers has jurisdiction to direct the issue of a writ of certiorari to bring up the record of a conviction for a breach of a municipal by-law. Gude's Crown Practice, vol. 1 p. 216, and Short and Mellors Crown Office Practice, pp. 132 to 140, followed.

All further proceedings after the return to the writ must, however, be taken either before the Court of King's Bench in banc or the Court of Appeal.

*Haffum*, for applicant. *Macdonald*, K.C., contra.

Mathers, J.] [Feb. 19.

CANADIAN PORT HURON CO. *v.* BURNETT.

*Priority as between unregistered equitable charge and subsequent registered conveyance—Effect of grant of land by registered owner "according to his estate and interest therein and as fully and effectually as he lawfully can or may" to an assignee for the benefit of creditors.*

The defendant Burnett, having purchased machinery from the plaintiffs on credit executed an agreement under seal giving a lien on certain farms therein described.

This agreement could not, under s. 4 of the Lien Notes Act, R.S.M. 1902, c. 39, be registered, but after default by Burnett the plaintiffs commenced their action to realize their claim out of the farms and registered a certificate of lis pendens against the farms in the proper land titles offices. A few days afterwards Burnett made an assignment for the benefit of his creditors to the defendant, which was duly registered. As regards Burnett's lands, the wording of the assignment was as follows: "The said debtor according to his estate and interest therein and as fully and effectually as he lawfully can or may . . . by these presents doth hereby grant . . . unto the said trustee . . . all the real estate, lands, tenements and hereditaments of the said debtor . . . of or to which he may have any estate, right, title or interest of any kind or description with the appurtenances."

*Held*, that such deed purported to deal only with such estate or interest in the land as the grantor then had and did not operate or assume to operate so as to convey the land free from the equitable charge or lien previously given to the plaintiffs.

Secs. 6 and 7 of R.S.M. 1902, c. 8, do not help the assignee as the assignment is not in the words or to the like effect of the words given in s. 6, and s. 7 provides only that every assignment . . . shall vest the estate "thereby assigned" in the assignee, and does not assume to give the deed of assignment any larger effect in the way of passing property than on its face it purports to have.

The only interest, therefore, that passed to the assignee being what was left after the plaintiffs' equitable charge should be satisfied, neither The Registry Act nor he Lien Notes Act can have any application, as they only apply to invalidate

an unregistered instrument as against a registered instrument that effects the same estate or interest in lands. Judgment for plaintiffs with costs.

*Hoskin*, for plaintiffs. *Hudson*, for defendants.

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Macdonald, J. ] [Feb. 26.

MCLAREN *v.* MCMILLAN.

*Contract — Rescission — Misrepresentation — Fraud—Right of some only of a number of joint contractors to rescind.*

The plaintiffs and a number of other persons had been induced by an agent of the defendants to agree to take each one share in a horse valued at $3,000 and to sign two promissory notes for $1,500 each in payment for the horse. The plaintiffs complained that they had been induced to sign said notes by fraud and misrepresentation on the part of the defendant's agent, and one of the plaintiffs also claimed that he was too drunk at the time of signing the notes to know what he was doing, but the trial judge found against him on this point. The plaintiffs brought this action for a declaration that the notes were fraudulent and void and to have them delivered up to be cancelled and for an injunction to prevent the negotiating or dealing with the notes.

*Held*, that the plaintiffs were not in a position by themselves to rescind the contract as in fact a partnership had been formed in the making of the contract and all the partners were not asking for rescission. *Morrison* v. *Earls*, 5 O.R. 434, followed. The plaintiffs' only remedy would be by cross-action or counterclaim for damages, and they could not succeed in this action.

*Noble* and *Card*, for plaintiffs. *Barrett*, for defendants.

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Macdonald, J.] [Feb. 26.

SMITH *v.* AMERICAN ABELL ENGINE CO.

*Charge on land created by assignment separate from order for chattel—Caveat.*

Section 4 of the Lien Notes Act, R.S.M. 1902, c. 99, forbids the registration, in any registry office or land titles office in Manitoba, of any lien notes, hire receipts, orders for chattels or documents on instruments containing as a portion thereof or

having annexed thereto or indorsed thereon any order, contract or agreement for the purchase or delivery of any chattel or chattels. It also forbids the filing or registration in any land titles office of any caveat which refers to or is founded upon any instrument or document, or part thereof, the registration of which is prohibited. And s. 7 of the Act declares that any instrument, the registration of which is prohibited by the Act, in so far as it purports to affect land, shall be absolutely null and void as against any person or corporation claiming an interest or estate in lands under a registered instrument. The plaintiff's predecessor in title to the lands in question had given an order to the defendants for a threshing outfit bought on credit, also a separate instrument creating a charge on the land for the price agreed on but not referring in any way to the order for the outfit. Defendants had promptly registered this latter instrument by way of caveat.

*Held*, that neither the instrument creating the charge nor the caveat founded thereon was within the prohibition of the statute, and that the lands in question were subject to the lien and charge created by the said instrument, as there is nothing in the Act to prevent security on land being taken separate and apart from the order under which the chattels are purchased. *Modell* v. *Thomas & Co.*, 1 Q.B.D. 230, distinguished.

*Fullerton* and *Blackwood*, for plaintiff. *Hudson*, for defendants.

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Macdonald, J.] [Feb. 26.

J. J. CASE THRESHING MACHINE CO. *v.* WERMIGER.

*Evidence—Estoppel—Note made payable to B. on sale made by A. of latter's goods.*

One Kirkpatrick, having previously bought a threshing outfit from the plaintiffs upon which he still owed them a large amount, made a sale of it to the defendant. As a matter of convenience this sale was carried out by the defendant signing an order for the purchase and making a note for the amount in the name of the plaintiff company, and the defendant resisted payment of the note on the ground that the consideration for it had wholly or partly failed, and that he had not got all the goods ordered or an engine of the quality ordered. It was contended on his behalf that the documents relied on were con-

clusive evidence that the sale had been made by the plaintiffs and that they were estopped from denying it.

*Held*, that the plaintiffs were not estopped from shewing that it was Kirkpatrick who had made the sale and that, as the evidence established this, defendant had no remedy against the plaintiffs and must pay the amount of the note.

*Henderson* and *Matheson*, for plaintiffs. *Coldwell*, K.C., and *R. A. Clement*, for defendant.

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Mathers, J.] GRANT *v.* REID. [March 8.

*Statute of Frauds—Agreement of sale of land—Memorandum in writing—Costs.*

Defendant, being informed by one McPhail that the plaintiffs would purchase the lot in question for $2,000, ascertained from the owner that he would sell it for $1,200. Defendant then, without making any bargain with the owner, went to McPhail and signed a document not under seal agreeing to sell the lot for $2,000 and acknowledging receipt of a cheque for $100 as deposit on same. This document did not mention the name of the purchaser or even McPhail's name, but it was McPhail's cheque for $100 that was given. McPhail had falsely represented to the plaintiffs that he had the lot for sale as agent of the owner, and the plaintiffs negotiated with McPhail on that basis. Afterwards the owner refused to sell the lot, and plaintiffs sued defendant on the document he had signed for specific performance or damages in lieu thereof.

*Held*, that, as McPhail was not the agent of the plaintiffs in the transaction, the case was not brought within *Pearce* v. *Gardner* (1897) 1 Q.B. 688, and his cheque was not sufficient to supply the omission of the purchaser's name from the agreement and the two documents did not together constitute a memorandum in writing sufficient to satisfy the Statute of Frauds. Action dismissed without costs, as defendant's conduct in agreeing to sell what he did not own had brought about the litigation.

*Laidlaw* and *St. John*, for plaintiffs. *Elliott* and *McNeill*, for defendant.

# Province of British Columbia.

## SUPREME COURT.

Full Court.] [Jan. 21.

IKEZOYA *v.* CANADIAN PACIFIC RY. CO.

*Appeal—Jurisdiction—Habeas corpus—*56 *Geo. III. secs.* 3 *and* 4*—Order discharging prisoner—Dominion Immigration Act —Proclamation—Effect of—Appealability from decision of immigration officer—B.C. Stat.* 1904, *c.* 15, *s.* 85.

Plaintiffs were four Japanese passengers from Yokohama to Vancouver. On arrival at the latter port, they were inspected by the medical officer of the Immigration Department, who concluded that three of them were suffering from trachoma, but were permitted to land for treatment. After a certain time, the officer decided to deport them, three of them on account of the disease, and the fourth, a child of one of the others, on the ground that it might become a public charge owing to the condition of its eyes. The evidence of three medical practitioners was produced on the application to the effect that the plaintiffs were not then suffering from any contagious disease, and on this evidence MORRISON, J., ordered their release from custody. They then departed and at the time of the appeal their whereabouts was unknown. The Dominion Government appealed on the construction of the amendment to the Immigration Act in 1902, and the proclamation issued pursuant thereto, advancing the contention that the finding of the officer appointed by the Minister of the Interior was final and was not reviewable by the Court.

A proclamation was issued and published in the Canada Gazette empowering the Minister of the Interior, or any officer appointed by him for the purpose, in pursuance of the amendment to the Immigration Act, 1902, to prohibit the landing in Canada of any immigrant or other passenger suffering from any loathsome or infectious disease, and who, in the opinion of the Minister, or such officer, should be so prohibited.

*Held*, on appeal, affirming the order of MORRISON, J., that the statute and the proclamation issued thereunder, merely authorizes the deportation of the diseased person; that it does not take away the right of the Court to decide the question of fact on a proper application and the judges are bound to inquire

into the matter on an application for habeas corpus. Parliament not having made the examination by the immigration officer final, and as the statute contains no expression that a writ of habeas corpus shall not issue to examine into the causes of detention of a person detained under the statute, the power to do so remains with the Court.

*Davis*, K.C., for appellants. *Macdonell*, for respondents.

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Full Court.] [Jan. 21.

COEN *v.* NEW WESTMINISTER SOUTHERN RY. CO.

*Railway—Animal killed on track—"Not wrongfully on the railway"—Adjoining owners—Obligation to fence—Railway Act (Dom.) c. 29, 1888,—B.C. Stats. 1887, c. 36, 1889, c. 36.*

Plaintiff's mare and colt strayed from his yard on to the public road, and reached the track of defendant company, presumably at a place called Morton's Crossing. The mare was overtaken by a train and killed as she was running towards the crossing. This was a farm crossing, which, under the statute, should have a gate on each side. There was no gate or fence on the west side of the crossing by which the animal was presumed to have reached the track from the public road, but there was a cattle guard (over which the animals crossed) put there by agreement with Morton. Plaintiff was not an adjoining owner.

*Held*, on appeal, MARTIN, J., dissenting, that Morton's Crossing being a farm, and not a public crossing, the statute required that it be either fenced off or provided with gates on both sides; and that the placing of the cattle guard did not relieve the company from its obligation to provide a fence or gate on the west side of the crossing.

*Bowser*, K.C., and *W. Myers Gray*, for appellant, plaintiff. *Reid*, for respondent, defendant.

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Full Court.] [Jan. 21.

ELK LUMBER CO. *v.* CROW'S NEST PASS COAL CO.

*Vendor and purchaser—Authority to contract—Option—Specific performance.*

An officer of the defendant coal company, known as Land Commissioner, gave to defendant M. in June, 1900, the following

document: "Re Sale to you of Mill-Site. The Crow's Nest Pass Coal Company hereby agree to sell to you a piece of land at or near Hosmer Station on the Crow's Nest line, to contain at least one hundred acres of land, at the price of $5.00 per acre, payable as follows: When title issued to purchaser. Title to be given as soon as the company is in a position to do so. Purchaser to have possession at once. The land to be as near as possible as shewn on the annexed sketch plan."

M. for a nominal consideration, in October, 1902, assigned this document to B. who in turn assigned it for value to plaintiff company. In an action for specific performance of this agreement, plaintiff company was non-suited at the close of its case, and it was

*Held*, on appeal, that one of the conditions on which the document was given being that a mill should be built at an early date, the defendant M., not having done anything in that direction for two years, must be taken to have abandoned any such intention.

Per HUNTER, C.J.—It was for the company to shew that the intention to build a mill was a condition dans locum contractui, and the fact that the condition was not inserted in the agreement was sufficient to call upon the company to make good that defence.

*Taylor*, K.C., and *Ross*, K.C., for plaintiff company. *J. A. Macdonald*, K.C., and *Herchmer*, for defendants.

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Full Court.] [Jan. 21.

PADUIAROGA *v.* CANADIAN CANNING CO.

*Shipping—Proximate cause of injury—Negligence—Collision with vessel at anchor.*

A tug attached to a scow loaded with coal approached a bridge the piers of which were being repaired by a railway contractor. The fairway was partly obstructed by a scow connected with the work, but the captain of the tug, after viewing the situation, was of opinion he could get through. In doing so, he brushed slightly against the scow, at the further end of which, on a boom stick in the water, was the plaintiff, engaged in an endeavour to swing or push the scow further around and out of the way of the tug. Plaintiff was crushed against a pile by the scow and severely injured.

*Held*, reversing the decision of MORRISON, J., that the master of the tug was negligent in not stopping and then making certain that it was safe to proceed.

*Lucas*, for plaintiff, appellant. *J. A. Russell*, for respondent.

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Full Court.] HAPLIN *v.* FOWLER. [Jan. 21.

*Mining law—County Court—Jurisdiction—Working agreement, or lease—Use of timber on claim—Ore-bins and tramway.*

Defendant by an agreement under seal, purported to lease to plaintiffs a portion of a quartz mine, the plaintiff covenanting inter alia to open and maintain in good repair 100 feet of No. 6 level from the mouth inwards, to remove all broken ore and to sort out and preserve for shipment such material as could be profitably sorted, to place all concentrating ore on the dump as directed by defendant, to work the demised area in a good and miner-like manner to the satisfaction of the defendant and to insure by means of timbering, etc., as required by defendant, the safety of the workings and their permanency. Defendant was to receive the returns from all ore shipped, first making certain deductions, to keep certain percentages from the amounts received, and pay the balance to plaintiff.

*Held*, that these provisions constituted a contract merely to win the ore for a sliding percentage of the returns.

Plaintiff claimed damages for being prevented by defendant from using the timber on the claim in his operations under the agreement, for tearing up and removing the ore track and trestle which were alleged to be the only means for working the ore, and also for preventing plaintiff from using certain ore-bins and a track in connection with same at the mouth of the level.

*Held*, that as the agreement was silent concerning the use of the timber, track, trestle and ore-bins, it should have been left to the jury to find whether there was a distinct collateral agreement concerning these matters, and if so, what it was.

New trial ordered, MARTIN, J., dissentiente.

*W. A. Macdonald*, K.C., for appellant. *Davis*, K.C., for respondent.

## Book Reviews.

*Notable Scottish Trials*. Canada Law Book Co., 32 Toronto St., Toronto, 1907.

This interesting series commenced with the celebrated trial of Madeline Smith, followed by an account of the trial of the Glasgow Bank Directors already referred to. Since then we have received two volumes, the first of which tells of the trial of Dr. Pritchard for the murder of his wife, of which he was found guilty and subsequently executed. This trial brought up even more difficult points for adjudication than the Thaw case, the records of which have been and still are disgracing the public press, but the trial only occupied four days and within three weeks he had suffered the extreme penalty of the law.

We have in another volume the trial of Eugene Marie Chantrelle for the murder of his wife. This trial also lasted four days and resulted in the verdict of guilty. The material in these books is interesting in itself and well put together.

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*Falconbridge on the law of Banking, Bills, Notes and Cheques*, Canada Law Book Co., 32 Toronto Street, Toronto. 1907.

Just received. Will be reviewed in our next issue.

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## Bench and Bar.

Hon. H. T. Taschereau, of the Superior Court of Quebec, to be Chief Justice of the King's Bench for that Province in the room of Hon. Sir Alex. Lacoste, Kt., resigned (January 29).

George Patterson, of New Glasgow, N.S., Barrister-at-law to be Judge of the County Court of Pictou and Cumberland in the room of His Honour W. A. D. Morse, deceased (January 26).

His Honour M. A. McHugh, Junior Judge of the County Court of the County of Essex to be Judge thereof in the room and stead of His Honour C. H. Horne, deceased (April 3).

E. P. Clement of the town of Berlin, Barrister-at law, to be Junior Judge of the County Court of the County of Essex in the room and stead of His Honour M. A. McHugh (April 3).