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THE LAW AND THE MOTOR CAR.

Seldom have the British people been so stirred by any question of secondary importance as they have been by the evils resulting from motor traffic. The columns of such papers as the *Times* and *Spectator* are full of correspondence upon the subject, which is not only talked about, and written about, but also has been legislated about. Proceedings are taken in the police courts, an army of policemen are employed in regulating the traffic, fines are imposed, chauffeurs are sent to prison, heavy damages are exacted as the result of accidents, but still the agitation continues, and though the better class of motorists and motor owners, alive to the danger, are doing their best to avoid the evils complained of, more stringent legislation is threatened.

The danger to life and limb resulting from careless and reckless motor driving is the most serious feature of the case, but the damage to property is also a very grave matter. Day after day the papers record an appalling list of accidents, many of them fatal, and all of them serious. It frequently happens that the motorists—both drivers and passengers—are themselves the victims. Motor cars sometimes act like runaway horses; they get out of control, fall over embankments, dash themselves against banks of earth or walls of stone, against rocks, or trees or lamp-posts, and generally some one is killed, and others are dangerously injured. For such sympathy is coldly expressed, they know the danger and they take the chances. It is otherwise with the inoffensive foot passengers, or drivers of ordinary vehicles, who are such frequent sufferers. They are so helpless that they can only seek safety in flight, and let the aggressor rush triumphantly by. The damage to property, and the annoyance to passers-by and dwellers by the roadside, caused by the dust which invades the houses, has rendered some quarters almost

uninhabitable, besides being destructive to clothing. The smell, also, which follows in the track of the motor is equally objectionable. This is a serious indictment, and there is besides the humiliation to one's self-respect in the insolence of the motorist, as, with his resistless force, he compels you to get out of his way, looks in scorn upon your inferior power of movement, and glorifies in your inability to resist his violence, or punish his aggression. But the motorist is not content with proving his superiority in all these various ways. He destroys the roads which centuries of careful industry have created, and renders them unfit for the purpose for which they were made, and finally makes them useless for even his own enjoyment.

With such a condition of affairs the law and its myrmidons have so far vainly endeavoured to cope. It is admitted that, to use a common phrase, the motor car has come to stay, and all that can be done is so to regulate it as to reduce as far as possible the evils which it causes. As a matter of necessity the owners and users of motor cars must be people of wealth who will not be deterred by the imposition of a fine from any indulgence in the use of their motors, any more than they will be from a sense of the dangers and annoyances they cause to others.

The main object of legislation both in England and this country has been to regulate speed so as to avoid the dangers arising from too great rapidity of motion. There are two principles upon which this may be accomplished—one is by fixing a maximum rate not to be exceeded under any circumstances, and reduced in certain places, where the condition of the roads or streets require extra precaution. Judging from the reports in the English papers this method is not found to be satisfactory. When the motorist sees a clear road before him he will not be restrained by fear of the police who are watching for him, or by dread of a fine, from trying the speed of his machine, and enjoying the delight of rapidity of motion which is to many people a most exhilarating sensation. At the same time he feels justified in going as fast as the law will allow him, even when the speed permitted is too great for the safety of the public.

The other rule, which has many advocates, is to do away with the speed limit, or largely increase it, except in towns and villages, and to hold the motorist responsible for any damage that may occur. Thus when the motorist saw a clear road before him he would be at liberty to take advantage of it, knowing the risk that he was taking in case of accidents.

In England more stringent regulation than now exists is demanded, and, no doubt, will be granted, unless, under the pressure of public opinion, the motorists shew as much diligence in obeying the law as they have hitherto done in disobeying or evading it, and as much care for the safety and welfare of others as they do for the indulgence of their own pleasure.

In Canada it is chiefly in the country that trouble with the automobiles has arisen. In towns the traffic in the streets is not so great as in the old country, and the number of motor cars is relatively less. Here in country districts there is practically no redress for accidents caused by the carelessness or recklessness of the motorist. He may have the regulation number on his car, but the man who is driving a frightened horse, with perhaps women and children in his charge, has no time to look at the number of the car which has flashed by him, and even if he could make it out (almost an impossibility at any time), there are no police to whom he can look for assistance, so that the number is of very little value. Consequently the motorist who cares nothing for the law, and as little for those whom he may have injured, may reckon on escaping responsibility for any damage he may have caused.

In the United States, where the same condition of things exists as in this country, many cases have been tried where owners of cars have sought to throw the responsibility for the act complained of on the chauffeur, an irresponsible person, as, for instance, where the latter borrowed his owner's car for his own pleasure, and, while so using it, by his negligence ran a man down. In a very recent case in the United States, *Cunningham* v. *Castle*, N.Y. Supreme Court, July, 1908, the court was divided as to the liability of the owner, but the judgment was

that he was not liable. The judge in giving his decision said: "It may be that it would be wise in the public interest that the responsibility for an accident caused by an automobile should be affixed to the owner irrespective of the person driving it, but the law does not so provide." A very able dissenting judgment was delivered, in which it was said that: "To my mind the element of consent to the use of the instrumentality is important and controlling in the present case. It had been the habit of the defendant to allow his chauffeur to use the automobile to go to his meals, presumably to save time and expense. On the night in question the chauffeur had taken the defendant to his apartments. It was a part of his remaining duty to take the machine to the garage, for it could not be left in the street or kept in an apartment house. The chauffeur requested permission to deviate from the direct route to the garage to go uptown on some business for himself. The defendant told him that he might do that, 'but to hurry back, only be gone a short while; come right back.' The testimony of the chauffeur is to the same effect, but a little more specific in that he says the defendant told him to be careful, and if anything happened to be sure and notify the defendant at once. The chauffeur was still in the pay of the defendant, and his duty was to properly care for the machine and to properly house it for the night. Even while he was gone on business of his own this duty remained with him, and he was being paid for the performance of that duty by the defendant. It does not seem to me that the chauffeur was emancipated during the trip, notwithstanding it was for his own pleasure. I concede that if the chauffeur had taken the machine without the consent of the master and contrary to his orders his act would then have been entirely outside the scope of his employment.

"I appreciate that the case is on the border line, but it seems to me that the chauffeur was engaged in the business of the master; and deviated from the direct course to house the machine by the master's express consent, and that therefore the relation of master and servant still continued, and that the court was justified in refusing to charge as requested, or, under the proofs,

to submit to the jury the question as to whether or not that relation had been severed."

Under the circumstances of this case we venture to think that the reasoning in the dissenting judgment might well have decided the case in favour of the plaintiff.

There are only, we believe, two cases in our own courts where the user of an automobile on the master's business was discussed. In *Smith* v. *Brenner*, tried at London, April 28th, in which Mr. Justice Riddell held that the defendant was liable because the driver had violated the ordinary rule of the road in not driving with reasonable attention to the rights of others rightfully upon the highway. He refused to give effect to the contention that the chauffeur was not at the time upon his master's business, and held that a chauffeur turning out of the direct route to procure a cigar did not render him as not being therein about his master's business, citing *Venables* v. *Smith*, 2 Q.B.D. 279. As to the liability of the owner the learned judge says: "If the owner placed the vehicle in the hands of a chauffeur or lent it to a friend, he is putting it into the power of servant or friend to manage it in a manner which may be dangerous, and he must assure himself of the capacity and prudence of servant and friend at his peril."

Mattei v. *Gillies* was also an Ontario case decided by a Divisional Court (16 O.L.R. 558). There was conflicting evidence as to the facts, but it was held that there was enough evidence to warrant the findings of the jury in the plaintiff's favour. *Venables* v. *Smith* was also referred to, quoting the language "that the chauffeur was on his way home, though he went in a somewhat roundabout way." The learned Chancellor adds to this sentence the words "in order to gratify his friends." He goes on to say, "The motor was entrusted to his general care. *Sleath* v. *Wilson* (1839) 9 C. & P. 607. Besides this I am inclined to hold that having regard to the provisions of the Act as to registration of the owner, the carrying of a number for the purpose of identification, and the permit granted on those conditions, as between the owner and the public, the chauffeur

or driver is to be regarded as the alter ego of the proprietor, and that the owner is liable for the driver's negligence in all cases where the use of the vehicle is with the sanction or permission of the proprietor. In driving the motor he is within the ostensible scope of his employment, and the liability will remain by virtue of the statute, and this even though the driver may be out on an errand of his own."

A consideration of the observations in the above cases, and having in view the exceptional risk which attaches to the use of motor cars, it might be well in the public interest that responsibility for accidents caused by these vehicles should always be affixed to the owner, irrespective of the person driving it, and that the law should be so amended as to make this quite clear.

The next matter of importance is that of contributory negligence on the part of the person injured. It is not likely that any court would give the benefit of any doubt to the defendant in such a case, but would construe it strictly in favour of the plaintiff. This is also the thought of the legislature, as expressed in s. 18, of 6 Edw. VII. c. 46, which provides that in such a case the onus of proof that the accident did not arise through negligence on the part of the motorist shall rest upon him.

As expressed by Lord Alverstone in a recent case: *Troughton* v. *Manning* (1905) 69 J.P. 297: "It has been more than once noticed that the idea prevails among some motor drivers that once they have sounded the horn they are justified in going at any rate of speed, and that people are bound to get out of their way; whereas the more salutary rule would be as recommended by the Considerate Drivers' League to assume that it is the business of the motorist and not the other man's to avoid danger." The rule must not, of course, be carried too for, but motorists must be made clearly to understand that there is no rule of the road in their favour and that every vehicle, and every person on the road, has as good a right to the use of it as they have. It goes without saying that they must not presume upon their power of inflicting injury or annoyance as giving them any right or privilege whatever. They are just as responsible, and are

bound to be just as careful as the driver of a horse is bound to be, and in fact should be more so in view of the greater force and momentum of their vehicles and the certainty of greater damage in case of a collision.

Whilst the usefulness of motor vehicles must be admitted it must also be admitted that their use has been more or less of a public nuisance for the reasons set forth in the commencement of this article and for others that might be added to that list. It is clear, therefore, that this user should be safe-guarded so far as the public is concerned in every possible way.

Another point to be considered is that of speed. We incline to the view that the liability of the owner of the car being established and the onus of proof of non-negligence being upon the driver, some liberty might be allowed as to speed upon clear and unobstructed stretches of road, but that in towns and villages, at all times, and wherever there is considerable traffic, the speed should be strictly limited, and any infraction of the rule laid down in this respect should be severely punished. There are those who think that the only statutory limit to the rate of speed should be that it should be reasonable and leave it to the constituted authorities to decide the question of reasonableness should the occasion arise. This would have the advantage of throwing all responsibility upon the motorist. There would be much to be said in favour of this if coupled with a provision for imprisonment in case of offence. In France there is no speed limit, but motorists are under strict police supervision, and it is said their methods work well.

What is wanted is to make motorists more careful—to make reckless driving "unpopular" with them. A few of them being sent to prison would "encourage the rest." What might be termed mechanical devices for regulating speed and in other ways preventing accidents are not of much practical utility. The *mind* of the motorist must be acted upon.

This brings us to a proposition of much practical importance, viz., that "the punishment should fit the crime." As we have pointed out a fine of fifty or even a hundred dollars is a penalty

which does not materially affect the wealthy motorist, whether inflicted on himself or his driver. The penalty to the professional driver who is careless, reckless or negligent, whether injury is caused or not, should always be imprisonment, and suspension, if not the withdrawal altogether of his license. To the unprofessional driver, whether owner or not, the penalty should be imprisonment, with possibly the option of a fine in exceptional cases, and a fine of sufficient magnitude to make careless or ignorant driving prove a very costly amusement.

Cases may arise as to whether an automobile can be said to be a "carriage" in the sense that that word is used in certain connections. This modern monster has so many points of difference from those ordinarily included in the word "carriage" that it might well be said to belong to a class by itself. This is illustrated by *Doherty* v. *Ayer*, 83 N.E. 677; 14 L.R.A. N.S. 816, in which the Massachusetts court held that an automobile is not a carriage within the meaning of the statute requiring towns and cities to keep their highways reasonably safe and convenient for travellers with their horses and carriages, and that the town is not liable for failure to make special provision for the safety of automobiles if its highways are reasonably safe and convenient for travel generally. This decision, of course, presents the rights instead of the liability of the users of motor cars on highways, but has a bearing also on the subject under discussion in this article.

The glory of the common law is that it moulds the rules of law to suit the changing circumstances of social life and business affairs of the community, so that this subject might, if time permitted, be left to the consensus of opinion of strong and wise judges, but unfortunately time does not permit, for lives and limbs are in jeopardy. There might be a danger in attempting to enact that the rules of the common law shall not necessarily be held to apply to the style of vehicular traffic so rapidly taking the place of that under which those rules grew up. These rules arose and developed under a very different condition of things, and it may well be said that some of them would not

have taken the form they have if the subject matter had been modern motor cars instead of carts, coaches and carriages. A consideration of this shews that appropriate changes in the existing rules of law are all the more reasonable and necessary. This is recognized by the legislature of the Province of Ontario (6 Edw. VII. c. 46). But even more stringent legislation would seem to be necessary for the protection of the public. Any one taking up the subject from that standpoint would, of course, study carefully legislation in England and in France, and the ordinances in force in those countries, where the evils are, by reason of a denser population, greater than in this Dominion and where more careful thought has been devoted to the consideration of the dangers and evils which have come in with the use of motor cars.

LAW REFORM.

PART II.—SETTLEMENTS.

One of the objects of the previous article was to try and shew that the subject of law reform does not depend only upon a change or improvement in the mechanism of litigation, but that without certain ethical and intellectual qualities and standards any changes in practice or in rules of law could only work a very superficial improvement. In other words no rules can be so good that they may not be misused and few can be so bad but that in the hands of sensible and conscientious practitioners they can be made to serve a useful purpose. Without, therefore, denying the importance of law reform in its popular sense, an attempt will be made to deal with some other matters equally pertinent and probably more important. One of these matters is the question of settlements to which reference has been already made in the earlier article. Naturally enough the subject of settlements has received comparatively little judicial consideration, the reason no doubt being that the very fact of an arrangement being made removes the matter from the cognizance of the

courts. It is curious, however, to note how little, if any, advocacy of compromise appears in our legal literature. Occasionally a judge in wise and thoughtful language points out that an action should never have been brought to court; but of direct argument in favour of the subject there are to the ordinary reader on legal topics few, if any, traces. Such must exist, no doubt, but it is probably incidental to some other subject and, therefore, known only to those who may hit upon it by chance. In the various codes of legal ethics which have recently been the subject of discussion in the United States, this very subject has received but slight consideration and has not been insisted upon with the emphasis that one might wish to see: see Transactions American Bar Associations for 1907, pp. 61 and 676, et seq.

For the honour of his profession the writer does not think or imply that this silence on the subject has any sinister explanation or proceeds from motives of self-interest on the part of solicitors. Indeed, self-interest, even under our present absurd tariff of costs probably dictates compromise to the average lawyer. Clients are in the end better satisfied and better off. The returns in the form of fees are generally quicker and more certain and there is not, as in the case of litigation between persons of moderate or small means, the same quantity of work done, but never paid for, because there is no tariff for it, or because the costs are so out of proportion to the amount involved that one has not the "face" to charge full fees. Probably lawyers have no more persistent detractors than the unsuccessful or even the successful litigant who has been obliged to pay a bill for which he sees no adequate return. For this reason alone the lawyer acting for the average litigant of moderate or limited means (of whom the great body of clients consist) finds it greatly to his interest to settle. Therefore, not only duty, but self-interest persuades us that we ought to bring about some amicable solution; and, in illustration of this, the writer may be permitted to say that in 16 or 17 years it has only once been suggested to him in words that a settlement was undesirable because both clients were well-to-do and able to pay the costs of

a good fight. Instances occur, of course, where there is some insurmountable, but not apparent, obstacle in the way of an adjustment, and where costs increase with surprising persistence, but even such examples are the exception and one is glad to believe and is justified in believing that where there are no settlements it is because no way of making a fair arrangement occurs to the parties. It is with the latter cases, however, that these remarks have most to do. Often the feelings of the litigants are the chief obstacle in the way. They are angry; and dramatically assert that they are fighting for "principle" and that they will spend their "last cent" in order to prove what a rascal their opponent is. In most of such cases, there is nothing for it but to begin action and let it continue until time and the costs of suit assist that sober second thought which generally comes to people in a temper. It may be remarked in passing that it often accelerates the arrival of a more judicial frame of mind to ask the gentleman who is going to spend his last cent in vindicating his position, for a substantial sum on account of costs before issuing the writ; and it is surprising how often the immediate payment of one hundred dollars will deter the rash litigant who has just announced his intention of staking all his substance upon the correctness of his views. Lawyers generally recognize and are entitled to insist that their judgment is better than the inflamed opinion of their client, and that it is their duty to find out some way of adjusting his quarrel even though the latter thinks that his opponent should be visited with the extreme rigour of the law.

There are some classes of cases which almost call for an apology from the solicitor who is concerned in them and which at least, it is his duty at all times to be ready to explain and defend to a demonstration. Those are cases of quarrels between relatives or cases in which bad feeling or some one's stupidity is unnecessarily encroaching upon an estate or some fund which is in dispute. The mere fact that whoever else may profit, the solicitor gets a larger share of the fund the more proceedings there are taken, at once puts the latter upon the defensive, and

though such cases exist and are properly undertaken by the most reputable firms, any one engaged in them professionally owes it to his profession and to himself to be able to shew that he has neglected no opportunity to shorten and cheapen proceedings and to put an end, by honourable means, to a quarrel which in the end is only going to do harm to his client.

It is to the honour of the profession that so few disputes between husband and wife, father and son, brother and sister, or others in close family or personal relationship find their way into the courts; but probably even fewer will thrive when and if the attention of the profession as a whole, and more particularly the younger members of it, is more frequently and more forcibly directed to the shame and impropriety of such disputes.

While on this subject the question of so-called speculative actions deserves some consideration. There are many cases of line fence disputes, libel, slander, crim. con. and malicious prosecution which have no merits in them and in which nothing is hoped for unless a verdict is secured against a defendant possessed of sufficient means to answer the judgment and costs. Such cases being generally undertaken by a class of solicitors whose patron saints are Messrs. Dodson and Fogg, and who are not much interested in settlements, except where they gain more than they would by going to trial, there is probably but little use in suggesting means of adjusting them and seeking to emphasize the morality of putting an end to such litigation; but there are other cases of injuries or death due to negligence where the claimant being poor, has a right to call on the profession for assistance in pressing a just claim, yet where no pecuniary reward can be hoped for unless damages are recovered. With exquisite irony our law by setting up a false standard of propriety and making it impossible to bargain for an adequate financial return for the risk taken, has rendered it difficult, if not out of the question for the better class of lawyers who respect themselves and desire to adhere even to false notions of propriety while they exist, to undertake such cases and they, therefore, often fall into the hands of devotees of Dodson and Fogg, who

make a living out of fomenting quarrels and prolonging them while there is a prospect of a larger financial return. If it were possible to accept without loss of dignity the bonâ fide retainer of the poor litigant, there would be in all probability a great falling off in the decisions on negligence because settlements would more frequently occur to the great benefit of both claimants and defendants.

The desirability of persistently and authoritatively pointing out the benefit of settlements especially to students and younger practitioners has already been reiterated in these remarks; but there is another point of view from which the same question may be approached. To many good lawyers the aspect of a settlement as an essential "step in the cause" never presents itself. They have been accustomed to see clients bring a writ or dispute into the office and to assist in grinding away till they turn it out a judgment, and the kind of judgment is almost a secondary matter. If it were part of the routine of an office to consider ways and means of settling just as we consider the form of pleading or the character of the evidence to be adduced at trial many actions might never come to trial at all. Then so often minor faults of temper or demeanour interfere. We have the "cocksure" solicitor who sees no hope for the other side; the solicitor whose client's geese are always swans and who becomes even angrier than the client at the other party's misdoings; and the solicitor who never trusts another, or who never sees a short cut whereby expense may be saved; and all these, acting in good faith, add enormously to the cost of litigation. If our Law School could inculcate and our Benchers and courts enforce the duty of compromising disputes, a marked improvement might be hoped for and new standards would soon be created to which the great majority of lawyers would gladly conform.

One hesitates to suggest any practical rules for bringing about settlements because to do so would be to state mere truisms current generally in the profession. So much, too, depends upon the demeanour and good temper of the solicitors themselves, and this leads to a discussion which is rather beyond the scope of a

legal journal. If one word on such a subject is permitted that word would be the reminder that a too positive or superior attitude on the part of either counsel is prejudicial. Incredible as it may seem, even the junior members of important firms have been known to err, and instances have occurred where the opinions of a country practitioner, hesitating in his speech and deferential in his manner, have prevailed over the definite assertions of younger men whose fathers have been extremely prominent.

The experience of men (both lawyers and laymen) having much to do with settlements has been that they must first carefully collect and consider the evidence as it will probably appear at a trial, and that they must be fortified with facts which they are prepared to disclose and prove to the other side. To do this there must be a frank interchange not only of views, but of evidence, and the first essential to such a conference or correspondence is that (whether expressed or not) all that is divulged must be treated as being without prejudice and must not be quoted, referred to or used in any proceedings other than the settlement. It is probably the experience of most lawyers in large practice that their confidence in such cases is seldom if ever abused, and judges are quick to discover and to prevent any improper use of information or offers made in the course of such negotiations.

The question frequently arises how far it is necessary or desirable to "bluff" the other side. It cannot be said that such tactics are improper or censurable in themselves; but it may safely be said that generally they are injudicious. No one can properly state as facts matters which he does not know to exist, and as a rule the other side is in possession of sufficient information to enable him to check, and roughly so, such statements of fact made to him. Besides that, solicitors must deal with their professional brethren not once, but frequently, and a solicitor who has once bluffed another and afterwards been discovered is a marked man and his subsequent attempts in the same direction are inevitably discounted. So also there is much

manœuvering for position, that usually proves to be a waste of time and energy. One side hesitates to make an offer because the other will look upon it as a confession of weakness, but he will entertain one if made. It attempts to settle were a necessary incident to an action, this feeling would disappear, and in any case no one is hurt by an offer made without prejudice. If a man goes carefully over his case and makes up his mind that,—subject to anything which the other side may disclose,—there are certain limits and no others within which he can properly settle, he cannot be forced, by any overtures he may make, into any other position unless he chooses. Upon the whole it will probably be found that those most successful in handling clients' affairs lose no opportunity of trying to settle, stand on very little ceremony when the game is once fairly going, and play it with most of their cards upon the table.

SHIRLEY DENISON.

SOLOMON TO THE RESCUE.—A., an implement agent, induces B. to buy a machine from him and take his note for $100. A. then fills up three more of his blanks, facsimiles, forges B.'s name to them and discounts them all at different banks. When the time comes B. receives four different demands for payment of his notes. He is an illiterate farmer and he can't "for the life of him" tell which is the genuine note., i.e., the one that he signed. All the banks threaten suit. The only evidence that can be offered is B.'s own, and that is no use. A comparison of the different documents results in the observation that he "can't tell t'other from which." The reader is requested to give his opinion as to the rights of the various parties, stating reasons.

REVIEW OF CURRENT ENGLISH CASES

COLLISION—SUBSEQUENT TOTAL LOSS—PROXIMATE CAUSE—TEMPORARY REPAIR—REMOTENESS.

The Bruxellesville (1908) P. 312 was an action in the Admiralty Court arising out of a collision. The plaintiffs were the owners of the Veritas and the defendants were owners of the Bruxellesville. The latter vessel had run into the Veritas in the English Channel, after which the Veritas put into Portland, where temporary repairs were effected and she then proceeded to Bristol, her port of discharge, but when off the Lizard she sprung a leak and sank. The plaintiffs in these circumstances claimed to recover from the owners of the Bruxellesville as for a total loss, but Bucknill, J., held that the final loss of the vessel was due to the insufficiency of the repairs effected at Portland and that therefore the plaintiffs could not recover more than the actual damage occasioned by the collision.

ACTION FOR INFRINGEMENT OF PATENT—JUDGMENT—REVOCATION OF PATENT AFTER JUDGMENT—ESTOPPEL BY JUDGMENT—INQUIRY AS TO DAMAGES—DE FACTO PATENT.

Poulton v. *Adjustable Cover & Boiler Block Co.* (1908) 2 Ch. 430 was an action to restrain the infringement of a patent and to recover damages for infringement, and judgment was given therein in favour of the plaintiff and directing an inquiry as to damages. Pending the inquiry the patent was revoked for want of novelty. The defendants then set up the revocation as a bar to the recovery of damages. The Master found that by reason of the revocation of the patent the plaintiff had not sustained any damage, but if, notwithstanding the revocation, the plaintiff was entitled to damages he assessed them at £110, and from this report the defendants appealed to Parker, J., who held the judgment estopped the defendants from saying that the plaintiff had sustained no damages, and that the plaintiff was therefore entitled to substantial damages, and he gave judgment for payment of the £110. From his judgment an appeal was had to the Court of Appeal (Williams, Moulton, and Buckley, L.JJ.), which that court dismissed. The Court of Appeal says that

even if the revocation had the effect of making the patent null ab initio, that could not affect the result, because by the judgment the infringement became res judicata.

UNPUBLISHED PICTURE—PROPERTY IN PICTURE—COMMON LAW RIGHT IN PICTURES—INFRINGEMENT—PIRATED COPY—INNOCENT PUBLICATION—DAMAGES.

In *Mansell* v. *Valley Printing Co.* (1908) 2 Ch. 441, the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) have affirmed the judgment of Eady, J., (1908) 1 Ch. 567 (noted ante, p, 352), to the effect that the owner of a picture has a common law right of property in it, which altogether apart from the copyright statutes, entitles him to restrain its reproduction and publication against his will and without his consent; and that it is immaterial that the copy has been obtained surreptitiously by a third person and is published in good faith by another under the supposition that the third party was the rightful owner.

RAILWAY COMPANY—STATUTORY POWERS—POWERS EXERCISEABLE WITHIN LIMITED PERIOD—EXPIRATION OF TIME—COMPANY IN POSSESSION OF LAND—POWER TO CONSTRUCT RAILWAY THEREON—ULTRA VIRES.

Great Western Railway v. *Midland Ry.* (1908) 2 Ch. 455. This was an action for a declaration that the plaintiff company were entitled to exercise running powers over a part of the line of the defendant company, and for that purpose to construct necessary junctions. The defendant company had granted to the plaintiff company in 1898 a license to enter on and use the line in question and construct junctions therewith, but subject to the provisions of a certain Act, which inter alia provided that the plaintiff might construct the railway, but that "if the railways be not completed within five years from the passing of this Act, then on the expiration of that period, the powers granted by this Act to the company for making and completing the railways or otherwise in relation thereto shall cease except as to so much thereof as is then completed." The construction of the necessary junctions was not completed within the five years and the defendant company contended that the plaintiffs had no longer any power to construct them, and to do so would be ultra vires; but Warrington, J., who tried the action, came to the conclusion that the limitation only applied to those powers which

the company could not exercise except by virtue of the Act, but as the plaintiffs had within the five years acquired the necessary land and consequently the lawful right to use it, they might use it for the purpose of making the railway, notwithstanding that the five years had expired.

MINES—OVERLYING AND UNDERLYING SEAMS OF COAL—RIGHT TO SUPPORT—SUBSIDENCE—INJUNCTION.

Butterley Co. v. *New Hucknall Colliery Co.* (1908) 2 Ch. 475. The plaintiffs in this action claimed an injunction to restrain the defendants from working their mine so as to cause a subsidence of the plaintiffs' mine. In 1887 the Duke of Portland granted the plaintiff a lease of the seam of coal nearest the surface of a large tract of land with the usual powers to work and carry away the coal. This lease provided that it should be lawful for the Duke and his assigns to enter upon the mining area of the plaintiffs, and to sink to and work the mines underlying the mine leased to the plaintiffs, and in such case that they should indemnify the plaintiffs against any physical damage that might be caused by the operations of the tenants of the underlying mines. In 1893, the Duke leased to the defendants a seam of coal lying 170 yards under the plaintiffs' mine, and in working this mine in a reasonable and proper manner a subsidence was caused to the plaintiffs' mine which made it more difficult to work, hence the present action. The defendants contended that the reservation in the plaintiffs' lease of the right to work the underlying mines, exonerated them from liability, and that the doctrine of a right of support applied to surface rights and not to overlying and underlying mines, and that the clause as to damages involved the right to remove the support of the plaintiffs' mine, and that there could be no physical damage to the coal in plaintiffs' mine, merely by reason of the subsidence. Neville, J., however, declined to accede to this argument and came to the conclusion that there was nothing in the plaintiffs' lease apart from the reservation of the right to work the underlying mines which was inconsistent with the idea of the plaintiffs' right to a continuing support to his mine, and the right to take minerals beneath did not involve a right to let down the overlying strata, and consequently that the defendants' acts were unlawful and should be restrained by injunction, which was accordingly granted together with an inquiry as to damages.

WILL—CONSTRUCTION—BEQUEST OF "ALL MY DEBENTURES"—DEBENTURES AND DEBENTURE STOCK.

In re Herring, Murray v. *Herring* (1908), 2 Ch. 493, a simple question was involved. A testator, having at the time of his will, and at the date of his death, both debentures and debenture stock in a certain company, by his will bequeathed "all my debentures and preferred and deferred stock in the Municipal Trust Co.," and the point was, whether the debenture stock was included in this bequest. Joyce, J., decided that it was, being of the opinion that "all my debentures" included all kinds of debentures. We notice that the learned judge pays a graceful tribute to the late Mr. Vaughan Hawkins, who argued the case for the defendant, but died before judgment.

WILL—LAPSE—DEATH OF ALL BENEFICIARIES AND EXECUTOR BEFORE TESTATOR—INTESTACY—INTESTATES' ESTATES ACT, 1890 (53 & 54 VICT. c. 29)—(R.S.O. c. 127, s. 12).

In re Cuffe, Fooks v. *Cuffe* (1908) 2 Ch. 500. The point decided by Joyce, J., is, that where all the beneficiaries and the executor named in a will die before the testator, who leaves a widow, and no issue; the testator has died intestate within the meaning of the Intestates Act. 1890 (see R.S.O. c. 127, s. 12), and that his widow is entitled to £500 (in Ontario it is $1,000), out of his estate absolutely and exclusively.

GAMING—CAUSE OF ACTION—CHEQUE GIVEN FOR BET—FORBEARANCE TO PUBLISH DEFAULT—NEW CONSIDERATION—GAMING ACT (9 ANNE c. 14)—(R.S.O. c. 329)—AMENDMENT AT TRIAL.

Hyams v. *King* (1908) 2 K.B. 696. In this case the action was brought to recover a balance due on a cheque given in settlement of a bet won by the plaintiff from the defendants. At the request of the defendants the cheque was held over and not presented on part payment being made, and subsequently a fresh verbal agreement was come to by which in consideration of the plaintiff holding over the cheque and refraining from declaring the defendants defaulters, thereby injuring them with their customers, they promised to pay the balance owing in a few days. The action was tried by Darling, J.; there were no pleadings in the action except the indorsement claiming £48 10s. on an account stated. The learned judge at the trial appears to have thought

that the plaintiff was not entitled to recover as on an account stated, but he thought that the new agreement to refrain from posting the defendants as defaulters constituted a good consideration for the promise to pay the balance and he gave leave to amend by setting up that case, and, assuming the amendment to be made, gave judgment for the plaintiff for the amount claimed. No amendment was in fact made, but the majority of the Court of Appeal (Barnes, P.P.D., and Buckley, L.J.) agreed with the view of Darling, J., and allowed the amendment to be made nunc pro tunc, but as the amendment had not been made at the trial, refused the plaintiff the costs of the appeal. Moulton, L.J., however, delivered a very able dissenting judgment, holding that the Statute of Anne had made cheques given for gaming debts a nullity and therefore the giving of time for payment thereof, or refraining from publishing to others that the defendants had made default in paying the cheque which was null and void, could not in law be a consideration for a new promise to pay it. The majority of the court, however, hold that a bet was not unlawful at common law, and no statute had made it so; that although the Statute of Anne made securities given in payment of bets void and prohibited actions to enforce such securities, yet the bet itself was not made illegal, and that it was still a debt of imperfect obligation, and the forbearance of posting the defendants as defaulters was a good consideration for a promise to pay. To hold otherwise, their Lordships think, would be to legislate, and yet we cannot forbear thinking that the conclusion of Moulton, L.J., more effectually carries out the existing statute law on the subject, whereas that of the majority merely furnishes an ingenious legal method for its evasion.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] BRENNER *v.* TORONTO RLY. CO. [Oct. 6.

Negligence—Street railway—Rules of company—Charge of judge—Contributory negligence.

A rule of the Toronto Rly. Co. provides that "when approaching crossings and crowded places where there is a possibility of accidents the speed must be reduced and the car kept carefully under control. Go very slowly over all curves, switches and intersections; never faster than three miles an hour. . ." A girl on the south side of Queen Street wished to cross to University Avenue, which reaches, but does not cross, Queen. She saw a car coming along the latter street from the east, but thought she had time to cross, but was struck and severely injured. On the trial of an action for damages the judge in his charge said: "It is not a question, gentlemen of the jury, as to the motorman's duty under the rule, it is a question of what is reasonable for him to do." The jury found that defendants were not guilt of negligence; that plaintiff by the exercise of reasonable care could have avoided the injury; and that she failed to exercise such care by not taking proper precautions before crossing. The action was dismissed at the trial; a Divisional Court ordered a new trial on the ground that the judge had misdirected the jury in withdrawing from their consideration the rules of the company. The Court of Appeal restored the judgment at the trial.

Held, affirming the judgment of the Court of Appeal (15 O.L.R. 195) which set aside the order of the Divisional Court for a new trial (13 O.L.R. 423), Idington, J., dissenting, that the action was properly dismissed.

Held, per GIROUARD and DUFF, JJ.—The judge's charge was open to objection, but as under the findings of the jury and the evidence plaintiff could not possibly recover, a new trial should be refused.

Per DAVIES, J.—There was no misdirection. The jury were not led to believe that the rules were not to be considered, but only that they should be the standard as to what was or was not negligence, which question should be decided on the facts proved.

Per MACLENNAN, J.—The place at which the accident occurred, where University Avenue meets Queen Street, is not a crossing or intersection within the meaning of the rules and they do not apply in this case.

Appeal dismissed with costs.

G. F. Henderson, K.C., for appellants. *D. L. McCarthy*, K.C., for respondents.

Ont.] BEATTY *v.* MATHEWSON. [Oct. 6.

Contract—Construction—Sale of timber—Fee simple—Right of removal—Reasonable time.

In 1872 M., owner of timber land, sold to B. the pine timber thereon with the right to remove it within ten years. In 1881 another agreement replaced this and all the timber standing, growing or being on the land "to have and to hold the same unto the said party of the second part, his heirs and assigns forever" with a right at all reasonable times during some years to enter and cut and remove the same." B. exercised his rights over the timber at times up to his death in 1898 and his executors did so after his death, M. not objecting. In 1903 persons authorized by said executors entered and cut timber and continued until 1905. The following year M. brought an action for an injunction against further cutting, a declaration that the right to take the timber had lapsed and for damages.

Held, affirming the judgment of the Court of Appeal (15 O.L.R. 557), Davies and Duff, JJ., dissenting, that the instrument executed in 1881 did not convey to B. the fee simple in the standing timber, but only gave him the right to cut and remove it within a reasonable time and that such time had elapsed before the entry to cut in 1903 and M. was entitled to damages.

Appeal dismissed with costs.

Hodgins, K.C., and *Stone*, for appellants. *Powell*, K.C., for respondent.

Que.] [Oct. 6.

MONTREAL LIGHT, HEAT & POWER CO. *v.* REGAN.

Negligence—Dangerous works—Protection of employees—Evidence—Questions for jury—Judge's charge—Findings of fact—Inferences.

An experienced employee of the defendants was killed by an explosion of illuminating gas while discharging his duties in the

meter-room at the defendants' gas works. It was shewn that there might possibly have been an escape of gas from the controllers or other fixtures in the room or in the blow-room adjoining it; that there had been no special precautions by the defendants to detect any such escape of gas that might occasionally happen, and that the meter-room had always been, and at the time of the accident, was lighted by means of open gas jets. There was no exact proof of any particular fault attributable to the defendants, which could have been the whole cause of the explosion, and its origin and course were not explained. In an action for damages by the widow and representatives of deceased, the jury found that the explosion had resulted from the fault and imprudence of the defendants in lighting the meter-room by open gas jets, and contributory negligence on the part of deceased was negatived.

Held, affirming the judgment appealed from (Q.R. 16 K.B. 246), Davies and Maclennan, JJ., dissenting, that in the circumstances the jury were justified in finding that there had been such negligence and imprudence on the part of the defendants in such use of open gas jets as would render them responsible for the injury complained of.

Appeal dismissed with costs.

R. C. Smith, K.C. and *G. H. Montgomery,* for appellants. *Oughtred,* K.C., and *W. H. Butler,* for respondent.

Board of Rly. Commrs.] [Oct. 6.

ESSEX TERMINAL CO. *v.* WINDSOR, ESSEX & LAKE SHORE RAPID RLY. CO.

Board of Railway Commissioners—Jurisdiction—Location of railway — Consent of municipality — Crossing — Leave of Board—Discretion.

On 12th August, 1905, the Township of Sandwich West passed a by-law authorising the W. E. etc., Rly. Co. to construct its line along a named highway in the municipality, but the powers and privileges conferred were not to take effect unless a formal acceptance thereof should be filed within thirty days from the passing of the by-law. Such acceptance was filed on 12th September, 1905. This was too late and on 20th July, 1907, the Council of Sandwich West and that of Sandwich East respectively passed by-laws containing the necessary authority.

In April, 1906, the location of the line of the E. T. Rly. Co. was approved by the Board. In June, 1906, the Board made an order allowing the W. E., etc., Co., to cross the line of the C.P.R. In March, 1907, another order respecting said crossing was made, and also an order approving the location of the W. E. Co., the municipal consent being obtained three months later. The E. T. Co. applied to the Board to have the orders of June, 1906, and March, 1907, rescinded and for an order requiring the W. E. Co. to remove its track from the highway at the point where the applicant proposed to cross it, to discontinue its construction at such point, or in the alternative, for an order allowing it to cross the line of the W. E. Co. on said highway. The applicants claimed to be the senior road and that the W. E. Co. had never obtained the requisite authority for locating its line. On a case stated to the Supreme Court by the Board,

Held, 1. The Board had power to refuse to set aside the said orders; that the by-laws passed in July, 1907, were sufficient to legalize the construction of the W. E. Co.'s line on said highway; and that the Board can now lawfully authorize the latter company to maintain and operate its railway thereon.

2. Leave of the Board is necessary to enable the E. T. Co. to lay its tracks across the railway of the W. E. Co. on said highway.

3. The Board, in exercise of its discretion, has power to order to authorize the maintenance and operation of the W. E. Rly. Co. along said highway and to give leave to the E. T. Co. to cross it and the line of the C.P.R. near the present crossing, and to apportion the cost of maintaining such crossing equally between the two companies instead of imposing two-thirds thereof upon the E. T. Co., as was done by a former order not acted upon; and to order that if the E. T. Co. finds it necessary in its own interest to have the points of crossing differently placed, it should bear the expense of removing the line of the W. E. Co. to the new point of crossing.

Appeal dismissed with costs.

Armour, K.C., and *Coburn*, for appellants. *Matthew Wilson*, K.C., for respondents.

Crim. Code.] IN RE SEELEY. [Oct. 27.

Criminal law—Indictable offence—Summary trial—Jurisdiction of magistrate—Offence committed in another county.

If a person is brought before a justice of the peace charged with an offence committed within the province, but out of the

limits of the jurisdiction of such justice, the latter, in his discretion, may either order the accused to be taken before some justice having jurisdiction in the place where the offence was committed: Crim. Code (1892) s. 557; Crim. Code (1906) s. 665, or may proceed as if it had been committed within his own jurisdiction. S. was brought before the stipendiary magistrate of the City of Halifax charged with having committed burglary in Sydney, C.B.

Held, that the stipendiary magistrate could, with the consent of the accused, try him summarily under Crim. Code (1892) s. 785, as amended in 1900, Crim. Code (1906) s. 777.

O'Hearn, for appellant. *J. J. Power*, K.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Teetzel, J.] REX *v.* TITCHMARSH. [Oct. 13.

Summary conviction—Crim. Code, ss. 530, 682, 711—*Quashing conviction—No evidence taken down.*

The defendant was convicted by three justices for polluting a well on his premises which was also used by other persons. The defendant put in a claim of right; but no evidence whatever was taken down in writing at the hearing of the case before the justices. On application to quash the conviction on a number of grounds,

Held, that as there was no evidence produceable to sustain the conviction, it must be set aside for want of jurisdiction.

Quære. Whether apart from the provisions of the Code the conviction was not for the reason alleged made without jurisdiction.

J. B. MacKenzie, for applicant. No one appeared for the justices or the prosecutor.

Anglin, J.] REX *v.* SIMMONS. [Oct. 16.

Criminal law—Conviction—Commitment—Habeas corpus—Proceedings anterior to conviction—Liquor License Act—Second offence—Admission of previous offence—Record—Magistrate's minute—Uncertainty—Discharge of prisoner—Excessive penalty—Power to amend.

Although a conviction on its face appears sufficient to support the commitment of the defendant, the court will, on the return of a habeas corpus, examine the proceedings anterior to the conviction to see if they warrant his detention, and, if they do not, will order his discharge. *Regina* v. *St. Clair* (1900) 27 A.R. 308 followed.

The defendant was convicted on the 15th September, 1908, for selling liquor without a license; the conviction recited that the defendant had been convicted on the 17th October, 1907, of having unlawfully sold liquor without a license; and the punishment adjudged was imprisonment for four months without hard labour—the statutory penalty for a second offence. The only record in the proceedings in respect to any previous conviction was contained in an indorsement upon the information in the handwriting of the magistrate, as follows: "The defendant makes a statement that he was convicted of selling between 4 Oct. and the 14 Oct., 1907, and I find the within charge a second offence for selling. I commit the defendant to the county gaol for four months' without hard labour."

Held, that sub-s. 6, of s. 101, of the Liquor License Act, R.S.O. 1897, c. 245, requires that the subsequent offence and the earlier offence shall each be an offence in contravention of one of the sections numbered 49, 50, 51, 52, or 72, or an offence against some other section for which no penalty is provided except by s. 86. The admission as recorded might mean that the defendant had previously been convicted of an offence against s. 78 (2) or against s. 124 (1), or of selling on licensed premises in prohibited hours; proof or the admission of a former conviction for any of these offences would not warrant a later conviction under s. 72 being treated as a second offence under sub-s. 6 of s. 101; and this fact sufficed to render the admission of the accused as recorded by the magistrate so uncertain that it was inadequate to sustain his conviction as for a second offence; and he should be discharged from custody under the commitment.

Semble, that the court had no power to amend the conviction by substituting the maximum penalty prescribed by s. 72 for a first offence.

J. B. MacKenzie, for defendant. *J. R. Cartwright*, K.C., for Crown.

Falconbridge, C.J., MacMahon, J., Riddell, J.] [Oct. 10.

QUART *v.* EAGER.

Vendor and purchaser—Conveyance—Covenant for additional payment if land disposed of by purchaser—Recitals—Breach of covenant—Conveyance by purchaser—Personal order—Lien—Declaration—Enforcement by sale—Covenants running with the land.

Appeal by defendants from the judgment of BOYD, C. By conveyance of October, 1901, the land in question was conveyed by the plaintiff to Daniel Eager and Thomas Sanderson for $200 with the proviso that if the land is fenced in the manner forbidden, or in the event of its being sold, leased or otherwise disposed of, a further sum of $500 cash as additional consideration should be paid, making $700 in all. The strip was sold as an entrance for railway purposes to mill property, and evidence was given that the plaintiff had confidence that the original purchasers could not use it so as to be a source of trouble and annoyance to him and so reduced the price on the above condition. Eager and Sanderson sold this portion with other portions to Eager & Sanderson Co. by conveyance made subject in express terms to the stipulations, covenants, and conditions set out in the first deed of 1901. Eager & Sanderson Co. sold and conveyed the strip in July, 1904, to William Eager and Richard Eager, the present defendants, and this conveyance was again made expressly subject to the original stipulations in the deed of 1901. The plaintiff now asks for the payment of $500 with a lien on the land and personal judgment against the defendants.

The defence was that there was no privity of contract and that the transaction sued on was void as being in restraint of alienation and on the ground that the conveyance of 1901 transgressed the rule as to perpetuity.

Held, 1. That where the operative part of a deed appears to

be intended to follow, but does not accurately follow, the words of the recital, the effect of the operative party will be controlled by the recital, and "the further sum of $500" is clearly stated in the first recital in the deed of Oct. 7, 1901, to be "an additional consideration for said land" and the Chancellor was right in holding the $500 to be part of the consideration, and as it had never been paid it formed a lien on the land.

2. For reasons set forth in judgment of RIDDELL, J., the personal judgment against the defendants could be sustained.

Per RIDDELL, J.:—In addition to the grounds upon which the decision is put by the Chancellor, it was argued before us that the mere fact of taking a conveyance of land subject to an incumbrance obligated the grantee to pay off the incumbrance, and this is a fortiori if there were a covenant to indemnify the grantor. The bald proposition first set out is, of course, based upon *Waring* v. *Ward*, 7 Ves. 332, and like cases, but, whatever may be the rights as between grantor and grantee, there can be no doubt that the incumbrancer cannot take advantage of the equitable right to indemnity (if it exist) and bring his action against the grantee directly: *Walker* v. *Dickson*, 20 A.R. 96. If there be an express covenant on the part of the grantee with the grantor, the case is not advanced. The doctrine supposed to be an equitable one that if A. promise B. that he (A.) will pay to C. B.'s debt to C., then C. can sue A. for the same, is not tenable. Some discussion of this heresy will be found in *Kendrick* v. *Barkey*, 9 O.W.R. 356,, at pp. 358 et seq. Nowadays the difficulty is got over by the original creditor taking from the new grantor an assignment of his rights against the grantee: *British Canadian Loan Co.* v. *Tear*, 23 O.R. 664.

It may be noticed also that in the conveyance to these defendants they do not covenant to indemnify their grantors or any one, and the conveyance is not even subject to the conditions, etc., of the original deed from Quart. And the stringent rule of *Carter* v. *Carter*, 26 Gr. 232, in which Blake, V.-C., held that if there is a devise of land subject to the payment of an annuity, and the devisee accepts the devise, he will be held to have assumed a personal liability to pay the amount, has never been extended to the case of a grantee. The only ground upon which the personal judgment against these defendants can be supported, if at all, is that upon which it is put by the Chancellor, that is, the covenant by the original grantees, and this being held to run with the land.

I am unable to see in what way the payment of part of the consideration can be said to touch or concern the land conveyed. It is not like the rent, which, in the theory of the law, issues out of the land devised—though even as to rent see *Milnes* v. *Branch*, 5 M. & S. 411—it is much of the nature of a covenant on the part of a lessor to pay on a valuation for trees planted by the lessee: *Gray* v. *Cuthbertson*, 4 Doug. 351 (although in that case indeed the breach was the refusal to name an arbitrator to fix the value of the trees); or to pay for improvements: *Guten* v. *Gregory*, 3 B. & S. 90; or by lessee to pay in addition to the rent 10 per cent. on the outlay the less should make in improvement of the buildings: *Lambert* v. *Norris*, 2 M. & W. 333; *Hoby* v. *Roebuck*, 7 Taunt. 157; *Donellan* v. *Read*, 3 B. & Ad. 899; *Martyn* v. *Clue*, 18 Q.B. 661. See also *Webb* v. *Russell*, 3 T.R. 393; *Stokes* v. *Russell*, 3 T.R. 678; *Russell* v. *Stokes*, 1 H. Bl. 562. Such covenants have been held to be merely personal between the covenanting parties, and not to bind the assignees, even if named.

I do not press the point here that the original grantees did not even in form bind their assigns to pay, the covenant reading that they, "for themselves, their executors, administrators, or assigns, covenant," etc. Nor do I enter into the larger inquiry whether except in the case of landlord and tenant, the burden of a covenant can run with the land. This has been very fully considered by the Court of Appeal in *Austerberg* v. *Oldham*, 29 Ch. D. 750. All the cases theretofore were examined, and, while the court did not absolutely decide that this principle was confined to the case of landlord and tenant, they in effect made its quietus for the proposition that it extended beyond. In that case A. sold a piece of land to B. as part of the site of a road intended to be built and maintained. B. covenanted with A., his heirs and assigns, that he, his heirs and assigns, would make the road and keep it in repair. This land was bounded on both sides by other lands of A. A. sold to the plaintiff; B., to the defendants; both with notice of the covenant. It was held by the Court of Appeal, affirming the decision of the Vice-Chancellor of the Duchy of Lancaster, that the plaintiff could not enforce the covenant against the defendant, as the covenant did not and could not run with the land. Upon the equitable doctrine that a person who takes with notice of a covenant is bound by its being appealed to—and Rigby, L.J., in *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, at p. 401, says: "I do not think any covenant runs with the land in equity. The equitable doc-

trine is that a person who takes with notice of a covenant is bound by it"—the court held that the said equitable doctrine, established as it is by *Tulk* v. *Moxhay*, 2 Ph. 774, applies only to restrictive covenants, *i.e.*, covenants respecting the mode of using the land, and indeed had already been held in *Haywood* v. *Brunswick Society*, 8 Q.B.D. 403, and *London and South Western R.W. Co.* v. *Gomm*, 20 Ch. D. 562.

As to the lien. Evidence was admitted by the Chancellor at the trial as to the circumstances surrounding the making of the deed, and I think rightly: *Frail* v. *Ellis*, 16 Beav. 350. It is a very old head of equity that if the purchase money or any part of it is unpaid, and the vendor gives possession, he will have a lien on the estate for the unpaid purchase money. This principle, which is said to be "a natural equity," was laid down by the Court of Chancery at least as early as 1684, when the Lord Keeper, Sir Francis North, Lord Guildford, expressly so decided in *Chapman* v. *Tanner*, 1 Vern. 267. This "lien is not in general discharged by the vendor taking security for the purchase money by bond, bill, or note, unless under circumstances clearly shewing that it was his intention to rely not upon the security of the estate, but solely upon the personal credit of the purchaser": Watson's Compendium of Equity (2 ed.), p. 1172. The rules for determining this question may be deduced from two well-known cases, *Parrott* v. *Sweetland*, 2 My. & K. 655, and *Frail* v. *Ellis*, 16 Beav. 350. In the former case Lord Commissioner Shadwell, in delivering the judgment of the court (himself, the Vice-Chancellor, and Mr. Justice Bosanquet) says (in speaking of the question whether a lien is excluded), p. 664: "It is manifest that in Lord Lyndhurst's opinion the proper way of dealing with questions of this kind is to look at the instruments executed by the parties at the time, and upon them to declare what the meaning of the parties must have been." In the latter Sir John Romilly, M.R., says: "I am of opinion that the form of the deed does not conclude the parties. . . . I am of opinion that in accordance with all the cases it is possible for the parties to shew what the real nature of the contract was." Accordingly the Master of the Rolls in that case allowed evidence which convinced him that the vendor executed the conveyance of the property in the faith and assurance that a mortgage deed to secure the balance money had been executed. This, be held, completely destroyed the effect of the deed executed at the time, which expressed that the consideration was £150 then paid, and the acceptance of the purchaser of £300 at 3 months,

at the same time delivered to the vendor, "the receipt whereof he did thereby respectively acknowledge, and that the same were in full satisfaction for the absolute purchase" of the property. It seems to have been considered that if some such evidence had not been given, the form of the deed would be binding. As I understand the law, the form of the deed is what must alone be looked at to declare the intention of the parties, unless, by some evidence dehors the deed, the parties can shew that the real nature of the contract was different—and such evidence must be received and considered.

In the present case I cannot see that the parol evidence assists the plaintiff's position, but rather the reverse. Looking at the deed alone, the consideration is explicitly "the sum of $200 . . now paid . . the receipt whereof is hereby . . acknowledged, and in further consideration of the several covenants, promises, and stipulations hereinafter set forth, to be kept, done, and performed by the said parties of the second part or their heirs and assigns . ." It seems to me that here the parties themselves have fixed the consideration as being part in cash and part in promise—not all in money—with a collateral agreement to pay such part thereof as may not yet have been paid. If this conclusion is sound, no vendor's lien ever attached. And I do not think that the case of the plaintiff is advanced by the fact that in the recitals the sum of $500 is spoken of as "additional consideration for said land, making in all $700 therefor"; the covenant for payment has the same expression in effect "as an additional consideration of said land, making in all therefor the sum of $700."

From an examination of the deed, together with (and perhaps without) a consideration of the circumstances surrounding the making of it, it seems manifest that $200 was considered about the value of the land taken along with the detriment to the plaintiff, so long as the original grantees held the land themselves, and used and operated the railway expected to be built in the manner the plaintiff thought they would, and did not fence it in. No doubt, there was a good deal of talk about the manner in which the railway would be operated. Whether this was so or not, it seems to me obvious that the parties looked upon the $200 as the price of the property. Then, to prevent the property being fenced, a covenant is taken that it shall not be fenced without written permission, and that, if fenced, $500 shall be paid to the plaintiff. Can it be said that this $500 is in reality part of the purchase price, the "purchase money." To prevent

the grantees readily parting with, conveying, or disposing of the property, it is provided that if they do so either they or their heirs or assigns must pay this same sum. The position of the sum if they should sell does not seem to me at all different from that of the same sum if they fence, and the fact that this sum is in either case called a "further consideration" does not advance matters one whit.

It seems to me that the sum of $500 is a rough computation of the amount of damages the plaintiff would expect that he would or might suffer if the prohibited fencing were proceeded with (and this is helped out by the covenant in that regard), or by his friends losing control over the line of rail. It is a penalty or liquidated damages, but I think no part of the purchase money, and no vendor's lien attaches.

Province of Nova Scotia.

SUPREME COURT.

Graham, E.J.] [Oct. 9.

COULSTRING *v.* NOVA SCOTIA TELEPHONE CO. ET AL.

Nuisance—Joinder of two parties defendant—Motion to compel plaintiff to elect dismissed.

Where in an action for a nuisance, namely, obstructing the access to plaintiff's house by the erection of a board fence in front of an adjoining building in course of construction, etc., brought against the defendant company and the contractor employed by them, plaintiff, in his statement of claim charged that the defendant company was erecting the building and committed the acts of obstruction complained of, and alleged in the same terms that the defendant H. was erecting the building and committed the act, application was made on behalf of one of the defendants to compel plaintiff to elect which of the defendants he would proceed against and on behalf of the other to strike out his name.

Held, dismissing the application with costs, that the transaction complained of being one and the same there was no objection to plaintiff stating his claim first against the one defendant and then, in the alternative, against the other.

Also, that under O. 16, R. 5, the defendant H. could be joined, although he was not connected with one of the acts of trespass complained of.

Henry, K.C., for plaintiff. *Chisholm*, K.C., and *T. R. Robertson*, for defendants.

Longley, J.] [Oct. 23.

EASTERN TRUST CO. *v.* BOSTON-RICHARDSON CO.

Advance of money to pay wages—Claim of lien dismissed.

G. & Son, acting as agents for the defendant company had been in the habit for some time of advancing money for the payment of wages, on orders drawn upon them by the company, and afterwards drawing upon the company to reimburse themselves for the amounts so advanced. The company being in default to bondholders, a winding-up order was granted and the plaintiff company appointed receivers. After the winding-up order had been granted the receivers had entered into possession, G. & Co. secured assignments of their claims and rights from the employees whose orders they had paid, and claimed a lien on account of the advances made, and to be placed in the same position that the men would have been in if their wages had not been paid.

Held, that G. & Co. were not entitled to the lien claimed, the moneys advanced by them having been paid in accordance with the previous course of business, and entirely on the credit of the company, and without any agreement between them and the men to whom the moneys were advanced for an assignment of their rights in consideration of such advances.

W. B. A. Ritchie, K.C., for claimants. *Mellish*, K.C., for Trust Company.

Longley, J.] [Oct. 23.

HALIFAX GRAVING DOCK CO. *v.* MAGLIULO.

Shipping—Advance of money for purposes of repair—Priority of payment as against attachers under absent or absconding debtor process.

Defendants' vessel arrived at H. in a damaged condition and it being necessary to procure funds to enable the cargo to be removed for the purpose of enabling a survey to be held and repairs effected an advance of $2,000 was obtained from W., the security for which was an agreement signed by the master of the

vessel and the Italian consul, acting as agent for the owners, undertaking, in case any moneys were received from the owners on account of the vessel or cargo, etc., that a sufficient portion thereof should be applied first in repayment of the amount advanced, with interest, etc. It became necessary to sell the ship and cargo and an adjuster was appointed to determine the general average and the contributions of the ship and cargo respectively and under his adjustment a large contribution towards general average was found to be due from the cargo to the ship. The master of the ship and the owner's agent thereupon gave W. an order on the adjuster for the payment of his advance and interest out of the funds to be obtained from the sale of the ship and the general average contribution, which the adjuster accepted payable when in funds. The agents of the cargo, S. C. & Co., who had notice of the advance made by W., delayed paying over to the adjuster the cargo's contribution to general average and while the money was in their hands, but after the order in favour of W. had been drawn upon the adjuster and conditionally accepted, plaintiffs took proceedings against the owners of the ship as absent or absconding debtors and attached the funds in the hands of S. C. & Co.

Held, that the undertaking given to W. by the master of the vessel and the owners' agent, on the faith of which the advance was made, and the subsequent order drawn upon the adjuster and accepted by him, constituted an equitable assignment and gave W. a claim upon the fund in the hands of S. C. & Co., for the amount advanced and interest prior to that of the attaching creditors.

Mellish, K.C., for plaintiffs. *W. B. A. Ritchie*, K.C., for claimant. *Stairs*, for garnishee. *Knight*, for defendants.

Graham, E.J.] SMITH *v.* MCGILLIVRAY. [Oct. 26.

Easement—Right of way—Evidence—Lost grant—License—Admission.

In an action for trespass to plaintiff's land the defence was user of a way as of right for twenty years before action brought; also a claim of way by lost grant; also under a compromise of an action brought some eight years previously, the terms of the compromise being that defendant was to have the user of the way upon condition of keeping up a gate. Evidence was given to shew that within the period of twenty years plaintiff closed

up the way, and then agreed to its being re-opened at the request of defendant upon condition that defendant would place a gate across the way and keep it up.

Held, 1. This evidence excluded the idea that the way was enjoyed as of right.

2. The doctrine of lost grant was not applicable where the enjoyment could be otherwise reasonably accounted for.

3. The compromise of the former action did not constitute an estoppel, but was merely a license which plaintiff was at liberty to withdraw.

Semble, an admission as to a mixed question of law and fact by a layman, particularly in reference to a question of right of way, is not conclusive.

Gregory, K.C., for plaintiff. *Griffin*, for defendant.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] MURPHY *v.* BUTLER. [Oct. 2.

Principal and agent—Commission agent—Liability of principal to agent on contract entered into by agent in his own name on behalf of principal—Sale on Grain Exchange.

The defendant a farmer residing in the United States, instructed plaintiffs, brokers and members of the Winnipeg Grain Exchange, to sell for him 4,000 bushels of oats for future delivery at 37 cents per bushel or better. Pursuant to these instructions, the plaintiffs sold in their own names, according to the rules of the Exchange, 4,000 bushels of oats to one Pearson for October delivery at 38½ cents per bushel, making themselves personally liable on the contract. They promptly advised the defendant of the sale and the price, and defendant did not repudiate the transaction. Defendant refused to deliver the oats and plaintiffs, on the last day of October, were compelled to purchase the 4,000 bushels of oats at 63 cents a bushel in order to carry out their contract with Pearson.

Held, that the plaintiffs were entitled to recover from the defendant the amount of their loss, viz., the difference between 38½ and 63 cents per bushel on the 4,000 bushels.

The defendant had no right to expect that any contract would be drawn up between himself and the purchaser which

would be signed by the parties and sufficient privity of contract between them had been established by what had taken place to enable the defendant to sue the purchaser on this contract if he had so desired.

Brokers on the Exchange buying or selling for a principal are not bound to disclose his name or to make him a party to the contract, and the proved custom of the trade on the Exchange by which the members make themselves personally liable for all transactions entered into is a reasonable one and necessary for the prompt and safe dispatch of business.

Robinson v. *Mollett*, L.R. 7 H.L. 802, distinguished; *Scott* v. *Godfrey* (1901) 2 K.B. 726 followed.

Noble and *Card*, for plaintiffs. *Affleck*, for defendant.

Full Court.] KING *v.* PORTER. [Oct. 3.

Criminal law—Information, sufficiency of—Particulars—Conviction—Doing "an unlawful act."

Applications for habeas corpus to release prisoner convicted before a police magistrate under s. 517 of Crim. Code "for that he did unlawfully in a manner likely to cause danger to valuable property without endangering life on person, do an unlawful act in the C.P.R. yards in the City of Winnipeg," and sentenced to three months' imprisonment. There was nothing in the information or conviction to shew the nature of the alleged unlawful act, although the evidence shewed that the prisoner had put stones in the journal of a car on the railway track.

Held, that the conviction was bad as it did not shew the nature of the unlawful act charged, and that the prisoner should be discharged, the order to contain the usual clause protecting the magistrate.

Patterson, D.A.-G., for the Crown. *Locke*, for the prisoner.

Full Court.] [Oct. 12.

WALD *v.* WINNIPEG ELECTRIC RY. CO.

Negligence—Street railway—Duty of company to put on wheel guards—Damages—New trial.

In an action for damages by reason of a car of the defendants running over the plaintiff, a child under six years old, and cutting off one of her legs, the jury at the trial in answer to questions found that the injury to the plaintiff was caused by the negligence of the defendants, that such negligence consisted,

amongst other things, in not having the car wheels guarded, and fixed the damages at $8,000.

Held, 1. The evidence shewed that the plaintiff got under the car owing to the absence of a wheel guard and that, if there had been a proper wheel guard, the accident would not have happened, and that the jury were warranted in finding that the absence of such wheel guards constituted such negligence as to render the defendants liable for the consequences that ensued.

2. The damages were not so excessive as to warrant an order for a new trial.

Bonnar and *Cohen*, for plaintiff. *Laird* and *Haffner*, for defendants.

KING'S BENCH.

Cameron, J.] WATSON *v.* FREE PRESS. [Sept 30.

Contract—Intention ascertainable only from words and acts of contracting party.

In this case the defendant company instructed an architect named Bristow to employ a contractor to perform certain work for the defendants in reconstructing a roadway which had got out of repair. Bristow employed the plaintiff who did the work and sued for the price. Defendants contested their liability to the plaintiff and set up that they had supposed the plaintiff had been employed to do the work by their architect Stone through his agent Bristow in consequence of their complaint against Stone that he was responsible for the defective condition of the roadway. It appeared, however, that, although the defendants' officers, under the circumstances, were justified in their belief that Bristow was still in Stone's employment and that Stone had ordered the work to be done, Stone had not in fact given Bristow any such instructions, that, at the time Bristow received his instructions from the defendants, he was no longer in Stone's employ, and that neither the plaintiff nor Bristow had any knowledge or notice of what was in the mind of the defendants' officers when they instructed Bristow to have the work done.

Held, that the defendants were liable to the plaintiff for the price of the work, notwithstanding they had supposed that he had been employed by Stone's agent to do it

The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his

intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real, but unexpressed, state of his mind on the subject. Syc., vol. 9, p. 245; Anson on Contract, p. 9, and Pollock on Contract, p. 5, followed.

Fullerton and *Foley*, for plaintiff. *Hudson* and *Ormond*, for defendants.

Cameron, J.] PALAKAISE *v.* MCLEAN. [Oct. 2.

Conditional sale—Lien note—Dealer disposing of horses in the ordinary course of his business.

The plaintiff's claim was for damages for the seizure by the defendants of a team of horses which he had bought from one Foorsen. Foorsen had bought the horses from the defendants giving a lien note on the horses for the purchase money. The plaintiff purchased without any notice or knowledge of the existence of the lien note and gave full value.

The trial judge found that the defendants, when they sold to Foorsen, knew that his business was that of a horse dealer and that he would resell in the ordinary course of his business and, in all likelihood, to an innocent purchaser.

Held, following *Brett* v. *Foorsen*, 17 M.R. 241, that the plaintiff had acquired a good title to the horses notwithstanding the defendants' claim under their lien note, and was entitled to recover.

Hudson and *McKerchar*, for plaintiff. *Bonnar* and *Thornburn*, for defendants.

Cameron, J.] [Oct. 10.

IMPERIAL BREWERS LIMITED *v.* GELIN.

Chattel mortgage—After-acquired goods—Purchase of business and property subject to liabilities of vendor—Estoppel in pais—Description of goods covered by chattel mortgage.

The plaintiff company in May, 1907, in pursuance of a previous agreement, purchased the business, plant and stock in trade of Lyone Bros., subject to their debts and liabilities. One of these was a loan of $4,000 from the defendants secured by a chattel mortgage of all the plant and stock in trade of Lyone Bros. This chattel mortgage contained a provision that it should

cover all after-acquired goods and chattels brought upon the premises owned or occupied by the plaintiff company or used in connection with their business during the currency of the mortgage. The plaintiff company had been incorporated prior to the date of the chattel mortgage and Lyone Bros. were the principal promoters and became its president and vice-president respectively, being, in fact, the controlling shareholders. $2,104.64 of the money lent by the defendants to Lyone Bros. was handed over to the plaintiff company and by it applied towards payment of the debts of Lyone Bros. The plaintiff company paid an instalment of the interest due to defendants on the $4,000 loan.

Held, 1. The provision in the chattel mortgage as to the after-acquired goods was as binding for the plaintiff company as purchasers of the mortgage property with notice of it as it would be upon the executors or administrators of the mortgagors, and that the defendants had a good and valid lien and charge upon all after-acquired goods brought upon the premises in question by the plaintiff company.

Mitchell v. *Winslow*, 2 Story 630, followed.

2. The plaintiff company was under the circumstances estopped from disputing such lien and charge: *Pickard* v. *Sears*, 6 A. & E. 460; *Freeman* v. *Cooke*, 18 L.J. Ex. 119, and defendants were entitled to shew in evidence the facts constituting such estoppel, although it had not been pleaded as an estoppel in pais and need not be pleaded to make it obligatory: *Freeman* v. *Cooke*, supra.

3. The mortgage was not void as to the after-acquired goods because of the generality and vagueness of the description. *Lazarus* v. *Androde*, 5 C.P.D. 318, followed.

Action dismissed with costs.

Phillipps and *Clapman*, for plaintiffs. *Dennistoun*, K.C., for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] MASON *v.* MESTON. [Oct. 10.

Municipal law—Contract or agreement with the corporation—Disqualification—Debt due to corporation—Compromise of—Penalty—Bona fides—Discretion.

Defendant, having a judgment by the city against him for taxes, entered into an understanding with the city, whereby, in

consideration of a promise to pay, and an extension of time for payment, a release of one-half the amount of such taxes was given. He was afterwards nominated and elected as an alderman.

Held, that this agreement came within the disqualification clause of the Municipal Clauses Act.

Held, further, that as in this case the defendant had acted bonâ fide, the court would exercise its discretion under the Supreme Court Act to relieve against the penalty.

Elliott, K.C., for defendant, appellant. *Higgins* and *Morphy*, for plaintiff, respondent.

Clement, J.] REX *v.* RULOFSON. [Oct. 19.

Perjury—"Judicial proceeding."

An examination ordered by a judge to be taken before the registrar of the court ceases to be a "judicial proceeding" as defined by Crim. Code s. 171 (2) of Criminal Code, if the registrar after administering the oath leaves the room and the examination is proceeded with in his absence.

A false statement under oath made by a witness at such an examination, but in the absence of the registrar as aforesaid, is not perjury as defined by s. 170 of the Criminal Code: *Queen* v. *Lloyd* (1887) 56 L.J.M.C. 119 followed.

The learned judge directed the jury to bring in a verdict in favour of the prisoner.

Taylor, K.C., for Crown. *Craig* and *J. A. Russell*, for prisoner.

Flotsam and Jetsam.

The attempt of an ex-convict to get even with the Chief Justice of Nova Scotia by burning down the learned judge's house must be strongly deprecated. The fact that the Chief Justice was away when the ex-convict made the attempt renders the act a positively ungentlemanly one. This language may seem harsh, but it can be justified.—(Exch.). As a breach of good manners this was almost as objectionable as the action of the prisoner who ended the moral essay of the magistrate who was passing sentence upon him by threatening to shy his boot at the "old 'un's nob," if he didn't stop.