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CONTRACTS BY TELEGRAPH.

HARVEY *v.* FACEY.*

The head note in the above case, (an appeal to the Privy Council from the Supreme Court of Jamaica,) gives this summary:—Where the appellants telegraphed, "Will you sell us B.H.P.? Telegraph lowest cash price," and the respondent telegraphed in reply, "Lowest price for B.H.P. £900," and then the appellants telegraphed, "We agree to buy B.H.P. for £900 asked by you. Please send us your title-deed in order that we may get early possession," but received no reply, it was held that there was no contract. The final telegram was not the acceptance of an offer to sell, for none had been made. It was itself an offer to buy, the acceptance to which must be expressed and could not be implied.

Ever since the above decision I have been waiting for Sir Frederick Pollock or Sir William Anson, my masters in the law of Contracts, either to say that it was wrong, or else to explain it away as a mere finding of fact on the evidence in the particular case. But I have been waiting in vain. In the meantime I have submitted the question, without prejudice, to pretty nearly every class that has gone through Dalhousie Law School, and I have not yet found a class that did not, by an overwhelming majority, condemn the decision. I think I may therefore be bold enough to ask whether this may not be one of the cases in which the wisdom of the Privy Council does not even attain to the standard of the Apocryphal Scriptures wittily attributed to it by Sir Frederick Pollock in his essay on Commercial Law.† It certainly is not, in this case, "good for example of life and instruction of manners." If any man in ordinary business were to act

* 1893, A.C. 552.

† Essays on Jurisprudence and Ethics, p. 69.

as he would be warranted in doing under the decision in *Harvey* v. *Facey*, he would surely be voted out of any decent society as a person of evil example.

Here are the facts. Facey had been offering a certain property called Bumper Hall Pen to the Mayor and Council of Kingston, Jamaica, for £900. The offer had been considered by the Council and further consideration of its acceptance had been deferred. The negotiations began at the beginning of October and the meeting at which the offer was considered was held October 6th. Possibly all this has nothing to do with the question at issue, but it is stated in the judgment of the court, and if it has any bearing on the matter it must tend to shew that proposals for purchasing the property were in the air and that the owner had good reason for assuming that any enquiries addressed to him on the subject of the property "meant business," as we sometimes say in "the Colonies." However this may be, on the 7th of October, Facey, the owner of the property was travelling in the train from Kingston to Porus, when Harvey et al. sent a telegram after him from Kingston addressed to him "On the train for Porus" in these words, "Will you sell us Bumper Hall Pen? Telegraph lowest cash price, answer paid." On the same day Facey replied by telegram, "Lowest price for Bumper Hall Pen £900." Harvey replied accepting the property at that figure. The question and the only question dealt with by the Board was as to the meaning of this correspondence by telegraph. The telegram to which Facey was replying indicated in express terms that Harvey wished to elicit from the owner an offer of the property. He had no mere idle, or rather, impertinent curiosity as to the price at which Facey would be willing to sell the place to somebody else, or the price at which he held it if he did not wish to sell it to anybody at all. Facey must have known, when he sent his reply, that it would be read by the receiver as an offer to sell the property at that price. Even if the correspondence had been by letters through the post office this would have been the natural interpretation and any intelligent and fair-minded jury would have said that

this was what was intended by the parties. How much more certainly is this the proper interpretation to place upon a correspondence by telegraph where every idle word is penalized and communications are as brief as they can be made consistently with being intelligible. Not so, however, is the correspondence read by the Privy Council. The owner of the property is by their judgment permitted to say to his correspondent, "I knew that you wished me to make an offer of my property and that this was your reason for asking me the price. When I told you that my lowest price was £900 I had every reason to assume that you would understand my reply to your enquiry as an offer to sell to you at that figure. So would any ordinary business man in any ordinary business transaction. But if you will examine your telegram closely, you will perceive that you asked me two distinct questions and that I answered only one of them. I told you that my price was £900, but if you will closely scrutinize my telegram, you will see how careful I was not to say that I was ready to sell at that figure. I am a 'pretty smart dog,' as you will have discovered, and the probability is that in the future when you deal with me, you will construct your sentences more cutely and parse mine more carefully before you arrive at your conclusions. If you had said, 'What is the lowest price at which you will sell me Bumper Hall Pen?' you would have caught me out, for my answer would have been precisely the same as it was and I would have been bound. If I had said 'Yes, my lowest price is £900,' which is precisely what I meant to say, you would have had an offer of the property and your reply would have been an acceptance of an offer to sell, instead of being a mere offer on your part to purchase. Language is an invention to conceal thought. Words are not to be understood in the sense in which ordinary persons in like circumstances, and in view of all the circumstances, would read them but may be understood in some narrow, so long as it is a strictly grammatical, sense which happens to suit the convenience of a tricky correspondent." This is not "Crowner's Quest law." This is Privy Council law. For Colonial courts it is final and

binding, unless indeed, it can be regarded as a mere finding of fact which would perhaps leave it open to a jury of business men, in a similar case, to find in accordance with the obvious intentions of the parties. It seems, however, to be regarded by Sir William Anson as a decision on a point of law* and it was probably so intended. As such it has already begun to work mischievous results.

A case comes from British Columbia,† not yet fully reported in which the defendant telegraphed, "Propose to go in from Alert Bay over to west coast of island, hunt elk; guarantee one month's engagement at least from arrival here, give earliest date you could arrive here. Paget recommends. State terms, wire reply." Plaintiff telegraphed, "Five dollars per day and expenses," whereupon, defendant telegraphed, "All right; please start on Friday," This was held, on the authority of *Harvey* v. *Facey* to be no contract. Perhaps it was not, and perhaps the fuller report of the case will shew why it was not a contract. But it would seem under the facts as stated, that when the plaintiff, without saying anything about the "earliest date at which he could arrive," wired his terms, "Five dollars a day and expenses," he was offering to go as soon thereafter as was reasonable under the circumstances in contemplation of both parties. It may be an arguable question whether "all right" was an acceptance of that offer, the request to start on Friday having reference to the performance and not the formation of the contract, or whether the latter words were not a statement of the condition on which the defendant was willing to accept, which would require the assent of the other party to conclude a contract. This, however, is not the point of the decision. The ruling is that under *Harvey* v. *Facey* the telegram of the plaintiff was not an offer to go at "five dollars a day and expenses," but merely a quotation of terms.

Thus it is that the Books of the Privy Council, as the prayer-book says of the Apocryphal Scriptures, are read "for example

* Anson on Contracts, 10th Ed., p. 51.

† *Little* v. *Hanbury*, 44 Canada Law Journal, 760.

of life and instruction of manners." Would that it were permissible to pursue the words of the Article and add, "but yet doth it not apply them to establish any doctrine."

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THE DEVOLUTION OF ESTATES ACT AND REAL ASSETS.

In a recent case *Re McGarry* before a Divisional Court (The Chancellor and Magee and Latchford, JJ.), the construction of the Devolution of Estates Act was under consideration. The point in question was a simple one. A testator had by his will bequeathed to his widow all his goods and chattels, and as to certain land which he owned he had died intestate.

The question for the court was whether in these circumstances the undisposed of realty, or the personalty bequeathed, should be first resorted to for the payment of the debts of the testator? The court held that the goods and chattels bequeathed to the wife were primarily liable.

In cases where the persons entitled to take both the realty and personalty are the same, it is, of course, a matter of no moment how such a question is decided; but when those entitled to the personalty and realty are different persons, the question becomes of moment.

It is to be feared that lawyers are too prone to approach the consideration of new statutes with more or less pre-conceived ideas arising from the former state of the law. In the old days, land in England was regarded as a kind of sacred property, it stood on an entirely different plane to mere goods and chattels; the latter might be sold to pay the debts of an owner, but land was surrounded with all sorts of safeguards against the assaults of creditors. A creditor might have an elegit to go in and enjoy the rents and profits until his debt was paid, but as for selling his debtor's land under execution, that was not to be thought of. In this country 'the ancestral acres' are not so highly esteemed,

and from a very early period in our legal history, lands were made exigible in execution for the satisfaction of debts; and in 1886, all practical distinction between lands and goods was supposed to have been removed in Ontario by the Devolution of Estates Act.

That Act provided that thenceforth lands were to devolve on the personal representative of the deceased owner "subject to payment of debts" and so far as not disposed of by deed, will, contract or other effectual disposition "the same shall be distributed as personal property, not so disposed of, is hereafter to be distributed."

The Act appears to place realty on the same footing, as far as administration is concerned, as personal estate. But according to the decisions of the courts the appearance is illusory. The land is only, as formerly, a secondary fund, it does not stand in the same category as personalty, the latter is still the primary fund for payment of debts, and it is not till it is exhausted, that resort can be had to the land. The effect of this construction of the Act as applied to the case above referred to might be this, that the benefit by the will intended to be conferred upon the widow might be wholly defeated, which certainly is a curious way of carrying out the testator's intention, which may reasonably be supposed to have been to confer on his wife a substantial benefit and not a mere "will o' the wisp." But in reaching this conclusion we respectfully venture to doubt whether due effect has been given to the statute.

The fourth section provides that the lands of a deceased person "shall . . devolve upon and become vested in his legal personal representatives . . . and subject to the payment of his debts; and so far as the property is not disposed of by deed, will, contract, or other effectual disposition, the same shall be distributed as personal property not so disposed of is hereafter to be distributed."

We may remark that this section is open to two constructions. The one adopted by the court which confines the concluding clause to a distribution among beneficiaries (apart from credi-

tors); the other a distribution among all persons entitled including creditors; having regard to the punctuation and particularly the semi-colon after the words "payment of his debts," it would seem extremely probable that the legislature meant that the concluding clause should apply not merely to the distribution among the heirs, but the distribution of the fund among all who are entitled to participate whether as creditors or heirs.

The former construction would naturally find favour with those who think that the former distinction between land and personalty ought to be preserved; whereas those who think that the Legislature intended to put both classes of property on the same footing would find ample justification in the statute for adopting the other construction. If the land in question in *Re McGarry* were in fact personal property how would it be distributed? clearly as between that part of the personal property disposed of by will, it (as undisposed of personalty) would be first applied in payment of the debts of the deceased; and yet that is what the decision in question determines is not to be done. So that although the statute says it is to be distributed as personalty the courts say it is not to be distributed as personalty so far as the payment of debts is concerned, but in the same way that realty was previously distributed; which some people may regard as importing into the statute something which is not to be found therein.

The learned Chancellor who delivered the judgment of the court admits that in arriving at that decision it was contrary to his first impression; but seems to have felt himself overborne by previous decisions. We are disposed to think that his first impression was more in accordance with the wording of the statute, and in the case in hand would very probably have had the additional merit of effectuating the real intention of the testator.

We may remark that the English Land Transfer Act of 1897 does not contain any words requiring land to be administered or distributed as personal estate. On the contrary it provides that the personal representatives are to hold the land as trustees "for the persons by law beneficially entitled thereto." Moreover,

the English Land Transfer Act, 1897, contains the express provision that nothing therein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts and legacies. See s. 2, s.-s. 3. The English decisions referred to by the Chancellor under that Act, do not, therefore, appear to be applicable to the construction of the Ontario Act which differs so materially in its terms.

With regard to the Ontario decisions referred to by the learned Chancellor *Re Hopkins*, 32 Ont. 315, was a decision of Street, J., a learned and careful and conservative Judge. He was followed by Teetzel, J., as in duty bound, and without expressing any independent opinion in *Re Moody*, 12 O.L.R. 10. In these circumstances the Divisional Court was not bound by the decisions of single judges and would have been at perfect liberty to decide otherwise, and it seems to us to be regretted that it did not do so.

EXTENDED MEANING OF THE WORD "BUILDING."

A collection of English cases bearing on the meaning attributable to the word "building" in the construction of restrictive covenants and in the statutory enactments will be found in a recent number of the London *Law Times*, p. 505. It will be seen from these cases that the word is used in a much more extended sense now than it used to be. In its ordinary use in the English language, as said by Lord Esher, M.R., in *Moir* v. *Williams* (1892) 1 Q.B. 264, it means a block of brick-work or masonry covered in by a roof; but it was observed ten years subsequently by Lord Collins that the word "building" is not necessarily limited to bricks, mortar, or to houses. He adds: "The building of a railway is a well-known phrase, and as far as my experience goes it is a term of art and just as applicable to an embankment as to a railway." So that in these days a great variety of structures which do not consist of bricks and mortar, or of wood or concrete, and which do not in any sense resemble

houses, are now in legal nomenclature to be classed as buildings. The most recent case in England on the subject appears to be *Nussey* v. *Provincial Bill Posting Co.* (1909) 1 Chy. 734.

In that case it appears that in the conveyance of some land in the City of Leeds the purchaser had covenanted that no bricks should at any time be burnt upon the lots and no buildings erected thereon to be used for manufacturing purposes for the carrying on of any noisy, noisome, offensive or dangerous trade or calling. The lessee of one of the purchasers erected a permanent hoarding 156 feet long and 15 feet high for bill posting. It was claimed by the plaintiff that this was a breach of the covenant; and it was held by the majority of the court that this advertising erection was a "building." Fletcher Moulton, L.J., whilst agreeing in the result, held that a hoarding is not a "building," adding:—"I cannot help protesting against the process of arriving at the true meaning of words in common use by etymological reasoning based on their derivation." Whilst the court was probably correct in holding that this erection was in a sense a building, it can scarcely be imagined that the parties ever dreamt that such an extended meaning would be given to the word. They probably expected it to be used according to its ordinary use in the English language.

PROTECTION OF CHILDREN.

Mr. Thomas Beven's criticism of the decision of the House of Lords in *Cooke* v. *Midland Great Western Railway of Ireland* (1909) A.C. 229, is excellent reading both for the matter contained therein as well as being an example of the caustic and amusing style characteristic of this eminent author.

This case, it will be remembered, was a decision in reference to the duty imposed on a landowner, whose property, accessible from the highway, is infested with young children who play upon it, to take precaution that they are not exposed to any greater dangers than would befall them in a well arranged playground. His conclusion is well worth reproducing and is as follows:—

"Whatever may be the validity of its conclusion, the Lords' decision in *Cooke* v. *Midland Great Western Railway of Ireland* must take its place amongst the unchallengeable authorities of the law. Although all the parties to it were to change their views it makes no difference; even though there were demonstrated to be palpable error, the decision stands for the principle it involves. What that principle is, is harder to tell. The Lord Chancellor seems to confine it to 'the peculiar circumstances.' Yet where 'peculiar circumstances' are permitted to overrule principles of law they will on all occasions be sought for as for hid treasure. These 'peculiar circumstances' are unlikely ever to recur; but, though they do not, that will not prevent the decision from being constantly invoked in the inferior Courts, and whole phalanxes of 'peculiar circumstances' adduced as persuasives to philanthropic County Court judges of limited reading and soft hearts.

Those praiseworthy practitioners whose lives are spent in seeking out wrong and injustice done to the poor by rich oppressors, whether private persons or corporations, will recognize *Cooke's* case as a potent new weapon in their armoury; one of the class to which Bramwell, B., referred when he said of it, 'when I have *Rylands* v. *Fletcher* cited to me I begin to suspect I am being asked to do something wrong.'

Their foredoomed prey—perhaps the phrase is an unkind one—those natural enemies of the predatory juvenile—those who cater for his pleasures or those who carry on business with implements congruent to his tastes (and what dangerous, costly or moveable machine does he not mark down as his prey?); the whole crowd of canoe and boat builders (for what more fascinating for a child than water, what greater 'allurement' than a light canoe or boat resting unprotected on the slope of the river bank or of the foreshore?); the owners of roundabout and swings—not the base makeshift of this case, but the genuine whirling vehicle of pleasure standing unused on private ground; those whose business cannot go on without ropes and cranes and weighing machines; the wholesale vendors of apples or oranges, perchance of any fruit or root (for a raw turnip has before now

proved an 'irresistible attraction to young persons'), will lead a harassed life under the threat that their method of conducting business is 'within the principle laid down by a late decision of the House of Lords' by which they are under a legal duty to afford greater facilities for the operations of the raiders who have always been their bane.

Many hundreds of pounds will be paid as blackmail as the only alternative to costly and indeterminate expenditure without hope in any event of recoupment. Some of the baser sort will speculate on a new road to fortune, a provision for life for a child without anything more serious than a maiming, or the loss perchance of a limb, and little Pat, or Jerry, or Tim's £500 will be an allurement—let us hope not an irresistible one—as of a morning the family horde is despatched to seek the day's diversions.

Meanwhile a railway company has had to pay a sum of money they could spare probably without inconvenience, and if they could not—why, it is only a railway company that suffers. Great encouragement is given to the idea that it is not the duty of the parent or guardian to see to the care of his family; that they may be sent out broadcast into the streets and over such private property as they decide is an *irresistible* allurement to them, and that when they have made their choice the law imposes on the sufferer by their depredations the alternative either to make these depredations easier or to make them impossible; and what is more startling of all, *Cooke* v. *Midland Great Western Railway of Ireland* is added to the precious possessions of English law as a monument of the infallibility, the learning, and the logical acumen of the House of Lords in 1909."

It has been held by the New Jersey Court of Appeal in *Mittelsdorfer* v. *West Jersey & S.R. Co.*, that one who, while riding in the private conveyance of another, is injured by the negligence of a third party may recover against the latter, notwithstanding that the negligence of the driver of the conveyance in driving his team contributes to the injury, where the person injured is without fault and has no authority over the driver.

CAPITAL PUNISHMENT.

The strongest force in any community towards the proper enforcement of the rules of conduct that make up the body of law is public opinion. Mr. William H. Taft, in an article on the law and its enforcement in this country, published in the *North American Review* for June, 1908, brings out strongly the importance of this fact. So material a factor is it that without the existence of a favourable public opinion no law can be for long successfully enforced. The most frequent instance of this is found, probably, at this time, in relation to the enforcement of the prohibition or local option laws. In counties, for instance, containing large towns, where prohibition laws have been voted on the county as a whole, against the will of the majorities in the towns, the full enforcement of the laws in these towns has proved almost impossible. This merely illustrates the principle which applies with equal force to all laws and decrees of courts not upheld by public opinion. Judge Taft puts striking emphasis on it in the article referred to, where he says, in reference to the trial of criminals, that the jury must be strongly imbued with the *right* of the public to have crime punished before it will feel properly its own obligation to the public at large to restrain future crime by the punishment of offences already committed; that this is necessary in order to resist the amiable tendency of human nature toward mercy and compassion for the unfortunate citizen under charge. Since this is true, and since the jury—the final arbiter of the guilt or innocence of the accused—is made up of the common citizenship, it is certainly of the greatest possible importance that the mind of the ordinary man should keep constantly before him this right in the State to punish crime. Not a passive admission, but an active and thorough appreciation of the right and the necessity. Particularly is this true in view of the many utterances, constantly appearing, of a nature tending to create sympathy for the criminal on trial, or already convicted and suffering the penalty of the law. Utterances in the form of books and stories and maga-

zine articles, frequently of an exaggerated and sensational sort, which find a ready and sympathetic response in that amiable tendency of human nature that Judge Taft alludes to. For, while this amiable good nature does fortunately exist, it has been frequently and very truly said that probably the dominant trait of the true American is his love of justice,—of the square deal. So if once his mind is thoroughly imbued with the idea that as a matter of *justice* and *right* the State must enforce its prescribed rules of conduct, and that the criminal must suffer for their violation as a matter, not only of necessity, but of *justice* and *right,* the inherent love of fairness will assert itself and the deplorable paucity of convictions that the Taft article speaks of will disappear. The importance of this is probably greatest in relation to the infliction of capital punishment, for it is naturally this extreme penalty that the juries are the most loth to assess. The necessity, therefore, that the general body of the people should actively appreciate the right of the State to inflict the death penalty, and should appreciate also the expediency of it, is imperative. In order to thoroughly understand the right of the State to assess this penalty some general knowledge of the *nature* and *objects* of civil punishment is necessary.

Punishment, in its broadest sense, is pain inflicted as a penalty for the commission of wrong; and as law, the governing principle in all things natural, human, or divine, is but a rule of action, wrong is best defined as a failure to conform to these established rules of action. Law as applied to human societies is a rule of civil conduct prescribed by the supreme power of the State, commending what is right and prohibiting what is wrong. This definition is Sir William Blackstone's, whose commentaries are regarded as the greatest exposition of English law principles as applied to property and individual rights. Civil punishment is any penalty, pain or suffering inflicted upon a person by authority of the State for his failure to observe any one of these rules of civil conduct thus prescribed for his guidance.

But to look further into the nature of civil punishments. Such a right is, in its nature, a dangerous prerogative, even

when vested in the State alone, and demands the most zealous restrictions. Every element of personal vengeance must be wrested from it. It is in recognition of this necessity that the right is taken from the individual injured by the wrong and vested in the political organization. As has been said, the wrong which calls forth the penalty is most ordinarily the violation of a private right of some other individual. The party thus injured has by his membership in the State divested himself of his original right of personal retaliation. To punish is by necessity and by the principles of the public compact solely the sovereign prerogative; the State, so to speak, has become subrogated to the retaliatory right of the individual—the right to punish is transferred to it.

However, it is of course, not the purpose of civil punishment to restore the wronged member to his former state. It would be a vain system that had for its aim the restoration of that one whose rights have been invaded by the commission of the wrong. Even the ancient law of retaliation, lex talionis, formerly in vogue, but now obsolete for its very apparent defects, signally failed of this end. A life for a life, or an eye for an eye, may appear in strict harmony with the original conception of abstract justice, but the death of the criminal cannot restore the life of the citizen, nor the loss of his sight the vision of his victim. Besides, penalties are not inflicted for wrongs done, per se, to other members of society, but rather for the offence against the State by the attack on one of its members and by the violation of the compact. Men are not hanged for the wrong done the members in the taking of his life, but for the crime thereby committed against the State; to protect the political body from his further depredations, and, *chiefly*, to deter others by the example of his fate from the commission of similar offences. The punishment is inflicted for the malice in the heart of the offender, evidenced by the act he commits, and his disregard of the social obligations. The rights of an individual are often more seriously invaded by the act of some one wholly innocent of vicious design than by a less serious offence, maliciously done. Yet the law to the one grants

immunity from punishment, while it visits a penalty upon the other. The inherent evil lies not in the overt act directed to the hurt of the member wronged, but in the manifest disregard of the rights of the State and its lawful authority to govern the conduct and restrain the vices of its citizenship. It is merely a step on the part of the State to repel the attack of one who has become an enemy to the social organization. The injury may be to some individual in the invasion of his personal rights, but the crime is against the society by the violation of the established compact. To remedy the one may be quite impossible, but to punish the other with sufficient severity is the imperative duty of the State.

Of course, in its highest sense the object of all punishment is the protection of society—the effort on the part of the State to perform and carry out its obligation to individuals to protect them in the exercise of their personal rights. As the ultimate right to punish is public utility, so the ultimate aim is public protection. Its purpose is to deter men in the commission of wrong. The specific divisions most universally recognized as the objects of punishment are, first, punitory—that is, for the infraction per se of the law; second, reformatory—that is, such as should improve the temperament of the offender; and, third, exemplary or prohibitory—that is, such as should intimidate those who might be tempted to imitate the guilty.

Capital punishment necessarily excludes the reformatory object. It excludes also the punitory theory, for the ancient rule of a life for a life as just, per se, is entirely obsolete in nations of advancement. It is therefore dependent solely for its legitimate infliction upon the prohibitory principle; its sole object is to deter those yet innocent of actual violence, but evilly inclined, from the commission of those offences for which death is prescribed. It is, of course, in this prohibitory object of punishment that the social body at large is the most concerned. It is by far the most important object of punishment, and particularly so in reference to punishment of those serious crimes for which death is usually assessed. It is well enough, and the unquestioned duty

of the State, to devote with assiduous care its attention to the reformation of such criminals as there may be yet hope of reforming. But the chief concern of the public with the more serious offences is to prevent their recurrence; to protect itself from this character of attack upon the social body. The public may be amply protected from the further depredations of criminals who by some overt act have already disclosed the vicious trend of their natures. This may even be accomplished in cases of serious offences without the infliction of death, by the lawful detention of the offender. But this is not true of those who, though morally perverse, have failed by reason of youth or the lack of opportunity, to give warning by any direct act, of their dangerous tendencies to crime. The law cannot lay hold upon these, and their restraint is dependent wholly upon example. It is only by the effect that the punishment of others may have upon such as these that the State can protect itself. It is therefore but a question of the safety of the State or the exemption of the criminal from severe punishment. Men instinctively fear and shrink from pain, and upon this fact the efficacy of all punishment is based. The punishment must be sufficient to create such fear in the breasts of men as will deter them in the commission of offences against the social body.

It is upon the principles stated that the *right* to assess the death penalty exists in the State. The proposition is axiomatic. If the Government is to afford its citizens protection in life and property it must be vested with the right to inflict such penalties as are necessary to enforce an observance of its rules of conduct which are prerequisite to its continuance.

Whatever is necessary to be done, or most expedient to be done, in the preservation of the political organization, may be done. This right is subject to one limitation only, namely, that unnatural or brutal penalties may not be levied. By this is meant such penalties as are naturally repugnant to the majority of the human minds, unnatural tortures or cruelties. Even this exception which eliminates elements of cruelty is due to no consideration for the criminal himself, but is based rather upon

the same wise theory which vests the State with the right to punish at all, *i.e.*, self-preservation. Systems too harsh are equally detrimental to public safety with those which are too lax. Tyranny begets resentment and resentment breeds crime. The prohibition against the infliction of cruelty and torture in punishments is founded upon expediency alone; upon the duty of the State to the large body of its innocent members, for in their infliction the very end sought would be defeated by the demoralizing effect upon the senses of the people.

It cannot be said that the infliction of the death penalty comes within this exception. It is the natural end of man, upon which he comes to look with composure, even while he hopes for its long deferment. Moreover, it is the natural penalty to which the mind of man turns when considering the character of punishment to be inflicted for the class of crimes to which it is usually incident. It is but natural in men's eyes, in consideration of abstract human justice, that a life should answer for a life unlawfully taken. It is not repulsive to the ordinary mind. How, then, in consideration of these things, can the *right* to punish with death be consistently questioned?

That it has occasionally been questioned upon this ground is no answer. Some learned men have denied the right in the State to commit its citizens to death. Of these the most prominent perhaps is the Marquis Beccaria (Essays on Crime and Punishment, 1775. English Translation by Farrer, 1880). He contends that no earthly power has the moral right to inflict so severe a penalty as death upon man; in which he has been found by others illogical, for, in discussing the efficacy of the punishment to deter crime, he confesses that other punishments, such as labour in slavery for life, are severer, and yet seemingly admits the right in the civil authority to assess these latter penalties, even though severer. Some few others have sustained Beccaria in this view, but the great weight of authority, and the practice of civilized powers from the remotest times, have adhered to the contrary opinion. The reasoning of Rousseau upon the point seems unanswerable. If the right in society to preserve itself is

admitted, the right to inflict whatever penalties that are deemed necessary to accomplish this preservation inevitably follows. If the State is not to be preserved, with the protection it affords to its individual members, then life itself can only be maintained by individual strength, carrying man back to his original state. The sacrifice, through all the years, of his absolute rights would have been in vain.

As to the efficacy of the punishment to deter crime, as to the wisdom of inflicting it, there seems equally small room for question. The teaching of experience justifies this conclusion. In some foreign countries and in some of the States of the Union the abolition of the penalty has been tried, but not with success, though some States still adhere to it. In the States of New York and Iowa the statutes prescribing the death penalties were (by New York in 1860 and Iowa in 1872) abolished; and (as good authority states) by reason of the consequent increase in crime, the Legislatures of both States (New York in 1862 and Iowa in 1878) were compelled to reinstate the law. One of the collaborators in referring to the restoring of capital punishment in the State of New York, adds, that the effect of the law of 1862 was an immediate and a marked falling off in the number of murders occurring in that State. It is not the purpose of this short article to enumerate the statistics on the question, and, as Judge Taft says, criminal statistics are difficult to gather, but it will not be amiss to refer to the article in the American Supplement to the Encyclopedia Brittanica (9th ed.), where some are given.

The unsatisfactory instances of experience afforded are sustained by the judgment of the wisest men. Love of life is instinctive. It is a necessary provision of nature to protect man from himself. Remorse, or insanity, temporary and otherwise, may occasionally overcome the natural instinct, but the original love of life is inherent. Men, even involuntarily, cherish it to the last, dreading, or not caring, to explore the mysteries of the grave. Can it, then, be the part of wisdom to deprive the State of this great leverage to the enforcement of its laws? To some, of course, life is a thing more lightly held, and many of the argu-

ments against capital punishment have been based on this fact; but these are a small minority. Some may prefer death to public degradation, but it is not from this class that the great mass of criminals come. Robespierre opposed capital punishment upon the puerile theory that it was unjust, in that for its infliction the whole social body was armed against one man in an unequal contest; and further that it is not the most repressive punishment that may be inflicted. In a speech delivered by him in the Constituent Assembly just three years before his death under the official knife of France, so busy in his time, he condemns the assessment of death in punishment for crime. A short excerpt from that address forms interesting reading and defines his position. He says:—

"I will prove, firstly, that the death penalty is essentially unjust; secondly, that it is not the most repressive of punishments, and that it increases crimes much more than it prevents them. Outside of civil society, let an inveterate enemy attempt to take my life, or, twenty times repulsed, let him return to devastate the fields my hands have cultivated. Inasmuch as I can only oppose my individual strength to his, I must perish or I must kill him, and the law of natural defence justifies and approves me. But in society, when the strength of all is against one single individual, what principle of justice can authorize it to put him to death? What necessity can there be to absolve it? A conqueror who causes the death of his captive enemies is called a barbarian! A man who causes a child, that he can disarm and punish, to be strangled, appears to us a monster. A prisoner that society convicts is, at the utmost, to that society but a vanquished, powerless and harmless enemy. He is before it weaker than a child before a full-grown man. Therefore in the eyes of truth and justice these death scenes which it orders with so much preparation are but cowardly assassinations—solemn crimes committed, not by individuals, but by the entire nation, with due legal forms. . . . (And upon the second point) . . . The death penalty is necessary, say the partisans of barbarous and antiquated routine. Without it there is no restraint strong

enough against crime. Who has told you so? Have you reckoned with all the springs through which penal laws can act upon human sensibilities? Alas, before death, how much physical and moral suffering cannot man endure! The wish to live gives way to pride, the most imperious of all the passions which dominate the heart of man. The most terrible punishment for social man is opprobrium; it is the overwhelming evidence of public execration. When the legislator can strike the citizen in so many places and in so many ways, how can he believe himself reduced to employ the death penalty? Punishments are not made to torture the guilty, but to prevent crime from fear of incurring them."

This was doubtless true of Robespierre, and possibly of many others like him, but the fallacy of his contention lies in the indisputable fact that it is not from this class of citizenship that the large per cent. of those offences for which death is usually inflicted comes; but rather from a class lower in social pride, to whom the fear of death is more potential, and the dread of public execration less serious.

The abatement of the death penalty would leave no substitute as a punishment for the crimes to which it is incident, at all adequate to their gravity. Solitary confinement has been tried, but without success, as experience has demonstrated that the average time the human mind can retain its reason under the terrors of this unnatural practice is very short. It could not be contended that such a punishment would inure to the benefit of society. Confinement for life at hard labour has been considered a companion penalty to death, and in many instances is an alternative which the jury may, at their discretion, affix. In many commonwealths the chief executive may, in the exercise of clemency, commute the death penalty to life imprisonment. But in civilized jurisdictions the service of this sentence must be so tempered as to eliminate all elements of harshness or cruelty to the prisoner, and the severity is thus much reduced. He is well clothed, well housed and well fed, and is only called upon to do reasonable work. Under such conditions the hardships are not

sufficient to create that fear of the punishment in the breasts of some, at least, from whom the public is entitled to protection, as will deter them from the commission of serious offences. The prisoner himself, even if surrounded in his confinement with all the luxuries of life, would be, as Robespierre suggests, a harmless enemy to society; but it cannot be thought for a moment that the mere social opprobrium attaching to such a condition would be sufficient to deter the criminal class by its example. This has been clearly demonstrated by the recent history of the matter in France, where the infliction of the death penalty has just been reinstated. Statesmen and journalists have filled the press of that country with their comments upon it. *The Literary Digest* of February 6 gives a fair review of these opinions. According to its report, it is agreed by French statesmen and journalists that acts of murder and violence have been frightfully common in France since the guillotine stopped its work. In consequence of this, petitions have been pouring into the Central Government clamouring for the revival of the death penalty. Clemenceau and Fallaires have been forced to submit, although the opinion of the former, as expressed in the *Aurore* (Paris) has never really changed. His views as elaborated in that article appear in striking accord with those of Robespierre. He says that the spectacle of all these men grouped together to kill one man, under the command of other officials quietly asleep at the time, revolts him as a piece of horrible cowardice. The murderer's act (he says) was that of a savage, but his execution by the guillotine strikes him as a low kind of vengeance. The eminent criminologist, Henry Joly, however, comes to a different conclusion. He says that when there appears in society a recrudescence of ferocious and bestial criminality which thinks nothing of the lives of others, and laughs at an administration of justice whose feebleness is palpable, the supreme rights of society must be energetically asserted.

The history of capital punishment is interesting. It has constantly held its place in the category of penalties since the very earliest times, but the grades of offence to which it has attached

have been various. Especially is this true in England. In the time of Sir William Blackstone (1723-1780) he declared it to be the melancholy truth that no less than one hundred and sixty offences had been made, by acts of Parliament, punishable with death, some of them most absurdly trivial. And not until late in the nineteenth century (1861) was this direful list brought to what may be considered among civilized powers a proper exercise of the right. Since 1861 the offences for which a criminal may be executed in England (outside of the military) have remained at four. In the United States the record is not so dark, though in its early history the laws were extremely severe. Here different statutes obtain in the different States, though the crimes so punished in any event are only of the most serious nature, being most commonly murder and treason.

According to Henry Joly, in the article referred to, the death penalty is the problem of the hour in penal matters. When the people become once imbued with the truth of his statement, that the supreme rights of society must be energetically asserted as an actual necessity, the present scarcity of convictions that Judge Taft deplores in the trial of serious crimes will rapidly disappear.

It is in view of these things that the numerous utterances upon the subject of civil punishment, tending to create in the public mind an unnatural sympathy for criminals, appear so unwise.—BEN. G. KENDALL, in *American Law Review*.

LIBELLOUS USE OF PORTRAIT.

A brief and trenchant opinion of Mr. Justice Holmes in the United States Supreme Court case of *Peck* v. *Tribune Co. Adv. Ops.* (1908) p. 554, 29 Sup. Ct. Rep. 554, declares a doctrine unmistakably sound and just, but which meets little favour from the newspapers. A woman's portrait was published under the name of another person, with the statement that she had constantly used a certain brand of whisky herself, and, as a nurse, had given it to her patients, and that she recommended it as the very best tonic

and stimulant for all local and run-down conditions. The plaintiff was not a nurse, and had never used the whisky, or given it to others. The United States Circuit Court directed a verdict for the defendant, and this was sustained by the Circuit Court of Appeals on the ground that the publication was not a libel, or, at the most, could entitle the plaintiff to nominal damages only, there being no allegation of special damages. This conclusion was based on the theory that there is no general consensus of opinion that drinking whisky is wrong, or that to be a nurse is discreditable; but the decision of the Supreme Court declares that, "if the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote." The court proceeds as follows: "We know of no decision in which this matter is discussed upon principle; but obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number, and will lead an appreciable fraction of that number to regard plaintiff with contempt, is enough to do her practical harm."

It is gratifying to see the sound principles of the subject stated so clearly by the court of last resort. The fundamental principles of the law of libel have long been settled, but, in some cases, the courts apparently lose sight of them, and get confused or befogged in the consideration of some of the incidents or details of the subject. In this case the brief and simple statement of the matter by Mr. Justice Holmes is unanswerable.

Libel by the unauthorized publication of portraits has brought out some peculiar reasoning from some of the judges who have denied the actionability of such publications. Some of them have been quite philosophical in contemplating the wrong done by such a publication, on the ground that it did no serious harm; but a similar publication of the portrait of the wife or daughter of any of these judges to advertise whisky or many another kind of article would have an illuminating effect on his mind with respect

to the real essence of the injury. In the celebrated case of *Roberson* v. *Rochester Folding Box Co.*, 171 N.Y. 538, 50 L.R.A. 478, the unauthorized publication of a girl's portrait to advertise flour was passed upon chiefly as a matter of a right to privacy, and the court pointed out the lack of proper allegations for a charge of libel. The decision denied that there was any injury to the right of privacy. On the other hand, in *Pavesich* v. *New England L. Ins. Co.*, 122 Ga. 190, 69 L.R.A. 101, the court held that an unauthorized publication of a person's portrait for advertising another's business is a violation of the right of privacy; but it also held that such publication, under the facts of that case, constituted a libel. A clear analysis of the elements of the wrong in cases of this class unmistakably leads to the conclusion that, where an actionable wrong is done by publishing a person's portrait, it is in its nature essentially a matter of libel. No court has held—probably no court ever will hold—that the mere fact of publishing the portrait of another person is necessarily, and under all circumstances, an injury of any kind whatever. If published in such a way as to injure him, it inevitably becomes libellous in character. There doubtless will be cases in which the wrong, if any, is slight; but such a case as that of *Peck* v. *Tribune Co.* presents an unmistakable wrong.

Good faith on the part of the publisher of an advertisement cannot certainly be a complete defense, though the resulting liability may be in some sense a hardship; but the publisher, in such cases, must rely on the responsibility to him of his advertiser who brings him the libel to be published. It would be a strange perversion of reason and justice to make the innocent victim of a libel remediless because the publisher had been deceived in his business dealings with the advertiser. Good faith may preclude punitive damages, but, obviously, the publisher of a libel is not excused for the wrong by the fact that he was deceived by the person who furnished it to him. The amount of damages was not passed upon in the *Tribune Company's* case, but the decision merely established the plaintiff's right to prove her case and go to the jury.

The invidious comments on this case by various newspapers are illustrations of the narrowness of view which men are likely to manifest in discussing matters which affect their own interests. Injustice is, no doubt, done sometimes to defendants in libel cases. From this many newspapers conclude that they should be exempt from any liability for a libel, at least, if it was published in the belief that it was true.—*Case and Comment.*

UNAUTHORIZED PUBLICATION OF PHOTOGRAPH AS VIOLATION OF RIGHT OF PRIVACY.

An action for damages on the ground that the defendants had published a likeness of the plaintiff in a newspaper advertisement without his authority and had thereby invaded his right of privacy, was before the Rhode Island Supreme Court in *Henry* v. *Cherry & Webb*, 73 Atl. Rep. 98. The defendants were general merchants advertising their merchandise in the newspapers, and in connection with such advertisements published a picture of the plaintiff, representing him as seated in an automobile apparently driving the same. Several other persons were represented as sitting in the rear seat of the automobile. The picture of the plaintiff was such as to be easily recognizable by his friends and acquaintances. Below the picture in heavy black type were the words: "Only $10.50. The auto coats worn by above autoists are water-proof, made of fine quality silk mohair—$10.50—in four colours." It was alleged that the publication tended to and did make the plaintiff the object of much scoff, ridicule, and public comment, contrary to the plaintiff's right of privacy, and that by reason of such ridicule and comment he had suffered great mental anguish to his damage in the sum of $1,000. Any element of libel was eliminated from the case. The court held that there is no such thing as a right of privacy for the invasion of which an action for damages lies at common law, and that therefore the plaintiff could not recover.

A seemingly contrary decision was rendered by the Kentucky Court of Appeals in *Foster-Milburn Co.* v. *Chinn*, 120 S.W. Rep. 364, wherein it was held that a person has the right of privacy as

to his picture and that the publication of the picture of a person without his consent, as a part of an advertisement for the purpose of exploiting the publisher's business, is a violation of the right of privacy and entitles him to recover without proof of special damages. In this case the picture was published in a patent medicine magazine advertising a preparation called "Doan's Kidney Pills," and was accompanied by a personal sketch and a forged letter of recommendation of the pills in question. The court evidently considered the publication as in the nature of a libel.—*Central Law Journal.*

ALTERATION OF TYPEWRITTEN INSTRUMENT MADE IN DUPLICATE.

A very interesting and apparently new question as to the presumption which arises in case of the alteration of typewritten instruments is presented by the case of *Stromberg-Carlson Teleph. Mfg. Co.* v. *Barber* (Neb.) 116 N.W. 157, 18 L.R.A. (N.S.) 680, in which it is held that, where a contract prepared by the use of a typewriter appears to have been changed after the first impression was made, the presumption is that such change was made before execution and delivery. This general rule, although not universal, is upheld by the great weight of authority. In this case, however, the defendant produced a duplicate copy of the contract made by the same impression as was the copy produced by the plaintiff, in which the alterations did not appear, and the plaintiff failed to explain how or when the alterations were made in his contract, or why he signed the duplicate without the alterations having been made therein; and it would seem that it might well be argued that this fact was sufficient to overcome the presumption upheld by the general rule. The court, however, held that the presumption still prevailed. It should be noticed, however, that the signatures on the two contracts were not identical, which tended to shew that the contracts were signed at different times. The question seems to have been considered in but two other cases, which are reviewed in a note in 18 L.R.A. (N.S.) 680.—*Case and Comment.*

OUR FLAG AT OSGOODE HALL.

Few people passing, or entering, Osgoode Hall, the legal temple of Ontario, can fail to notice the flag that floats over the building. We have all heard of "The flag that braved a thousand years the battle and the breeze," but few realized until now that it had actually come into the possession of the Law Society of Upper Canada; but, judging from the extremely dirty and dilapidated condition of the rag which is hoisted over Osgoode Hall, it may not be unfairly concluded that its woe-begone appearance is due to its extreme age, and the battles and breezes through which it has passed, and it must indeed be the veritable bunting of which the poet sang. As a relic of the past it is no doubt extremely curious and interesting from the archæological standpoint. But we fear there are few among the general public who are capable of taking this high view, and in their irreverent and unarchæological minds the thought will arise, "If the Law Society or the Government of Ontario cannot afford to display a more respectable specimen of the flag we all honour than that miserable rag, it would be better to have none at all."

The subject of capital punishment is one that crops up from time to time. Humanitarians, who, like the Humanitarian League in England, which is urging the abolishment of flogging as a punishment, urge that the death penalty should be abolished. We are of the old fashioned sort that think it should be retained. In the United States it has ceased in Michigan, Wisconsin, Rhode Island and Kansas. It was abolished for a period and then reinstated in Colorado, New York and Ohio; but properly enough it is inflicted only, as here, for the most serious offences, most usually for murder. A discussion of the subject is given in a recent number of the *American Law Review*, from which we make some extracts, to be found in another place.

REVIEW OF CURRENT ENGLISH CASES.

BANK—BANKER'S LIEN—STOCK BROKER—PLEDGE OF CLIENT'S SECURITY—OVERDRAFT.

Cuthbert v. *Roberts* (1909) 2 K.B. 226 was an appeal from a decision of Jelf, J. The plaintiff had employed one Cancellor a stock broker to purchase American shares for her, and to provide the purchase money therefor, she had authorized him to borrow money on certain Provident Clerk shares worth £1,350 of which she executed a transfer to him. Cancellor saw the manager of the defendants' bank who, as the court held, understood that the shares to be deposited did not belong to Cancellor, but to a customer of his. The result of the interview was that the defendants agreed to give Cancellor an overdraft "up to £1,350 for three months at bank rate against Americans worth about £1,350 and transfer certificates (with letter of authority) of 100 shares Provident Clerks." Cancellor bought the American shares but instead of borrowing the money and paying for them, he carried over the transaction on the Stock Exchange and the price having fallen the plaintiff became liable for differences amounting to £240. Cancellor then borrowed from the bank £250 from the bank who opened a loan account and credited his current account with that amount. On the settling day many cheques of Cancellor were presented to the defendants and honoured by them with the result that Cancellor's account was £500 overdrawn. The bank claimed to be entitled to a lien on the plaintiff's Provident Clerks shares for the general balance due to them by Cancellor, but Jelf, J., held that having notice that those shares were not the property of Cancellor the defendants were only entitled to hold them as security for anything except the actual loan made thereon, viz., £250, and his judgment was affirmed by the Court of Appeal (Cozens-Hardy, M.R., Buckley and Kennedy, L.JJ.), that court holding that a banker's general lien on securities of a customer in its hands does not attach to securities deposited by the customer for a specific purpose and known by the bank to belong to a third party. Furthermore that although the drawing of a cheque by a customer for an amount in excess of that standing to his credit is in effect a request for a loan, and if honoured the amount advanced is in fact a loan, yet it does not follow that a borrowing of that kind is a borrow-

ing upon a security not belonging to the customer and deposited for another purpose, although the court conceded that the bank would not have been affected by any misapplication by Cancellor of moneys actually borrowed by him on the securities in question.

SAVAGE DOMESTIC ANIMAL—SCIENTER—LIABILITY OF OWNER OF DANGEROUS ANIMAL—TRESPASSER.

In *Lowery* v. *Walker* (1909) 2 K.B. 433, the defendant, a farmer, was owner of a savage horse which had previously bitten human beings to the defendant's knowledge, and he kept the horse in one of his fields through which there was a footpath along which, as the defendant knew, numbers of the public had for thirty-five years habitually trespassed in order to make a short cut from a highway to a railway station. The plaintiff, while thus trespassing on the field, was bitten by the horse. The defendant had frequently interfered with people using the footpath, but had never taken any legal proceedings for the purpose of stopping trespassers, and gave as a reason that most of the trespassers were his own customers. The County Court judge who tried the action, held that in these circumstances the defendant was liable to the plaintiff, but a Divisional Court (Darling and Pickford, JJ.) reversed his decision, on the ground that the plaintiff being a trespasser had no right of action.

DEFAMATION—LIBEL IN NEWSPAPER—PUBLICATION—INTENTION TO DEFAME PLAINTIFF.

Jones v. *Hulton* (1909) 2 K.B. 444 was an action of libel against a newspaper proprietor, in which the facts were somewhat extraordinary. The plaintiff's baptismal name was "Thomas," but he had assumed also the name of "Artemus," and was known as "Thomas Artemus Jones," or "Artemus Jones." He was a practising barrister. In the defendants' newspaper an article was published purporting to give an account of the proceedings of "Artemus Jones" at Dieppe, who was represented as being with a woman who was not his wife and who must be "the other thing," and as the frequenter of the Casino turning night into day and betraying an unholy delight in female butterflies, whereas in England Mr. Jones was represented to be a churchwarden at Peckham. Neither the writer or publisher intended the article to refer to the plaintiff, and the writer supposed he was describing a fictitious and non-existent person. The plaintiff proved that his friends and acquaintances thought

that the article was intended to refer to him, though he did not reside in Peckham, nor was he churchwarden at that place. The action was tried by Channell, J., with a jury, who gave a verdict for the plaintiff for £1,750 damages, for which judgment was given. In the Court of Appeal (Lord Alverstone, C.J., Moulton and Farwell, L.JJ.) the judgment was affirmed, Moulton, L.J., dissenting, but the majority of the court was somewhat divided in opinion. Lord Alverstone, C.J., thought that where an untrue and defamatory statement is published without lawful excuse, which in the opinion of the jury refers to the plaintiff, the plaintiff is entitled to succeed, and it is immaterial that the defendant did not intend to refer to the plaintiff, the question of liability depending not on what was the defendants' intention, but whether it was understood by reasonable people to refer to the plaintiff. Farwell, L.J., on the other hand, thought that was not sufficient to found liability; that it was necessary for the plaintiff to shew that the defamatory statement was printed and published of him, but that this might be done not only by shewing the defendant's actual intention, but by shewing that the statement was made recklessly, and careless whether it fitted the plaintiff or not. In his opinion the question was not what the defendant meant, but what his words taken with the relevant and surrounding circumstances and fairly construed mean, and that the fact that the plaintiff was unknown to the defendant would not of itself be a conclusive defence. Moulton, L.J., on the other hand, was of the opinion that the onus lay on the plaintiff to establish affirmatively, that the defendant intended the defamatory statement complained of, to apply to the plaintiff, and that had not, in his opinion, been done in the present case.

LANDLORD AND TENANT—LEASE—MORTGAGOR IN POSSESSION—BREACH OF COVENANT TO REPAIR—RIGHT OF MORTGAGOR TO SUE LESSEE—CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44-45 VICT. C. 41) S. 10—JUDICATURE ACT, 1873 (36-37 VICT. C. 66) S. 25(5), (ONT. JUD. ACT, S. 58(4)).

In *Turner* v. *Walsh* (1909) 2 K.B. 484 the Court of Appeal (Lord Alverstone, C.J., and Jelf and Lawrance, JJ.) reversed the judgment of Channell, J., on a ground not taken by the court below. The action was by a mortgagor in possession against a lessee of the mortgaged premises to recover damages for breach of a covenant to repair. Before Channell, J., the plaintiff relied

on s. 25(5) of the Judicature Act, ((Ont. Jud. Act, s. 58(4)), as entitling the plaintiff to sue, but the learned judge held (as the Court of Appeal found, rightly) that that section did not apply to actions for breach of covenant to repair; but in the Court of Appeal the plaintiff relied on the provisions of the Conveyancing and Property Act, 1881, s. 10, as enabling the plaintiff to maintain the action. That section provides that the "benefit of every covenant" contained in a lease having reference to the subject matter thereof shall be annexed to and go with the reversionary estate in the land immediately expectant on the term, and shall be capable of being enforced by the person for the time being entitled to the income of the land leased and under that provision, the Court of Appeal held that the plaintiff was entitled to maintain the action in his own name, notwithstanding the mortgage.

PRINCIPAL AND AGENT—SHIP BROKER—CHARTER-PARTY — CONTRACT MADE BY PERSON MISREPRESENTING HIMSELF AS AGENT —RIGHT OF PERSON CALLING HIMSELF AGENT, TO SUE AS PRINCIPAL—COSTS.

Harper v. *Vigers* (1909) 2 K.B. 549. In this case the plaintiffs who were ship brokers in February, 1908, entered into a contract misrepresenting themselves as agents of an undisclosed principal to furnish a steamer to carry a cargo for defendants at a specified rate. The plaintiffs were not in fact agents for anyone, but were themselves the principals. In May, 1908, they entered into a contract of charter-party with the owners of the steamer "Hektos" for the carriage of the cargo of the defendants representing themselves as agents for the merchants and inserted the name of the defendants as the charterers, the freight agreed to be paid being less than that named in the contract of February, 1908. The cargo was duly consigned and delivered by the "Hektos," and the defendants then claimed that they were only liable to pay the freight payable under the charter-party of May, 1908. The present action was brought therefore to recover the difference, and it was contended that the plaintiffs having purported to make the contracts of February and May as agents were not entitled to sue as principals. Pickford, J., who tried the action, held that the plaintiffs being in fact themselves principals were entitled to sue, but inasmuch as, but for the misrepresentation, he considered it probable that the defendants would not have entered into the contract, he refused to give the plaintiffs costs as against the defendants.

MUNICIPALITY—"REFUSE"—RESTAURANT.

In *Lyons* v. *London* (1909) 2 K.B. 588 the simple question was, whether the ashes, clinkers, coffee-grounds, egg-shells, dust and general dirt, broken crockery, tea-leaves, parings, scrapings, emanating from premises carried on as a restaurant, came under the category of "house refuse," which under a construction clause in an Act was not to include "trade refuse"; "trade refuse" being defined to mean "the refuse of any trade, manufacture or business or of any building materials." "House refuse" being removable without cost by the defendants, they contended that the refuse in question was "trade refuse" for the removal of which the plaintiffs are bound to pay. The Divisional Court (Lord Alverstone, C.J., and Jelf and Sutton, JJ.) came to the conclusion that the refuse was "house refuse," on the ground that refuse of the kind in question was common to all houses, and was distinct from what is ordinarily meant by the refuse of a trade.

JUSTICES—SUMMARY JURISDICTION—SUMMONS—APPEARANCE OF DEFENDANT BY COUNSEL—WARRANT TO COMPEL PERSONAL ATTENDANCE OF DEFENDANT—SUMMARY JURISDICTION ACT, 1848 (11-12 VICT. C. 43)—(CR. CODE, S. 658, S. 660(4)).

The King v. *Thompson* (1909) 2 K.B. 614. In this case a summons under the Summary Jurisdiction Act, 1848, was issued against the defendant on a charge of having exceeded the speed limit in a motor carriage in which he was travelling. He appeared thereto by counsel. The solicitor for the prosecution stated that he was prepared to three previous convictions against the defendant and had witnesses present who would have been able to identify the defendant as the person convicted on those three occasions had he been in court. The defendant's counsel having refused to undertake that the defendant would personally attend in court for the purpose of identification the justices issued a warrant for the defendant's arrest. The defendant then applied to quash the warrant as having been issued without jurisdiction, and the Divisional Court (Lord Alverstone, C.J., and Jelf and Lawrance, JJ.) held that the justices had no jurisdiction to issue the warrant for the purpose of compelling the defendant's attendance for identification. It seems, however, doubtful whether the case would be applicable under the Cr. Code, see s. 660(4), which expressly provides that the issue of a summons is not to preclude the issue of a warrant before or after the time mentioned in the summons for appearance.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX *v.* BLYTHE. [Sept. 29.

Criminal law—Conviction for murder—Non-direction—Alleged intoxication of prisoner—New trial.

On Feb. 9, 1909, the prisoner was tried before RIDDELL, J., upon a charge of murdering his wife by repeated blows with an iron poker, and convicted. He was sentenced to be hanged on May 13, but was reprieved by the Governor-General till June 17. On June 15, 1909, counsel for the prisoner applied to the trial judge, under 8 & 9 Edw. VII. c. 9, to reserve a case for the Court of Appeal, upon certain grounds specified, but the application was refused.

On Sept. 22 (the prisoner having been again reprieved), counsel for the prisoner, moved before the Court of Appeal for leave to appeal or for an order directing the trial judge to state a case for the opinion of the court, upon the ground stated before the trial judge, and upon the further ground that the trial judge should have specifically instructed the jury that they should consider the prisoner's state of intoxication, and that, if they thought his state of intoxication was such as to prevent him from appreciating the nature and result of his acts, they should not convict of murder, but of manslaughter.

The court, on Sept. 24, gave judgment refusing to direct a stated case upon the grounds urged before the trial judge; but suggested that an application should be made to the trial judge to state a case upon the new grounds.

This was done, but RIDDELL, J., refused the application, saying: "No one having at the trial made any pretence that the mind of the prisoner was affected by intoxication in the direction indicated, and there being no evidence in that direction, it would have been idle for me to have charged the jury upon what is, of course, undoubted law in the case of a prisoner proved to have been drunk at the time of committing the offence, and told them that the presumption that a man is taken to intend the natural

consequences of his act is rebutted in the case of a man who is drunk, by shewing his mind to have been so affected by the drink that he was incapable of knowing that what he was doing was dangerous. No one doubts the law: but the law stated does not apply to the present case. "Where a judge sums up to a jury, he must not be taken to be inditing a treatise on the law:" *Rex* v. *Meade*, [1909] 1 K.B. 895, at p. 898.

On Sept. 28, counsel for the prisoner moved before the Court of Appeal for an order directing the trial judge to submit a question as to the state of intoxication of the defendant to the court for its opinion and determination.

Held, that having due regard to the gravity of the issues involved it would have been desirable that there should have been a case stated on the above question. The conviction was therefore set aside and a new trial granted. The Chief Justice in giving judgment said that if the trial judge had been requested to charge the jury in the way it is now stated he should have done, he presumably would not have refused so to do. Those in charge of the case seemed to have directed their minds to other views of it and the one now under discussion was overlooked or not thought of sufficient importance to determine the issue before the jury; the result perhaps being that the prisoner had not had his case presented to the jury as advantageously as it might have been. The proper direction to the judge in such a case would be that the presumption that a man intends the natural consequences of his act may be rebutted in the case of a man who is drunk by shewing that his mind was so affected by the drink he had taken that he was incapable of knowing what he was doing was dangerous, and that it was likely to inflict serious injury. The jury should be asked to pass upon that, having regard to the evidence before them.

Cartwright, K.C., and *Bailey*, K.C., for Crown. *Robinette*, K.C., for prisoner.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P.] [Sept. 23.

WARREN v. BANK OF MONTREAL.

Company—Pledge of shares—Right of pledgee to transfer—Form of.

The plaintiff was the pledgor of some shares in the Otisse Mining Company and the defendant Currie was the pledgee. Currie

claimed the right to have the shares stand in his name on the books of the company and to have the certificates issued to him as though he were the absolute owner.

Held, that whilst he was entitled to have the shares transferred to him he was not entitled to have the transfer without it being shown on the books of the company that it was made to him as pledgee, and not as the absolute owner. The pledgee's right is to have the shares so transferred to him as to prevent the pledgor dealing with them to the former's prejudice, but he has no right to be put in a position to deal with them in fraud of his pledgor's right, and so possibly to defeat it by the sale and transfer of them to a purchaser without notice. The proper mode of dealing with such shares is to transfer them to the pledgee in pursuance of and subject to the terms of the agreement between the parties, shortly setting it forth, and the share certificates should issue in the same form.

J. B. Mackenzie, for plaintiff. *Middleton,* K.C., and *McFadden,* K.C., for defendants.

Riddell, J.] [Sept. 28.

RE HODGINS AND THE CITY OF TORONTO.

Municipal law—Local improvements—Defective notice to owner —No time mentioned—Quashing by-law.

This was an application to quash, pro tanto, by-law No. 5056 of the City of Toronto, so far as it assessed and levied upon certain property in Bloor Street rates to be applied in paying off certain debentures issued to pay for asphalting that street. The notice given to the owner under s. 671 of the Municipal Act failed to mention a time for the payment of the assessment for this local improvements.

Held, that the notice was fatally defective and it was no answer to say that the applicant could have found out the time by application at the proper municipal office. The statute must be construed strictly. The application was granted with costs.

The following cases were cited: *Goodison Thresher Co.* v. *Township of McNab,* 19 O.L.R., p. 214; *Gillespie and City of Toronto,* 19 A.R. 713, 26 S.C.R., p. 693; *Williamsport* v. *Beck,* 128 P.A. St. 167; *Brown* v. *Jenks,* 89 Cal. 10; *Re Macrae & Brussels,* 8 O.L.R. 156; Elliot on Streets, 1533.

Applicant, in person. *Johnston,* for the City.

Province of Nova Scotia.

SUPREME COURT.

Meagher, J.] HUBLEY *v.* CITY OF HALIFAX. [Sept. 17.

Municipal corporation—Alienation of land expropriated for special purpose—Injunction.

The City of Halifax expropriated land in the year 1893 for "the extension and improvement" of the water system of the city, at a cost of $1,050. It was now proposed to sell the land at the original cost in aid of a manufacturing enterprise which desired to obtain the site for the erection of its works reserving a strip a few feet wide on each side of a pipe line which had been carried through the property, but giving the purchaser a right of way over it.

Held, 1. Granting the injunction applied for by plaintiff, that while it was clear that the city might devote land so acquired to temporary uses which would not interfere with the express purpose for which it was obtained, it could not apply it to any purpose inconsistent therewith.

2. A resolution passed by the city council declaring that the land was not required for water extension purposes, but which was silent on the other branch, namely, the improvement of the water system, was not a sufficient determination that the land was no longer required for the object originally designated, the two things being quite distinct, and the city consequently was not in a position to make a legal sale of the land and should therefore be restrained from doing so.

Allison, for application. *Mellish*, K.C., contra.

Book Reviews.

The House of Lords on the Law of Trespass to Realty and Children as Trespassers. London: Stevens & Haynes, Bell Yard. 1909.

This is a very interesting study by Thomas Beven, so well known as a legal writer, of the reasons given in the House of Lords in the case of *Cooke* v. *Midland Great Western Railway of Ireland* in the light of the principles of the common law. 47 pages. Price, 1s. (See ante, p. 625.)