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HARBOURING DANGEROUS ANIMALS.

A case of *Connor* v. *Princess Theatre,* (ante p. 118) came before the Divisional Court on an appeal from the County Court of Wentworth in which the plaintiff sought to recover damages for being bitten by a performing monkey in the following circumstances. The defendants, the proprietors of a theatre engaged a person to give an exhibition with a performing monkey at the defendants' theatre. Adjoining the theatre was a restaurant having a backyard into which there was access from the theatre; but the yard belonged to the owner of the restaurant, and the defendants were merely permitted to have access thereto, and occasionally placed property thereon belonging to them. The owner of the monkey, without any license or authority from the defendants fettered the monkey to the leg of a table in this yard and the plaintiff who was living at the restaurant, going into the yard, as he had a right to do, was bitten by the monkey. The action was dismissed by the County Court judge and the Divisional Court (The Chancellor, Latchford, and Middleton, JJ.), affirmed the decision, on the ground that the monkey was not in any way harboured by the defendants, nor on their premises, nor under their control, except during the time of the performances in the theatre. Of the correctness of this conclusion there can, we think, be no reasonable doubt.

If the action had been against the owner of the restaurant it would probably have succeeded: see *Shaw* v. *McCreary,* 19 Ont. 39, because a person who permits a wild animal (ferœ naturœ) to be harboured on his premises, does so at the risk of being liable for any damage it may do. But this rule, as the

Chancellor points out, is subject to modification in regard to animals which, though ferce naturæ in their savage state, have, by long domestication become tamed and made gentle in their behaviour to mankind. Of this the recent case of *Clinton* v. *Lyons* (1912), 3 K.B. 198, is an instance, where the owner of a cat which bit a customer on his premises was held to be free from liability, for the sudden and unlooked for vicious act, and so it is with dogs, horses, cattle and other domestic animals which are not known to be vicious, but which suddenly and unexpectedly develop vice.

All animals, were, of course, originally wild, and more or less savage, but some have, by long domestication, become ordinarily gentle, and inoffensive to mankind; such as horses, bulls, cows, rams, sheep, pigs, cats, and dogs. The keeping of such animals, not actually known to be vicious entails no liability at common law for any sudden and unlooked-for outbreak of viciousness, whereby injury is caused to another; but by statute (2 Geo. V. c. 65, Ont.), an exception is made in the case of dogs killing or injuring sheep, the owner of the dog being liable for such injury whether he knew the dog was vicious and accustomed to worry sheep or not.

But animals which are not usually domesticated and are ordinarily wild and savage stand on a different footing, and can only be kept or harboured at the peril of the person so keeping or harbouring them, having to be answerable for any damage which they may do, even though such an animal may have been tamed and be ordinarily quiet and inoffensive; therefore he who keeps an elephant: *Filburn* v. *Peoples' Palace Co.*, 25 Q.B.D. 258; or a monkey: *May* v. *Burdett* (1846), 9 Q.B. 101; a bear: *Shaw* v. *McCreary*, 19 Ont. 39; *Besozzi* v. *Harris*, 1 F. & F. 72, or animals of a like nature must keep them secure, and incapable of doing injury to others, and whether the owner knows of their dangerous disposition or not, is immaterial, he is liable at common law for all damage which they may do; unless the person injured be so injured while a trespasser; thus where the owner of zebras kept them securely tied up in his stable but

the plaintiff went into the stable without leave or license to stroke them and got injured it was held the owner was not liable: *Malor* v. *Ball* (1900), 16 T.L.R. 239. In *Brock* v. *Copeland,* 1 Esp. 203, it was held by Lord Kenyon, that every man has a right to keep a dog for the protection of his premises and that a person coming on the premises after dark and being bitten by a dog so kept has no right of action.

In *Irving* v. *Walker* (1911), A.C. 10, a horse known to be savage was left untethered in a field through which it was known to the owner that the public were accustomed to pass, and it was held that the owner was liable for injury done thereby to the plaintiff passing through the field; and though the courts below thought that the fact that the plaintiff was a trespasser exonerated the defendant from liability: see *Marlor* v. *Ball* (1900), 16 T.L.R. 239, yet the House of Lords considered that the defendant, knowing of the habit of people passing through the field, though without license, was guilty of a wrongful act in exposing them to the attack of a known vicious animal; and see *Brock* v. *Copeland* (1794), 1 Es. p. 203, where it was also said if the person injured was on the premises under colour of right, though contested, he might maintain an action, but a mere trespasser who is bitten by a dog on the owner's premises has no right of action: *Sarch* v. *Blackburn,* M. & M. 505; 4 Car. & P. 297, and see *Brock* v. *Copeland, supra.*

While, therefore, a knowledge of the dangerous character of ordinary domestic animals is necessary (except in case of dogs injuring or killing sheep) in order to make the owner liable for the injury they may do; such knowledge is not necessary in the case of animals which are not domestic, but are usually wild —even though such an animal may have been tamed and rendered ordinarily inoffensive to mankind: *Besizzi* v. *Harris,* 1 F. & F. 92.

Where it is necessary to prove knowledge, the fact that the defendant had admitted that his animal had done the injury complained of and offered $10 in compensation was held to be admissible evidence of knowledge to be submitted to a jury, but

with a caution as to its weight: *Mason* v. *Morgan*, 24 U.C.Q.B. 328; *Thomas* v. *Morgan*, 2 Cr. M. & R. 496. A knowledge that a bull would run at anything red, was held to be evidence of knowledge of the dangerous character of the bull, which had attacked the plaintiff wearing a red necktie: *Hudson* v. *Roberts* (1851), 6 Ex. 697. But the mere knowledge that a dog was a fierce one is not sufficient, in the absence of any evidence that he had ever bitten anyone, *per* Lord Ellenborough, in *Beck* v. *Dyson* (1815), 4 Campb. 198, but a knowledge that a dog had the habit of rushing at people, and attempting to bite them, though it may not have actually bitten anyone, was held to be evidence of knowledge of its dangerous character: *Worth* v. *Gilbing* (1866), L.R. 2 C.P. 1, but proof that the dog had a habit of bounding upon and seizing persons, not so as to hurt or injure them, though causing some annoyance and trivial damage to clothing, is not proof of knowledge of its being of a savage or ferocious disposition: *Love* v. *Taylor*, 3 F. & F. 731, and in that case the dog was allowed to be shewn to the jury. The knowledge need not be actually brought home to the owner himself, it is sufficient if his servant who has the charge of the animal has knowledge of its vicious propensities: *Baldwin* v. *Casilla*, L.R. 7 Ex. 325. Proof that the owner had warned a person to beware of the dog lest he should be bitten, was held to be proper to be submitted to a jury in support of the allegation that the dog in question was accustomed to bite mankind: *Judge* v. *Cox*, 1 Stark 285, 18 R.R. 769. Proof that a dog had bitten cattle is not evidence that the owner knew he would bite mankind: *Thomas* v. *Morgan*, 2 C. M. & R. 496.

But an owner of domestic animals may be liable for damage they do owing to his negligence, quite irrespective of any knowledge of their liability to do the injury in question; thus where the owner of two dogs fastened them together and let them run loose in the highway, and they rushed at the plaintiff, and threw him to the ground, and thereby broke his leg, it was held that the owner was liable: *Jones* v. *Owen*, 24 L.T. 587. See also *Baker* v. *Snell*, 1908, 2 K.B. 352, 825, and the comment on that case, ante vol. 45, p. 357.

If the owner of a dog keeps him properly secured, but another person improperly lets him loose and urges him to mischief, the owner is not liable: *Fleming* v. *Orr*, 2 Macq. H.L. Cas. 14, and the owner of a horse which strayed on to a highway, and, without any apparent reason, there kicked a child, was held not to be liable in the absence of evidence that he knew the horse was likely to commit such an act: *Cox* v. *Burbidge*, 13 C.B. (N.S.), 430.

The harbourer, though he be not the owner, of a known vicious animal is liable for the injury it does: *Vaughan* v. *Wood*, 18 S.C.R. 703.

A recent ruling of Mr. Justice Darling at the Central Criminal Court as to the distinction between murder and manslaughter has raised some comment in the profession. A woman charged with the wilful murder of another woman by shooting her raised the defence that, having received great provocation from her husband and the woman, she intended to shoot him and herself, but by mistake shot the other woman. It was contended on her behalf, and the learned judge charged the jury to the same effect, that such facts, if proved, might amount only to manslaughter if the husband were killed, and might justify a verdict of manslaughter in the case in question. The tendency of the courts to narrow, rather than to enlarge, the cases which come within the category of "constructive" murder is well known, but the old rule still obtains that if a person, whilst doing or attempting to do another act, undesignedly kills another person, if the act amounted to felony, the killing is murder; if merely unlawful, manslaughter. Manslaughter is a felony, and it seems somewhat difficult to reconcile the above ruling with the old-established rule of law.—*Law Times.*

THE COURT OF KING'S BENCH IN UPPER CANADA, 1824-1827.

By The Honourable Mr. Justice Riddell, LL.D., LL.D.

(*Third Paper.*)

It is now proper to speak of Mr. Justice Willis. John Walpole Willis was an Englishman of good family, but not much money. He was the son of (Rev.) Dr. Willis, who with his son, also a Dr. Willis, took charge of King George III. during his periods of mental aberration. Willis became a barrister and devoted himself chiefly to equity, writing several books which display both ability and learning. He married Mary, the daughter of the Earl of Strathmore, a client of his; and the bride had not much more money than the groom.

About 1827, the project was in the air to establish a Court of Chancery in Upper Canada to "mitigate the rigour of the common law," a project which was held in more favour at Westminster, England, than at York, Upper Canada. Willis no doubt was led to believe that this Court would soon be created; and he accepted an appointment as puisne justice of the Court of King's Bench in the meantime, expecting to be made Chancellor at no very distant date.

As we have seen, he was sworn in on Nov. 5, 1827, succeeding Mr. Justice Boulton. He soon found that neither the Lieutenant-Governor (Sir Peregrine Maitland) nor the Attorney-General (John Beverley Robinson) was favourable to the formation of a Court of Equity at that time in the colony. There was trouble, too, when his wife arrived, over the relative rank and precedence of the daughter of the Earl of Strathmore and the wife of the Lieutenant-Governor, the beautiful Lady Sarah Lennox. Willis, moreover, had his fair share of the traditional and proverbial sentiment of superiority felt by the new-come-out Englishman over the "Colonial." He entertained some contempt for the Chief Justice and his colleague, and did not hesitate to express it. Considering himself wronged by the official class, he rather affected the opposition, or Radical, element. The

"hope deferred which maketh the heart sick" he felt in no small measure; and he was led to do some very unwise acts. At a somewhat early stage in his judicial career, he exhibited his want of judgment—I had almost said of common sense and common decency.*

George Rolph, who is described by Mackenzie as "an English Barrister†, and who was called to the Bar of Upper Canada, Trinity Term, 2 George IV., 1821, was practising in Dundas: he

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*Dent in his "Story of the Upper Canadian Rebellion," vol. 1. p. 168, says that the judgment of Mr. Jutsice Willis in *Rolph* v. *Simons et al.* was the "very first judgment ever rendered by him." This is an error; in addition to what appears in the official Term Books we have the following statement in Willis' Narrative: "On the 19th of November (1827), the last day of Michaelmas term, judgment was given in two cases; in the first I differed with both my brother judges." And he shews that it was an action for malicious prosecution brought by a tailor against an employer who had prosecuted him for theft, and adds, "this was the first in which I gave any judgment that was not quite of course." In the other case the two puisne justices, Sherwood and Willis, were of the same opinion, but the Chief Justice (Campbell), dissented.

Dent is equally in error in saying "no hint of partiality had ever been heard against him. There had been no opportunity for any display of partiality by him, for he then took his seat upon the Bench for the first time." He had in May, 1828, been upon the Bench for two full terms, he had had on April 11th an open dispute with the Attorney-General, charging him with neglect of duty in not prosecuting those who had destroyed Mackenzie's press—and generally had shewn himself not well disposed to the Government. Public comment was not wanting.

Dent's mistake probably arose from a misapprehension of a passage in Lieutenant-Governor Sir Peregrine Maitland's dispatch to the Colonial Secretary of June 6th, 1828. He says: "In the first cause ever tried by him he began an excitement to which our Courts of Justice have never before given occasion, by proceedings which have been already referred to your consideration."

The Lieutenant-Governor is apparently, by Dent, supposed to be referring to the case of *Rolph* v. *Simons et al.*, but such is not the fact. What he refers to is the first time Willis ever presided in a trial court, civil or criminal, in Upper Canada or elsewhere, which was April 11th, 1828, when Patrick Collins, editor of the *Canadian Freeman*, was to be tried for libel. On this occasion Willis allowed Collins to make a vicious attack upon the Attorney-General, and himself went out of his way to administer a rebuke to that officer wholly undeserved and effectively resented on the spot.

†George Rolph was not an English Barrister, as Mackenzie thought. Dr. Rolph was called to the Bar of Upper Canada upon his standing as a member of the Inner Temple, in Michaelmas Term, 2nd George IV.; but George was admitted on the books of the Law Society as a student-at-law, Saturday the last day of Trinity Term, 56 George III., 1816, as being under articles of clerkship, and he was called Saturday the 6th day of Trinity Term, 2 George IV., 1821, having proved his service for five years as a student-at-law in Upper Canada.

was a brother of the more celebrated Dr. John Rolph. One night in June, 1836, a number of persons broke into his house, with their faces blackened and otherwise disguised, and took Rolph out of the house and tarred and feathered him. He brought an action against Titus Geer Simons, (Dr.) James Hamilton and Alexander Robertson for assault and battery. The action was tried at the assizes for the Gore District, Saturday, 25th August, 1827, before Mr. Justice Macaulay and a jury.‡ The judge's note-book is still extant and gives a full account of the shameful affair.. Dent says ("The Upper Canadian Rebellion," vol. 1, p. 168), that "the outrage arose out of private complications and no political question arose in the course of the trial." But no one who is acquainted with the political situation of the time and the personnel of the parties, can read the judge's notes without seeing that the outrage was very largely political. Perhaps the assailants justified themselves to their own minds and consciences, but it is notorious that a sin in a political opponent seems blacker than in any other. It was, at the trial, proved that the gang had blackened their faces at Dr. Hamilton's, that tar was taken from near there, and generally it was sufficiently shewn that Simons and Hamilton had been ringleaders of the mob.

Andrew Stevens, who had been subpœnaed, was called as a witness by the plaintiff, "he declines being sworn, says he can answer no questions but may criminate himself. After argument," the judge says: "I think him competent and that he is bound to be sworn, but not to answer questions that will implicate himself criminally. He refuses to be sworn. Were it a criminal case the refusal is a contempt for which he might be committed; in a civil case, I consider it a contempt also, the witness having appeared in court, but as the refusal may be tantamount to a disobedience of the subpœna, I will not commit him, the party having a remedy in case I should be wrong; but

‡James Buchanan Macaulay who became a justice of the King's Bench in 1829, Chief Justice of the Court of Common Pleas in 1849, and who was afterwards in 1857 knighted, had been 3rd July, 1827, appointed temporary Justice of the King's Bench in the room of Hon. D'Arcy Boulton.

if I ought to commit him till he is sworn, the verdict may be set aside for breach of duty by the judge. Witness refuses to be sworn; Mr. Stevens seemed to want to be sworn in a qualified way, and not to receive the general oath, but knowing of no such precedent, I did not permit it. I think he should be sworn generally and the court should protect him under his privilege not to implicate himself criminally. But the witness refused to be sworn." George Gurnett took the same objection. "I explained to him my opinion of the law—of his rights and duty and of his privilege when a witness, but not from being a witness. There is no proof of his being an accomplice further than he himself states; taken for granted." Dr. Baldwin in his argument in term says Gurnett "impudently addressed" the judge as follows: "My Lord, I have a duty to perform superior to and independent of all personal considerations, which makes it impossible for me to give evidence upon this trial"—but the judge's notes do not set this out. Allan N. McNab, an attorney of the court and of counsel for the defendants, took the same objection. "Means to say that he can give no evidence that has not a tendency to implicate himself criminally."

The attorney for the defendants, Mr. Chewett, was also called and took the same position; none of the last named three had been subpœnaed. None of these witnesses was sworn or committed, as it was argued they should have been. There were four witnesses for the defence, and the jury found against Col. Simons and Dr. Hamilton, assessing damages at £40 ($160.00), and acquitted Robertson. The plaintiff was not satisfied with the result, but moved in term. The following is the official record:—

"Michaelmas Term, 8 George IV., Nov. 9, 1827 (Praes. Campbell, C.J., Sherwood and Willis, JJ.): *Rolph* v. *Titus G. Simons, James Hamilton and Alexander Robertson.* Motion for a rule to shew cause why the verdict rendered in this cause at the last assizes in the district of Gore should not be set aside and a new trial granted, the plaintiff having lost important testimony from the contumacy of certain witnesses in refusing to be sworn when required so to be by the learned judge who

tried the cause, and having been refused the reply. Robt. Baldwin, Esq., for plt. Granted and issued."

(Praes. Campbell, C.J., Sherwood and Willis, JJ.), Nov. 17. "Rule enlarged."

The Chief Justice (Campbell) went to England on leave of absence, leaving Sherwood and Willis alone as justices of the court. The commission of Macaulay, of course, lapsed when Willis was appointed in Boulton's place.

The case came on for final argument in Easter Term, May 1828, before these two judges; the Solicitor-General, Henry John Boulton, against the motion, Dr. Baldwin and his son Robert Baldwin for it. The object of the new trial was stated to be two-fold: (1) A verdict against Robertson and (2) an increase in the amount of damages awarded. Neither judge attached any importance to the second ground of appeal, viz., that the plaintiff had been refused the right of reply—and they differed as to the other ground, Mr. Justice Sherwood holding that there was no breach of duty in the trial judge not committing Stevens, that either the Court in Term should do so or the plaintiff might bring an action against him. As to the other three witnesses he held that as they were not subpœnaed they could not be compelled to give evidence even if present in court. He concluded that the plaintiff should have taken a nonsuit, and that as he did not, but took a verdict against two defendants, he could have a new trial.

Mr. Justice Willis held that McNab and Chewett were in contempt, Stevens also contumacious, whatever might be said as to Gurnett, inclining to the opinion, however, that he was in the same case as Stevens. He considered that there should be a new trial. He rebuked the Solicitor-General for taking the brief for the defendants instead of prosecuting them criminally, as was his duty—a rebuke instantly resented and replied to with much spirit and asperity by the Solicitor-General, who defended his conduct with vigour and point.

In the course of his judgment Willis said: "In forming my opinion of this cause, which I have now given at very consider-

able length, I have viewed the case, as I hope I shall do every case that comes before me, solely with reference to its intrinsic merits. Totally devoid of all personal, all party and all political feeling, it has been and ever will be my earnest desire to render to every one impartial justice;" and winds up by quoting Horace Odes, Bk. 3, Carm. 3:—

> "Justum ac tenacem propositi virum
> Non civium ardor prava jubentium
> Non vultus instantis tyranni
> Mente quatit solida . . ."

of which he gives a translation for the benefit of the vulgar:—

> "The Man, in conscious virtue bold
> Who dares his honest purpose hold
> Unshaken hears the crowd's tumultuous cries
> And the stern tyrant's brow in utmost rage *defies*."

However admirable these sentiments in the abstract may be and are, this was a most injudicious method of speech, plainly suggesting as it did, that other judges acted from political motives or through fear of the Governor. But the Radical papers took up the newcomer and extolled his sentiment—largely, one may be permitted to conjecture, that they might thus harass the Government of the day.

Mr. Justice Willis, when he could not get his Court of Equity through the Government, himself drew up a bill and endeavoured to have it passed through the agency of the opposition. Chief Justice Campbell was in poor health and was known to be about to retire, and Willis applied for the Chief Justiceship; but Attorney-General Robinson also desired the position, and had the better claim to it. Willis fell out with the Attorney-General and charged him officially with neglect of duty. Complaint was made against Willis to the home authorities; while he on the other part seems to have acted in everything in such a way as most to irritate the Government. He had, or affected to have, the most profound contempt for the legal attainments of his colleagues, especially Mr. Justice Sherwood, and when the Chief Justice, as we have seen, left for England on leave of absence, which he did after Hilary Term, 1828, the court, composed of two puisnes, was the scene of continual and unseemly

wrangling. At the beginning of Trinity Term he announced that the court was not properly constituted, as the Act, 34 George III., c. 2, required three judges, and he declined to sit in Term, leaving to Mr. Justice Sherwood the whole work of the full court. He then left for England to lay his wrongs before the home authorities. It is to be remembered that from the very beginning, the Court of King's Bench in Term was frequently composed of only two judges, and sometimes only one. Take what occurred at the very first. The court was instituted in 1794 by 34 George III., c. 1, of three judges. William Osgoode, the first Chief Justice, never sat in the King's Bench in Term; up to Hilary Term, 37 George III., Jan. 16, 1797. William Dummer Powell, the puisne judge, sat occasionally alone, but usually with Hon. Peter Russell, who had a special commission. At length (Jan. 16, 1797), John Elmsley presented his patent as Chief Justice and was sworn in. Peter Russell also presented his patent as one of the justices for that term, and he also was sworn in. The ceremony is described in detail in the Term Book and the description is copied in Read's "Lives of the Judges," p. 44. Russell was appointed also for Easter Term, 1797, for Trinity Term, 1797; and these two, i.e., Elmsley and Russell sat for these terms. Powell, J., came back in Michaelmas Term, 38 George III., November 6, 1798, and sat with the Chief Justice thereafter. Willis had himself, the first term he was judge, sat with Sherwood, J., to make a full Court in two days of the term, and the next term for more, while the two formed the Court for the whole Easter Term, 1828.‖

The Lieutenant-Governor removed Willis; "Amoved" is the term invariably used in our records. The Privy Council decided Willis was wrong in his law. He was appointed judge at Demerara and afterwards at New South Wales. He had trouble

‖From a list made up June 19th, 1828 by Mr. James E. Small, Deputy Clerk of the Crown, for the information of the Executive Council, it appears that up to that time out of the 135 terms of the Court of King's Bench, 56 only had been held by the Chief Justice and two puisne judges; that 59 terms had been held by a Chief Justice and one puisne judge; that 15 had been held by two puisne judges and 5 by one puisne judge alone.

with the Governor there and was again amoved; this time, however, irregularly, and the Privy Council allowed his appeal (1846, *Willis* v. *Gipps*, 5 Moo. P.C. 379). But he was forthwith regularly removed and failed to obtain further employment. He died in 1877.

The statement of the Lord Chancellor (Lord Lyndhurst) at p. 388 of the report in 5 Moore that on the previous occasion "the order on a motion then appealed from was set aside because the appellant was not heard in Canada" is an error. Sir George Murray said in his place in Parliament, May 11th, 1830, when the matter was brought up by Lord Milton on the occasion of Willis petitioning for redress on the ground that he had acted in good faith: "The Government had taken the expense (of an appeal to the Privy Council) on itself. The case was argued before the Privy Council . . . Mr. Willis' complaint amounted to this, that his removal was unwarranted, illegal and ought to be void; and the decision of the council was that it was not unwarranted, not illegal and that it ought not to be void.§

There has been only one other instance of amoval of a judge of a Superior Court in Upper Canada (Ontario)—that of Mr. Justice Thorpe in 1807. Other troubles of Mr. Justice Willis may be seen in the report of *Willis* v. *Bernard*, 5 C. & P. 342; 8 Bing. 376. His wife, left behind in Canada, consoled herself with Lieutenant Bernard; and the injured husband brought a successful action of crim. con.

When Willis, J., refused to sit, Dr. W. W. Baldwin, his son Robert Baldwin, Dr. John Rolph and Simon Washburn declined to act as counsel before the court. But when the decision of the Privy Council became known, they all returned to the court except Dr. Rolph, who never again appeared in term, and shortly afterwards sold out his practice to his brother in Dundas.

We have gone far away from *Rolph* v. *Simons et al.*, but the result was such that Mackenzie was almost justified in saying in 1832 in his "Sketches of Canada and the United States," p.

§Hansard's Parliamentary Debates, New Series, vol. 24, pp. 551 et seq. (1830).

400: "Mr. Rolph . . . had been tarred and feathered a few years before by some of the Government officers . . . but the law in Canada could yield him no redress, although a lawyer, and his brother, one of the most popular and estimable men in the colony." It may have been A. N. McNab's success in disobeying the judge at this trial which emboldened him in 1829 to defy a committee of the assembly, refuse to answer their questions and aggravate his offence by the terms of his written defence. This conduct landed him in custody for ten days, but was the begining of a prosperous career as a politician, culminating in the premiership of Canada and a knighthood. George Rolph seconded the motion for committing him to the gaol at York for contempt. "Time brings about its revenges."

WILLIAM RENWICK RIDDELL.

REVOLVERS.

The habit of carrying revolvers, and the consequent readiness to use them is a serious menace to the peace and good order of the country. The revolver is a deadly and powerful weapon. Unlike other fire-arms it can be easily carried, easily concealed, and easily made use of. Unlike other fire-arms its chief, indeed, almost its only use is for mischief. For defence it is practically useless. For acts of violence it is ready at any moment, and requires no preparation to make it available. It is the chosen tool of the assassin, the burglar, and the footpad. By its use, even as a threat, most daring and successful robberies have been committed. It is not safe even in the hands of the police, and should only be entrusted to men of proved discretion, and only for use in cases of extreme necessity. The possession of so handy a weapon is of itself a temptation to use it upon the slightest provocation. Where a blow of the fist, or of a cudgel, would, in former times, have been used to punish an injury, or requite an insult, a shot from the hidden revolver is now the method approved, and accepted as a matter

of course. The daily papers are full of such incidents. Lately, in one paper, were recorded two typical specimens. In one case a man in a fit of jealously went into a room where his wife was and shot her dead. In the other a policeman, finding himself unable to catch a man who, for some trifling depredation he wished to arrest, fired off his revolver, thinking thereby, if he thought at all, to frighten the thief and compel him to stop. The bullet, however, though sent forth aimlessly, found its billet with fatal effect in the person of an innocent bystander.

Such things happening, and happening frequently, prove that the mere possession of the weapon is an inducement to use it. The carrying of such weapons is unlawful, but how often is the law put in force? Some more stringent measures should be adopted to change this growing evil, and one so difficult to deal with.

The sale of poisons is carefully guarded; the sale of revolvers should be equally looked after. No ordinary person needs, or should possess, a revolver any more than he should have, or carry about him a bottle of prussic acid, arsenic, or other deadly drug.

Public opinion should be roused on this subject, and directed to the evils of the habit and its more evil consequences. In this way, more effectually perhaps, than in any other, the mischief may be dealt with. We earnestly commend this subject to the consideration of the police authorities and the law officers of the Crown.

REVIEW OF CURRENT ENGLISH CASES.

COMPANY — DEBENTURES — JEOPARDY OF ASSETS—TRUST DEED —POWER OF MODIFICATION — DEBENTURES PAYABLE PARI PASSU—RESOLUTION SANCTIONING SALE OF COMPANY'S ASSETS, AND DIVISION AMONGST DEBENTURE HOLDERS ACCEPTING LOWEST PRICE.

In re New York Taxicab Co., Sequin v. *The Company* (1913) 1 Ch. 1. This was an action by a debenture holder of the defendant company on behalf of himself and all other debenture holders for a receiver and an injunction restraining the defendants from carrying out a resolution altering or purporting to alter the provisions of the trust deed securing the debentures. The company was not being pressed or threatened by outside creditors, and there was no risk of its assets being seized on their behalf, but the security of the debenture holders was inadequate, but this, Eady, J., held was not a sufficient reason for appointing a receiver as asked. The trust deed in question provided that the debentures were to be paid pari passu; but it provided that the provisions of the trust deed might be modified by a resolution passed by three-fourths majority of the debentures at a general meeting. At such a meeting the required majority had passed a resolution sanctioning a sale of all the company's assets and a division of the proceeds, not among all the debenture holders rateably, but amongst those willing to accept the lowest price for their debentures. This resolution, Eady, J., held was not such a modification of the trust deed as the majority were competent to make and he granted an injunction against it being acted on by the company.

MARRIAGE SETTLEMENT—AFTER ACQUIRED PROPERTY—COVENANT TO SETTLE—ACQUISITION OF PROPERTY—EFFECT OF COVENANT IN EQUITY—PAYMENT OF AFTER ACQUIRED FUND TO HUSBAND—REMEDY OF TRUSTEES—LAPSE OF TIME—STATUTE OF LIMITATIONS.

Pullan v. *Koe* (1913) 1 Ch. 9. This was an action by the trustees of a marriage settlement to enforce a covenant to settle after acquired property. The settlement was made in 1859 and contained the usual covenant by the husband and wife to settle

the wife's after acquired property. In 1879, the wife received £285 which was bound by the covenant, and paid it into her husband's banking account on which she had power to draw. Part of the money was invested in two bonds payable to bearer, which remained at the bank until the husband's death in 1909, and were now in his executor's possession. The action was brought against the executors, claiming the two bonds as bound by the settlement and subject to the trusts thereof. Eady, J., who tried the action held that the money being bound by the covenant when received by the wife, was consequently subject to a trust enforceable in favour of all persons within the marriage consideration, and notwithstanding the lapse of time the trustees were entitled to follow and claim the bonds as trust property, though the legal remedy on the covenant was barred by the Statute of Limitations. The court therefore declared that the plaintiffs were entitled to the two bonds and the interest which had accrued thereon since the husband's death.

SETTLEMENT—TENANT FOR LIFE AND REMAINDERMAN—SHARES IN COMPANY—CAPITALIZATION OF RESERVE FUND—OPTION TO TAKE NEW SHARES—NEW SHARES—CAPITAL OR INCOME.

In re Evans, Jones v. *Evans* (1913) 1 Ch. 23. This was a contest between a tenant for life and remainderman as to the right to certain new shares in a company acquired in the following circumstances. Trustees of a testator's will held 200 shares of £10 each in a limited company. The testator died in 1904. In 1912, the reserve fund of the company exceeded £50,000 and the directors proposed a scheme for distributing a part of this reserve representing accumulated and undivided profits, amongst the shareholders, so that every shareholder would get a bonus of one new, fully paid £10 share for every existing share held by him. Accordingly resolutions were passed by the company empowering the directors to declare a bonus dividend out of the reserve fund sanctioning distribution of a bonus dividend of £10 per share out of the reserve fund; and authorizing the issue and allotment of new shares fully paid up pro rata among the shareholders. The directors then sent a circular letter to each shareholder with a warrant for the bonus dividend, informing him of the allotment of the new shares and giving him an option to accept or refuse the allotment, and stating that if he accepted he was to indorse and return the dividend warrant to the com-

pany. The trustees on receipt of the notice accepted the allotment and indorsed and returned the dividend warrant to the company. They subsequently sold the shares at a profit. The question then arose between the tenant for life of the original shares and the remainderman, whether the new shares thus acquired were to be regarded as capital or income. Neville, J., held that the result of the evidence was that the company intended to capitalize its reserve fund, and not to distribute it as a bonus dividend, and therefore, though the form of the transaction was the payment of a bonus dividend and a payment of it back to the company for the new shares, it was nevertheless merely a scheme to carry out the real intention of the company, which was to capitalize and not distribute the reserve fund.

SETTLEMENT—LIFE INTEREST SUBJECT TO BE DIRECTED BY ASSIGNMENT — ADVANCEMENT CLAUSE — APPOINTED SHARES — RELEASE OF LIFE INTEREST IN ADVANCES—FORFEITURE.

In re Hodgson, Weston v. *Hodgson* (1913) 1 Ch. 34. Two questions are discussed in this case arising under a marriage settlement—whereby the husband and wife's property were vested in trust to pay the wife £150 per annum and the residue of the income to the husband for life, subject to forfeiture if he assigned, charged or incumbered the same or any part. The settlement provided for advancement to the children of the marriage and after the termination of the husband's life estate the trust estate was to be held by the trustees for the children, in such shares as the husband and wife by deed should appoint and in default of appointment for them equally at twenty-one or marriage. The husband and wife appointed in favour of two sons respectively, each one ninth part of the fund, and at their request sums were raised by way of advancement for two daughters in which sums the husband released his life interest—One of the questions raised was whether the shares appointed were to be regarded as advancements; and Neville, J., decided that they were, and that they were within the advancement clauses of the settlement. The other question was whether the husband, by releasing his life interest in the moneys advanced, had forfeited his life interest in the rest of the funds; and Neville, J., held that he had not, because his release of his interest in the sums advanced was something done in accordance with and for the purpose of carrying out the advancement clause of the settlement.

REVENUE—INCOME TAX—COLLECTION OF TAX—RESOLUTION OF COMMITTEE OF HOUSE OF COMMONS—STATUTE.

Bowles v. *Bank of England* (1913) 1 Ch. 57, involved a point of constitutional law and is therefore deserving of attention. By resolution of the House of Commons committee of ways and means, an income tax at a certain rate for the ensuing financial year was assented to. Before any statute had been passed giving effect to the resolution, the Bank of England had assumed to deduct the income tax at the rate agreed to, from dividends payable by the bank to the plaintiff. Parker, J.,, held that the bank had no right to do this without the assent of the plaintiff, and that the Crown had no right to collect a tax until it has been duly imposed by Act of Parliament.

COMPANY—LIQUIDATION—CLAIM AGAINST FIRM OF PROMOTERS FOR SECRET PROFIT—LIABILITY OF PARTNERS—JOINT AND SEVERAL LIABILITY.

In re Kent County Gas Co. L. & E. Co. (1913) 1 Ch. 92. In this case, the company was promoted by a firm of F. C. Lawson & Co., of which Gyde and Darby were the sole partners—The firm sold a business to the company, and made a secret profit out of the transaction. The company went into compulsory liquidation. Both Gyde and Darby were bankrupt: Gyde had no assets. The liquidator of the gas company proved against Hyde's estate a claim for the secret profit and received from his estate a dividend of 3s. in the pound, amounting to £2109. Out of this money and other assets the liquidator was prepared to pay the preference shareholders part of their capital. Two preference shareholders were mere nominees of Lawson & Co. The liquidator claimed, in these circumstances, to retain the dividends payable to these nominees of Lawson & Co. and set them off pro tanto against the amount due from Lawson & Co. to the company in respect of their secret profit; but Neville, J., was of the opinion as the company had elected to prove against the separate estate of Darby, its right to prove against the firm was gone, as the liability did not arise on separate contracts of the firm, and the partner, but was a liability of the firm; and therefore the election to prove against the separate estate of one of the partners there being no double liability, put an end to the right to sue the firm and consequently that the liquidator had no right to set off the dividends due

the firm's nominees as proposed. This may be law, but it does not appear to be satisfactory, inasmuch as it enables the fraudulent firm to participate in the damages recovered from one of its members in respect of its fraud.

LANDLORD AND TENANT—COVENANT TO REPAIR—WASTE—RIGHT TO DAMAGES FOR WASTE—UNASSIGNABILITY OF RIGHT—IMPLIED COVENANT BY TENANT NOT TO COMMIT WASTE.

Defries v. *Milne* (1913) 1 Ch. 98. In this case the plaintiff was trustee of a lease for a company and the company as the beneficial tenant of the premises agreed to sell the plant and machinery and tenant's fixtures on the demised premises, and for the purpose of enabling the purchaser to remove the property purchased by him, he was authorized by the company to occupy the premises for a specified period upon condition (inter alia) that he was not to do anything which if done by the lessee would be a breach of the covenants and conditions contained in the lease (which contained the usual covenants by the lessee to repair). It was also provided that the purchaser was to make good to the satisfaction of the lessor all damage done in removing fixtures. Whilst in possession the purchaser did certain acts alleged to constitute waste. Upon the purchaser going out of possession on 29 September, 1911, the plaintiff was let into possession and by deed dated November 6, 1911, the company's interest was released to the plaintiff together with the benefit of the agreement with the purchaser and full power to enforce the obligation under that agreement. This was an action by the plaintiff as transferee of this company's right against the purchaser, to recover damages for waste alleged to have been committed by him. Warrington, J., who tried the action, held that, assuming that a claim for damages for waste was assignable, upon the true construction of the assignment, it was not in fact assigned, and with this the Court of Appeal (Cozens-Hardy, M.R. and Farwell and Hamilton, L.JJ.) agreed. They also held that such a claim is not assignable; and they dissented from the dictum of Lord Eshe, M.R., in *Witham* v. *Kershaw* (1885), 16 Q.B.D. 613, 616, that "There is an implied covenant on the part of the tenant not to commit waste." There is an interesting comment on this case in 34 L.T. Jour. 354.

INJUNCTION—EASEMENT—RIGHT OF WAY—ALTERATION OF USER—INCREASE OF BURDEN.

White v. *Grand Hotel* (1913) 1 Ch. 113. This was an action to restrict the user by the defendants, of a right of way. The

predecessors in title of the plaintiff and defendants had in 1883 made an arrangement whereby the defendants' predecessor in title acquired the right of way in question. At that time the defendants' premises were used as a private house and the way was used for obtaining access from the stables of the house to a highway—on the defendants acquiring the premises they were used in connection with the business of a hotel carried on by the defendants, and the way was used for the passage of motor vehicles of guests, and the house on the premises was used for the accommodation of drivers. The plaintiff claimed that this was increasing the burden on the servient tenement, and he claimed an injunction to restrain the user of the way otherwise or to any greater extent than it was used in 1883. Joyce, J., who tried the action held that the right of way was unrestricted, and was not confined to the purposes for which it was required when the grant was made. The Court of Appeal (Cozens-Hardy, M.R. and Farwell, and Hamilton, L.JJ.), affirmed this decision, but inasmuch as it appeared that the defendants had altered and widened the gateway to the way as it had existed in 1883, the Court of Appeal varied the judgment by restraining the defendants from exercising the right of way except through a gate in the position of that which stood on the premises when the way was granted.

MONEY PAID UNDER MISTAKE OF FACT—PRINCIPAL AND AGENT—SEQUESTRATOR — RECOVERY OF MONEY PAID BY MISTAKE — MONEY HAD AND RECEIVED—LIABILITY OF PAYEE FOR MONEY PAID BY MISTAKE.

Baylis v. *Bishop of London* (1913) 1 Ch. 127. In this case the plaintiff sued to recover money paid by mistake in the following circumstances. A clergyman of the Church of England having become bankrupt, the bishop appointed a sequestrator of his benefice, and the sequestrator demanded and received from the plaintiff sums of moneys as title rent charge in respect of property of which the plaintiffs had been, but had ceased to be lessees, and the plaintiffs in forgetfulness of the fact paid the money demanded, which was duly applied by the sequestrator in payment of the curate in charge and other outgoings and the balance was handed by him to the trustee in bankruptcy. Neville, J., held, (1912) 2 Ch. 318 (noted ante vol. 48, p. 539), that the bishop was liable to refund and the Court of Appeal (Cozens-Hardy, M.R., and Farwell, and Hamilton, L.JJ.) have affirmed his decision.

HIGHWAY—OBSTRUCTION — NOT ALLOWING FREE PASSAGE FOR OVERTAKING VEHICLE—HIGHWAYS ACT (1835), 5-6 W. 4, c. 50), s. 78—(2 GEO. V. c. 47, ss. 3-5, ONT.).

Nuttall v. *Pickering* (1913), 1 K.B. 14. The English Highway Act, s. 78, makes it an offence for the driver of a vehicle not to keep it on the left side of a road for the purpose of allowing free passage for other vehicles: (see 2 Geo. V. c. 47, ss. 3-5 Ont.). The defendant was driving a heavily loaded vehicle so far beyond the centre that a motor vehicle overtaking him could not pass on the proper side and he signalled to the driver of the motor to pass him on the wrong side, which he did without delay or inconvenience, there being no other traffic on the road. The defendant was prosecuted for a breach of the Highway Act, s. 78, and convicted, but the Divisional Court (Lord Alverstone, C.J., and Channell, and Avory, JJ.), set aside the conviction. The gist of the offence is not allowing the free passage of other vehicles, and that, in the circumstances of this case the Court held did not take place.

PATENT—PATENT AGENT — DESCRIPTION OF UNREGISTERED PERSON.

Graham v. *Tanner* (1913), 1 K.B. 17. The English Patents and Designs Act, 1907 (7 Edw. VII. c. 29), s. 84, provides that a person shall not be entitled to describe himself as a patent agent unless he is registered as a patent agent. The defendant, who was not registered as a patent agent, issued a circular in which his firm were described as "experts and engineers" and in which it was stated that the firm were prepared to do the class of work which is usually done by patent agents, but the circular did not, in terms, state that the firm were patent agents. The defendant was prosecuted for having committed a breach of the Act, but the charge was dismissed and the Divisional Court (Lord Alverstone, C.J., and Channell, and Avory, JJ.), held rightly so, though the Chief Justice said he came to that conclusion with great regret.

LANDLORD AND TENANT—COVENANT TO REPAIR—BREACH OF COVENANT—WASTE—RELIEF AGAINST FORFEITURE—CONVERSION OF BUILDING FROM CHAPEL TO THEATRE—REINSTATEMENT OF BUILDING—CONVEYANCING ACT, 1881 (44-45 VICT. c. 41), s. 14 (2, 3).

Hyman v. *Rose* (1912) A.C. 623, is another case in which the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten,

Atkinson, and Shaw) have failed to agree with the Court of Appeal (1911, 2 K.B. 234; noted sub nom. *Rose* v. *Spicer*, ante vol. 47, p. 606). This was the case in which a piece of land was let for a term of 99 years, on which a chapel was being erected and which was afterwards completed and separated from the adjoining street by railings, and was used as a place of worship for sixty years. With the consent of the Charity Commissioners the lease was then sold, and the purchasers proceeded to convert the premises into a theatre, and for this purpose removed the railings and opened a new door and made various changes in the interior. The vendor had neglected to comply with a notice to repair pursuant to a covenant in the lease, and the lessor was entitled to possession under a proviso for re-entry for breach of covenant, subject to the claim of the purchasers for relief against the forfeiture. The purchasers offered as conditions of obtaining relief, to deposit a sum of money to secure the restoration of the premises to their original condition at the end of the lease, and also to erect and maintain a moveable fence of posts and chains in the line of the old fence, in order to exclude the public from the premises. The Court of Appeal held that the alteration of the premises amounted to waste and was a breach of the covenant to repair; and that relief against the forfeiture could only be granted on the terms of the immediate restoration of the premises to their former condition; the House of Lords, on the other hand, took a more liberal view of the matter, and came to the conclusion that as there was nothing in the lease prohibiting the carrying on of a theatre on the demised premises, the alterations in the circumstances constituted neither waste nor a breach of the covenant to repair, and that relief ought to be granted on the terms proposed by the defendants.

ARBITRATION—UMPIRE—REFUSAL OF ARBITRATORS TO APPOINT UMPIRE—APPLICATION TO COURT TO APPOINT UMPIRE—PRACTICE—PARTIES—ARBITRATION ACT, 1889 (52-53 VICT. C. 49), S.S. E, 20—(9 EDW. 7 C. 35 S. 9. ONT.).

Taylor v. *Denny* (1912) A.C. 666. This was an appeal from the Court of Appeal on a point of practice under the Arbitration Act, in reference to the appointment of an umpire. By the terms of the submission the two arbitrators had power to appoint an umpire, but on being requested to do so by one of the parties to the reference under s. 5 of the Act, refused to do so. The party requiring the appointment then applied to the Court on

notice to the arbitrators, but the opposite party to the reference, who was out of the jurisdiction, was not notified. One of the arbitrators objected that he was not a proper party and that the other party to the reference was a necessary party to the application. The Judge in Chambers who heard the motion made an order appointing an umpire, with liberty to the party not before the Court to apply to discharge the order within a given time after notice thereof, the costs to be in the arbitration, which order was affirmed by the Court of Appeal (1912) 2 K.B. 542; (noted ante vol. 48, p. 500). The House of Lords (Lord Haldane, L.C., and Lords Halsbury, Ashbourne, Macnaghten, and Atkinson) held that the arbitrators were the proper parties to be notified of the application, and that the application was right in form and the appeal consequently failed.

DAMAGES—BREACH OF CONTRACT—SALE OF GOODS—GOODS NOT ACCORDING TO CONTRACT—PURCHASE OF OTHER GOODS TO MITIGATE DAMAGES—PROFIT ARISING FROM ACT DONE IN MITIGATION OF DAMAGES—APPEAL—JURISDICTION—AWARD INCORPORATING OPINION OF COURT ON CASE STATED BY ARBITRATORS—ERROR ON FACE OF AWARD.

British Westinghouse Elec. M. Co. v. *Underground Electric Railways* (1912) A.C. 673, is one of those cases in which if the suitors adopted the celebrated opinion of Mr. Bumble concerning the law, one would think they did so with some shew of reason. The way the case has been bandied about from Court to Court, though affording excellent entertainment to those in the game, must, one should think, prove highly exasperating to those who are looking for a speedy adjudication of their rights. The question at issue was simply the measure of damages for breach of a contract—and this is how it has worked out—the contract was for the supply of machines to an electric railway; the machines supplied were not according to contract, and, in order to mitigate the damages from the breach, the railway company purchased greatly improved machines from another firm. The cost of these machines the railway company claimed as part of its damages. The arbitrators to whom the fixing of the damages had been referred, submitted that question to the Court; and the Divisional Court (Lord Alverston, C.J., and Hamilton and Avery, JJ.) held that the railway were entitled to recover the cost of the substituted machines. The case t[h]
went back to the arbitrators, who, as in duty bound, adopted t

ruling of the Divisional Court and allowed the costs of the substituted machines. A motion was then made against the award on the ground of alleged error of law, the alleged error being the allowing the cost of the substituted machines; but the Divisional Court thought that it was not open to it to review the law laid down by Lord Alverstone, C.J., and his colleagues, because that was a consultative opinion from which no appeal lay, and in their opinion was conclusive between the parties. They therefore dismissed the appeal, and from that decision an appeal was had to the Court of Appeal which was divided on the point, one Lord Justice thinking that decision of the first Divisional Court was not conclusive, the other two thinking it was. This, of course, naturally led to a further appeal to the House of Lords (Lord Haldane, L.C., and Lords Ashbourne, Macnaghten and Atkinson) and their Lordships' final decision is that a consultative opinion given by a Court on a stated case, though not itself appealable, is nevertheless not conclusive, and may be the subject of attack if adopted by arbitrators, and appearing on the face of their award. Their Lordships therefore held that there was jurisdiction to set aside the award on that ground, which they did, because it did not provide for the abatement from the cost of the substituted machines, of any benefit or profit realized by their user; and they further found that the pecuniary advantage which the railway company had derived by the use of the substituted machines by saving of fuel, etc., etc., was a matter to be taken into account in assessing the damages. The case was therefore remitted to the arbitrators.

MASTER AND SERVANT—NEGLIGENCE—MINE OWNER—HOISTING AND LOWERING APPARATUS — BRAKE — FATAL ACCIDENT — BREACH OF STATUTORY DUTY.

Watkins v. *Naval Colliery Co.* (1912) A.C. 693, was an appeal from the Court of Appeal (1911) 2 K.B. 162 (noted ante vol. 47, p. 457). The action was to recover damages for a fatal accident. By a statutory provision "Proper apparatus for raising and lowering persons at each shaft shall be kept on the works belonging to the mine and shall be constantly available for use." The accident arose from the apparatus being used to lower too many men at once and from having an inefficient brake and spanner bar, due to the negligence of the defendant's foremen, but not to their own negligence, they having provided reasonably proper and efficient foremen. The

Court of Appeal thought the defendants were not under any absolute obligation to provide efficient apparatus, and that they discharged their duty if they supplied such apparatus as their expert manager deemed sufficient, and therefore that they were not liable. The House of Lords (Lord Haldane, L.C., and Lords Halsbury, Macnaghten and Atkinson) held this view to be erroneous and that the statutory duty was absolute and had not been discharged, and therefore the defendants were liable.

PRACTICE — DISCOVERY — AFFIDAVIT OF DOCUMENTS — FURTHER AFFIDAVIT.

British Association of Glass Bottle Manufacturers v. *Nettlefold* (1912) A.C. 709. It is somewhat surprising to find a case getting into the House of Lords on a simple point of practice, yet such is the case. The Court of Appeal had ordered the appellants to file a better affidavit of documents, on the ground that it appeared that the defendants were under a mistake as to the relevancy of documents and that their affidavit of documents was consequently discredited. The appellants claimed that their affidavit was conclusive. Their Lordships (Lord Haldane, L.C., and Lords Ashbourne, Macnaghten and Atkinson), however, agreed with the Court of Appeal (1912) 1 K.B. 369 (noted ante vol. 48, p. 217) that although as a general rule the affidavit of documents is conclusive in the absence of the admission that there are other documents than those produced which are material; yet where the affidavit is based upon a misconception as to the materiality of documents in the deponent's possession, and the Court is certain that he has in his possession or power other relevant documents which ought to have been disclosed and which would have been disclosed if the deponent had rightly conceived his case, then it is right and proper to order a better affidavit to be made.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—LIABILITY OF PRINCIPAL FOR FRAUD OF AGENT.

Lloyd v. *Grace* (1912) A.C. 716. It is not very surprising to find that in this case the House of Lords (Lords Loreburn, Halsbury, Macnaghten, Atkinson and Shaw) have reversed the decision of the Court of Appeal (1911) 2 K.B. 489 (noted ante vol. 48, p. 614). The plaintiff, a widow, who owned two cottages, and a sum of money secured on mortgage, being dissatisfied with the income, went to the office of a firm of solicitors, the defendants, with a view to improving her income. She saw

their managing clerk, who conducted the conveyancing business of the firm without supervision. Acting as the representative of the firm, he induced her to give him instructions to sell the cottages, and call in the mortgage money, and for that purpose to give him the deeds (for which he gave a receipt in the firm's name), and to sign two documents, which were neither read over nor explained to her, and which she believed it was necessary to sign in order to effect the sale of the cottages. These documents were in fact transfers to the clerk of the cottages and mortgage, and by means of them he dishonestly disposed of the property for his own benefit. The Court of Appeal thought that the clerk was not acting within the scope of his authority and that as his master got no benefit from the fraud, therefore that the defendant was not liable; but the House of Lords holds that he was acting within the scope of his authority, and his master was consequently liable for his fraud, which seems a very reasonable and just conclusion. The attempt to escape liability on the ground that the principal had derived no benefit from the fraud was based on *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 259, but their Lordships hold that case does not lay down any such proposition as, that in order to make a master liable for the act of his servant the master must have profited by it. The only difference which arises where the master gets the benefit, is that he may then be said to have adopted the act. As Lord Macnaghten observes, it would have been absolutely shocking if the master were not held liable in such circumstances.

MORTGAGE—PRIORITY—MORTGAGE TO BANK TO SECURE CURRENT ACCOUNT—SUBSEQUENT MORTGAGE—NOTICE—APPROPRIATION OF PAYMENTS—RULE IN CLAYTON'S CASE.

Deely v. *Lloyds Bank* (1912) A.C. 756. This was an appeal from the Court of Appeal (1910) 1 Ch. 648 (noted ante vol. 46, p. 449). The question involved is comparatively simple. One Glaze in 1893 mortgaged land to a bank to secure his current account, limited to £2,500. In 1895 he gave a second mortgage on the property to secure £3,500 to his sister Mrs. Deely. Frank Deely, her husband, acted as solicitor for Glaze in the transactions which led to the litigation. Notice of the Deely mortgage was given to the bank, but they continued the account as an unbroken account, instead of opening a fresh account. Glaze from time to time made payments into his account, which, if applied according to the rule in Clayton's case, would have

paid off the moneys due to the bank at the date of the second mortgage, by January, 1896. The bank forgot about the second mortgage; and Deely and her husband believed that the bank's mortgage was a continuing security in priority to Mrs. Deely's, and the account was dealt with on that footing. The bank never allowed Glaze to overdraw his account beyond the secured amount, except temporarily and on deposit of additional security. On several occasions Mrs. Deely authorized her husband to deposit her mortgage with the bank to secure Glaze's account. In 1896 and 1897 Glaze made specific appropriations of payments into his account without any alteration being made in the form of the account as shewn by the pass-books. In 1899 the bank realized the security for a sum just sufficient to pay the amount due them, and retained the proceeds. Glaze in the same year was made bankrupt. At that time Mrs. Deely made no claim to priority and her husband induced the bank to give up a claim under a collateral guarantee given to them at the time of their mortgage, on the representation that the discharge of their mortgage put an end to the guarantee; and thereupon Mrs. Deely obtained the release of a counter-guarantee she had given to the guarantor. In 1905 the present action was commenced by Mrs. Deely against the bank for the usual account, and for a declaration that in taking these accounts the bank were not entitled to charge for advances made to Glaze after notice of the Deely mortgage. The Court of Appeal refused the declaration, but the House of Lords (Lords Macnaghten, Atkinson and Shaw) held that the plaintiff was entitled to it, and that the rule in Clayton's case applied and was not excluded by the conduct of the parties.

NUISANCE — INJUNCTION — POLLUTION OF STREAM — MUNICIPAL BODY — WORKS FOR OBVIATING ALLEGED NUISANCE — SUFFICIENCY OF REMEDY—REFERENCE TO EXPERTS—INJUNCTION —DISCHARGE OF INJUNCTION ON UNDERTAKING.

Attorney-General v. *Birmingham T. & R. District* (1912) A.C. 788. In this case Kekewich, J., had granted a perpetual injunction restraining a municipal body from polluting a stream by discharging sewage into it, in contravention of a statute. On an appeal therefrom the Court of Appeal ordered a reference to an expert to ascertain whether the effluents discharged had been freed from noxious matter and the expert having reported that the effluent discharged into the stream was freed from noxious matter so as not to affect the purity of the

water of the river, whereupon the Court of Appeal accepted the undertaking of the defendants to use their best endeavours to prevent any breach of the statutory provisions, the injunction was discharged (1910) 1 Ch. 48 (noted ante vol. 46, p. 93.) From this order the present appeal was brought; and the House of Lords (Lords Loreburn, Atkinson, Garrell and Robson), while holding that the Court had jurisdiction to rescind the injunction, yet thought it ought not to have done so on the limited undertaking given, for which the House directed the defendants to substitute an undertaking that the existing results as described in the report of the expert should in future be maintained by them; and the defendants were condemned in three-fourths of the costs of the appeal.

TELEGRAPH CABLES—TAXATION OF TELEGRAPH COMPANIES—COMPANY OWNING CABLES BUT NOT CARRYING ON BUSINESS.

Commercial Cable Co. v. *Attorney-General of Newfoundland* (1912) A.C. 820. The Commercial Cable Co. has telegraph cables landed on the island of Newfoundland, but by contract with the Government confirmed by provincial statute it is prohibited from competing with the Government and from receiving and transmitting business in Newfoundland, a prohibition which it has not transgressed. A provincial Act imposes taxation on all telegraph companies carrying on business in or from the island in respect of every cable (not exceeding five) landed thereon. The Government claimed to tax the plaintiffs' cables, which claim was allowed by the Colonial Supreme Court, but the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson and Shaw) held that the Act only applied to the cables of companies doing business, and that the plaintiffs were not doing business, and their cables were therefore exempt from taxation.

DOMINION LANDS ACT (R.S.C. 1886, C. 54)—ROAD ALLOWANCES —NORTH-WEST IRRIGATION ACT, 1898—INTERSECTION OF ROAD ALLOWANCES BY IRRIGATION CANALS—BRIDGING POINTS OF INTERSECTION.

The King v. *The Alberta Ry. Co.* (1912) A.C. 827. In this case the Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Macnaghten, Dunedin and Atkinson) have reversed a judgment of the Supreme Court of Canada. The short point being this. The Alberta Railway Co. having power to construct irrigation works, under the North-west Irri-

gation Act, 1898, obtained authority to carry the irrigation canals constructed by them across the road allowances met with in their route—and the question was whether they could exercise this right without also providing necessary bridges wherever they thus rendered the road allowances impassable. The Supreme Court was of the opinion that as to travelled roads the company were bound to provide bridges, but the majority of that Court considered that the certificate of the Commissioner of Public Works under which the canals were authorized exonerated the railway from providing bridges at the intersection of road allowances which were not travelled.

POWER TO ERECT POLES FOR ELECTRIC WIRES IN STREETS—RIGHT OF MUNICIPALITY TO PREVENT ERECTION OF POLES—2 EDW. VII., C. 107, S.S. 12, 13, 21D.—RAILWAY ACT, 1888, S. 90D.—RAILWAY ACT, 1906, S. 247D.

Toronto & Niagara Power Co. v. *North Toronto* (1912) A.C. 834. This is the case in which the plaintiffs successfully established their right under their act of incorporation, 2 Edw VII., c. 107, Can., to erect their poles in the public streets of North Toronto without the permission or consent of the municipality, and also established that s. 90 of the Railway Act of 1888, as amended by the Railway Act, 1906, s. 247, being inconsistent with the plaintiffs' special Act, was by s. 21 of the latter Act inapplicable to the plaintiffs. The judgment of the Court of Appeal for Ontario was therefore reversed by the Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Macnaghten, Dunedin and Atkinson and Sir Charles Fitzpatrick).

NEGLIGENCE—MOTOR CAR—RETENTION OF CONTROL OF CAR BY OWNER.

Samson v. *Aitchison* (1912) A.C. 844. This was an appeal from New Zealand. The action was for damages for injuries occasioned by the negligent driving of a motor car. The facts were a trifle peculiar—a Mrs. Collins was desirous of buying a motor car. Samson offered to sell her his own car and took her for a drive in the car. On returning, Mrs. Collins was anxious that her son Albert should give his advice and opinion about the car, he having had two years' experience as a chauffeur. For the purpose of testing the car as a hill climber, all three got into the car, Samson driving. As they were coming down hill Samson and Albert changed seats and Albert took the wheel.

Whether this was done at Samson's or Albert's suggestion was disputed, and while Albert was driving the accident in question took place. The Court below found in these circumstances that Samson as owner, though he invited Albert to drive the car, retained control of the car and was responsible as principal for the injury occasioned by the negligence of Albert, in the absence of proof that he had by contract or otherwise abandoned the right of control over the car to Albert. The judgment in favour of the plaintiff Aitchison was therefore affirmed.

COVENANT—RENTAL TO BE VARIED ACCORDING TO ELECTRICAL ENERGY GENERATED—CONSTRUCTION.

Attorney-General v. *Canadian Niagara Power Co.* (1912) A.C. 852. This was the case in which the agreement between the Ontario Government and the Canadian Niagara Power Co. was in question. By the agreement a certain specified rental was payable and also "In addition thereto payment at the rate of $1 per annum for each electrical horse-power generated, used and sold or disposed of over 10,000 e.h.p. up to 20,000 e.h.p., and the further sum of 75 cents for each e.h.p. generated and used and sold or disposed of over 20,000 e.h.p. up to 30,000 e.h.p., and the further sum of 50 cents for each e.h.p. generated and used and sold or disposed of over 30,000 e.h.p." The question between the parties appears to have been whether, in the construction of this agreement, the additional payment was to be based on the highest amount of e.h.p. generated at any time until a subsequent higher record is made, or whether the average horse-power generated in a given period should be the basis. With some hesitation the Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Macnaghten and Atkinson and Sir Charles Fitzpatrick) came to the conclusion that the additional rental was to be based on the highest amount of e.h.p. generated at any time and to remain thereat until a higher amount is reached, when it is to be increased accordingly and so from time to time as each higher amount is generated.

CONVEYANCE—RESERVATION TO GRANTOR OF MINES, MINERALS AND SPRINGS OF OIL—NATURAL GAS.

Barnard-Argue-Roth-Stearns Oil & Gas Co. v. *Farquharson* (1912) A.C. 864. This was an appeal from the Court of Appeal for Ontario, 25 O.L.R. 93. The case turns upon a reservation to the grantors of all "mines, minerals and springs of oil" upon certain land conveyed by the Canada Company in 1867 to the

plaintiffs' predecessor in title. Many years after the grant natural gas was discovered on the land and the Canada Company claimed it under the reservation in the deed and granted it to the defendant company with the right to enter and recover it. The action was brought to restrain the defendants from entering upon or interfering with the plaintiffs' land. The Chancellor who tried the action held that the reservation carried the right to oil, but not the right to search and bore for natural gas. The Court of Appeal affirmed this decision, Meredith, J.A., dissenting. The Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Macnaghten and Atkinson and Sir Charles Fitzpatrick), while conceding that natural gas being neither animal nor vegetable must be classed as a "mineral," yet were of the opinion that the reservation of minerals in the deed was not to be construed in the widest sense, but by the intention of the parties when the deed was made—and it appearing by the evidence that natural gas did not become commercially valuable until 1880 and that prior thereto it had been regarded as a destructive and dangerous element to be got rid of if possible, and that it did not begin to be utilized until 1890. Their Lordships thereupon concluded that it could not be inferred that this product was included in the reservation in 1867. The judgment of the Court of Appeal was therefore affirmed.

B.N.A. Act, s.s. 91, 92—Marriage—Dominion jurisdiction over marriage—Solemnization of marriage.

In re Questions Concerning Marriage (1912) A.C. 880. This is the case in which the questions touching the Dominion Parliament's jurisdiction over marriage and its right to pass the proposed Lancaster Bill are discussed. The Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Halsbury, Macnaghten, Atkinson and Shaw and Chief Baron Palles) determined that the Dominion Parliament had no power to pass the proposed bill. The question whether the law of the Province of Quebec renders null and void a marriage between Protestant and Roman Catholic or between two Roman Catholics unless solemnized before a Roman priest their Lordships treat as superfluous and do not answer. Their Lordships are of the opinion that the powers conferred on the Dominion Parliament concerning marriage do not cover "the whole field of validity," but that the provinces by virtue of their jurisdiction over the solemnization of marriage have also power so to legislate on that subject so as to affect the validity of marriages. On the whole

it cannot be said that the matter is, as a result of the debate, placed on a satisfactory footing. The divided jurisdiction instead of being any advantage to the public is proving rather the reverse, as it makes it all the more difficult to legislate in a satisfactory way on the subject or establish a uniform law throughout the Dominion.

FATAL ACCIDENT—PRISONER BURNT TO DEATH IN LOCK-UP.

McKenzie v. *Chilliwack* (1912) A.C. 888. This was an action by the widow of a man who had been burnt to death while a prisoner in a lock-up in a small rural township in British Columbia. The defendants were the township and the negligence complained of was the not keeping a man constantly in charge of the lock-up. The fire appeared to have originated in the cell, but how was not shewn. The Judge at the trial dismissed the action and his decision was affirmed by the Court of Appeal of British Columbia; and the Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Atkinson and Shaw, and Evans, P.P.D.) also agreed that the defendants were not bound to have a watchman constantly on duty to guard against the risk of fire in a wooden cell used for the custody of prisoners, in which there is no fire and matches are not allowed, and therefore that the action was rightly dismissed.

Correspondence.

THE MARRIAGE QUESTION.

Editor, CANADA LAW JOURNAL:

DEAR SIR,—There are some points in Mr. E. F. B. Johnston's interesting paper on the Law of Divorce in Canada, recently published in your Journal (ante p. 1) which I should like to refer to.

At the close of his article (p. 15) he ventures the suggestion that some punishment should be visited upon those who so violate their matrimonial obligations as to render the continuance of cohabitation, under reasonable conditions, impossible. This suggestion is well worthy of careful consideration.

The marriage contract is one in which not merely the parties to it are interested, it is, on the contrary one in which the whole community is concerned. Our whole social system is founded on marriage, and a violation of its obligations is not only a wrong to the individual, it is more or less a crime against the state, and if matrimonial offenders had the fear of a term of im-

prisonment, or fine, before their eyes, it might have a wholesome effect. Mr. Johnston seems to assume that men alone are matrimonial offenders deserving of punishment, but the divorce statistics of Canada will shew that there are nearly, if not quite, as many women as men whose misdeeds have been grounds for divorce. But such statistics are illusive, and if the full facts of all divorce cases were thrashed out it would often appear that the supposed innocent party was really very far from innocent. Many petitions which now go undefended might have a very different result if it were known that the respondent, if found guilty, would have to serve a term of imprisonment.

But that a Parliament of men would be willing to pass any such law, seems somewhat doubtful.

Mr. Johnston asks, where a married couple find themselves in a condition which has become intolerable, "why should they not be restored to their original position?" The obvious answer to that question, is that it is simply impossible to do so, the granting of a divorce cannot do it. A divorce does no more than put a legal end to a status which is not a mere legal status, but a social and a moral one; but it cannot by any possibility restore the parties to their original position, as if they never had been married; and it is precisely this fact which makes the question of divorce so difficult. It is, at best, a rude, imperfect and doubtful remedy for an irremediable wrong. The ordinary legal principle on which contracts are rescinded, is, that such a remedy can only be given where the parties can be restored to their original position as if the contract had never been made. If the contract has been partly executed and it is impossible to restore the parties to the *status quo ante* the only remedy is in damages. Those who advocate a divorce law, therefore, virtually desire that to the marriage contract a wholly new principle of law shall be applied.

Mr. Johnston suggests that in the consideration of the subject of his proposal to establish a Divorce Court in Canada, we should eliminate the religious question entirely. We think he is mistaken in this, and that the religious aspect of the question must be kept steadily in view. It must be always remembered that there is a great body of opinion in Canada in favour of the view that marriage is not a mere civil contract, but that it involves a sacred religious obligation, and any legislation which may be proposed must be framed with due regard to that opinion. The difficulty, of course, is that any such law must be general in its operation, you cannot frame it so as to exclude any denomination from its operation, if they choose to avail

themselves of it. At the same time any such measure in order to have any chance of adoption must be of an extremely conservative character in view of the opinion we have referred to.

One other matter might be referred to. Mr. Johnston states that Henry VIII. adopted the remedy of applying to Parliament for a divorce. If he intended this statement to apply to the so-called divorce of Katherine of Arragon, he appears to be mistaken. The statute, 25 Hen. VIII. c. 22, which he may possibly have had in mind, itself shews that this was not the case. That Act did not grant the so-called "divorce," but merely affirmed the "separation" decreed by the Archbishop of Canterbury. Henry's suit, it may be observed was not for a divorce; it was for nullity of marriage on the ground that Katherine was his brother's widow, and therefore the parties were within the prohibited degrees of relationship and incapable of lawful marriage. There was never any question that the parties were within the prohibited degrees; but Pope Julius sanctioned the marriage. Learned divines were divided in opinion whether he had exceeded his power in so doing. Some held that he had power, others held that although he had power to permit marriages within degrees prohibited by mere ecclesiastical authority, he had no power to dispense with the laws of God, as set forth in Leviticus; that marriage with a brother's wife is prohibited in Leviticus, and therefore no one had power to dispense with that law. Those who think there is such power regarded and will continue to regard the marriage as valid, and therefore indissoluble. Those who think that no one has such power thought, and will continue to think, that the marriage was properly declared to be null and void.

I refer to this point because there is no great historical question concerning which there has been so much misunderstanding, or misrepresentation, by historians and others as to the real facts of the case from its legal aspect.

To conclude, Mr. Johnston speaks of impediments of relationship as if they were all "some remote or fanciful connection between the parties and their god parents." There is no doubt some impediments of this character were created by ecclesiastical authority, but those that are laid down in Leviticus, and which are the only prescribed degrees recognised by law in Canada, are of a different character, and founded on principles applicable to the whole human race for all time. No one can say of them that they were instituted for the purpose of raising money by dispensing with their observance.

Yours, etc.,

CONSTANT READER.

REPORTS AND NOTES OF CASES.

Province of Ontario.

SUPREME COURT.

HIGH COURT DIVISION.

Falconbridge, C.J.K.B.] SNELL *v.* BRICKLES. [Jan. 28.

Vendor and purchaser—Contract for sale of land—Time of essence of contract—Failure of purchaser to close in time—Duty of vendor as to tender of conveyance.

This was an action for specific performance of a contract to convey lands. The defendant sought to rescind the contract on the ground that time was of essence of the contract and that the plaintiff neglected to close the transaction on the proper date. The agreement provided: "$2,000 to be paid upon the acceptance of title and delivery of deed and give you (vendor) back a first mortgage on the property for the remainder, repayable in five years from the date of closing."

Held, 1. The general rule, in the absence of other provision, is, that the purchaser prepares the conveyance at his own expense: *Foster* v. *Anderson* (1907), 15 O.L.R. 362, at p. 371; *Stevenson* v. *Davis* (1893), 23 S.C.R. 629, but this rule was waived by the provision in the contract above set out, and it was the duty of the vendor to prepare and tender to the purchaser the conveyance. The vendor's solicitors recognized that duty because they wrote to the purchaser's solicitors enclosing a draft deed for approval.

2. That purchaser was not in default and judgment for specific performance was directed.

W. Proudfoot, K.C., for purchaser. *J. E. Jones*, for vendor.

Province of Quebec.

COURT OF REVIEW.

Tellier, DeLorimier, Greenshields, JJ.] [Dec. 13, 1912.

DULAC *v.* LAUZON.

Contracts—Building contracts—Extras—Substantial performance.

Held, 1. A builder or contractor who agrees to build according to plans and specifications for a fixed price cannot recover

for alterations and extras unless such alterations and extras and the price to be paid therefor are stipulated in writing, and parol evidence of such additional contract alleged to have been made verbally is inadmissible.

2. Where a builder's contract calls for payment as the work progresses, the owner of the building is not entitled to retain in his hand a large amount of the contract price on the ground that the work has not been properly done, when it is established that the work of a value of $8,000 is all finished saving a few trifling imperfections (e.g., $15.40), and in such case the owner will be condemned to pay the balance of the contract price less the value of such imperfections.

J. A. Robillard, K.C., for plaintiff, appellant. *N. U. Lacasse,* for defendant, respondent.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Feb. 5.

JOHNSTON *v.* MUNICIPALITY OF THE COUNTY OF HALIFAX.

Consolidated Public Health Act—Suppression of contagious or infectious disease—Local Board of Health—Powers of — Liability of municipality for debts incurred.

Under the provisions of the Consolidated Public Health Act. N.S. Acts of 1910, c. 6, s. 25, "If any person . . . is infected with . . . smallpox, diphtheria, etc., the local board of the district in which such person is, may make effective provision in the manner which to it seems best for the public safety by removing such person to a separate house . . . and by providing nurses, etc., at his own cost or charge or the cost of his parents or other person or persons liable for his support if able to pay the same; otherwise at the cost and charge of the municipality." By section 29 of the Act, sub-section (1), "all necessary expenses incurred by a local board in suppressing any infectious or contagious disease shall be a charge upon the municipality."

Held, by Graham, E.J., and Ritchie, J., following the case of *Cameron* v. *Dauphin,* 14 Man. 573, and dismissing defendant's

appeal, that the municipality was primarily liable for obligations incurred by the local board in connection with the suppression of contagious or infectious disease, with a remedy over against the patient or other person or persons liable for his support if able to respond.

An allegation in the statement of claim that plaintiff is a physician "duly registered," where not denied, is equivalent to an admission of registry.

Per Meagher, and Drysdale, JJ., that proof of inability on the part of the patient or those liable for his support to pay was a condition precedent to the right to recover against the municipality.

Appeal dismissed without costs.

O'Connor, K.C., for defendant, appellant. *Nem. con.*

Province of British Columbia

COURT OF APPEAL.

Full Court.] [Nov. 5, 1912.

MURRAY *v.* COAST STEAMSHIP COMPANY.

Master and servant—Wages—Discharge for disobedience—Result as to wages not yet accrued—Sunday—Emergency—Meaning of word as applied to work on a ship—Lord's Day Act—Sunday work.

Held, 1. A contract for service contains an implied condition that if faithful service is not rendered the master may elect to determine the contract, and where that right is properly exercised by the master during the currency of the servant's salary, the servant has no remedy, that is to say, he cannot recover salary which is not due and payable at the time of his dismissal, but which is only to accrue due and become payable at some later date, and on condition that he had fulfilled his duty as a faithful servant down to that later date. (Dictum per Irving, J.A.).

2. As to "cases of emergency in conection with transportation," as applied to an ablebodied seaman at cargo work on a ship, the word "emergency" must be given an elastic and varying meaning acording to the circumstances, especially in the case

of vessels engaged in the coasting trade in dangerous waters where conditions of wind, tide, and weather must be carefully considered beforehand and duly provided for by the master, so as to insure, as far as possible, the safety of the vessel and those on board.

3. It is the duty of an ablebodied seaman in service on a ship to obey the master of the ship, and he cannot refuse to work at cargo on Sundays simply to vindicate a principle against Sunday work.

4. Where the substituted holiday provided for by the Lord's Day Act, is being claimed, it is the duty of the employee to do the work and then demand the substituted holiday during the next six days.

McCrossan, for plaintiff, applicant. *Harold Robertson*, for defendant, respondent.

Province of Alberta.

SUPREME COURT.

Harvey, C.J., Scott and Simmons, JJ.] [Dec. 18, 1912.

CHADWICK *v.* STUCKEY (No. 2).

Specific performance—Rescission of contract—Failure to pay purchase instalment, effect of—Subsequent tender.

Where, under an executory contract for the sale of land providing for the payment of the purchase price in instalments, the vendee made default in the payment of an instalment when due, though it was expressly agreed that time should be of the essence of the contract, and notice was terminated pursuant to the terms of the contract, yet a forfeiture will not be allowed by the court where it appears that a substantial amount, both absolutely and relatively to the whole purchase price, has been paid and the default had continued for only two months after the notice was given, at which time the vendee tendered the amount in which he was in default, and the vendee may notwithstanding be declared entitled to specific performance of the contract.

Chadwick v. *Stuckey*, (No. 1), 6 D.L.R. 250, reversed; *Labelle* v. *O'Connor*, 15 O.L.R. 519, distinguished; *B.C. Orchard Land*

Company v. *Kilmer*, 2 D.L.R. 306, 20 W.L.R. 892, specially referred to.

Jones, Pescod & Adams, for the appellant. *McCarthy, Carson & McLeod*, for the respondent.

Stuart, Simmons, and Walsh, JJ.] [Dec. 19, 1912.

ELLIS *v.* FRUGHTMAN.

Damages—Penalty or liquidated damages—Wrongful dismissal —Stipulated damages.

Where a contract contains a provision that either party to it may terminate it on payment of $500 to the other party, said amount may be either a penalty or liquidated damages; such question is one of law to be determined by taking into consideration the intention of the parties from the language used and the circumstances of the case taken as a whole as at the time the contract was made.

Law v. *Local Board of Redditch*, [1892] 1 Q.B. 127, referred to.

C. C. McCaul, K.C., for defendant, appellant. *G. A. Grant*, for plaintiff, respondent.

Flotsam and Jetsam.

LETTER-BOX OUTRAGES.—There is very little doubt that the misplaced leniency shewn to the women convicted of offences in connection with the militant suffragist propaganda has been largely responsible for this last outbreak of female hooliganism, and short shrift should be given to any persons convicted of this latest form of violence. Under s. 61 of the Post Office Act, 1908, placing injurious substances in letter-boxes is punishable on summary conviction by a fine of £10, or on conviction on indictment to imprisonment with or without hard labour for twelve months. The time has now arrived for compelling these women to serve their complete sentences, and to let them take the full consequences of their starvation tactics in prison. The militant movement has proved a good thing for many of the so-called leaders, but these and their hysterical followers should be made to feel the utmost rigour of the law.—*Law Times*.