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# The BARRISTER

A. C. MACDONELL, D.C.L., Editor.

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# The Barrister.

VOL. III. TORONTO, APRIL, 1897. No. 4

## EDITORIAL.

### Biennial Sessions of Legislatures.

The labours of our local legislators for the present year have just been completed; in our next issue we will shortly review the recent legislation. It is considered by many that we have altogether too much legislation and too many legislators; legislation means litigation, and litigation means business for lawyers. Our legislative machinery seems specially designed to breed briefs for counsel. It has been truly said that "It is a natural result of the laws not being understood by those who make them that persons of legislative capacity should be employed in their interpretation and improvement." It is, however, a question for those who have to pay the piper whether this state of affairs has not continued long enough. At the present time all our provincial institutions have settled themselves upon solid and workable foundations; few new questions of importance arise in provincial matters from year to year; the civilization and advancement of the age we live in have brought all matters relating to property and civil rights to a reasonably perfect condition; our country has been settled, opened up, and reduced to a system of municipal government which is highly satisfactory; railways and highways have been built everywhere, and our whole system of mercantile and educational life has been reduced to a stage that permits of few improvements. Such being the case, it is just a question whether we should not substitute biennial sessions of our Local Legislature for the present annual assemblies. Another very pertinent subject that is receiving much attention in the States of the neighbouring Republic is the question of restricting the introduction of bills in the legislatures of the various states. With this movement we, however, have no sympathy. We do not believe that this matter has yet reached the grievance stage in Ontario.

That the evil is a real one and a growing one with our neighbours may be inferred from the fact that in the Legislature of New York during the first two months of its recent session more than 900 bills were introduced. No one needs to be informed that the great majority of these bills were either bad, useless or positively vicious in their character. We believe, however, there is a growing feeling in the public mind that the great expense and constant tinkering with the laws consequent upon the annual sessions of our Local Legislature is becoming a burden and a nuisance. What has been the experience in the United States on this subject? It is not well that we should follow the lead of the United States or any other people upon the subject, because our condition and circumstances may not be identical ; but it is just as well to know what is going on around us, and to learn what other people at least somewhat similarily situated are doing. It is worthy of note that in 39 States of the Union there are biennial sessions, and 25 Secretaries of the States have declared that not only has the biennial system proved so satisfactory that there is no disposition to change it, but that the gratifying results of the restriction have stimulated a movement for further restriction. In several states there is a desire to make the interval between sessions even greater than it is now. The Colorado Secretary of State, speaking for public opinion, says that one session in four years would be enough ; the secretaries of three other states make similar statements, while the Secretary of Arkansas says that the people of his state would be satisfied with one session in five years. In Oregon, Washington and other states the length of the session is limited. Biennial or limited sessions appears to be the true solution of the problem of how to prevent superfluous and ill-advised legislation. With us the question is also one of great expense. We believe a period has been reached in Ontario when an annual session of the Legislature is no longer necessary ; but it will be a hard matter to get the politicians in power for the time being to admit it.

* * *

### Law School Examinations.

It is one of the signs of the improvement and progress of the times and of increasing efficiency in all departments, that the final year students at the Law School now submit to eleven days' examination, while only a few years since the ordeal was over in three days. The change certainly must mean that the test of qualification is now much more thorough, and it cannot longer be thought that there is anything superficial in these examinations. Apart from this, while it is likely to produce a better class of men, it is, we think, calculated to give a student a fairer chance. Under the old system the custom was, we

think, to ask only a few questions on each subject, and if a hapless candidate should be "down on his luck" it was a possibility that by chance he would get a majority of questions on points where he was weakest; and while say with seven questions his average might be low, yet had there been seven more he might have pulled up. There is certainly a large element of chance and luck in examinations, but the more thorough and extensive the examination there is the greater likelihood of these objections being removed and a test made fair to the student without fear of lowering the standard.

* * *

## The Court of Appeal.

For the first time in some years it is likely the visitor to the Court of Appeal will find a change in its composition. The law of the legislators has added a Judge to this Court, and the law of nature —the weight of years of service —has caused the Chief Justice to seek relaxation in retirement. There is nothing certain about the appointments that are to be made, but, of course, rumour has already fixed the future occupants of the seats in this Court. In a way we believe it will be almost impossible to replace Chief Justice Hagarty with a Justice as capable as he was, yet there are many members of the Ontario Bar who have in them the abilities that would in time fill the vacancy. But it is rarely that one can be found with such a wide grasp of legal principle and such a great experience as Chief Justice Hagarty. Of course, it is understood Mr. Justice Burton is to succeed, but our remarks are of course in reference to the new Justice of Appeal required to take the place of the Justice who takes the Chief Justiceship. Mr. Justice Burton will, we think, make a very worthy Chief Justice of Ontario. The appointment of another Justice of Appeal by the Legislature is a much needed addition, and one that we would remind our readers has been specially advocated in these columns on various occasions recently.

* * *

## Law Firm Dissolutions.

Partnership changes in Toronto legal circles are beginning to attract attention. It was Horace Walpole who remarked during the course of one of England's most brilliant war periods, that one had to enquire every morning before breakfast what the latest victory was or one would miss track of them. And it is the same way with *The Barrister* over his toast and coffee. There is hardly a day that the newspapers do not contain the announcement of a dissolution of some legal firm. There seems to be a continuation of upheaval that causes even the oldest combinations to undergo a shuffle. Some there are who cause what appears to be a formal announcement to appear in the papers, while others seem to keep strictly

mum on the subject. The prevailing feature of these changes—if they have any feature—is the triumph of the younger men. But the most certain conclusion to be drawn is that there is a shrinkage in business. When dissolutions come about we can be sure that it is the result of a conviction by one that he brings more to the firm than he takes out, and that his partner absorbs more of the earnings than he contributes to them. We are all the time in receipt of information that points to a state of distress in the profession in Toronto, but of course the fact, if true, is better hidden than paraded, and no great good can arise from publication of such a state of affairs. Yet the thing is getting so patent that a reference to it will not be out of place, especially in view of the fact that we are soon to have a further batch of young lawyers turned out by the Law School. We think the situation in Toronto is not improving, and that the fact should be understood.

## RECENT ENGLISH CASES AND NOTES OF CASES.

*Is the solicitor personally bound to repay costs which he has received under an order of the Court of Appeal on that order being reversed by the House of Lords?*

HOOD-BARRS v. CROSSMAN AND PRICHARD.

[T. 291; W. N. 30; L. J. 159; L. T. 461; S. J. 347.

No, said the House of Lords, the party only is liable to repay—not the solicitor employed; thus affirming the decision of the Court of Appeal.

* * *

*Are entries in a diary made by a deceased solicitor in the course of his business admissible as evidence?*

ECROYD v. COULTHARD.

[L. J. 161; W. N. 25.

Mr. Justice North, after a careful review of all the authorities, held that such entries were not admissible, for although made in the course of the deceased solicitor's business, he was under no duty to make such entries. (*Rawlins* v. *Rickards* (1860), 28 Beav. 370, and *Bright* v. *Legerton* (1861), 2 De G. F. & J. 617, doubted; dicta of the Court of Appeal in *Hope* v. *Hope* (1893), L.J.N.C. 110, followed).

* * *

*Does the Married Women's Property Act, 1893, apply where a married woman, a defendant in an action, appeals against the decision given?*

HOOD-BARR v. HERIOT.

[T. 291; W. N. 30; L. J. 159; L. T. 461; S. J. 347.

The Court of Appeal held that the Act giving the Court power to order payment of costs out of her separate property, notwithstanding a restraint on

anticipation, only applied to an action brought by a married woman, and not to an appeal instituted by her in such a case. This decision the House of Lords upheld.

* * *

*If a defendant pays money into Court admitting his liability, and the plaintiff does not take it out, can the defendant subsequently deny liability and join issue?*

DUMBLETON v. WILLIAMS, TORREY AND FIELD, LIMITED.

[L. T. 388.

The Court of Appeal (Esher, M.R., Lopes and Chitty, L.JJ.), held that the defence and joinder of issue ought not to have been put on the record, and must be treated as struck out, liability having been admitted by payment into Court.

* * *

*Consent order—Unilateral mistake—Order construed by Court—Setting aside—Evidence of counsel, how given.*

WILDING v. SANDERSON.

[Chancery Division, BYRNE J., MARCH 9, 10, 11, 12, 13, 15, 25.

This was an action brought to set aside a consent order, made in a former action of *Ainsworth* v. *Wilding*, which was an action by second mortgagees against a first mortgagee in possession, claiming damages in respect of certain sales of the mortgaged property, and an account.

Prior to the trial of *Ainsworth* v. *Wilding* before Mr. Justice Romer, some correspondence had taken place between the parties with a view to agree as to the principle on which the account should be taken, and after some discussion before the Judge an order was made by consent, which was subsequently embodied in minutes. When the account was brought in, it appeared that the parties differed in their views as to the meaning of the consent order. Mr. Justice Stirling decided in favour of the present plaintiff Wilding's contention, but his decision was reversed by the Court of Appeal. Mr. Wilding then brought this action to set aside the order on the ground of mistake. The learned counsel who had appeared for him in the former action were sworn, examined, and cross-examined as witnesses on his behalf, and they gave evidence standing in their places before the Bar.

Byrne, J., following *Hickman* v. *Berens*, 64 Law J. Rep. Chanc. 785; L. R. (1895) 2 Chanc. 638, set aside the order on the ground that Mr. Wilding had consented under a mistake, that the mistake was in an essential particular, and that the fact of the order having been passed and entered did not affect the principle, but only the procedure by which relief could be granted.

* * *

*Practice—Security for costs—Plaintiff out of jurisdiction—Writ of summons—Plaintiff not to be found at the address endorsed upon the writ—Motion to set aside writ—Rules of the Supreme Court, order IV, rule 1.*

THE PITTSBURGH CRUSHED STEEL CO. (LIM.) v. MARX.

[Chancery Division, NORTH, J., MARCH 27TH.

This was a motion on behalf of the defendant that the writ in the action and the service thereof might be set aside, on the ground that the same was

irregular, the true address of the plaintiffs not being indorsed thereon.

The plaintiffs were a foreign corporation.

P. T. Blackwell, for the motion, contended that, as the plaintiffs could not be found at the address stated in the writ, the defendant was entitled to have the writ set aside.

Austen-Cartmell, for the plaintiffs.—The plaintiffs, being a foreign corporation, are willing to give security for costs. It is not necessary to set aside the writ.

North, J.—The proper order will be that the paintiffs do give security for costs; and they must pay the costs of the motion.

* * *

LAMOND v. HOTEL METROPOLE.

[W. N. 17; L. J. 118; L. T. 387; T. 235; S. J. 292.

The Court of Appeal (Esher, M.R., Lopes and Chitty, L.JJ.), affirmed the decision of the Divisional Court: an innkeeper, therefore, is only bound to permit a traveller and guest to remain at the inn so long as he bears that character, and he is not entitled to become a resident.

* * *

*Copyright — Picture — Infringement.*

BROOKS v. THE RELIGIOUS TRACT SOCIETY.

[Chancery Division. ROMER, J. MARCH 5TH.

The plaintiff owned the copyright in a picture and engraving entitled "Can You Talk?" of which a little child and a collie dog formed the central group and motive, the title being presumably suggested in part by the juxtaposition of and in part by the contrast between the pair of sentient beings of whom one only was gifted with speech. The defendants owned a periodical in which appeared, as an illustration to the letterpress, a woodcut, depicting a collie dog in attitude and expression similar to the one in "Can You Talk?"—namely, seated, and looking downward with, as the Court said, a sagacious expression in his face; only whereas in the picture he was contemplating the child, in the woodcut the place of the child was occupied by a tortoise, around which were grouped other domestic animals with looks either of astonishment or of alarm. The woodcut was entitled "A Strange Visitor." The plaintiff claimed to restrain the sale of the woodcut as an infringement of his copyright.

R. Neville, Q.C., and Knowles Corrie for the plaintiff.

T. E. Scrutton (E. L. Levett, Q.C., with him), for the defendants, argued that the substitution of the tortoise for the child made the incident depicted in the woodcut meaningless as a presentment of the idea of the picture, which required for its point the contrast between the human and the dumb animal. It would therefore interfere neither with the reputation of the artist of "Can You Talk?" nor with the commercial value of his work, which it was the object of copyright law to protect—see *Hanfstaengl* v. *The Empire Palace*, 63 Law J. Rep. Chanc. 681; L. R. (1894) 3 Chanc. 109, per Lopes, L.J.

Romer, J., held that infringement had taken place. The dog —a principal figure in the picture—had been copied, and besides that the artistic feeling and character of the work had

been taken. In substance the plaintiff's design had been followed, with the substitution of other animals for the child. Where a substantial part of a picture was taken, qua picture, then there was infringement; as, for instance, if from an historical picture the principal figure were reproduced, although alone. An injunction was accordingly granted.

* * *

*Solicitor and Client—Bill of costs—Taxation--Bankruptcy of applicant—Mortgagee joining in application for taxation—Submission to pay—Practice.*

IN RE BATTAMS & HUTCHINSON.

[Chancery Division, KEKEWICH, J., MARCH 19TH.

Motion to vary minutes of order as settled by a registrar.

An originating summons had been issued by a client for an order upon his then solicitors for the delivery of certain bills of costs, and for taxation of the same. Subsequently a mortgagee from the client of moneys coming under the taxation joined in the application, and an order for taxation was made. The mortgagee was not willing to join with the client in the usual submission to pay what should be found due to the solicitors upon taxation. The client had become bankrupt pending the proceedings, and was willing to submit to pay what was found due. The registrar declined to pass the order unless both applicants made this submission, and the matter was now brought before the Court.

Kekewich, J., held that it being the established practice never to make an order for taxation except upon the applicant's submitting to pay what was found due, the mortgagee being an applicant, though not a client of the respondents, could only get the order upon such a submission.

* * *

*Landlord and tenant—Covenant running with land—Assigns not named—Hotel—Covenant not to sell on premises except supplied by or through lessor—Abatement of rent on observance of covenant.*

WHITE v. THE SOUTHEND HOTEL COMPANY (LIM.)

Court of Appeal. LINDLEY, L. J., SMITH, L.J., RIGBY, L.J., MARCH 23.

Appeal from a decision of Kekewich, J.

In 1882, W., a wine and spirit merchant, granted a lease of an hotel to F., at an annual rent of £1,500. The lease contained a covenant by the lessee with the lessor, his heirs and assigns, that the lessee would not during the term buy or sell, or permit to be bought or sold, either directly or indirectly, upon the demised premises any foreign wines or spirits (with an exception therein mentioned) other than should have been bona fide supplied by or through the lessor or his successors or successor, assigns or assign, provided such person or persons were willing to supply the same of good quality, and at a fair market price. The lease also contained a proviso that so long as the lessee should observe the above covenant the lessor would allow to the lessee an abatement of £75 from each quarterly payment of rent. W. had died, and his trustees (who were the plaintiffs) had sold the goodwill of his business. Shortly afterwards F. assigned the lease of the hotel to the defendant company. The

company had continued to buy their wines and spirits from the purchasers of W.'s business in accordance with the lease, and they claimed from the plaintiffs an abatement of the rent as provided. The plaintiffs contended that the ownership of the business having become severed from the ownership of the reversion, the covenant was no longer binding, and consequently the defendant company were not entitled to any abatement.

Kekewich, J., without deciding whether the covenant was binding or not, held that so long as the defendants dealt with the purchasers of W.'s business they were entitled to the benefit of the proviso in the lease as to the abatement of rent.

The plaintiffs appealed.

Their Lordships dismissed the appeal. They said that, having regard to authorities such as *Tatem* v. *Chaplin*, 2 H. Bl. 133, *Fleetwood* v. *Hull*, 58 Law J. Rep. Q. B. 341; L. R. 23 Q. B. Div. 35, and *Clegg* v. *Hands*, 59 Law J. Rep. Chanc. 477; L. R. 44 Chanc. Div. 503, it was impossible to say that the assigns of the lessee were not bound by the covenant, although they were not named in it. The covenant was one touching the land and affecting the use of the premises, and it ran with the land. The defendant company, therefore, being liable to the burden of the covenant, they were entitled to the benefit of the proviso contained in the lease.

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## THE ANIMAL KINGDOM IN COURT.

PAPER II.

*"Give me another horse—bind up my wounds;*
*A horse, a horse! My kingdom for a horse."*

King Richard III.

Notwithstanding the increasing adaptability of steam and electricity, and the convenience of the bicycle, the horse will ever be a useful and much-prized auxiliary in the world; and as long as it occupies its present relation to man it is likely to be a visitor in the court room. We find the horse coming into Court in all possible attitudes and circumstances, and he is litigated about before he arrives in the world, and it has even happened that he has been the object of a charitable bequest at the hands of zealous philanthropy. The ticklish question of the ownership of a foal, whether delivered or "due" in future expectancy, is settled as the increase of other animals, and goes with the ownership of the mare. By the case of *University of London* v *Garrow*, 23 Beav. 159, a legacy to establish an institution for curing maladies of quadrupeds and for providing a professor to give free lectures to the public, is good as a charitable legacy. Taking our subject first where he is used for the gallant sports of chase and hunt, *Storey* v. *Robinson*, 6 T. R. 138, decides that a trespassing horse cannot be distrained damages feasant if there is a rider upon it. The subtle grounds of this exception to the general rule is the likelihood of a breach of the peace were it allowable to take the horse in

disregard to the lusty and sportsmanlike occupant of the saddle. But this distinction will not hold where the animal is being led.

When a horse exhibits viciousness and kicks, it is difficult to fasten liability on its owner without scienter. An authority on the subject is *Cox* v. *Burbidge*, 2 Jur. N. S. The object of the animal's wrongdoing was an innocent child, which a horse straying on the highway and without apparent reason, violently kicked. Yet the defence of no knowledge of the wicked propensity prevailed. But in *Ellis* v. *Loftus Iron Co.*, 10 L. R. C. P., the defendants' horse having injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendants', it was held that there was a trespass by the act of the defendants' horse or some part of it getting over the line on the plaintiff's property, for which the defendant was liable apart from any question of negligence or scienter; and further, it was held that the damage was not too remote. A similar case—so similar in fact that the two are always quoted in the same breath—is *Lee* v. *Riley*, 34 L. J.C.O., where a horse, through the neglect of its owner in not keeping his fences properly repaired, strayed out of the field in which it was feeding into a field occupied by an adjoining owner, and there got among his horses and kicked one in such a way as to cause its death, and the owner was held liable. The Court held that there was no necessity to prove scienter, and in fact did not consider scienter entered into the case. They simply held the defendant by his horse guilty of a trespass causing damage, and that the damage was not too remote. *Ellis* v. *Loftus* was quoted and approved of. A rather interesting case is *Abbott* v. *Freeman*, 35 L. T. 783. The plaintiff was by the defendant's invitation attending a sale of horses in defendant's yard. The plaintiff was walking up the yard behind a row of spectators attending the auction. The defendant had caused a horse to be led up and down on exhibition. The spectators, giving way on either side, had formed a lane, through which the horse was being led back and forward. While the plaintiff was hovering on the skirt of the row of spectators who formed a shield between him and the horse being led, a second servant of the defendant lashed the horse smartly to cause him to trot and show his paces. The horse swerved into and through the crowd and kicked the plaintiff. The action succeeded before a jury, but was reversed on appeal. It was successfully contended that as it was not usual to erect barriers between spectators and the horses on such occasions, there was no negligence. The English Courts have held that a horse comes within the expression "cattle," and that the Act that makes the owner of dogs liable without scienter covers horses, but our Ontario Act speaks only of sheep, so that the decision does not affect us in Ontario. The most recent law affecting horses is the Ontario Act, that drivers of horses must turn out of the way for the bicyclist. It is a sign of the times as to horses. It is certain that this poor animal has lost caste in this ungrateful world during the last fifty years, and with the proposals for locomotion by the various triumphs of science, the horse becomes less and less the valued animal he was.

## RECENT UNITED STATES CASES AND NOTES OF CASES OF INTEREST.

### CENTRAL UNION TELEPHONE CO. v. FEHRING.

*Telephone Connection.*

It has been decided by the Supreme Court of Indiana, in the case of Central Union Telephone Co. v. Fehring, that a subscriber to a telephone service has the right to have his instrument connected with the telephone of another with whom he desires to converse. The defendant, a subscriber of the plaintiff, permitted another to use his telephone after the latter had his own telephone taken from his office. An objection was made by the company to this use of the instrument, and refused to connect defendant's telephone unless it would be agreed by defendant that he would not permit the other person to use it. The defendant sued the company to recover the penalty as provided by statute. The plaintiff maintained that by its agreement with defendant he was bound to permit no other person to use the telephone, and that the statute in question only required the company to supply a telephone or instrument to those who requested it, and by its terms and intentions it could make such regulations as to connections between different instruments in its service as it deemed best. The Court held that s. 5529 R. S. 1894, which provides a penalty for a telephone company which refuses to supply connections to applicants without discrimination, is constitutional. That such statute requires such company to furnish the applicant with connections, when requested, with other subscribers.

* * *

### EVERETT v. LOS ANGELES CONSOLIDATED ELECTRIC RAILWAY COMPANY (CAL.)

[34 L. R. A. 350.

*Negligence—Riding bicycle between rails of street railway.*

It has been decided in Everett v. Los Angeles Consolidated Electric Railway Company (Cal.), 34 L. R. A. 350, that a person riding upon a bicycle between the rails of an electric street railway is charged with the duty of avoiding danger from electric cars. That it is a matter of common knowledge that a bicycle under a rider of ordinary strength and experience can attain a greater rate of speed than that of an electric car running at the rate of about ten miles an hour, and that by a mere pressure of the hand can be instantly turned aside so as to leave a street car track upon which it is being moved. That the motorman of an electric car who sees a bicycle rider going on the track ahead of him may up to the last moment assume that the rider will get out of the way, either by increasing his speed or turning his wheel aside in time to avoid danger. A bicycle rider by his negligence in continuing to ride on the track of an electric car up to the moment he is struck, when by the slightest care he could have placed himself out of danger, contributes to the cause of his injury, precluding the conclusion that the negligence in managing the car was later in

time, and therefore the proximate cause of the injury.

While in New York, Books v. Houston, W. S. & P. F. R. Co., 10 App. Div. 98, 41 N. Y., supp. 842, a bicycle rider can use the slot of a cable road and need not look behind him for the approach of a car which gives no signal.

* * *

DILLON v. ALLEGHENY COUNTY LIGHT CO.

[35 ATL. REP.

*Electric wires—Contributory negligence.*

The Supreme Court of Pennsylvania has lately decided that a policeman on duty, who, on a rainy night, attempts to remove with his mace a broken wire hanging from a pole in a street on his beat, is not necessarily chargeable with contributory negligence, though he knows that the wire is charged with electricity: *Dillon* v. *Allegheny County Light Co.*, 36 Atl. Rep. 164.

* * *

COOGLER v. RHODES.

[21 So. REP. 109.

*Libel—Privileged communication—Letter to Governor.*

A letter from an elector of a state to the governor, in reference to the character and qualifications of an applicant to the governor for appointment as sheriff of the county in which the said elector resides, is not an absolutely privileged publication, but is only qualifiedly or conditionally privileged. The publisher of such a letter cannot, under the guise of such a communication, falsely and maliciously traduce and slander the moral character of the applicant; and if he does so, he will be liable to an action therefor. But, on the other hand, the applicant cannot recover damages for any statements made in such publication, unless they were both false and malicious; and accordingly, though the alleged libellous matter cannot be shown by the publisher to be true, yet, if there was reasonable ground for him to suppose that it was true, and it was published by him in good faith, under an honest belief that it was true both in assertions of fact and in comment thereon, and was published with the motive of benefiting the public welfare, without any private personal malice towards the plaintiff, the publisher will not be liable in damages: *Coogler* v. *Rhodes* (Supreme Court of Florida), 21 So. Rep. 109.

* * *

INTERNATIONAL & G. N. R. R. CO. v. SATTERWHITE.

[38 S. W. REP. 401.

*Carriers—Negligence—Assisting passenger on train.*

According to a recent decision of the Court of Civil Appeals of Texas, which seems to be consonant with the other authorities on the subject, the mere fact that a train fails to stop the usual and reasonable time to enable passengers exercising ordinary diligence to get on and off does not constitute negligence as to a person who gets on to assist a passenger, and is injured in getting off after the train has started. He must give notice of his intention to alight before getting on: *International & G. N. R. R. Co.* v. *Satterwhite*, 38 S. W. Rep. 401.

HARROUN v. BRUSH ELECTRIC LIGHT CO.

[42 N. Y. SUPPL. 716.

*Master and servant — Electric wires—Reliance on care of master.*

An employee of an electric light company, who is sent to trim lamps at a time when the wire connected with the lamps is usually "dead," and who knows that lamps are never trimmed while on "live" wires, has a right to assume that the wires will not become alive through the negligence of the company while he is engaged in trimming them: *Harroun v. Brush Electric Light Co.* (Supreme Court of New York, Appellate Division, Fourth Department), 42 N. Y. Suppl. 716.

* * *

ST. LOUIS & S. F. RY. CO. v. MATTHEWS.

[17 SUP. CT. REP. 243.

*Railroad Companies — Liability for destruction of property by fire.*

It has been decided that the Act of Missouri of March 31, 1887, which makes railroad companies liable for property destroyed by fire communicated from their locomotives, and gives them an insurable interest in the property along their roads, is not in excess of the powers of the legislature; and that it is not unconstitutional, either as depriving the companies of property without due process of law, or as impairing the obligation of a contract between the companies and the state, by which they are impliedly permitted to use fire in the operation of their roads, or as denying to the companies the equal protection of the laws: *St. Louis & S. F. Railway Co. v. Mathews*, 17 Sup. Ct. Rep. 243.

* * *

PHARR v. SOUTHERN RY. CO.

[26 S. E. REP. 149.

*Railroad companies—Negligence —Injury to person on track.*

When an apparently helpless person is lying so near to the outer side of a rail as to be exposed to danger from a passing engine, and the engineer, by using ordinary care, could have seen him in time to stop the train, with safety to those on board, before the engine struck him, the company is liable for the injury, notwithstanding the man's contributory negligence; the duty of the engineer in such a case is the same as if the person endangered had lain between the rails: *Pharr v. Southern Railway Co.* (Supreme Court of North Carolina), 26 S. E. Rep. 149.

* * *

*Landlord and tenant—Fixtures —Removal—Condition.*

The Court of Appeals of Colorado has recently held, that when a tenant, during the term, and at his own expense, lays a tile floor in the demised building, he may, before the expiration of the term, remove the tiling, and restore the building to its original condition.

## ANGLO-SAXON CITIZENSHIP.

### A Proposition by Prof. Dicey Looking to this End—How Englishmen and Americans Would be Affected by It.

On Friday, February 26, in a public lecture delivered at All Souls College by Prof. Dicey, the Vinerian Professor of English law, "A Proposal for the Common Citizenship of both branches of the English People" was developed and defended before a large and representative gathering of members of Oxford University. After deprecating the offhand condemnation of any such proposal as an absurdity, Prof. Dicey surveyed briefly certain noteworthy signs of a widespread desire to recognize the unity and to extend the power of the whole English-speaking race. The sentiment of the unity of the English people was, he said, beginning to take a more concrete and profitable form than questionable declarations as to the superiority and ultimately certain predominance of the Anglo-Saxon race. Apart from the stimultaion in England of a friendly interest in the well-being of English colonies, there had been on both sides of the Atlantic a unanimity, startling to politicians, in condemning war between the United States and England. Arbitration had already decided questions which, a century ago, would have led to war. A permanent tribunal for the decision of disputes between two kindred nations was ultimately sure of establishment, whatever might be the momentary outcome of actual negotiations. Without believing that arbitration could dispose of all international disputes, we might reasonably maintain that the greater number of questions likely to arise between England and the United States could be referred to a law court, by disputants who entertain similar ideas of law and legal procedure.

The lecturer's proposal was, he said, an attempt to give practical effect to the widespread and growing belief in the unity of English-speaking peoples. It was that England and the United States should, by concurrent legislation, institute a common citizenship for Englishmen and Americans; that an Act of the Imperial Parliament should make every citizen of the United States during the continuance of peace between England and America, a British subject, and that an Act of Congress should make every British subject, during the continuance of peace between America and England, a citizen of the United States. Technically he argued that such acts would suffice; but practically a treaty providing for the passing of such Acts would no doubt be necessary. There was no need to dwell on qualifications and limitations in detail, which would certainly be introduced into such acts. After hinting at some of these details, Prof. Dicey insisted that his proposal was not designed to effect anything in the least resembling political unity. His plan simply aimed at making each citizen of the one country also a citizen of the other.

This proposal the lecturer proceeded to defend as (1) a feasible one, (2) one of comparatively

small practical effect, but wholly good, so far as it went, (3) greatly beneficial in its indirect and moral effects. It was practicable, because it required no revolutionary change in the Constitution of either country to found a common citizenship for both. Two short acts—one by Congress and the other by Parliament—would accomplish it. The assertion of its practicability rested, of course, on the assumed desire for it on both sides. If the wish were prevalent among a majority in England and America, no substantial difficulty would stand in the way of giving effect to it, because the common law of both countries is the same, making the acquisition of nationality depend, generally speaking, on the place of a person's birth. To the objection that no such wish has yet arisen, the lecturer replied by saying that neither men nor nations desired an end until it was set before them as an object for attainment. And then he added: "I shall have done enough if I have proposed an object which by degrees the best citizens both of England and of America may come to desire, and have shown that, if they wish for it, it is easily attainable."

Perhaps the most striking points in Prof. Dicey's argument were those next given to show that the practical effects of a common citizenship such as he had in mind would be small, revolutionary though the proposal might sound. He began by accentuating the fact that, under his proposal, America and England would in no sense become one country, and would not be entering into partnership or alliance as regards other powers. As matters now stand in England, and for that matter throughout the British Empire, aliens belonging to a country at peace with England enjoy nearly all the civil rights of British subjects. They can trade in England, are protected by British law, can own land, and cannot, except by a special act, be expelled from England. An alien cannot own a British ship, though he may hold shares in a company which owns ships. An American in England would hardly feel that he had gained a perceptible increase in his civil rights under the proposed common citizenship. In some English colonies this might be somewhat different. On the other hand, the position of aliens in the United States, he said, was, theoretically at least, inferior to their position in the United Kingdom. Common law and the varying laws of the several states governed their right to hold and to inherit real estate, but state legislation had on the whole tended to improve their position. Englishmen in America would thus gain rather greater civil advantages than Americans in England by an interchange of citizenship, but in neither case would the ordinary transactions of life, outside the sphere of politics, be substantially affected. An Englishman in New York undoubtedly feels that he has pretty much the same rights as a citizen.

Not civil, but political, rights would be affected. The political status of the American in England would become precisely that of his grandfather, who before 1776 was a citizen, say of New York or of Massachusetts, but also a subject of the British Crown. He would be able to vote for a member of Parliament, to sit in Parliament, and, if fortune favored, to become a

Cabinet minister or Premier. He might aspire to the House of Lords, just as a British subject might, under the proposal, aspire to a seat in the Senate. On the other hand, he would be liable to be tried in England for a limited number of criminal offences though committed in the United States, but the common-law doctrine that crime is territorial could and would set a strict limit here. The whole question of treason and of political offences would have to be carefully and specially considered with other details easily adjustable, supposing the existence in both countries of a desire for common citizenship. If every American now in England or any of her colonies were, by Act of Parliament, made a British subject, he might be long in realizing any change. Suppose we could say that every American in England would, by Act of Parliament, become a British subject after the 1st of January, 1901, it would be startling, but surely not alarming. Americans would enter Parliament, but we do not regret the presence there of men who by race, language, and religion are much less closely connected with us. We need not, said Prof. Dicey, be startled at the thought of seeing a citizen of New York, or of Massachusetts, seated at Westminster by the side of a Parsee or a Bengalee. Our liberal laws of naturalization make it impossible to maintain that political life is to be open only to natural-born British subjects.

The direct effects of common citizenship, he continued, might be less for an Englishman in America than for an American in England. Many rights and liabilities in America connected themselves with State citizenship rather than with being a citizen of the United States. An Englishman's civil rights would scarcely, if at all, be altered. He would gain the political rights of voting for a member of Congress, of sitting in Congress or in the Cabinet; he could not aspire to the Presidency. The naturalization laws in America appear, on the face of them, a greater safeguard for the standard of citizenship than the English, and might seem to constitute an argument, from the American point of view, against the present proposal. But the lecturer maintained that they were by no means evenly enforced, and, therefore, largely served to bring newly arrived emigrants of weak character into the undesirable companionship of polical managers. The aliens whom these laws chiefly excluded were the very class of foreigners who most deserved to become citizens. This opinion he echoed from the lips of an American of some eminence, who maintained years ago that the abolition of all checks on naturalization would, as things stood when he spoke, be a benefit. Accordingly he argued that restrictions on naturalization which are, in the opinion of Americans themselves, of dubious value, were not worth weighing against any serious advantages to be obtained from the common citizenship of the English-speaking peoples.

Turning now to his third point, that the proposed common citizenship would be greatly beneficial in its indirect and moral effects, Prof. Dicey urged that community of race, of religious and moral beliefs, and of political ideals connected Englishmen and Americans with links

which it was impossible to break. Their material interests did not clash. The openly proclaimed fact that neither division of the race could be induced to attack the other by any provocation falling short of the causes justifying civil war, would increase the material power both of England and of America. And this fact would be made plain by a scheme of common citizenship, as by an Arbitration Treaty. The lecturer now spoke of what individuals in England or America could contribute to the welfare of English-speaking peoples under a scheme of common citizenship.

"Let me take one example," said he, "known to most of us. Whether Mr. Godkin is at this moment a British subject or an American citizen I am totally ignorant, what I am certain of is, that the writer who, landing, I believe, in America as technically a foreigner, has, by talent, energy, and, above all, character, done more than any one man to raise the character of American politics, would, should he ever return to the United Kingdom, be able to give us invaluable aid in the solution of some of the most difficult questions which demand the consideration of English statesmanship. Whoever will read the 'Problems of Democracy' will assuredly admit that its author might in many respects supply in England the place left vacant in the world of speculative politics by the death of Mill and of Maine."

He then spoke of the late Mr. Benjamin as one who, "unless common rumor was mistaken," came near obtaining a seat on the bench, after achieving the very highest eminence at the Bar.

An intimate link, uniting America and England (including her colonies and dependencies), was the prevalence of English common law. Upon this theme the Professor was most eloquent, and cited with equal admiration the work done by Judge Holmes and by Sir Frederick Pollock and Prof. Maitland, finally dwelling upon the non-political nature of his proposal for common citizenship, and upon the appropriateness of such a non-partisan theme for an Oxford Professor of English Law. After an interesting survey of the possibilities for good latent in the Monroe Doctrine, and a further development of the moral and material advantages indirectly to be compassed through establishing a common citizenship, the lecturer argued that the present time was especially propitious for entertaining and discussing such a proposal.

Having reference to the ticklish question of ratification by the Senate of the arbitration treaty, he distinguished between the moment which was accidentally unpropitious, and the time which was essentially propitious. The fact of common ties between the English-speaking peoples was in men's thoughts, and a recognition of it might naturally issue in the desire that states closely connected by race, by community of history, or by historical sympathies, should also communicate to each other the rights of citizenship. The notion of a similar union in citizenship of the Latin races should not offend English patriotism. Here followed a lucid and remarkable account of common citizenship in the German fatherland, and of the part which it had played in building up the German power. The present time was propitious

for drawing closer ties between England and America because, both countries being strong, it could not be alleged that either is seeking aid or protection. The fancied antagonism between a republic and a constitutional monarchy had vanished. Slavery and the visible imminence of the "irrepressible conflict" had disappeared. The memories of the contest between England and her colonies had passed away. We all knew that George the Third and his supporters were not consciously bent on tyranny, but acted under a conviction that the independence of the colonies involved the ruin of England. Prof. Dicey declared that the national independence of the United States was a benefit to mankind, because it was well that the English people should have developed the English form of republicanism, and said that what he was now advocating was an attempt to preserve the good while undoing all the evil which flowed from the contest with the colonies. The lecturer now paid a feeling tribute to the peace-making and reconciling effects of the action of Queen Victoria and her adviser, who made it possible for Lincoln to steer through the Trent affair without a war, arguing that her reign was therefore a peculiarly propitious one for close union. He then gave a really powerful picture of the greatness of Lincoln, whose civilian guidance of the American war he strikingly paralleled by the career of Lord Canning in India during the Mutiny. Finally, his discourse ended with the cordial words used by King George in welcoming Mr. Adams as Minister of the United States of America to the Court of St. James.

Louis Dyer.

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## A WIFE'S CONTRACTS.

Lines in *The St. James Gazette* by "One practising in Equity and Conveyancing," upon a case of *Leake* v. *Driffield.*

There is hope held out to tradesmen by a memorable Act,
That the wife is, like her husband, bound to pay if she contract;
But on studying the statute, as expounded by decision,
You will find that hope of payment fades away as doth a vision.
If you sue a wife in contract, as has previously been shown,
You must prove that when she has gained she had something of her own.
And her bargain is not sanctioned by a legal obligation.
If you prove she had an income with restraint on alienation,
Mrs. D. had no effects except her wardrobe when she bought.
Goods of Leake, who promptly sued her for the price in County Court.
Judgment went against the lady spite of reasons not a few,
Ably set forth by her counsel, for the Judge expressed this view,
"She had separate estate within the meaning of the Act;
In respect of her apparel she was able to contract."
To a contrary opinion does a woman ever yield?

Does a wife brook opposition,
Mrs. D. at once appealed,
Said the Judge, "It afflicts us
with unutterable woe,
To reverse our little brother in
the County Court below;
But as Judges we are bound to
give decision independent
Of our feelings, and we here must
enter judgment for defendant.
It's a notion common sense
abhors, judicial reason loathes,
That a wife should make a con-
tract on the credit of her
clothes.
We have heard that if a gambler
legal tender lacks,
He will bet his boots or lay the
very shirt upon his back,
But we cannot think that any
wife would pledge her 'com-
bination,'
As security that just demands
shall meet with liquidation.
So we hold that married women
who have nothing but their
raiment,
If they purport to contract can
never be compelled to pay-
ment."

## SPORTS.

The following clipping is from *The Law Chronicle*, Sydney, Australia. We can congratulate ourselves that "sports" are in a more flourishing condition at Osgoode Hall:

Will some active and enthusiastic articled clerk take it into his head to start a "Sports' Association" for embryo lawyers? In Sydney there are more than 300 articled clerks, beside law-school students, and out of that number a strong association can surely be formed. We venture to think that a Law Association Rowing Club would very soon be one of the strongest in Sydney. Articled clerks and law-school students are not as much united in the "bond of brotherhood" as one would naturally expect them to be; and though this feeling has been somewhat fostered by the Articled Clerks' Association, it is still like a flickering flame. By far the greater number of these gentlemen are more inclined to sport than to study, and so an association which promotes anything of a sporting nature is certain of more support than one merely employed in promoting legal knowledge. We do not wish to lessen the power of the present association by forming a new one on a different principle, but would like to see a sporting branch added to it, with a provision that clerks may be members of one branch, without being members of the other, if they so wish.

* * *

In a recent case in the Cook County (Ill.) Criminal Court the defendant, who had been found guilty by a jury, was granted a new trial by the Judge, on account of the inefficiency of the counsel who had defended him. This seems to be establishing a new principle, for the almost uniform tenor of the decisions is to the effect that neither ignorance, blunders nor misapprehension of counsel, not occasioned by his opponent, is reason sufficient for setting aside a judgment or granting a new trial. Any other course would, perhaps, be apt to lead to collusions and confusion in the administration of justice, and for this reason Courts are

strongly disposed to hold parties as bound by the acts of their attorneys in their behalf, in all cases where they are authorized to appear, and in which no fraud is shown, the client being left to his remedy against the attorney for negligence. There are few reported cases in which the contrary has been held, the leading one being that of *State* v. *Jones* (12 Mo. App. 93), where the record presented such a lamentable example of ignorance and incompetency that the Court of Review held that the trial Court should have afforded the remedy by setting aside the verdict and appointing a competent attorney to defend the prisoner. *The Chicago Law Journal*, in discussing the Cook county case, while conceding that the action of the Judge may have done violence to technicality, nevertheless believes it tended to compass the ends of justice—and for such purposes are Courts established and maintained.—*Albany Law Journal.*

* * *

In the case of *Guy Weber* v. *Shay & Cogan*, the Supreme Court of Ohio decided a very interesting, as well as unusual, question. It was whether a contract made by attorneys-at-law to render services in preventing the finding of an indictment against one accused of crime is illegal and void without respect to the belief of such attorneys as to his guilt. Shay & Cogan, the attorneys, brought suit against Weber in the Court of Common Pleas, alleging in their petition that the defendant entered into a contract with them by which it was agreed that they, Shay & Cogan, should protect the interests of the said Weber, and one Anderson, in certain criminal actions threatened and pending in the Court of Common Pleas, of Hamilton county, Ohio, and in the United States Circuit Court for the sixth judicial circuit and southern district of Ohio. For their services Weber was alleged to have agreed to pay $1,000. To certain interrogatories the plaintiffs replied that they were to protect Weber from public scandal; protect him, if possible, from being indicted by the United States or State authorities, and defend Anderson against charges of burglary in feloniously entering a post office. One of the charges against Weber was that some of the stolen postage stamps were found in his possession. On the trial of the action the jury rendered a verdict in favour of the plaintiffs for the amount claimed, and that judgment was affirmed by the Circuit Court. The Supreme Court reversed these findings, holding that public policy requires that all offences against the law shall be punished, and all contracts which tend to suppress legal investigations concerning them are immoral and void. Courts being charged with the duty of administering the law, they should not lend their aid to the enforcement of any contract which looks to its subversion. The Supreme Court further finds that it was not material whether the plaintiffs knew or believed that Weber was guilty or not; their belief in his innocence would not have made the contract valid. It was held as error in the lower Courts to leave to the jury to determine whether there had actually occurred the secret and corrupt practices which the contract encouraged. The decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of such agreement.

## THE VOICE OF LEGAL JOURNALISM.

*Extracts from Exchanges.*

### Statement by Prisoner to Policemen.

There are two schools of opinion among the Judges as to the policy or propriety of admitting in evidence extrajudicial statements by prisoners, and in particular statements made to a constable on arrest or in answer to inquiries made by a police officer with or without caution at or after arrest. Mr. Justice Smith in *Regina* v. *Gavin*, 15 Cox, 656, laid it down that when a prisoner is in custody the police have no right to ask him questions, and when the prosecution attempts to elicit statements made by a prisoner on arrest Mr. Justice Cave always disallows the question, but permits counsel for the defence to get the statements out if he wishes to do so. He has expressed his opinion decidedly in *Regina* v. *Male* (1893), 17 Cox, 689, to the effect that the police had no right to ask questions or to seek to manufacture evidence. He said the law does not allow the Judge or jury to put questions in open Court to a prisoner, and it would be monstrous if it permitted a police officer, without anyone present to check him, to put a prisoner through an examination, and then produce the effects of it against him He should keep his mouth shut and his ears open, should listen and report, neither encouraging nor discouraging a statement, but putting no questions. And this view is substantially the same as that expressed by Mr. Justice Hawkins, if we may judge from his preface to Howard Vincent's "Police Guide," and his ruling in *Regina* v. *Greatrex-Smith* (noted ante, p. 46, but not yet fully reported). A contrary rule was expressed by Mr. Justice Day in *Regina* v. *Brackenbury* (1893), 17 Cox, 628, who expressly dissented from *Regina* v. *Gavin*, and admitted statements made by the prisoner in answer to questions put by the police. The learned notes in Cox to both these cases affirm that the opinion of Mr. Justice Day is that sustained by the text-books and earlier decisions. But a good deal is to be said for the view that statements made in answer to police questions about the time of arrest are made to persons of authority and under fear, compulsion, or inducement, and that if admitted in evidence at all the circumstances under which they were made should be carefully scrutinized in accordance with the rule in *Regina* v. *Thompson*, 62 Law J. Rep. M. C. 93; L. R. (1893) 2 Q. B. 12, and the strong opinions of Mr. Justice Cave in *Regina* v. *Male*, which being expressed after *Regina* v. *Thompson*, appear with that case to justify the conclusion that *Regina* v. *Brackenbury* can no longer be regarded as of any authority. It is curious that the cases of *Regina* v. *Jarvis*, L. R. 1 C. C. R. 96, and *Regina* v. *Reeve*, L. R. 1 C. C. R. 362, do not seem to have been cited in *Regina* v. *Thompson*, and their authority or applicability seems to be considerably shaken by the late decision.—*The Law Journal* (England).

* * *

Many counsel are fond of binding their witnesses down to "Yes" or "No" answers. How unfair this is the following bit of

cross-examination which occurred last month shows: Counsel—Mr. Brown, will you have the goodness to answer me "yes" or "no" to a few plain questions? Witness—Certainly, sir. Counsel—Well, Mr. Brown, is there a female living with you who is known in the neighborhood as Mrs. Brown? Witness—Yes. Counsel—Is she under your protection? Witness—Yes. Counsel—Do you support her? Witness—Yes. Counsel—Have ou ever been married to her? Witness—No. (Here several jurors scowled on the witness.) Opposing counsel—Stop one moment, Mr. Brown—Is the female in question your mother? Witness—She is.

That witness evidently did not know the old wheeze, which we fear, we have already told in these columns. A witness asked to answer "Yes" or "No" declared it was impossible to answer some questions with a plain "Yes" or "No." Counsel ridiculed the idea, and defied the witness to ask him a question which he could not satisfactorily answer with a plain "Yes" or "No." "Very well," said the witness, "answer then 'Yes' or 'No.' Have you left off beating your wife?" —*Law Notes.*

* * *

## Contempt of Court.

"Ten dollars," said the Magistrate.

"But, Your Honor," said the prisoner, "I protest against this fine. I have the right to make a defence against the charge."

"But you have already pleaded guilty," said the Magistrate.

"I beg Your Honor's pardon; I denied the charge in the plainest terms."

"Young man," said the Magistrate sternly, "I want to call your attention to the fact that the Court understands the English language. You have pleaded guilty in unmistakable words. The plaintiff charges you with assault and battery. It is clearly evident that he has been assaulted and battered. According to your statement he approached you on the street and used abusive language towards you. Then you say that you 'didn't do a thing to him.' If the Court understands the language spoken by seventy millions of people, you immediately wiped up the earth with him. The fine stands, and any further reflection upon the Court's knowledge of English will cost you ten more.—Detroit *Free Press.*

* * *

## On the Jaffa and Jerusalem Railroad.

Ben-Ali-Sneezer, late one afternoon,
Met Sheik Bak-Gammon on old Horeb's mount,
And thus he, in the language of the East,
His multifarious hardships did recount:
"O Sheik, I bow me in the dust and mourn,
For lo! while browsing on the fertile plain,
Two of my choicest heifers—fair and fat—
Were caught in limbo and were duly slain
By that infernal pest of recent birth—
The half-past 8 accommodation train!"

Then quoth the Sheik: "One of my whitest lambs,
Which I did purpose soon to drive to town,
While frisking o'er the distant flowery lea
Was by that self-same fatal train run down;
Now, O Ben-Ali! by the Prophet's beard,

What are ruined shepherd-folk
to do?
Suppose we take our troubles into
Court—
You swear for me and I will
swear for you;
And so, by mutual oaths, it's pos-
sible
We may most hap'ly pull each
other through."

Ben-Ali-Sneezer some months af-
ter met
The Sheik Bak-Gammon, and,
inclined to sport,
The two sat down upon a cedar
stump
To talk of their experience in
court.
Ben-Ali quoth: "Them co-s was
thin as rails—
Now that they're gone, it's
mighty glad I am!"
Bak-Gammon said: "Now that
the judgment's paid,
I don't mind telling you that
slaughtered lamb,
So far from being what you swore
in court,
Was, by the great horned spoon,
not worth a ——"
—*Denver Tribune.*

* * *

The great House of Lords case *Allen* v. *Flood* was still sub judice at the time we went to press. The question is whether an action lies against Allen, as agent of the Boilermakers' Union, for inducing the employers of the shipwrights to get rid of them because they had been doing ironwork in another yard while they ought to have confined themselves to woodwork. The shipwrights were dismissed, and they raised an action against Allen for maliciously inducing their employer to dismiss them. They were successful in the Courts below, but in the House of Lords there was an equal division of opinion, and the case was therefore re-heard.

The sixteen Judges hearing the appeal are: The Lord Chancellor, Lords Ashbourne, Herschell, James of Hereford, Macnaghten, Morris, Shand and Watson. The Judges, all of whom wore their red robes and full wigs, were Justices Cave, Grantham, Mathew, North, Lawrance, Wills, Wright, and Hawkins.

The last occasion on which the Lords sought the assistance of the Judges was in 1880, to help in the case of *Angus* v. *Dalton*.—*Law Notes.* * * *

In an action for breach of promise the fair plaintiff's attorney proposed to read to the jury the proposal of marriage, which happened to have been written on an ordinary telegraph blank. When he started to read he began with the words, "My dear Louisa." The counsel for defendant interrupted him and said, "If it please the Court, this is an instrument partly printed, and partly in writing; by all the rules that were ever held by all the Courts, if the party offers part of that instrument he must read it all, he can't read part of that and not read it all." The lady's attorney protested that the fact that the matter had been written on a telegraph blank was a mere accident only, and that the printed matter on the telegraph blank had nothing to do with the case; but the plaintiff's counsel insisted on having it read and was sustained by the Court. Thereupon very reluctantly the gentleman began to read at the top of the message, "There is no liability on account of this message unless the same is repeated, and then only on condition that the claim is made within thirty days in writing." And then after the signature of "Yours lovingly, John," he was compelled still more reluctanly to read "N.B.—Read carefully the conditions at the top."

## RECENT ONTARIO DECISIONS.

### Important Judgments in the Superior Courts.

#### Court of Appeal.

SORNBERGER v. CANADIAN PACIFIC RAILWAY COMPANY.

[BOYD, C., FERGUSON, J., ROBERTSON, J., APRIL 13.

*Negligence of railway company—Amount of damages not obviously excessive—Exposing broken limb to jury—Refusal of trial Judge to allow limb of another person similarly broken to be exposed—Objection should be taken at the trial to counsel improperly inflaming the minds of the jury.*

Judgment on appeal by defendants from judgment of Armour, C.J., in favour of plaintiffs, in action for negligence, tried with a jury at Whitby, and motion to have the verdict of the jury set aside and a new trial ordered, upon the ground of excessive damages,and upon the following three grounds, namely, (1) that counsel for plaintiff at the trial, in his address to the jury, improperly inflamed the minds of the jurors by allusions to the wealth of the defendants and the magnificence and luxury in which its principal officers live and travel about; (2) that plaintiff Charles Sornberger was improperly allowed to expose his broken leg (on account of which he sued), bare to the view of the jury; and (3) that the trial Judge improperly rejected evidence tendered on behalf of defendants of a person who had a leg broken in a similar way. The jury gave plaintiff Charles Sornberger $6,500 damages, and plaintiff Lelah Sornberger, his daughter, $500. The plaintiffs were crossing defendants' railway in a sleigh, when the sleigh was struck by a snow plough, and they were thrown out and received the injuries for which they sued. Held, that it was within the discretion of the Court to allow the plaintiff to exhibit to the jury his injured limb, for the purpose of being examined thereon by a physician, and that the ruling of the trial Judge on this head was unexceptionable. Review of American authorities on this subject. Held, also, that the trial Judge was right in rejecting evidence offered in regard to a man who had had some injury to his leg. It was asked that this might be exhibited on the part of the defendants as a sort of offset to the other, but the trial Judge refused to let this be done unless competent evidence was forthcoming to explain the nature of the injury which that man's leg had sustained; and in this he was right, if the evidence was admissable even with such explanation. Held, as to the remarks of the plaintiff's counsel in addressing the jury, that objection should have been lodged at the time by the defendants; that an appeal should have been made to the presiding Judge, who was there for the very purpose of seeing that the trial was duly and properly conducted, and whose intervention should have been claimed while the alleged transgression was being committed; and the Court could not now interfere. Held, as to the amount of the damages, that the Court could not interfere; they were substantial, but the man was badly injured, and suffered much, so that the jury was not so obviously wrong that their verdict should

be disturbed. Appeal dismissed with costs. W. Nesbitt, for appellants. C. J. Holman, for plaintiffs.

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## Divisional Court.

### RYAN v. SHIELDS.

[ARMOUR, C. J., FALCONBRIDGE, J. STREET, J., APRIL 9.

*Chattel mortgage—Description of after-acquired goods—Removal of place of business—Goods subsequently purchased not covered—Milligan v. Sutherland, 270 R. 235, followed.*

F. C. Cooke, for A. G. Clements, claimant in an interpleader issue tried in the 10th Division Court in the County of York, appealed from an order of the second junior Judge of the County Court dismissing a motion for a new trial of the issue, which has been determined in favour of the execution creditors. The appellant's claim was under a chattel mortgage with the following description:—"All and singular the stock-in-trade and fixtures now contained in the store premises hereinafter mentioned and known as number 380 Queen Street west, Toronto, and all additions thereto or substitutions thereof hereafter at any time made by the said mortgagor or any one on her behalf." The learned Judge in the Division Court held, following *Milligan* v. *Sutherland*, 27 O. R., 235, that the description covered only goods which might thereafter be brought on the premises 380 Queen Street west; and, it being admitted that some of the goods seized were bought after the execution debtor had moved from 380 Queen street west to other premises, the claimant could not hold these as against the execution creditors. A. C. McMaster, for execution creditors, supported judgment. Appeal dismissed with costs, the Court agreeing with the judgment below.

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### MOONEY v. JOYCE.

[MEREDITH, C. J., ROSE, J., AND MACMAHON, J., APRIL 16.

*Costs, security for—Rule 1377—Plaintiff ordinarily resident out of jurisdiction, temporarily resident within for business purposes.*

W. M. Douglas, for plaintiff, appealed from order of Street, J., in Chambers, dismissing appeal from order of a local Judge at Windsor, requiring plaintiff to give security for costs under Rule 1377, adding to Rule 1245, clause (a), as follows:—"A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction." This amendment followed an amendment in the English Rule passed to overrule the decisions in *Redondo* v. *Chayter*, 4 Q. B. D. 453, and *Ebrard* v. *Jassier*, 28 Chy. D. 232, followed in Ontario in *Fournier* v. *Hogarth*, 15 P. R. 72, and in other cases. Plaintiff contended that he, though not permanently resident in the jurisdiction, was here for business purposes unconnected with the action, and was living here when the cause of action arose, and might be said to be ordinarily resident here, and did not come within the terms of the new rule. He cited re *Appollinaris Co.*, 63 L. T. N. S. 502, and *Michelis* v. *Empire Palace* (Ltd.), 66 L. T. N. S. 132. D. Armour, for defendants, contra. Appeal dismissed with costs.

## Single Court.

LEYBURN v. KNOKE.

[ROSE, J., APRIL 6.

*Motion to dismiss action for want of prosecution—Plaintiff not giving notice of trial for jury sittings in non-jury action not liable to have his action dismissed.*

Judgment on appeal by plaintiff from order of Mr. Cartwright, sitting for the Master-in-Chambers, upon a motion by defendants to dismiss the actions for want of prosecution dismissing such motion upon plaintiff undertaking to go to trial at the Stratford non-jury sittings in May next, and ordering that the costs of the motion should be costs to the defendants in the cause. Plaintiff contended that he was not in default for not giving notice of trial for the Stratford jury sittings in March, as he intended to go down to the non-jury sittings in May. Rule 647 provides that "if the pleadings are closed six weeks before the commencement of any sittings of the High Court for which the plaintiff might give notice of trial, and he does not give notice of trial therefor, the action may be dismissed for want of prosecution." These actions were admittedly not to be tried by a jury; but non-jury actions are properly triable at the jury sittings. Held, that defendants had no reasonable ground of complaint upon which to found the motion before the referee; the actions should not have been dismissed for want of prosecution, nor should the plaintiff have been punished for not bringing them down for trial until both the sittings appointed for the spring or autumn were past, or until the time for giving notice of trial was past. Appeal allowed, and order of referee set aside with costs here and below to plaintiff in any event. D. L. McCarthy, for plaintiff. R. Hodge, for defendants.

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TOOGOOD v. HINDMARSH.

[OSLER, J.A., APRIL 23.

*Jury notice—Legal and equitable issues—Regularity — Difference of present practice from old practice under Chancery Division.*

Judgment on appeal by plaintiff from order of Mr. Cartwright, sitting for the Master in Chambers, striking out a jury notice filed and served by plaintiff. Held, that the jury notice was not irregular, there being both legal and equitable issues on the record, and the notice being at least regular as regards the legal issues; but, on looking at the whole of the pleadings, that it was a case proper to be tried without a jury, because the main cause of action was an equitable one, and the other claims to relief were more in the nature of make-weights. The case of *Baldwin* v. *McGuire*, 15. P. R. 305, is not now an authority for the proposition that a jury notice is irregular where there are both legal and equitable issues; the remarks made there must be read with reference to the state of practice at that time, when separate sittings were held by the Judges of the Chancery Division, and subsequent rules have made a difference. The case of *Bristol and West of England Loan Co.* v. *Taylor*, 15 P. R. 310, has not been followed in practice, and there certainly is power to strike out a regular jury notice. Appeal dismissed. Costs here and below to be costs in cause. D. L. McCarthy, for plaintiff. W. H. Blake, for defendant.

## Trial Court.

CITY OF KINGSTON v. KINGSTON, PORTSMOUTH AND CATARAQUI ELECTRIC RAILWAY CO.

[STREET, J., APRIL 22.

*Action to compel electric cars to run in winter months—Impossible to enforce personal service—Specific performance—Mandamus—Inability of Court to direct and superintend working of railway—Actual damage—Reference.*

Judgment in action tried without a jury at Kingston. The action was brought to compel the defendants to run their cars during the winter months, as well as the rest of the year, over the portion of the railway from Alfred Street along Princess Street westward to the city limits, in accordance with the terms of the agreement between the plaintiffs and defendants set out in the schedule to 56 V. c. 91 (O). Held, that, in the face of the line of authorities referred to in the judgment of Ritchie, C.J., in *Bickford v. Chatham*, 16 S. C. R. 235, a judgment for specific performance could not be pronounced, because such a judgment would necessarily direct and enforce the working of the defendants' railway under the agreement, in all its minutiæ, for all time to come. *Fortescue v. Lostwithiel and Fowey Railway Co.*, (1894) 3 Chy. 621, not followed. Held, also that the enforcement of a judgment for the performance of a long series of continued acts involving personal service, and extending over an indefinite period, would be equally difficult if the judgment were in the form of mandamus. The plaintiffs were not entitled to the prerogative writ of mandamus, because that writ is not obtainable by action but only by motion: *Smith v. Chorley District Council* (1897), Q. B. 532. Held, also, that to grant an injunction restraining the defendants from ceasing to operate their cars on the part of the line in question would be to grant a judgment for specific performance in an indirect form: *Davis v. Forman*, (1894) 3 Chy. 654. Held, also, that a declaration of right under s. 52, s.-s. 5, of the Judicature Act should not be made, as the terms of the contract were plain, and were confirmed by statute, and the only difficulty was that of enforcing them. Held, lastly, that no evidence of any actual damage having been offered, a reference could not be directed. Action dismissed with costs, but without prejudice to any future action in respect of further breaches of the agreement in question, or any motion for mandamus in respect to past or future breaches. J. McIntyre, Q.C., for plaintiffs. J. L. Whiting (Kingston), for defendants.

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## THE TAXATION OF COSTS.

Mr. J. A. McAndrew, one of the taxing officers of the Supreme Court of Judicature for Ontario, has issued from the press of Goodwin & Company, law publishers, Toronto, a most useful book, entitled "Tariffs of Costs Under the Judicature Act, with Index to Tariff A., Practical Directions, and Precedents of Bills of Costs." The title sufficiently indicates the nature of the contents, and the book, to use a trite, but in this case a most appropriate phrase, "supplies a long felt want." It is hardly necessary to add that the work of both author and publisher is excellent.