E. F. B. JOHNSTON, Q.C.

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E. F. B. JOHNSTON, Q.C

One of the best known men at the Bar, although still young in years, is the gentleman whose portrait appears on the opposite page. His reputation as a criminal and jury lawyer has caused his name to be known more widely than many of longer standing at the Bar who would perhaps be first choice for term work. He is now very prominently before the public, having just brought to a successful termination the prosecution against the dynamiters in the case already referred to in these columns as the "Outrage at the Welland Canal." His selection by the Government to take charge of this important matter, demonstrates the high position which he occupies.

Mr. Johnston is a native of Haddington, Scotland. He studied law at the City of Guelph, and began the practice of his profession there, where he remained for about eight years, when he was appointed Deputy-Attorney General, under Sir Oliver, then Mr. Mowat. After occupying this position for four years, he resigned in the fall of 1889, and returned to active practice, forming the partnership of Johnston & Ross, which has since continued. This firm commenced busines in the City of Toronto with no connection or influence, and has gradually worked to the front. Mr. Falconbridge, son of Mr. Justice Falconbridge, joined the firm in the beginning of this year. For three years, until 1892, Mr. Johnston was Inspector of Registry Offices, but the increase of his business compelled his resignation of that office, which is now held by Donald Guthrie, Q.C.

In his earlier professional life he was inclined towards politics, taking an active part therein and being well-known as a platform speaker in Wellington and the counties adjoining. He has refused more than one nomination by the Liberal party, but on his resuming practice in Toronto, he decided to devote his whole energies to his profession. At Guelph, he was secretary and one of the leaders of the Reform Association of South Wellington.

In his earlier days he was an enthusiastic Scotchman and Chief for several years of the Caledonian Society at Guelph, then the largest of its kind in Canada.

Mr. Johnston has had much experience in criminal law, and in his first criminal case, was junior to the late Sir M. C. Cameron, in the then celebrated case of the *Queen* v. *Sturdy*. No one at the bar has been engaged in so many important criminal trials during the past six years. As his abilities became known, his career has been rapid and successful in civil as well as criminal cases. The first case which brought him into prominence in Toronto was the murder trial of Clara Ford in which he led for the defence. He also acted as one of the leading counsel in the cause celebre of the *Queen* v. *Hyams*. The first trial of this case, which lasted two weeks, resulted in a disagreement of the jury, and the next, which lasted over three weeks, resulted in an acquittal. One of the prominent features in this trial, and which was spoken of as a masterly effort, was Mr. Johnston's cross-examination of the medical testimony. In this line he has, as a lawyer, no superior.

Among other important trials he defended the prisoners in the *Queen* v. *Dick*, Mrs. Sternaman in the *Queen* v. *Sternaman* and the actor Emerson, in the *Queen* v. *Emerson*, all for murder, and in all these cases he was successful. In the well-known case of the *Queen* v. *Hammond*, he defended the prisoner against hopeless odds and obtained two new trials for him, the only instance of such an event in Canadian Courts.

Mr. Johnston has acted for the Crown in several important criminal prosecutions. One of his earliest cases after resuming practice was the *Queen* v. *Day*, in which the prisoner was indicted for killing his wife at Niagara Falls. He also acted for the Crown in the *Queen* v. *Harvey*, in which the prisoner was indicted for murdering his wife and some members of his family at Guelph. He also acted for the Crown in the *Queen* v. *Prevost*, and in the well-known case of the *Queen* v. *Brennan*, in which the prisoner was indicted for the murder of the late Mr. J. A. Strathy, of Barrie and twice tried. In each of these cases the prisoner was convicted. He has also acted for the Crown in other important cases, and was one of the Counsel in the well-known Constable Case, which determined the right of the constables employed at election booths to vote.

But it is not as a criminal lawyer alone that Mr. Johnston has come so rapidly to the front. His briefs in civil cases are many and increasing. His forte may be said to be as a nisi prius lawyer. To succeed in this, a man has to think on his feet and to general his case as its features develop. In this, he has no superior. He

has abandoned the old fashioned declamation by means of which nisi prius lawyers have tried to work on the feelings of a jury, and has instead, adopted a business-like method of putting those prominent facts, which in his opinion should determine the fate of the case, in a strong light before the jury. In speaking, he is slow and deliberate, and in cross-examination, owing to his rapidity of thought and to the careful preparation which he devotes to his cases, he is at his best and has few equals. His exposition of the law relating to the case which he has in hand is always lucid and painstaking. His position in the profession which he has chosen is assured, and he is now one of the leading senior counsel at the Ontario Bar.

Mr. Johnston, like most eminent men in his profession, has a hobby. He has an artist's eye for a fine picture. His collection of water colors is probably the best in Toronto, and one of the largest in the Dominion. He has also a great fancy for delft and has one of the largest collections of old Dutch delft in America. He takes an active interest in art matters, and has frequently exerted himself in encouraging talented Canadian artists, and wherever one such presents himself he finds a ready friend in Mr. Johnston.

The Soldiers of the Queen have virtually ended the war and the Empire rejoices. British justice will now take the place of Boer tyranny.

A meeting of members of the County Library Associations throughout Ontario has been called for Saturday, June 30th next, at Osgoode Hall, Toronto, at which meeting matters of general interest affecting the profession will be discussed, such as the advisability of making the Law School self sustaining or abolishing it, the election of a larger proportion of younger men as benchers and the reduction of the annual solicitor's fees by any amount which may be paid by members of the County Law Associations to their local branch

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The case of *The Queen* v. *Dullman, Nolin, and Walsh*, recently tried at the Welland Assizes is well worthy of note as testifying to the swiftness and certainty with which criminal justice is administered in Canada. The very serious crime by which the prisoners sought to destroy one of the great public works of the Dominion took place at 7 p.m. on April 21st. The same evening at 9 p.m.

they were arrested and lodged in jail. Evidence was rapidly gathered and sifted, and within ten days the preliminary examination before the magistate took place, thirty-five witnesses being examined at the three sittings. On May 14th the prisoners were committed for trial. The indictment for the offence for which the prisoners were charged was presented to the Grand Jury on the 23rd of May, and a true bill found. On the morning of the Queen's birthday (which, by the way, the presiding Judge, Chancellor Boyd, said "Although a holiday was an appropriate day to do the Queen's business") the case was called, and within one hour the jury panel was selected and the trial begun. During the first day the evidence of thirty-three witnesses was taken between 11.30 a.m. and 7 p.m. On the second day the case was finished, the Judge's charge being concluded at 6 p.m. At 6.35 the jury brought in a verdict of guilty against all three prisoners. By 6.45 the prisoners were sentenced to the penitentiary for life, and within a few hours were removed to their present abode at Kingston. The detective department did its work well, and was most energetically and intelligently aided by the United States authorities. Too much praise cannot be given to Mr. E. F. B. Johnston, Q.C., for his skilful management of the case for the Crown, whilst Mr. German deserves his meed of praise for loyal devotion to the interests of his client, Dullman. One can imagine that the culprits and their instigators may now have come to the conclusion that whilst British justice gives absolute fair play to anyone charged with crime it is an act of folly to trifle with a machine which, with ceaseless activity and unimpassioned precision, works out an adequate and just conclusion.

SUPREME COURT PRACTICE.

In the case of *Farquharson* v. *The Imperial Oil Co.*, lately decided by the Supreme Court of Canada, a question of practice was raised which is of great importance to the Ontario profession. A report of the case will appear in the next number of the reports, but a brief summary may enable the profession to understand the situation more clearly.

The plaintiff in the case appealed from the decision at the trial to the Divisional Court, and, being unsuccessful there, had no appeal as of right to the Court of Appeal. He therefore applied to the Registrar of the Supreme Court in Chambers for leave to

appeal direct to the latter Court under s. 26, sub-s. 3 of the Supreme Court Act. This leave was refused by the Registrar, and the plaintiff appealed to Mr. Justice Gwynne in Chambers, who held that in cases where recourse to the Court of Appeal is taken away, the Divisional Court is the highest Court of last resort in Ontario, and that plaintiff could appeal as of right to the Supreme Court. He also, though considering it unnecessary, granted leave to appeal under s. 26 (3). An appeal from this decision to the full court was dismissed on the ground that the Court would not interfere with the order granting leave to appeal, and the case was, in the following term, argued on the merits.

After judgment had been given on the merits, the Chief Justice and Mr. Justice Taschereau handed out written opinions on the above question of jurisdiction, the Chief Justice agreeing with Judge Gwynne that leave to appeal under s. 26 could properly be given, Judge Taschereau taking the contrary view and holding that the appeal should have been quashed when first before the Court. Sedgewick, J., agreed with Judge Taschereau; Girouard, J., gave no opinion on this question, and King, J., was not present on the first hearing. These important questions of jurisdiction remain, therefore, undecided, and the position may be stated in this way. Mr. Justice Gwynne alone held that there was a right of appeal from the judgment of the Divisional Court. The Chief Justice and Gwynne, J., that leave to appeal could be granted under s. 26. Taschereau and Sedgewick, JJ., that there is neither a right of appeal nor power to grant leave. King and Girouard, JJ., have expressed no opinion either way.

It must be borne in mind that their Lordships heard no argument on these questions, and the Ontario Bar will no doubt look eagerly for the matter to come before the Court again. When it does, no one would venture to predict the issue. In addition to the forcible reasons given by the Chief Justice and Mr. Justice Gwynne, is the fact that those of the former cannot matter against a previously expressed opinion, as will appear from the cases cited by Mr. Justice Taschereau. On the other hand, Mr. Justice Taschereau makes a strong case, and there are other considerations, argumentative and statutory, to support his view. If the matter should come up again before a full bench, it might result in an equal division, in which case the jurisdiction of the Court would be established against the opinion of half the judges.

C. H. MASTERS.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

SPECIFIC PERFORMANCE—AGREEMENT FOR LEASE OF UNDIVIDED MOIETY IN MINERAL PROPERTY.

Hexter v. *Pearce* (1900) 1 Ch. 341, was an action for the specific performance of an agreement for a lease of an undivided moiety in a mineral property, with liberty to work and dig and sell the same. A doubt expressed by Knight Bruce, L.J., in *Price* v. *Griffith*, 1 D. M. & G. 80, as to whether the Court would grant specific performance of such a contract, was relied on by the defendants; but Farwell, J., was of opinion that the doubt of Knight Bruce, L.J., was not whether specific performance of a contract for a moiety should be granted, but whether it should be granted as against a person who really intended to buy or sell not a moiety, but the whole interest, and as no such difficulty existed in the present case he felt no difficulty in giving the plaintiffs the relief they asked.

PARTIES—FRAUDULENT PROSPECTUS—COMPANY AND DIRECTORS JOINED AS DEFENDANTS—DIRECTORS LIABILITY ACT, 1890 (53 & 54 VICT., C. 64) S. 3—(R.S.O. C. 216, S. 4).

In *Frankenburg* v. *Great Horseless Carriage Co.* (1900) 1 Q.B. 504, the Court of Appeal (Lindley, M.R. and Romer, L.J.) had to deal with a question of practice. The action was brought against the defendant company and its directors and the personal representatives of a deceased director, claiming as against the company cancellation of an allotment of shares to the plaintiff and the rectification of the company's register of members by the removal of the plaintiff's name therefrom, and against the other defendants pecuniary damages, on the ground that the plaintiff had been induced to subscribe for the shares in question by reason of statements contained in a prospectus issued by the defendants which the plaintiff claimed were false and calculated to mislead. Channel, J., was of opinion that there was a misjoinder of defendants and required the plaintiffs to elect whether they would proceed against

the directors alone, and dismissed the action as against them in case the plaintiff refused so to elect. The Court of Appeal, however, came to the conclusion that there was really only one cause of action viz., the issue of the false prospectus, and that it was no ground for striking out the names of the directors, or the compelling the plaintiff to elect to proceed against them alone, that the relief claimed against them differed in detail from that claimed against the company. A point was raised as to whether the action against the deceased director's personal representatives would lie, but the Court of Appeal held that this question would have to be left for the trial and could not be disposed of on the present application. See *Greenwood* v. *Leather Shod Wheel Co.* (1900) 1 Ch. 421, noted post.

SALE OF GOODS—CONTRACT—IMPLIED CONDITION THAT GOODS ANSWER DESCRIPTION — PASSING OF PROPERTY — SALE OF GOODS ACT, 1893 (56 & 57 VICT., C. 71,) SS. 13, 17, 35.

Varley v. *Whipp* (1900) 1 Q.B. 513, is a decision under the Sale of Goods Act, 1893, which is one of those codifying Acts passed of recent years in England, embodying in a statute the law as it had previously been formulated by judicial decisions on the subject of the sale of goods. Although the Act has not been reproduced in Ontario, the case is nevertheless of authority here. The action was brought for the price of a reaping machine, which the plaintiff agreed to sell and the defendant agreed to buy before he had seen it, and which the plaintiff stated to have been new the previous year, and to have been used to cut only fifty or sixty acres. The machine was delivered, and, shortly after, the defendant wrote complaining that it did not correspond with plaintiff's statement, and after some further correspondence the defendant returned the machine. Section 13 of the Act enacts, "Where there is a contract for the sale of goods by description there is an implied contract that the goods shall correspond with the description. . . . ." And the first point to be determined was whether the sale in question was 'a sale by description.' Channell and Bucknill, JJ., held that it was. As Channell, J., puts it, "The term 'sale of goods by description' must apply to all cases where the purchaser has not seen the goods, but is relying on description alone."

The next question was, Had the property in the goods passed to the purchaser? And the Court held that the earliest date at

which it could pass was when the machine was accepted by the purchaser.

Section 35 of the Act enacts, "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

And the Court held that there had never been an acceptance of the goods.

CONTRACT—PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL—RATIFICATION—SALE OF GOODS.

Durant v. *Roberts* (1900) 1 Q.B. 629, is a very interesting case on the law of contracts, and is remarkable for the strong and emphatic difference of opinion on the point in question in the case between Smith, L.J., on the one hand and Collins and Romer L.JJ., on the other. The point in controversy is one that one would assume must long ago have been settled by judicial decision And so Smith, L.J., considers to be the fact, whereas the other members of the Court of Appeal are equally clear that the point is not covered by any previous authority, and was open for decision. The facts were very simple: One Roberts had contracted to buy a quantity of wheat from the plaintiffs; he did not profess to be acting for anyone but himself, but he had it in his mind that a firm of Keighley, Moxsted & Co. would join him in the venture, and on their being subsequently informed of the contract they said that they thought Roberts had agreed to give too much, but that they thought the wheat worth the price, and told him to take it. On this evidence the vendors, who were plaintiffs suing for the price, claimed to recover against Keighley, Moxsted & Co. Day, J., who tried the case, was of opinion that as Roberts, when he entered into the contract, did not profess to be acting on behalf of any principal, there could be no ratification by Keighley, Moxsted & Co. of the contract, and he therefore directed a verdict in their favour. With this view Smith, L.J., agreed, and, after an elaborate review of the cases, claims that it has the support of such eminent judges as Lords Wensleydale and Cairns; Tindal, Erle and Cockburn, C.JJ.; Brett and Bowen, L.JJ.; Rolfe, Parke, Wilde, Martin, and

Amphlett, BB.; and Holroyd, Wills and Blackburn, JJ. But the opinions of these learned judges are held by the other members of the Court to be merely dicta, and on principle they hold there is no sound reason why a principal may not, under such circumstances, ratify the contract. The actual disclosure of a principal's name is clearly unnecessary, and it is now held that it is not even necessary for the agent to disclose that he is acting as agent.

NEGLIGENCE—LIABILITY OF EMPLOYER FOR NEGLIGENCE OF CONTRACTOR.

The Snark (1900) P. 105, although an admiralty case, serves to illustrate a branch of the law of negligence which has of late years been very frequently discussed. A barge belonging to the defendants was, without negligence on their part, sunk in the fairway of a navigable river. The defendants employed an under waterman to conduct the salvage operations necessary to raise her and for that purpose put him in possession and control; but owing to the guard-vessel, placed by him with lights upon it to mark the submerged vessel, having been negligently allowed to get out of position, the plaintiff's vessel, without negligence, ran upon the sunken barge and was damaged. The Court of Appeal (Smith, Rigby and Collins, L.JJ.) affirmed the decision of Barnes, J. (1899) P. 74 (noted ante vol. 35, p. 304) that the defendants were liable following *Penny* v. *Wimbledon* (1899) 2 A.B. 72 and *The Utopia* (1893) A.C. 492. The following statement of the law taken from the judgment of Bruce, J., in *Penny* v. *Wimbledon* is cited by Smith, L.J., with approval:—"When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and if necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor."

VOLUNTARY GIFT—GIFT MADE ON INNOCENT MISREPRESENTATION OF FACT—MISTAKE—DONOR'S RIGHT TO RECOVER GIFT.

In re Glubb, Bamfield v. *Rogers* (1900) 1 Ch. 354, turns upon the question of the effect of a voluntary gift obtained by means of an innocent misrepresentation of facts, and as to whether or not a donor on hearing the true state of facts has a right to recover his gift. The question arose in an administration action respecting a testator's estate. By his will the testator had given legacies of

various amounts to seven named charitable institutions, coupled with a condition that within four years of his decease each of the legatees should raise by voluntary subscriptions an amount equal to the legacy bequeathed to such legatees. And if any of the legatees failed to raise within the specified time the required sum, then the legacy bequeathed to them should be offered to the other legatees, on the same terms of raising an equivalent sum, observing their order as regards priority, and giving each a reasonable time to raise the required amount, and such of the legacies as were not taken up within seven years of the testator's decease were to form part of his residue. Some of the legatees issued circulars soliciting subscriptions on the representation that if the required amount was raised the legatees would be entitled to the legacy given by the testator, and on the faith of this representation the required amount was raised, but it turned out that, owing to the money not having been obtained within the four years, the terms of the will had not been complied with and the legacies were not payable. In order to avail themselves of the terms laid down in the will in regard to the deferred legacies, the charitable institutions concerned issued a circular explaining the reason of the failure to secure the original legacy, and asking the subscribers to allow their subscriptions to be applied towards a fund in order to entitle the legatees to the deferred legacies, and this they agreed to do, and the amount required to entitle the legatees to take the deferred legacies was thus raised. The point, however, was raised on behalf of the residuary legatees, whether the amounts originally subscribed to meet the original legacies could, by consent of the donors, be thus transferred to a fund to entitle the legatees to the deferred legacies, and that question depended for its solution on what are the legal and equitable rights of donors to moneys given by them on the faith of an innocent misrepresentation; for if they have the right to claim a return of their money, then they have a right to dispose of it by applying it to a fund to meet the deferred legacies. The Court of Appeal (Lindley, M.R., and Williams and Romer, L.JJ.,) were of opinion that a donor has an equitable right (though perhaps not a legal right) under such circumstances to have his money refunded, and, that being the case, they held that the donors' consent was efficacious to transfer their subscriptions to a fund to meet the deferred legacies, and the decision of North, J., to the contrary was consequently reversed.

COMPANY—WINDING-UP—RESCISSION OF CONTRACT TO TAKE SHARES—PROCEEDINGS COMMENCED BEFORE WINDING-UP ORDER.

In re General Railway Syndicate (1900) 1 Ch. 365, was an appeal from a decision of Wright, J. (1899) 1 Ch. 770 (noted ante vol. 35, p. 487), holding that a shareholder was too late to obtain a rescission of a contract to take shares on the ground of misrepresentation, after a winding-up order had been made. The shareholder sought to obtain this relief by counterclaim in an action brought by the company for calls commenced before the winding-up order, but the counterclaim was not delivered until after the winding-up order had been made, though the defendant had previously made affidavit in answer to a motion for speedy judgment, stating his intention to counterclaim for rescission of the contract to take shares on the ground of misrepresentation, and on that ground got leave to defend. The Court of Appeal (Lindley, M.R., and Williams and Romer, L.JJ.,) were unable to agree with Wright, J., and held that the shareholder had commenced his proceedings for rescission in time, and was not precluded by the winding-up order from claiming a rescission of the contract.

SALE BY COURT—PURCHASER FOR VALUE WITHOUT NOTICE—CONVEYANCING AND LAW OF PROPERTY ACT,, 1881, (44 & 45 VICT., c. 41), s. 70—(ONT. JUD. ACT, s. 58 (11).)

In *Jones* v. *Barnett* (1900) 1 Ch. 370, the Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.,) have affirmed the decision of Romer, J. (1899) 1 Ch. 611 (noted ante vol. 35, p. 408), to the effect that the Conveyancing and Law of Property Act, s. 70, (Ont. Jud. Act, s. 58 (11)), does not validate the title of a purchaser at a sale by the Court, as against persons who were not parties to, or bound by, the proceedings in which the sale takes place, and whose interests the Court did not in fact intend to sell.

The Forum.

A CAUSERIE OF THE LAW.

CONDUCTED BY CHARLES MORSE.

It seems to be our sad métier of late to continuously chronicle the deaths of eminent members of the English Bar. Since our last writing Mr. Charles Isaac Elton, Q.C., and Mr. F. O. Crump, Q.C., have both passed away. Mr. Elton had a place in legal and antiquarian literature, as well as enjoying at one time a large Equity practice. His "Copyholds and Customary Tenures," and "Origins of English History" will serve to perpetuate his memory.

* * * Mr. Crump, Q.C., might have left some literary achievement behind him had his life been less exclusively devoted to the practice of his profession. He was a profoundly religious man, and it is touching to know that in the bag he had with him at the time he was stricken down with his fatal illness there was found an unfinished essay from his pen on, "The Outward Aspect of Christ." If it be true, as Renan claims it is, that there is only one saint in the calendar who was a lawyer by profession, we take comfort in the fact that so many sincere, and withal unostentatious, Christians, such as the subject of this notice, have lived and died within its ranks.

* * * The Edward Thompson Company, publishers of the admirable "American and English Encyclopædia of Law," have generously forwarded to Mr. Justice Burbidge, of the Exchequer Court, their cheque for $100, to be applied to the Relief Fund for the sufferers by the recent fire in Ottawa and Hull.

* * * While lawyers will recognize the literary value of Mr. W. S. Lilly's recently published "First Principles in Politics," they will hardly be disposed to agree with all of the learned author's conclusions. Take, for instance, this generalization: "A striking characteristic of the present day is the well-nigh total effacement from the general mind of the idea of law." So far from concurring in this view, we take it that there never was a time when the "general mind" in the study, as well as the mind of the "man in the street," were so pervaded with juridical considerations. That

all-absorbing topic—the betterment of the existing relations between Capital and Labour—gives rise to legal theories and speculations on the part of both employer and wage-earner; and is argued simultaneously, but from necessarily different points of view, in the Chambers of Commerce and the Trades Unions. The columns of the daily press are eloquent of this fact. Add to this the circumstance that the philosophic mind of to-day is much given to the exploitation of economic and sociological questions, which often invade the domain of law, and we think our exception to Mr. Lilly's postulate is fairly sustained. We would refer to the well-known works of Herbert Spencer, in support of our statement concerning fin-de-siècle philosophy. Then, too, the present expansionist movement of the Anglo-Saxon race opens up considerations of positive law on its international side, which through the ubiquitous medium of newspapers, are bound to arrest the attention of the average reader. Mr. Lilly seems to evolve his view from what he assumes to be the fact, namely, that physical science is now the supreme field of activity for the "general mind;" and he thinks that it does not lend itself to the promotion of jural conceptions, but rather tends to obliterate them. We believe, however, that sociology per se has more of a hold on the general mind to-day than physical science.

It is due to Mr. Lilly to say, that while he is undoubtedly laudator temporis acti, he does not wholly despair of the future well-being of mankind.

* * * Apropos of the law of Criminal Evidence: The Canada Evidence Act, 1893 (56 Vict., c. 31) s. 3 provides that "a person shall not be incompetent to give evidence by reason of interest or crime." This provision appears to be new, as it was not contained in the Evidence Act, R.S.C. c. 139. By the Imperial Act, 6 and 7 Vict., c. 85, s. 1, it was enacted that the evidence of any witness was admissible "notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence." In *Reg.* v. *Webb* (1867, 11 Cox C.C. 133) Lush, J., refused to receive the evidence of a felon under sentence of death, holding that the above Imperial enactment did not overcome the old common law disability of civiliter mortuus in such a case. In *Graeme* v. *Globe Printing Co.* (noted in 13 Leg. News (1890) at p. 409) the Master in Chambers applied the doctrine of

Reg. v. *Webb* to a question arising in a civil case where the enabling provisions in such behalf of the Ontario Evidence Act were invoked. The provisions of the Canada Evidence Act of 1893 are no wider than the English or Ontario statutes referred to, and we opine that under it the common law disability still attaches to a person condemned to death. It is to be said, however, that Taylor ("Evidence," s. 1347 n.) doubts the case of *Reg.* v. *Webb.*

Correspondence.

JUDICIAL SENTENCES.

To the Editor CANADA LAW JOURNAL:

Dear Sir:—The apportionment of punishment is always a difficult one, and unless one is familiar with all the circumstances of the case it is not well to find fault. It is therefore with some diffidence that I venture to suggest that the sentence pronounced by Mr. Justice Street on Arthur McIntyre, who shot and killed his father, was inadequate. If the boy's mental condition was such that he was unaccountable for his act it would have been more appropriate to have sent him to some asylum where he would be under careful medical supervision. If, however, he was perfectly sane, and there was no attempt to cast any doubt upon this, and his conduct at the trial did not warrant any such thought or in fact excite much sympathy, four years' confinement in an institution which is really an industrial school rather than a place for criminals, does not seem to be a punishment which can be said to carry with it the deterrent effect which would be appropriate for such a heinous offence. The lightness of the sentence has given rather a shock to the public; but as the learned judge who tried the case has a large fund of strong common sense and is the last person to be afflicted with any maudlin sentimentality, we can only suppose that there were some good reasons for the course he adopted.

Yours etc., READER.

[Being aware that many had the same thoughts on this matter as our correspondent, we have taken the trouble of making as full enquiries as possible as to the circumstances attending this painful case which may have weighed with the learned judge in passing a sentence, which on the face of it seems to have been a very light one for a charge of fratricide. Without discussing the subject at

length, our enquiries have led us to the conclusion that the sentence upon this boy, (who by the way is under the age of fourteen, see Criminal Code, sec. 10), could not be bettered. His competency to "appreciate what is wrong" was largely dependent upon his home training, and to the want of this training may largely be ascribed the event which has brought such misery to all concerned. As to the sentence itself, anyone who carefully considers the various places of confinement and terms of imprisonment open to the learned judge in disposing of this case would probably arrive at the same conclusion that he did ; and we are free to confess that we have no better suggestion to make. The judge had a very perplexing question to solve.]—Ed. C. L. J.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] LEAK *v.* CITY OF TORONTO. [April 20.

Public work—Land required—Land injuriously affected—Damages—Interest.

The City of Toronto, in 1891, passed a by-law for the construction of new iron and steel bridges across railway tracks on Dundas Street West. Having acquired by expropriation the land necessary for the purpose, the County Court Judge was appointed arbitrator to assess the value thereof and also the compensation to be given to the owners of other lands affected. L., one of the latter, was awarded $8,000 and interest from the date of passing the by-law. On appeal by the city to a judge of the High Court in Chambers from the arbitrator's award, it was sent back for the arbitrator to state whether L.'s land was taken or only injuriously affected, with an intimation that if it was the latter no interest could be given. The award was then altered by striking out the amount for interest, and as altered was set aside by the Divisional Court (29 O.R., 685) but restored by the Court of Appeal. On appeal to the Supreme Court,

Held, affirming the judgment of the Court of Appeal, 26 A.R., 351, 35 C.L.J., 495, that interest in such case was not given by any statute, and the whole course of common law was opposed to it. The award, as altered, was therefore valid. Appeal dismissed with costs.

Du Vernet, for appellant. *Fullerton*, Q.C., and *Chisholm*, for respondent.

Ont.] WATERS *v.* MANIGAULT. [April 23

Appeal—Jurisdiction — Title to land—Duty—Future rights—60 & 61 Vict., c. 34—Ditches and Watercourses Act.

W. applied for an injunction to restrain M. and others from proceeding to construct a ditch on land adjoining his own under an award which had been lost and which W. claimed was illegally obtained. He also claimed that the ditch would bring water on his land and injure it. His action was dismissed by the trial judge whose judgment was affirmed by the Court of Appeal. On appeal to the Supreme Court of Canada,

Held, that no question of title to real estate or any interest therein was involved so as to permit of an appeal under sub-s. (a) of 60 & 61 Vict., c. 34; that the charge upon W.'s land for a proportionate part of the cost of the ditch by reason of benefit was not the taking of a duty under sub-s. (d); and that no future rights of W. were affected; the case was not therefore, one in which an appeal would lie.

As the respondent might have taken exception to the jurisdiction in time to have saved the expense of printing the case and factum for the appeal, he was only allowed the costs of a motion to quash. Appeal quashed with costs.

Folinsbee, for appellant. *Stuart*, for respondent.

Ont.] BANK OF TORONTO *v.* QUEBEC FIRE INS. CO. [April 27.

Fire insurance—Proof of loss—Increase of risk—Appeal—Questions of fact.

The John Eaton Co., of Toronto, whose premises were destroyed by fire in 1897, had insurance on the stock amounting to $219,000, and actions were brought against five companies by the Bank of Toronto as assignees of the claims by an assignment after the loss. The companies defended on the grounds of false and fraudulent statements in the proofs of loss; that the fire was caused by the act of the insured; that the risk was increased by overstocking and heavy insurance; and that the Bank was not in law the assignee of the policies. Two of the causes were tried before FERGUSON, J., and the others by MEREDITH, C.J., all without a jury, and all resulted in a verdict for the Bank which was sustained by the Court of Appeal. On appeal to the Supreme Court of Canada:

Held, per STRONG, C.J., and TASCHEREAU, SEDGEWICK and KING, JJ., that the appeal depended almost entirely on questions of fact passed upon by two courts and for a second appellate court to reverse would be going in the teeth of many former decisions; that on the question of law that the proofs were defective, it being claimed that according to the evidence the accounts of stock were padded and the true value was much less than the insurance, the reasons given by the trial judge and judges in appeal were conclusive, namely that the explanation of the discrepancy had been

accepted by the trial judges; and that on the question of increase of risk, the Ontario courts had adopted too narrow a construction in holding that such increase could only be effected by direct dealing with the property insured, but there was no increase in fact.

MR. JUSTICE GWYNNE was of opinion that the whole case was open and that the court should pronounce upon it without considering themselves bound by the findings in the court below. Appeal dismissed with costs.

Aylesworth, Q.C., and *McCarthy* (*F. B. Osler* with them), for appellants. *S. H. Blake*, Q.C., and *Riddell*, Q.C. (*McKay* with them), for respondent.

Que.] STANDARD LIFE ASSURANCE CO. *v.* TRUDEAU. [May 4.

Appeal—Amount in dispute—Pleas—Incidental matters.

Poirier, for whose murder in the Province of Quebec his wife was hung, had two polices of insurance on his life for $1,000 each. After the execution of Mrs. Poirier the insurance company brought an action to have the policies cancelled, and an appeal is now pending in the Supreme Court from a judgment against the company. In such action, Mrs. Trudeau, mother of Poirier, pending such action sued the company for $1,000, half of the insurance, as one of the heirs of the insured, and obtained judgment in all the Quebec courts, the company having by its pleas raised the same issues as in the former action, and asked for cancellation of both policies. The company sought to appeal to the Supreme Court in this action also, and applied to the Court for approval of security which had been refused by the registrar.

Held, refusing such application, that the amount in dispute was only $1,000: that the company could not by the pleas increase the demand so as to give jurisdiction to the Court.

Falconer, for the motion. *Fitzpatrick*, Q.C., Solicitor-General, contra.

Province of Ontario.

HIGH COURT OF JUSTICE.

Street, J.] REG. EX REL. BURNHAM *v.* HAGERMAN & BEAMISH. [March 5.

Municipal corporation—Aldermen—Qualification of—Title by possession—"Partly freehold and partly leasehold"—Meaning of.

In quo warranto proceedings under the Municipal Act it is permissible to join two or more persons in the one motion only when the ground of objection apply equally to both.

Where, therefore, the ground of objection was as to the qualification of two aldermen, which was separate and distinct, the joining of the two in one motion was held to be improper.

Property which had been in the undisputed possession of an elected candidate for fourteen years, he paying no rent nor giving any acknowledgment of title thereto, his title being admitted by the previous owner, who a few days after the election executed a conveyance thereof to him, is such as to constitute a sufficient qualification.

Held, also, that the qualification which by section 75 of the Municipal Act is allowed to be "partly freehold and partly leasehold" is satisfied by half the amount being freehold and half leasehold.

Masten, for relator. *H. J. Scott*, Q.C., for Hagerman. *Wood*, for defendant Beamish.

Boyd, C.] MOSHER *v.* KEENAN. [March 15.

Mercantile law—R. S. O. c. 150—Obtaining possession of goods—Not "entrusted"—Sale by—Recovery from purchaser—Estoppel.

A limited meaning is to be given to the term agent as used in R. S. O. c. 150. It is to be restricted to mercantile agents and does not include every one who may act and who has possession of the property. An agent within the act must be one who is *entrusted* with the possession as agent for sale in a mercantile transaction, or for a purpose connected with the sale of the property.

And an agent who has obtained possession of certain lumber from the master of a vessel without authority from the owner was

Held, not to have been *entrusted* with the possession, and the owner was entitled to recover the price against the purchaser although the latter had paid the agent.

J. M. Kilbourn, for plaintiff. *W. J. Hatton*, for defendant.

Divisional Court.] RYAN v. CORPORATION OF CARLETON PLACE. [March 15

Building contract—Erection of town and firehall—Reference—Division of questions of law and fact—Advisability of—Non proof of by-law—Waiver of—Plans and specifications—Incorporation into contract.

On a reference of an action, it is inadvisable unless the line between the questions of law and fact is clear and distinct, to divide up the reference by first directing the evidence to the question of legal liability leaving the quantum of damages, and all other matters to be afterwards disposed of.

An objection as to the non-proof of a by-law authorizing a contract for the erection of a town and fire hall, raised for the first time at the close of a reference of the action to recover a balance due under the contract, was

overruled where the contract was declared on and referred to in the statement of defence, and identified by the mayor on the application for the reference by the defendant and made part of the defendant's material, and treated as the contract throughout the whole reference, and upon which large sums of money had been paid under by-laws passed therefor.

An application for leave to amend so as to set up such objection was also refused.

Plans and specifications—the latter being divided under the headings "notes," "conditions" and "specifications," all bound up together and forming one document—drawn up for the erection of the said buildings, and, on the execution of the contract, and endorsement, initialled by the contractor and mayor, was made on the specifications stating that they were those referred to in the contract, must be read together as constituting one entire contract.

Watson, Q.C., and *Allen*, for plaintiffs. *Aylesworth*, Q.C., and *Labelle*, for defendants.

Divisional Court.] COOLIDGE *v.* NELSON. [March 17.

Will—Annuity—Agreement constituting charge on land—Necessity for registration—Notice—Registry Act.

The testator by his will directed his executors to pay his widow an annuity for the support and maintenance of one of his sons until he became of age; but, if there was not sufficient funds therefor, it was to be a charge on separate parcels of land severally devised to three of his other sons. There were sufficient funds in the executors' hands for the payment of this annuity, but by an agreement, for valuable consideration, made between the widow and the said devisees of the lands, it was agreed that the annuity should not be paid out of such moneys but should be a charge upon such lands, the intention being that such moneys should be kept in hand for the payment of a legacy to be paid to the first named son on his attaining his majority. A sale was subsequently made by one of the sons of the parcel of land devised to him, the purchaser being informed as to an agreement having been entered into but being at the same time told that it in no way affected the land, but merely created a personal obligation to pay the annuity, he made no further inquiry with regard to it.

Held, that the purchaser could not be deemed to have purchased the land with notice of the contents of the agreement so as to be affected thereby.

Notice at law and under the Registry Act discussed.

Shepley, Q.C., for appellants. *Aylesworth*, Q.C., contra.

Boyd, C.] KING *v.* ROGERS. [April 17.

Limitation of actions—Acknowledgment in writing—Revival of liability—Agent of executor—Letter to third person—Admissability.

The executor of the will of one of the joint makers of a promissory note proved the will after the debt on the note as against the testator or his estate had become barred by the Statute of Limitations. The will directed that all the testator's just debts should be paid by his executors as soon as possible after his death. The executor, who lived out of Ontario, executed a power of attorney to the other joint maker of the note, who was primarily liable on it, and against whom it had been kept alive by payments, to enable him in Ontario "to do all things which might be legally requisite for the due proving and carrying out of the provisions" of the will—the executor having at this time no knowledge of the note.

Held, that a letter written by the surviving maker shortly after the execution of the power of attorney, even if in its terms sufficient, was not such an acknowledgment, within R.S.O. c. 146, s. 1, as would revive the liability after the expiry of six years; for there was no trust created by the will for the payment of debts, nor was there any legal obligation on the part of the executor to pay statute-barred debts, and the surviving maker was not an agent "duly authorized" to exercise the discretion which an executor has to pay such debts.

Three years' later the executor wrote to the holder of the note to the effect that the holder ought to look to the surviving maker for payment, as he was now doing well.

Held, that this, though some recognition of the debt, was not sufficient; there must be such a recognition as amounts to a promise or undertaking to pay.

Just before this action was brought to recover the amount of the note, the executor wrote to the plaintiff's solicitors, asking them not to take any further step till he could hear from the surviving maker; and to the latter he wrote: "The debt is owing, and they are anxious to get their estate settled up."

Held, insufficient as an acknowledgement, and that the letter to a third person—not the creditor—was not admissible. *Goodman* v. *Beves*, 17 A.R. 528, followed.

D. E. Thomson, Q.C., and *W. N. Tilley*, for the plaintiffs. *F. E. Hodgins*, for the defendant Elford.

Boyd, C.] LOGAN *v.* HERRING. [May 5.

Costs—Will—Action to set aside—Failure of—Dismissal without costs—Costs out of estate—Administration.

In an action to set aside a will for undue influence by two of the defendants, one of whom was the executor, the attack failed, and the action

was dismissed, but without costs as to these two defendants, there being circumstances which might, unexplained, appear to be suspicious.

The other defendants, two pecuniary legatees under the attacked will, and a religious society to whom land was devised by it, submitted their rights to the Court, but appeared by counsel at the trial, and joined in resisting the plaintiffs' claim.

Held, that these defendants were in the position of "interveners" under the English procedure, and were not entitled to costs out of the estate.

Held, also, that they were not entitled to costs against the plaintiffs.

Semble, that they would be entitled to compensation in the administration of the estate.

Watson, Q.C., and *W. D. Swayze*, for plaintiffs. *E. F. B. Johnston*, Q.C., *Kirwan Martin* and *M. S. Mercer*, for the various defendants.

Rose, J.] EVANS *v.* CHANDLER. [May 7.

Costs—Scale of—Jurisdiction of County Courts—Ascertainment of amount—Price of goods sold.

In an action for the price of goods sold, in which the plaintiff recovered $290, it was contended that that amount was ascertained by the act of the parties, and therefore within the jurisdiction of the County Courts, because the goods were sold according to a price list agreed to, and therefore the amount was ascertainable by a simple computation.

Held not so. *Thompson* v. *Pearson*, 18 P.R. 420, distinguished.

W. R. Smythe, for plaintiff. *D. E. Thomson*, Q.C., for defendants.

Rose, J.] [May 9.

PIGOTT *v.* EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

Insurance — Employer's liability contract — Alteration after execution—Foreign company—Local agent—Authority—Notice.

A local agent of an English insurance company, without authority from any one, upon the request of the assured, and after some correspondence with the chief agent for the company in Ontario as to other changes which had been refused, to the knowledge of the assured, altered an employer's liability policy which had been sent to him for delivery to the assured by making it comprehend the workmen at a place other than those named in the policy, and then handed it to the assured, who paid him the premium. He then sent the premium to the chief agent for Ontario, and advised him at the same time of the alteration made. The power to make any change in the policy did not rest in the local agents, nor in the chief agent for Ontario, but only in the manager and attorney for Canada, who was not notified of the alteration.

Held, that the company could not be held to have authorized the alteration and were not found by the contract as altered.

Osler, Q.C., and *Bruce*, Q.C., for plaintiffs. *Aylesworth*, Q.C., for defendants.

Meredith, C.J., MacMahon, J.] [May 10.

SAWYER *v.* ROBERTSON.

Jury notice—Exclusive jurisdiction of Chancery—R. S. O. c. 51, s. 103—Legal and equitable issues—Rule 551.

The plaintiff's claim was to enforce a charge against the defendant's lands and for a personal order or judgment for immediate payment of the sum for which they asserted the charge.

Held, not such an action as would have been, before the Administration of Justice Act of 1873, within the exclusive jurisdiction of the Court of Chancery and within s. 103 of the Judicature Act, R.S.O. c. 51.

There being, therefore, legal and equitable issues raised, and notice for a jury given, Rule 551 applied, and the action should be entered for trial at a jury sittings.

Kirwan Martin, for plaintiffs. *Glyn Osler*, for defendant.

Meredith, C.J.] [May 10.

MACDONALD *v.* GRAND TRUNK R. W. CO.

Railway company—Carriage of goods—Condition limiting liability for loss—51 Vict., c. 29 (D.)—Canadian company—Part of line in foreign country.

The Railway Act of Canada is not applicable to a railway situate in a foreign country, though operated by a company incorporated by or under the authority of the Parliament of Canada.

Therefore where goods shipped from Scotland to be delivered at Portland, Maine, to the Grand Trunk Railway Company, and by that company to be forwarded thence to the plaintiffs at Toronto, were destroyed by fire on the line of that company in New Hampshire, by negligence from which they were protected from liability by the terms of the contract for carriage:—

Held, that the provisions of s. 246 of 51 Vict., c. 29 (D.) were not applicable to the defendants' contract; and an action to recover damages for the loss of the goods failed.

Aylesworth, Q.C., and *Spencer Love*, for plaintiffs. *Wallace Nesbitt*, Q.C., for defendants.

Meredith, C.J., MacMahon, J.] [May 14.

WHITEWOOD *v.* WHITEWOOD.

Payment into Court--Infant's fund—Trustee—Discretion—Costs—Taxation—Interlocutory motion—Affidavits.

The defendant, having in her hands a fund to the benefit of which the plaintiff, an infant, was entitled, asserted that, by the terms of the trust upon which she held it, she had a discretion as to the application of it for the benefit of the plaintiff. She nevertheless paid the money into a bank to her own credit as trustee for the plaintiff and agreed that she would not use it except for his benefit, and would pay it to him at majority.

Held, that the defendant was a mere trustee for the plaintiff, without the discretion which she contended for; and a summary order, (made before delivery of statement of claim in an action to recover the fund and for an injunction) requiring the defendant to pay the fund into Court, and thereupon perpetually staying the action, was affirmed.

In re Humphries, Mortimer v. *Humphries*, 18 P.R. 289, approved.

Where an interlocutory motion was dismissed upon preliminary objections;—

Held, that the taxing officer had a discretion to disallow to the party opposing it the costs of affidavits filed in answer to it.

Eyre, for plaintiff. *Carey*, for defendant.

Boyd, C., Robertson, J., Meredith, J.] [May 14.

WAKEFIELD *v.* WAKEFIELD.

Tenant for life—Renewal of lease—Carrying on business on premises—Profits—Account.

A widow was entitled under her husband's will to the use and enjoyment of all his property during her life. It was conceded that she was entitled to the enjoyment in specie of the personal estate. The testator owned a brick-field on leasehold land, which was a going concern at the time of his death. This and the plant in connection therewith the tenant for life took possession of, and went on with the working of it. She put other assets of the estate into this business and extended it, and when she died it was still a going concern. At the expiration of the term of her husband's lease, she obtained a new one, covering a larger area of land.

Held, MEREDITH, J., dissenting, that the widow, having elected to carry on the business on these premises, did so for the ultimate benefit of the estate. She was entitled to all the income, earnings and profits derivable therefrom each year, in so far as she applied them to the maintenance of the family, or in the acquisition of other property, or in the paying off of mortgages; but whatever profits went into the business to increase it, and whatever plant, stock, and belongings of the businesss remained on the

premises or elsewhere at her death, became the property of the husband's estate.

An account against her executor was directed, and the scope of the inquiry defined.

Murphy, Q.C., and *R. G. Smyth*, for plaintiff. *Coatsworth* and *F. E. Hodgins*, for defendant, T. Wakefield. *A. J. Boyd*, for infant defendants.

Boyd, C., Robertson, J., Meredith, J.] [May 14.

CRAIG *v.* CROMWELL.

Mechanics' lien—"Notice in writing" to owner — Letter—R.S.O. c. 153, s. 11, sub-s. 2.

The claimants of a mechanics' lien for materials wrote to the owner a letter asking him, when making a payment to the contractor "on the Lisgar Street Buildings"—the property on which the lien was asserted—to "see that a cheque for at least $400 is made payable to us on account of brick delivered, as our account is considerably over $700, and we shall be obliged to register a lien if a payment is not made to-day."

Held, MEREDITH, J., dissenting, a sufficient "notice in writing" of their lien, under sub-s. 2 of s. 11 of the Mechanics' and Wage-Earners' Lien Act, R.S.O. c. 153.

Thomson, Q.C., and *R. B. Matheson*, for claimants. *Arnoldi*, Q.C. for owner.

Osler, J.A.] APPLEBY *v.* TURNER. [May 15.

Leave to appeal — Order setting aside judgment — Grounds of plausible attack—Statement of claim—Service by posting—Irregularity—Delay—Discretion.

A Divisional Court of the High Court having set aside a judgment signed by the plaintiffs for default of defence in an action on a bond (ante p. 313), upon two grounds, viz., (1) that a motion for judgment was necessary, and (2) that the statement of claim had never been legally served upon the defendants, the posting up thereof in the office not being service because of the omission to file an affidavit of service of the writ of summons before doing so;

Held, that leave to appeal should not be granted unless the plaintiffs could make a plausible attack upon both grounds, for if only one were demolished, the other would support the judgment, and leave to appeal is not given merely to settle a point of practice the decision of which would not affect the judgment complained of.

And in this case the service of the statement of claim could not be supported, having regard to Rule 574, and it was in the discretion of the Court below to give effect to the objection to its regularity, notwithstanding the defendants' delay in moving against the judgment.

W. E. Middleton, for plaintiffs. *Hislop*, for defendants.

Meredith, C.J., SEGSWORTH *v.* MCKINNON. [May 15.

Venue—Writ of Summons—Indorsement—Election—Rules 138 (2), 529.

Where in the special indorsement of his writ of summons the plaintiff names a place of trial, he is not at liberty to change by naming another place in his statement of claim. Rule 529 must be read subject to the provision of Rule 138 (2).

R. S. Robertson, for plaintiff. *W. H. Blake*, for defendant.

COUNTY COURT OF THE COUNTY OF YORK.

TAIT *v.* JACKSON.

Municipal law — Setting out fire — Violation of fire by-law—Notice—Negligence—Burden of proof.

By Municipal Act, R.S.O. c. 223, s. 532, sub.-s. 16, by-laws may be passed by the Council "for regulating the times during which stumps, wood, logs, trees, brush, straw, shavings, or refuse, may be set on fire or burned in the open air, and for prescribing precautions to be observed during such times; and for preventing such fires from being kindled at other times;" and by s. 702, sub-s. 1 (*b*), the right to impose penalties is given for violation of any of these by-laws. In pursuance of this power the Municipality of Scarborough passed a by-law enacting that no fire was to be set out in the Township between July 1 and September 15, nor at any other time until afte eight days' notice had been given to the owner or occupant of the adjoining property of the intention of any person to set out such fire, and it was also provided that any person contravening the by-law should be liable to a fine of not less than $2 nor more than $50. The defendant in clearing his land set out a fire, which resulted in the burning of a quantity of fire wood and timber of the plaintiff which was piled upon the public highway opposite the defendant's land. No notice was given under the by-law. Action having been brought by the plaintiff alleging negligence it was

Held—1. That the omission to give the notice under the by-law did not interfere with or deprive the parties of their common law rights, but that such omission only had the effect of rendering the defaulting party liable to the penalty imposed by the by-law.

2. That the omission to give the above notice was evidence of negligence and shifted the burden of proof as to negligence from the plaintiff to the defendant.

[TORONTO, April 18.—MORSON, J.J.

This was an action brought by a farmer of the Township of Scarborough, in the County of York, to recover from another farmer of said Township, the value of a quantity of firewood and other timber cut into logs and piled upon the public highway opposite the defendant's land in two separate piles, called the north and south piles, the property of the plaintiff which had, as was alleged, been destroyed by fire set out by the defendant for the purpose of clearing his land. The plaintiff alleged that the fire was unlawful, as being contrary to the provisions of the by-law above referred to, passed December 16, 1890, still in force. He further alleged that the defendant did not use due care to prevent the fire from spreading, but carelessly permitted it to spread and burn for a long time.

The defendant admitted the burning of the property of the plaintiff, but said that the fire was set out in the usual course of husbandry and without carelessness or negligence on his part, and if it escaped and did the damage complained of, it was through no negligence of his. He further alleged that the by-law had no application to this case; that the plaintiff was not the owner or occupier of adjoining property within its meaning, and was not, therefore, entitled to notice. He also alleged that the plaintiff was guilty of contributory negligence in not saving his property, after knowledge and notification that it was in danger.

J. B. Clarke, Q.C., for the plaintiff. *Du Vernet*, for defendant.

MORSON, J.J.—On the evidence I have come to the conclusion that the defendant knew of the plaintiff's property being on the highway opposite his property, that the fire set out by him was set out in the early part of June in the ordinary course of husbandry; that no fire was set out by him in the month of July; that he reasonably and honestly thought the fire had been extinguished in June by the rain and by burning out, and that he was not aware of any fire or smoke upon his premises until the 30th July, the day on which the north pile was destroyed. It is quite clear, however, that in this he must have been mistaken, for there seems no reason to doubt that the fire had been smouldering from the time when defendant thought it was out up to the 30th July, when it broke out again, but not to the knowledge of the defendant. I do not find any negligence on his part in not knowing of the smouldering, under the circumstances. That on the 30th July in consequence of a very high wind suddenly arising it blazed up, and as a result the plaintiff's north pile was destroyed. About a week later the south pile was also destroyed, and during all that week the fire was burning to the knowledge of the defendant, who took no steps, so far as his evidence shows, to control it or put it out, and who was aware that the south pile had not been removed out of danger. The plaintiff had knowledge that the fire was raging, as he termed it, all that week and that he, having his harvest to attend to, which he deemed the most important, took no steps to remove the south pile which was destroyed; that the defendant did not give the notice required by the by-law before setting the fire out. The plaintiff does not allege there was any negligence in setting out the fire, which he admits was quite proper in the ordinary course of husbandry in the month of June. He does not show any particular act of negligence down to the 30th July. He only alleges that fire was set out on the 13th July and that smoke was seen rising during the months of July and August. This in itself, apart from the by-law, in my opinion is not evidence of negligence. He does not state that the fire was not under control nor that there was any danger in it, nor that it must have been smouldering. It might be, however, that the setting out of fire on the 13th July, a month which was very dry, is some evidence of negligence, but the defendant has answered this by showing to my satisfaction that he did not set out any fire on that date.

Now, at common law it was the defendant's right to properly set out fire on his own land for the necessary purposes of husbandry, provided he or his servants managed it with due care, and if he did and damage was nevertheless done, he was not responsible on the ground that every man has a right to use his land in the way he thinks best, but in using fire, which is a dangerous substance, he must use proper precautions to prevent it extending to his neighbors. He must exercise the care and diligence which a prudent man would observe in his own affairs and which a prudent and conscientious man will observe as to the interests of his neighbors, but this amount of care varies, of course, according to circumstances: *Dean* v. *McCarty*, 2 U.C.R. 448; *Furlong* v. *Carroll*, 7 A.R. 161.

The plaintiff, however, while admitting this to be the law and contending the defendant was negligent, further contends that because of the non-observance of the by-law in not giving notice, the setting out of the fire which was otherwise lawful, was unlawful, and, therefore, the defendant is liable in any event, whether negligent or not, and refers to *Fletcher* v. *Rylands*, L.R. 1 Ex. 265, in support of this contention. This case decides that where one for his own purposes brings upon his land and collects and keeps there anything likely to do mischief, if it escapes, is prima facie answerable for all the damage which is the natural consequence of its escape.

By the Municipal Act, R.S.O. c. 223, s. 542, sub-s. 16, by-laws may be passed by the Councils of Municipalities "for regulating the times during which stumps, wood, logs, trees, brush, straw, shavings, or refuse, may be set on fire or burned in the open air, and for prescribing precautions to be observed during such times; and from preventing such fires from being kindled at other times," and by s. 479, sub-s. 17, the right to impose penalties is given for violation of any of these by-laws.

In pursuance of this statutory power, the Municipal Council of the Township of Scarborough passed the by-law in question, No. 516, which enacts, "(1). That from and after the passing of this by-law it shall not be lawful for any person or persons to set on fire or burn any stumps, wood, logs, trees, brush, straw, shavings, or other refuse, in the open air within the Township of Scarborough at any time between the 1st day of July and the 15th day of September in any year; nor at any other time or times during the year until after eight days' notice has been given to the owner or occupant of the adjoining property which might be injured thereby, of the intention of any person to set fire to or burn such material.

"(2). That any person contravening the provisions of this by-law shall be liable, upon conviction, to a fine of not less than two dollars nor more than fifty dollars, to be recovered before any Justice of the Peace for the County of York, to be collected by distress and sale of the goods and chattels of the offender," etc., etc.

By this s. 479, sub-s. 17, no power is given municipalities to interfere with the common law rights of parties who come within the by-laws, either

to increase or lessen them, or to take them away altogether, only the power to impose a penalty and nothing more. If the Legislature intended that the non-observance of the by-law took away the common law right of defence of no negligence as contended for by Mr. Clarke, they would have expressly said so, but not having done so, it is not for me to do so. It is a well-known rule applicable to all by-laws, that they must be reasonably clear and unequivocal in their language in order to vary or take away common law rights, and in my opinion this by-law does neither. It only says you must not set out fire in certain months of the year without first giving notice, and if you do you must pay the penalty imposed by it. It cannot make the setting out unlawful without the notice, for if it did I think it would be clearly ultra vires, for power is only given to regulate the times during which fire may be set out, not to prevent it altogether. It only adds to what is a lawful act in setting out for the purpose of husbandry, the condition of first giving notice, under a penalty for its omission. From a perusal of the case of *Lamb* v. *Sloan*, 94 North Carolina Reports 534, it appears that the Legislature of that State at all events thought it necessary, just as I do, to enact specially, in addition to the pecuniary penalty, that anyone violating the statute should be liable to any person injured in an action. The section of that Act, which is very similar to this by-law, is as follows :—

"No person shall set fire to any woods except it be his own property, nor in that case without first giving notice to all persons owning lands adjoining to the woodlands intended to be fired, at least two days before the firing of such woods, and also take effectual care to extinguish such fire before it shall reach any vacant or patented lands near to or adjoining the lands so fired. Every person wilfully offending against the preceding section shall for such offence forfeit and pay to any person who shall sue for the same the sum of $50 and be liable to any one injured in an action, and shall moreover be guilty of a misdemeanor."

The action was brought under this statute against the defendant, who set out the fire without giving the notice. The learned Judge in his judgment, amongst other things, says : "Having set fire to his woods, without having given the plaintiff at least two days' notice thereof, he made himself liable for such damages as the latter sustained by the spread of the fire to and upon the adjoining woodland. Reasonable diligence on the part of the defendant in his efforts to keep the fire under control would not relieve him from this cause of action. He made himself responsible at all events for the harm his fire did the plaintiff. The very purpose of the statute was to give the plaintiff a right of action in which the defendant could not defend himself successfully by showing reasonable care and diligence on his part as he might do if the plaintiff had sued for a breach of his common law right, otherwise the statutory right would be nugatory." In my opinion then, the by-law does not have the effect contended for by Mr. Clarke, and coming to this conclusion it becomes unnecessary for me to consider the

point raised by the defendant, that the plaintiff was not the adjoining owner of property within the meaning of the by-law so as to entitle him to notice. I think, however, the only effect the failure to give notice has, is that it is sufficient evidence of negligence so as to make it unnecessary for the plaintiff to prove it, which he otherwise would have to do, and puts the onus upon the defendant of the proof of no negligence.

I have not been referred to any cases directly on the point and can find none, but in notes to s. 489, sub-s. 24 of Harrison's Municipal Manual, I find the following: "The kindling of a fire in a municipality where such a by-law exists at a time other than prescribed by the by-law or in disregard of the precautions made necessary by the by-law, would be strong if not conclusive evidence of negligence." It is to be noticed that it is not said that the defendant would be liable at all events and prevented from setting up his common law defence of having used due care and caution. It seems to me if this were the effect of the non-observance of the by-law, in addition to being evidence of negligence, it would have been referred to by the late learned author, who would not have overlooked a point so important.

The defendant, then, in my opinion, for the reasons I have stated, is not by reason of his failure to give the notice under the by-law, brought within the principle of *Fletcher* v. *Rylands*, and is therefore entitled to defend himself by satisfying the onus that is upon him, as a result of his failure to give notice and show that the destruction of the plaintiff's property was not the result of his, the defendant's negligence, so far as the north pile is concerned. I think he has satisfied this onus. The conclusion, on the evidence, that I have come to, compels me to find, that there was no negligence on the part of the defendant, and that the causa causans was the sudden rising of the very high wind which the defendant was not bound to anticipate, and which caused the smouldering fire to suddenly blaze up to the extent it did, carrying it across to the plaintiff's north pile and destroying it. Under these circumstances the defendant is not liable: *Buchanan* v. *Young*, 23 U.C.C.P. 101.

As to the south pile, I think I must find that the defendant was negligent. [The learned Judge here commented on the evidence as to the fire at the south pile and expressed the opinion that because the defendant took no steps to extinguish the fire, but remained inactive, there was negligence on his part; but he also held that the plaintiff was guilty of contributory negligence because he took no steps to remove the south pile to a place of safety. Not having done so, he was as much to blame for its destruction as the defendant.]

For the reasons that I have stated the plaintiff cannot, in my opinion, recover for either the north or south pile, and I therefore dismiss his action with costs.

FIRST DIVISION COURT OF THE COUNTY OF YORK.

Morson, J.J.] LAW SOCIETY OF UPPER CANADA *v.* S. R. CLARKE. [May 5.

Law Society—Solicitor—Annual fees—Recovery by action.

The defendant was alleged to have been practising as a barrister and solicitor without having taken out his annual certificates. An action being brought to recover the same with fines for default it was

Held, 1. The taking out of annual certificates by solicitors is voluntary and not compulsory.

2. A solicitor practising without having taken out his certificate does not give a right to the Law Society to sue for the fees, but only renders the solicitor liable to the penalties provided by the rules of the Law Society or the Solicitors' Act.

3. The Law Society could not recover under the usual bond given when entering as a student as that only covers cases when fees are due, and no certificate being taken out, fees were not due within the condition of the bond.

Walter Read, for plaintiff. Defendant in person.

ASSESSMENT CASES.

Ketchum, Co.J.]

IN RE BURNHAM AND THE TOWNSHIP OF HAMILTON.

Assessment of toll roads—Assessment Act, s. 32.

J. D. Roddick, assessor of Hamilton township, for the year 1899, assessed certain portions of toll roads running through the township and the whole of another toll road in said township at $11400, following the assessment of previous years, though in the assessor's judgment the amount was too low. Mr. Burnham, the president of the road companies, appealed to the Township Court of Revision, which confirmed the assessment. He thereupon appealed to the county judge and the assessor appealed to have the assessment increased. The case turned upon the interpretation of s. 32 of the Assessment Act, which directs that such roads shall be assessed as real estate in the municipality in which they are situate; and that in making the assessment the assessor shall take into consideration the value of (1) the land occupied by the road, (2) the materials employed in the superstructure, (3) toll houses, buildings and gates on the road, (4) quarries and gravel pits and roads to and from such places and used in connection therewith.

KETCHUM, Co. J., after hearing evidence exhaustively, and argument of counsel, reserved judgment and subsequently delivered a considered judgment, in which he alluded to the fact that the section appeared in the statutes of 1890 but that no reported case upon its construction

could be found. After tracing the history of toll road legislation down to the present time he decided against the contention of the road companies that the width of side roads crossing the toll roads should not be computed in arriving at the assessable area, but that, on the other hand, these gravel roads do not "occupy" and are not assessable for the whole of the width of the original highways upon which they are constructed. That there is nothing in any of the Acts of incorporation which vests in the road company the whole or any part of the original highways upon and over which the gravel roads were constructed; the soil and freehold of the highways remain in the Crown, and are exempt from taxation; the right of the public to use the original highways remains as it was before the gravel roads were made, subject to the privileges granted to the road companies: *Reg.* v. *Davis*, 35 U.C.R. 107; *Reg.* v. *Davis*, 24 U.C.C.P. 575; and see also *In re Hamilton and Court of Revision of Biddulph*, 13 C.L.J. 18; also ss. 147, 148, 149 of the present Road Companies' Act (R.S.O. c. 193). What is vested in each of these companies is the road that such company was authorized to construct; in ascertaining the width, the ditches on each side of the gravel should be included. As to the value of the materials, the case of *Bell Telephone Company* and *City of Hamilton*, 25 A.R. 351, applies, and the materials must be valued not as forming part of a going concern, in which the franchise would be a material element, but as materials to be separate and removed from the road, for sale in the state and condition in which they now are, without considering the cost of the labor involved in the construction of the road.

Frank M. Field, for Hamilton township and the assessor. *W. F. Kerr*, for the road companies.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] McLEOD *v.* THE INSURANCE COMPANIES. [Feb. 7.

Practice and procedure—Commission to take evidence abroad—Setting aside—Discretion of judge reviewed.

The granting of a commission to take evidence is in the discretion of the judge to whom the application is made, but where strong reasons are shown to the Court of Appeal why the commission should not have been granted, such as failure to exercise due diligence on the part of the party applying, or unreasonable delay caused to the opposite party, the discretion will be reviewed.

In a case which had been twice tried, and was coming on for a third trial, where it appeared that two commissions had already been obtained,

and evidence taken under each; that the facts sought to be established had been previously known to or their existence suspected by the party applying: where it was not alleged that the evidence sought to be obtained was material and necessary and that the party could not safely proceed to trial without it, but only that the examination would be effectual; and where no defence based upon the fact sought to be established had been set up, and no application had been made to amend the pleadings so as to enable it to be set up.

Held, that the order for the commission must be set aside with costs.

W. B. A. Ritchie, Q.C., for appellant. *R. E. Harris*, Q.C., for respondent.

Full Court.] CUMMINGS *v.* PICKLES. [Feb. 7.

Practice—Notice of trial—Waiver of—Cause entered on docket improperly—Action dismissed for want of prosecution—O. 34, R. 23—Appeal from—Order—Costs.

Defendant after giving notice of trial accepted service of a replication pleaded by plaintiff, without making any objection thereto.

Held, that he thereby waived his notice and admitted that the cause was not at issue when it was given.

Where defendant subsequently gave another notice, which was admittedly defective, and entered the cause on the docket of causes for trial,

Held, that the cause was improperly entered and that a motion to set aside the notice and to strike the cause off the docket should have prevailed.

Plaintiff did not appear at the time at which the cause was entered for trial, and an order was obtained by plaintiff under O. 34, R. 23, dismissing the action for want of prosecution.

Held, that there was an appeal from the order so made, and that plaintiff was not limited to an application under the order to have the judgment set aside.

Per MEAGHER, J. (dissenting). There should be no costs, as the difficulty appeared to have arisen from a misunderstanding between solicitors.

J. A. McLean, Q. C., for appellant. *J. J. Ritchie*, Q. C., for respondent.

Full Court.] HARRINGTON *v.* PETERS. [Feb. 7.

Statute — Construction — Act changing form of procedure retroactive—Barrister and solicitor—Rendering signed bill.

By the Acts of 1899, c. 27, s. 69, to amend and consolidate the Acts relating to barristers and solicitors, passed March 30th, 1899, it was enacted that "No action shall be brought for the recovery of fees, costs, charges,

etc., by a barrister or solicitor as such until one month after the bill therefor signed by such barrister or solicitor has been delivered to the party to be charged," etc. By s. 81 it was provided that the Act should not come into force until the first day of July, 1899. On May 4th, 1899, plaintiffs caused a writ to be issued for the recovery of an amount claimed to be due them from defendants for professional services and moneys expended by plaintiffs as solicitors of defendants upon their retainer and at their request. The statute was pleaded and it was agreed that no bill had been delivered as therein provided.

Held, that the delivery of a signed bill in accordance with the provisions of s. 69 and proof thereof upon the trial involved a matter of procedure only, or, at most, a mere alteration in the matter of proof necessary to sustain the action, and therefore was within the rule stated by BLACKBURN, J., in *Gardner* v. *Lucas*, 3 App. Cas. 603, that alterations in the form of procedure are always retrospective unless there is some good reason or other why they should not be.

Held, also, that the enactment being a remedial one should receive a liberal construction.

A. Drysdale, Q.C., and *H. Mellish*, for appellants. *W. B. A. Ritchie*, Q.C., for respondents.

Full Court.] BOAK *v.* HIGGINS. [Feb. 7.

Practice—Discontinuance after plea—Leave of court or judge—Words "proceeding in action," O. 26, R. 1—Receiver—Order for, set aside with costs.

Where defendants were added by order of court and appeared and pleaded,

Held, that plaintiffs had not the right, except by leave of the court or a judge, to discontinue as against such defendants, especially where defendants claimed a specific right in the property in question, which right would be affected by the action.

Where an agreement had been entered into under which defendants' solicitor was permitted to withdraw the defence pleaded by him and to prepare and deliver a new defence,

Held, that this was another "proceeding in the action" after delivery of the defence, which, under O. 26, R. 1, precluded plaintiffs from discontinuing without leave of the court or a judge.

Held, also, that an order for the appointment of a receiver made while the first defence was on the record and had not been abandoned, and of which neither the defendant F. nor his solicitor had notice, was irregularly made and must be set aside with costs.

C. S. Harrington, Q.C., and *C. P. Fullerton*, for appellant. *F. T. Congdon*, for respondent.

Full Court.] McDONALD *v.* BROAD COVE COAL CO. [Feb. 7.

Goods sold and delivered—Authority of agent to purchase—Ratification—Evidence.

In an action brought by plaintiff against the defendant company for the price of certain articles alleged to have been sold by him to the company for use in connection with the construction of their line of railway it was shown that the articles sued for were sold to H., who acted as manager for defendant and were used by him in connection with the building of the road. It was also shown that plaintiff was employed by H. to do certain work on the road, and that this act of H. was recognized and ratified by the company, who paid plaintiff for the services rendered by him.

Held, that there was sufficient evidence to support a finding that the sale of the articles sued for was made to the company and not to H. individually.

D. McNeill, Q.C., for appellant. *C. E. Gregory*, for respondent.

Province of New Brunswick.

SUPREME COURT.

RUNCIMAN *v.* STAR LINE STEAMSHIP CO.

Negligence causing death.

The note of this case on p. 317 would more correctly read as follows:—"*Held* on motion for a nonsuit on the ground that there was no sufficient pecuniary loss to the plaintiff, etc."

Province of Manitoba.

QUEEN'S BENCH.

Killam, C.J.] ROBOCK *v.* PETERS. [April 11.

Mechanics' liens—Mechanics' and Wage Earners' Lien Act, 1898—Priorities between lienholders and mortgagees—Notice of lien—Subrogation of rights of unpaid vendor in favor of mortgagee paying him off—Practice—Defects in the statements of lien registered.

Trial of an action under the "Mechanics' and Wage Earners' Lien Act, 1898," 61 Vict., c. 29, which was not defended by the debtor, but at which it was necessary to determine the respective rights and priorities as between the plaintiff, whose claim was for work and labor, another lien holder whose claim was for lumber and other materials supplied at different dates, and

several mortgagees. These parties had been served, pursuant to s. 32 and s. 27 (2) of the Act, with notice of the trial, but had not otherwise been made parties to the action.

Sec. 31 of the Act provides for a special trial of such an action before a judge who disposes of all questions between all parties and persons on whom notice of trial has been served, without a reference to the Master, and has to "embody all the results in the judgment." By s. 4, sub-s. (1) the lien arises by virtue of the performance of the work, or a furnishing of the materials, and by sub-s. (2) "such lien upon registration . . . . shall arise and take effect from the date of the commencement of such work or service or from the placing of such materials as against the purchasers, chargees or mortgagees under instruments registered or unregistered." Sub-s. (3) of s. 5 provides that, in case the land be encumbered by a mortgage or other charge, existing or created before the commencement of the work or of the placing of the materials or machinery upon the land, such mortgage or other charge shall have priority over a lien to the extent only of the actual value of such land at the time the improvements were commenced. By s. 2, the word "owner" extends to all persons claiming under the person who ordered the work done o materials provided, and "whose rights are acquired after the work or service is commenced, or the materials furnished have been commenced to be furnished." By s. 19, when a lien is registered under the Act, the person entitled shall be deemed a purchaser pro tanto, and within the provisions of the Registry Act, "but, except as herein otherwise provided, the Registry Act shall not apply to any lien arising under this Act." And s. 11 is as follows: "The lien created by this Act shall have priority over . . . . . all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of such lien as hereinafter provided."

Held, 1. Although an account for materials supplied may consist of items for different lots supplied at different dates on separate and distinct orders, the lien filed within the required time after the delivery of the last lot will be good to cover all the orders if given in pursuance of a general arrangement previously entered into. *Morris* v. *Tharle*, 24 O. R. 159, followed. *Chadwick* v. *Hunter*, 1 M.R. 39, not followed.

2. The claims of subsequent incumbrancers and other lien holders may be disposed of at the trial without their being made parties to the action, and although the notice of trial has been served after the time limited for bringing the action: *Cole* v. *Hall*, 13 P.R. 100.

3. The lien holder who registers his lien in time has priority from the date of the commencement of the work or from the placing of the materials over every conveyance, mortgage or charge made thereafter, although registered first, and such priority is not affected by s. 11 which applies only to payments or advances made subsequently to the taking effect of the lien under conveyances or mortgages otherwise having priority.

4. The effect of s. 17 of the Act is that only substantial compliance with the directions as to the contents of the claim and the registration of it is required, and no failure in such compliance, in however substantial a degree, is to invalidate the lien unless some other party is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.

5. The lien for materials supplied as against a mortgage has priority over the mortgage only to the extent of the materials actually placed on the ground before the mortgage money was advanced.

6. Under s. 11, if a mortgagee has notice in writing of the fact that there is an indebtedness for which a lien may be claimed, that is, prima facie notice of the lien itself, and he cannot claim priority for money advanced after such notice.

7. The first mortgagee having applied his last advance in payment of the purchase money of the lots to the unpaid vendor who then conveyed the land in fee to the defendant "owner," and having thus secured the title to the property, claimed to be entitled to be subrogated to the position of the original vendor in respect of such purchase money; but, having had actual notice of one of the liens and constructive notice of the other before making this payment, following *Pairy* v. *Wright*, 1 Sim. & St. 369, 3 Russ. 142, it was held that he could not have priority over either lien holder for such advance. *Brown* v. *McLean*, 18 O.R. 533, and *Abell* v. *Morrison*, 19 O.R. 672, distinguished.

Crawford, Q.C., for plaintiff. *Huggard*, for defendant. *Phippen*, *Perdue* and *McPherson*, for the other parties respectively.

Killam, C.J.] SHRIMPTON *v.* WINNIPEG. [April 23.

Municipality—Injunction against carrying out illegal contract—Ultra vires—Costs—Municipal Act, R.S.M. c. 100, s. 396.

This was a motion for an injunction to prevent the City of Winnipeg from entering into a contract which was in the nature of an agreement of purchase of certain land to be paid for in five yearly instalments, which the city council had by resolution approved of, notwithstanding the provisions of s. 396 of The Municipal Act, R.S.M. c. 100.

After several adjournments of the motion, and before it finally came on for hearing, a new arrangement was entered into so far varying the original proposition that the injunction was not pressed on the argument, and the only question argued was as to the disposition of the costs.

It was contended on behalf of the defendants that the agreement if entered into would have been wholly void, and no injunction to prohibit it was necessary; also, that an individual ratepayer could not sue for an injunction.

Held, following *Hoole* v. *The Great Western Railway Co.*, L.R. 3 Ch. 262, that a suit for an injunction was proper in such a case, and that the

defendants should pay the costs. It is not necessary that such a suit should be brought in the name of the Attorney-General, notwithstanding what is stated in Dillon on Corporations at par. 910. See paragraphs 911-922, and the following Ontario Cases: *Wilkie* v. *Clinton*, 18 Gr. 557; *Helm* v. *Port Hope*, 22 Gr. 273; *Smith* v. *Raleigh*, 3 O.R. 305; and *Wallace* v. *Orangeville*, 5 O.R. 37.

Tupper, Q.C., and *Phippen*, for plaintiff. *Ewart*, Q.C., and *Campbell*, for defendants.

Province of British Columbia.

SUPREME COURT.

Court of Criminal Appeal.] [Feb. 9.

REGINA *v.* PETRIE.

Criminal law—Common gaming house—Black jack—Criminal Code, s. 196.

Prisoner was lessee of a room to which the public had free access and in which several people congregated and played the game called black jack. There was no constant dealer (banker) and the lessee got no benefit. The dealer (who is chosen on commencing by cutting the cards) has an advantage, and as a rule, can keep the deal five or six minutes. Prisoner was convicted under s. 196 of the Code, of keeping a common gaming house and the Court of Criminal Appeal confirmed the conviction, holding that as the dealer had an advantage over the other players, the game came under the provisions of s. 196.

Wilson, Q.C., and *Brydone-Jack*, for Crown. *Davis*, Q.C., for prisoner.

Martin, J.] FEIGENBAUM *v.* JACKSON. [March 8.

Practice—Privilege—Photographs.

Summons for inspection. The action was for an injunction and for damages against defendants who had erected a building next to plaintiff's building and thereby shut out free access of light. In the affidavit of documents filed by defendants they objected to produce some photographs showing the buildings occupied by all the parties before the erection of the addition complained of, on the ground that they were privileged.

Held, dismissing the summons, that photographs sworn to be part of the materials of the defendant's evidence in the action are privileged from production.

Barnard, for the summons. *Bradburn*, contra.

Martin, J.] RUSSELL *v.* SAUNDERS. [March 9.

Practice — Cross-examination on affidavit — Rules 385, 401 and 429.

Motion for injunction. Counsel for defendant objected to plaintiff's affidavit being read as he had served notice asking that plaintiff be produced for cross-examination on his affidavit, but plaintiff had objected to being cross-examined.

Held, that Rules 385 and 429 taken together compel the production for cross-examination of a deponent on his affidavit if required by the opposite party before such affidavit can be used.

Duff, for defendant. *Harold Robertson*, for plaintiff.

Martin J.] CRUTCHFIELD *v.* HARBOTTLE. [March 31.

Mining law—Failure to record transfer of mineral claim—Right of locator subsequent to such transfer—Mineral Act, ss. 9, 49, 50.

In May, 1897, B. located and recorded the May Day claim and six days after location conveyed a half interest to defendant by a bill of sale which was not recorded till April, 1898. B.'s free miner's certificate lapsed in July, 1897, and in October, 1897, the plaintiff, a free miner, relocated the May Day as the Equaliser claim. By section 9 of the Act on the lapse of B.'s certificate his half interest in the May Day became vested in his co-owner, the defendant.

Held, in adverse proceedings, that the defendant's title could not prevail against the plaintiff.

Galliher and *P. E. Wilson*, for plaintiff. *S. S. Taylor*, Q.C., for defendant.

Book Reviews.

Greenleaf on Evidence.—A treatise on the law of evidence, by SIMON GREENLEAF, LL.D., in three volumes, 16th edition, revised, enlarged and annotated by PROFESSOR WIGMORE and PROFESSOR HARRIMAN; Boston: Little, Brown & Co., 1899.

It is of great interest to the profession even to be told that a new edition of this standard work has been published, but it adds largely to the interest when a writer of such eminence as Professor Wigmore takes charge of the first volume, and Professor Harriman of volumes II. and III. As has been well stated this revision and enlargement has given Greenleaf a new lease of life and renewed his hold upon the profession. Whilst this edition contains the original text, it is claimed that all matters in previous editions which were useless have been eliminated, and new chapters introduced, treating fully on such topics as real evidence, relevancy, circumstantial evidence, exceptions to hearsay rule, and regular entries in the way of business, etc.

The first edition of Mr. Greenleaf's work was published in 1842, the treatises on evidence most in favour at that time being those by Mr. Starkie and Mr. Phillipps, and the thought of the learned writer was rather to prepare a text book for the use of students under his instruction, than to compete with the above works. So admirable was Mr. Greenleaf's first effort that it was taken by Judge Taylor as the model for his work on evidence. How greatly both these standard works have grown in size and value is known to every student of the law; and what Taylor on Evidence is in England such is Greenleaf on Evidence in the United States. There is of course much in both works not directly appropriate to the use of the Canadian lawyer. But it may be remarked that the circumstances of this Dominion in many respects are very similar to those of the United States, and so there will be found much of value in the work before us which cannot be found elsewhere.

This work is now so modern, so practical and so helpful that it is a necessity to every law library, for therein may be found not only the great fundamental principles of evidence, but their application to every form of action. Volume one being a general treatise can be purchased separately; volumes two and three, covering the law of evidence as appropriate to various special forms of action and prosecutions for crime, are practically nisi prius treatises.

The Law Relating to Electric Lighting and Energy,—Second Edition, by John Shiress Will, Q.C. London: Butterworth & Co. 1900.

This is a collection of the Acts applicable to electric concerns in England, with explanatory notes and references to the comparatively few cases in which this legislation has been discussed. It is doubtless a very useful book to the English practitioner, and to us in this country is interesting as showing the scope of legistation on the subject of electrical energy in England.

There has been a good deal of legislation in this Province lately in reference to electrical light and power, and it will not be out of place to call attention to a section in the English Electric Light Act, of 1888, which makes a very proper provision to prevent the attempted spoliation of capital which unfortunately is rather too pronounced in the large centres of population in these days. By the section referred to it is enacted that any undertaking authorized under the Act to supply electricity may within six months after the expiration of a period of forty-two years be purchased by the municipal authorities upon the terms of paying the then value of the land, machinery and plant at their fair market value, without any addition for goodwill or profits. The Ontario Acts of 1899 and 1900 in reference to these matters is not nearly so conservative and pays much less regard to the interests of capital.

Wit and Humor of Bench and Bar, by MARSHAL BROWN; Chicago: T. H. Flood & Co., 1899.

This contains things new and old. If on opening a page you see something you have seen before turn to the next, for the statement that "there is nothing new under the sun" seems peculiarly applicable to jokes. Some of them are wise, some are otherwise, "not all alike good." However an occasional dip into it is most refreshing. Possibly it might be found useful to keep in an office and hand to a client when depressed and irritated by a lengthy bill of costs.

The Municipal and Assessment Guide, by J. J. Kehoe, Barrister at Law, Sault Ste. Marie. 1900.

This manual will be useful to the general reader as giving a sketch of the law in this Province on the above subjects. It does not, however, give references to the sections of the Act or to decided cases. It is merely intended to give to those who need the information, in every day language, the general and salient features of the law affecting the above subjects.

IN MEMORIAM.

At a meeting of the trustees of the County of York Law Association held on the 27th day of April, 1900, it was resolved "That the Board of Trustees of the County of York Law Association desire to convey to the members of the family of the late Sir John Hawkins Hagarty some expression of their sympathy with them in their recent bereavement. During his long and brilliant professional and judicial career Sir John Hawkins Hagarty inspired in all who enjoyed the privilege of social or business intercourse with him the highest admiration for his stainless life, profound learning and powerful reasoning, while his never failing courtesy and his genial unassuming kindness to everyone entirely disarmed all attack from that spirit of envy which so frequently follows in the footsteps of success such as he achieved. While his judgments will live always in the body of our law as a monument to his own learning and a guide to others, his memory will long be cherished by the members of a profession in which he was such a distinguished ornament, and to none will it be dearer or more revered than to those who, as inexperienced advocates, received at his hands that invariable consideration and encouragement which have so largely contributed to the great respect in which the Court, over which he so long presided, is justly held. It is with unfeigned regard and affection for his memory, and with sincere and respectful sympathy for the members of his family, that this resolution is tendered."