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Hon. Mr. Justice Ferguson, of the Chancery Division of the High Court of Justice for Ontario, passed away on the 31st ult. His health had been failing for some time. He was an able, painstaking and conscientious Judge; and his loss will be much regretted.

We notice that the objectionable practice of appointing judges to do extra judicial work is being continued. We should have supposed that the Governments of the Dominion and Ontario would by this time have realized the damaging results that necessarily flow therefrom. But it would seem that the juggernaut of party politics still holds the right of way. Surely if it is necessary to ascertain why some United States engineers are employed on the Grand Trunk Pacific Railway, the information could be obtained without taking a judge from his proper duties on the bench, and incidentally running the risk of dragging the judiciary into politics.

We feel that we owe our professional readers no apology for our persistency in urging the political union of Newfoundland and Canada. What concerns the national welfare finds an instant recognition in the hearts of Canadian lawyers, than whom there is no more zealously loyal class of citizens in the Dominion. Since our last issue the consummation we so devoutly wished has been advanced a stage by the outspoken pronouncement in favor of Confederation by Archbishop Howley, head of the Roman Catholic Church in the island. Archbishop Howley is a far-sighted and broad-minded Imperialist, and his words cannot but bear good fruit among the people of Newfoundland. But it will take a lot of sentiment to offset the present active pro-American policy of the Newfoundland legislature. The recent grant by that body of a virtual monopoly of the cold storage and fresh fish business to a subsidized American firm shows how indifferent the politicians there are to the commercial interests of Canada and British ascendency in British America. Facts like this and the Bond-Blaine treaty, which Great Britain was short-sighted enough to promote, shew us how urgent is the need for a vigorous agitation for Confederation being instituted by the people of this Dominion.

We return to the Alaska Boundary Commission merely to note that the carrying out of the settlement arrived at between Lord Alverstone and the United States Commissioners is, in some important respects, virtually impracticable. In the first place, as Mr. Dall, the United States expert, in describing the treaty's tortuous and zigzag course, says:—"Let any one, with a pair of drawing compasses, having one leg a pencil point, draw this boundary on the United States survey map of Alaska. The result is enough to condemn it. Such a line could not be surveyed on the land. It crosses itself in many places, and indulges in myriads of knots and triangles. It would be subject to insuperable difficulties, and the survey would cost more than the whole territory cost originally." In audition to this the Canadian engineers say that the cost to Canada for marking this boundary on the territory would be $2,300,000. The United States engineers say that the cost to them would be $2,250,000; moreover, that it would take some fifty years to do the work. This would certainly be a very valuable result, and a nice place it would be for fugitives from justice to play hide and seek in. There is, in addition the fact that, as to a portion of the boundary, no settlement whatever has been arrived at. There is, therefore, still a large field for diplomacy to cover. We venture to think, however, that Canada will not then need the services of the learned Chief Justice who, last October, ventured to play a lone hand in a game which his opponents *did* understand.

In a recent number of "Revue de Droit International et de Législation Comparée," M. Maxime Kovalewsky has a very interesting article on the Literature of the Social History of England in the Middle Ages and in the Epoch of the Renaissance. M. Kovalewsky finds in the historical literature of these periods fascinating material for the sociological student. He looks upon the Doomsday Book (c'est-à-dire, "livre du jugement") of William the Conqueror, as a document unique of its kind, and of paramount use in tracing the origin of economic and social institutions in Europe. In this connection he also speaks of the value of the compilation of Anglo-Saxon laws, known as the laws of Edward the Confessor, and the legal works of Glanville, Bracton and Britton in the twelfth and thirteenth centuries. He alludes in terms

of praise to the learned labours of English archæologists and historians, such as Bishop Stubbs, Maine, Professor Thorold Rogers, Freeman, Green, and Professor Maitland, of Cambridge; nor does he overlook our latter-day Grotius, Sir Frederick Pollock. The entire article is pleasant reading to those of us who believe that the history of the development of jurisprudence and of political and social institutions in England is second only in interest and importance to that of Imperial Rome.

Prof. Münsterberg, of Harvard University, has told the Americans some very homely truths about their national shortcomings during his sojourn among them, and his latest deliverance, namely, that the Monroe Doctrine is obsolete, or soon will be, because its raison d'être has passed away, is calculated to give some of their chauvinists ample food for reflection. We have all along entertained the view that compelling Imperialism to masquerade as Monroe Doctrine up-to-date needed a Gilbertian hand to do it full justice.

We are glad to see that the country, as a whole, is waking up to the inadequacy of the scale of salaries paid to the judiciary of Canada. Some time ago an able plea for justice to the judges was advanced by the organ of the Canadian hardware trade; and it has been quoted with approval by several of the most influential newspapers in the Dominion. One of these in a forcible article quotes the late Senator Dickie's speech in the Senate, in 1891, and observes: "What Senator Dickie said then with so much force gains additional strength when quoted after thirteen years of inaction in the matter. It is not becoming to the dignity of Canada that it should be said of her that her judiciary is the poorest paid of any in the chief British possessions. It is the smallest sort of cant for us to laud the probity of our judges on the one hand, and to deny them salaries commensurate with their work and dignity on the other. It is an old saying that a well-paid bench makes justice cheap. An unsound judge is dear at any price; and it is no answer to say that he can be put right on appeal. That means additional expense and delay to the well-to-do suitor; to the poor man it means in the majority of instances enforced acquiescence in a denial of

justice. The better the judges the fewer the appeals. By all means, then, let us make it possible for our best lawyers to go on the bench without facing one of the hardest of all trials—poverty in high position."

So far as we have looked into the matter the statement that we pay our judges less than is paid in any other of the chief British possessions is quite correct. A much higher scale prevails in the Commonwealth of Australia, as well as New Zealand and South Africa, not to mention India, where we would naturally expect to find more generous salaries, on account of climate and unique political conditions. True, in Newfoundland, the scale is pretty much the same, but in Jamaica, on the other hand, the remuneration is relatively more liberal than in Canada. We believe that the time is near at hand when parliament will relieve the country of this cause of reproach.

The reason for an increase in judicial salaries is obvious. The cost of living is vastly greater now than it was, and the value of money is proportionately less. Salaries and wages, with the exception of judges' salaries and solicitors' fees, have all been largely increased during the past twenty years. The present tariff of fees for solicitors, at least in the Province of Ontario, is simply ridiculous. When judges claim that their salaries ought to be increased, it does not seem to occur to them as vividly as it might, that the same reason for such increase applies also to solicitors. It would be quite in order for them to come to the relief of those who have loyally supported them in the premises, by revising the present tariff. "Do as you would be done by," is an appropriate exhortation on this occasion. Another matter connected with this subject is the disproportion between the remuneration to High Court judges and their brethren of the Court of Appeal. The latter should, on principle, be entitled to more than the former, but in fact they receive less. It might be desirable and, perhaps, it would be good policy, at the present time, to continue the crusade on behalf of appellate judges only. A step gained in that direction would eventually be helpful to the others.

We have before us the judgment of Mr. Justice Townshend, in five Nova Scotia Cases, *McDonald and others* v. *Warwick Gold Mining Co.* (post p. 399). Some of the claims in these cases were for work and labor, and others for goods sold and delivered. Applications were made for summary judgment under Nova Scotia Order XIV., which corresponds with the English Order XIV., in its latest amended form. We may remark also, that Nova Scotia Order III., Rule 5, corresponds with English Order III., Rule 6. The learned judge, in his judgment, remarks: "What constitutes a liquidated demand, which may be specially endorsed, has been the subject of much controversy in England, Ireland and Ontario, but as far as I am aware, it is raised for the first time here." We notice that the judge follows the line of reasoning taken in what he describes as the "very full discussion of the point to be found in 39 C.L.J. pp. 259 and 545, by Mr. Alexander MacGregor." In view, however, of the subject being new he gave leave to the parties to bring the matter before the full court.

APPEALS TO THE KING IN COUNCIL.

We have received from Mr. Donald MacMaster, K.C., Batonnier of the Montreal section of the bar of Quebec, a memorandum recently sent by him to his Council, calling attention to some anomalies and encumbrances in connection with the bringing of appeals to the King through the Judicial Committee of the Privy Council.

As our readers are aware, appeals from colonial possessions go to the Judicial Committee—that is to say to the King in Council, and appeals from the courts of the British Isles to the House of Lords—that is to the King in parliament. There are many who think that there should be but one general court of Appeal for the Empire, whilst others, favor the view that there should be no appeal beyond our own Supreme Court, except in constitutional matters. Whilst this is not our opinion, we recognize that the present condition of things, connected with appeals to England, strengthens the hands of the latter class.

Mr. MacMaster, in calling attention to the present practice, says, that it is usual to engage a firm of English solicitors, so

that there are usually three sets of legal gentlemen engaged in connection with these appeals, (1) the Canadian counsel; (2) the English solicitors, and (3) the English counsel. This, of course, entails considerable expense, and the suggestion is that this expense ought to be and can be considerably reduced. His proposition is "that under the rules covering the procedure in the Privy Council, an agent might be appointed to represent the party appealing, and another to represent the respondent, and that these agents might be two of the clerks in connection with the Canadian High Commissioner's office, in London. Their main function would be to file the record and the cases or factums of the parties, to receive notice from the Privy Council office when the case is coming on for hearing, to give notice to the respective principals, to arrange for consultation between the counsel, and to report the result of the hearing." This course would do away with the very unnecessary charge resulting from the employment of English solicitors to do merely routine work. He also calls attention to the absurd charge made by the English solicitors for "perusing the record." This item is a relic of a previous state of things when the record was prepared in England. Now it is almost universally prepared and printed in this country.

The other matter referred to by Mr. MacMaster is the antiquated and embarrassing procedure in connection with compelling a party to appear and file his case. Should it be necessary to serve papers in procedure of this kind, notices are to be posted or affixed in two conspicuous places in the city, namely, the Royal Exchange or Lloyd's Coffee House. We learn "that this quaint old custom dates back to the times when captains of outward bound ships used to meet and make a note of these summonses." Members of the legal profession are apt to be somewhat conservative, but this is rather too much of a good thing; and so Mr. MacMaster suggests that the office of the High Commissioner or agent of the colony from which the appeal comes would be a much more appropriate place for posting notices. It seems odd, as he remarks, that in these days of progress the utter uselessness and absurdity of this procedure never seems to have occurred to those in authority. We have no doubt that this remonstrance of Mr. MacMaster will cause some emendation of the practice. We trust it may.

EVIDENCE OF ACCUSED PERSONS.

A statutory rule prohibiting comment by the prosecuting counsel upon the failure of the accused, either to testify on his own behalf, or to call his wife as a witness in a criminal case, is contained in the Canada Evidence Act, 1893, s. 4. This was viewed as prohibitive, and not as directory only, in the Nova Scotia case of *The Queen* v. *Corby* (1898) 1 Can. Cr. Cas. 457, and its infraction resulted in a conviction being set aside and a new trial ordered. The same doctrine was applied in the more recent decisions of *The King* v. *Hill* (1903) 7 Can. Crim. Cas. 38, by the Supreme Court of Nova Scotia, although the prisoner's counsel was the first to comment on the absence of the prisoner's wife as a witness. The prisoner's counsel had there suggested in his address to the jury an explanation of the failure to have the wife present as a witness at the trial, and the prosecuting counsel was thus led into commenting in answer. The court granted a new trial, holding that the section specified is an absolute mandate.

The same rule is contained in the Criminal Evidence Act, 1898 (Imp.), and that Act is also silent as to what is to be the result should the prosecution disregard the prohibition. But it is interesting to note that in Scotland a different interpretation is given to it from that which obtains here.

The *Law Times* (England), in a recent issue says: "The learned editor of the last edition of Best on Evidence expresses the opinion (at p. 521) that any comment by the prosecution on an accused person's failure to go into the box would be sufficient to vitiate the proceedings and render voidable any conviction obtained. As appears from two decisions, reported in the last issued part of the Session Cases, the judges of the High Court of Judiciary are not disposed to take so serious a view of the consequences of disobedience to the statutory injunction. In each of the two cases in question it was sought to set aside a conviction on the allegation that the prosecutor had commented upon the fact that the accused had not given evidence on his own behalf, but in each case the judges, while stating that the statutory direction ought to be scrupulously observed, nevertheless thought that the mere fact of its transgression was not enough to entitle the accused to acquittal, and they accordingly refused to quash the convictions: *Ross* v. *Boyd*, 5 F. (J.C.) 64; *M'Attee* v. *Hogg*, 5 F. (J.C.) 67. Both appellants

cited the case of *Charnock* v. *Merchant*, 82 L.T. Rep. 89 ; (1900) 1 Q.B. 474, where a conviction was set aside because the prosecutor, in disobedience to another direction of the statute, asked an accused who had tendered himself as a witness whether he had been previously convicted, which question the accused answered in the affirmative. The court, however, regarded this case as distinguishable, inasmuch as the prosecutor's disregard of the statute had there resulted in the admission of incompetent evidence, which was a different matter from the making of incompetent or improper observations. The result seems to be that the statutory direction that no comment is to be made on the accused's failure to give evidence stands, in Scotland at least, as a bare injunction and nothing more." It occurs to us, however, that the statute is more than a mere exhortation, and the better view, it seems to us, is the one propounded in the Nova Scotia cases above referred to.

North Carolina attorneys, if the press is to be believed, have figured out a pretty good way of getting even with an unpopular judge. It would seem that this specimen of the genus judex has made a point of conducting himself with such marked discourtesy to counsel that the lawyers of that particular county recently entered into a most solemn compact between themselves to refrain from appearing in his court. Wherefore, when his Honor opened court a short time ago he found nineteen cases on the trial docket, but not a member of the bar present. It is said that he has contempt proceedings in contemplation, but the lawyers of the county seem disposed to regard his threats with levity. Boycotting an unpopular member of the judiciary appears to be a rather novel proceeding, but in view of the calibre of some of the specimens which, unfortunately, acquire a position on the bench, this remedy would seem to be occasionally needed. It is to be hoped that it will work well in the present instance.—*American Lawyer.*

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

LANDLORD AND TENANT—RESTRICTIVE COVENANT—COVENANT BY LANDLORD WITH LESSEE "NOT TO LET" ADJOINING PREMISES FOR SIMILAR BUSINESS TO THAT OF COVENANTEE—BREACH OF COVENANT—INJUNCTION—DAMAGES.

In *Brigg* v. *Thornton* (1904) 1 Ch. 386, the plaintiff leased certain premises in an arcade from the defendant Thornton for the business of a fine art dealer, and Thornton covenanted with the plaintiff not to let any of the other shops in the arcade for carrying on any similar business. Thornton subsequently let a shop to one Grant for the purpose of carrying on a bookselling and stationery business, and in carrying on such a business Grant sold certain articles commonly sold in such a business, but which were also usually included in the plaintiff's business. The plaintiff claimed an injunction restraining Thornton from letting the shop let to Grant or any other shop in the arcade, and Grant from using the shop, or any other shop in the arcade, for any of the purposes deseribed in the plaintiff's agreement. The Vice-Chancellor of the Palatine Court granted an injunction as prayed. On appeal, however, the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.), varied his judgment. Although they conceded that the plaintiff might have framed his case to set aside the lease to Grant as a breach of the covenant, yet they found that he had not done so, his claim being to restrain Thornton from letting or allowing to remain let, and Grant from using the premises for the purpose of carrying on a similar business to that of the plaintiff and the Court of Appeal found that as the plaintiff had elected as against Grant to treat the lease to him as a subsisting lease, the only remedy they were entitled to was damages against Thornton for breach of contract, with costs, and they dismissed the action as against Grant with costs.

WILL—CONSTRUCTION—PRECATORY TRUST—ABSOLUTE GIFT "IN CONFIDENCE" THAT DONEE WILL MAKE A CERTAIN DISPOSITION—GIFT OVER IN DEFAULT OF DISPOSITION BY ABSOLUTE DONEE.

In re Hanbury, Hanbury v. Fisher (1904) 1 Ch. 415, was the case of a "home-made" will. By it the testator bequeathed and devised all his estate to his wife "absolutely in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will, shall, at her death, be equally divided among the surviving said nieces." The testator left his wife and seven nieces surviving. An originating summons was obtained by the widow for the purpose of getting a construction of the will. She claimed that the will gave her an absolute right to the property, and the expression of the testator's 'confidence' that she would make a certain disposition of it did not impose any trust or limit her absolute right to the property. Kekewich, J. agreed with this, and held the widow solely and absolutely entitled, and the Court of Appeal Williams, Stirling, and Cozens-Hardy, L.JJ., affirmed his decision. Cozens-Hardy, L.J., however, dissented and considered that the widow only took a life estate, but that if all the nieces predeceased her, her estate would become absolute, and that in case they survived her they would be entitled in such shares as the widow might appoint, and in default of appointment in equal shares.

WILL—CONSTRUCTION FORFEITURE CLAUSE—WHETHER FORFEITURE CAN BE INCURRED BEFORE DEATH OF TESTATOR.

In re Chapman, Perkins v. *Chapman* 1904 1 Ch 431. A testator, by his will, provided that "if any son or daughter shall" alienate his interest, or "shall contract any marriage forbidden by me" then "his or her share shall thenceforth cease and determine." The testator declared that the marriages forbidden by him were marriages with a person of any degree of kindred, unless more remote than third cousin, and also in the case of a daughter's marriage, contracted without the previous consent of the trustees of his will. By *Metcalfe* v. *Metcalfe* (1891) 3 Ch. 1 (noted ante vol. 27, p. 550), it was laid down that a forfeiture clause of a will providing

that in the event of alienation by, or bankruptcy of, a legatee his interest shall cease and determine, applied to acts committed after the date of the will, but before the testator's death; and the question was whether that rule applies generally to all forfeiture clauses, including such as that in the present case of marrying within forbidden degrees; one of the daughters of the testator having married, during the lifetime of the testator, her first cousin. Kekewich, J., came to the conclusion that it did apply; but the Court of Appeal (Williams, Stirling and Cozens-Hardy, L JJ.), determined that it did not, and that the will in question, on its face, shewed that the acts of forfeiture in the testator's contemplation, were acts occurring after his death and, therefore, as to marriage within the forbidden degrees, the clause must be held to apply only to such marriages contracted after his death; the reason why a different rule applies to forfeitures in case of alienation or bankruptcy is, as Lindley, L J., explained in *Metcalfe* v. *Metcalfe*, supra, in order to give effect to the obvious intention of the testator to secure the personal enjoyment by the legatee of the property left to him by the will.

SETTLEMENT—COVENANT TO SETTLE AFTER ACQUIRED PROPERTY—CONSTRUCTION—ANNUITY.

In re Dowding, Gregory v. *Dowding* (1904) 1 Ch. 441, involved the question whether a general covenant to settle after acquired property, whether in possession of covenantor or otherwise, affected an annuity for life acquired by the covenantor during coverture. Kekewich, J., held that unless there was something in the covenant expressly making it applicable to such an interest it would not be caught by the covenant. As he points out, if the contrary were the case it would have the effect of necessitating the conversion of each instalment of the annuity into capital so that only the interest thereon alone would have been payable to the cestuis que trust of the settlement, a result which could not be deemed to have been the intention of the parties.

SEPARATION DEED SETTLEMENT BY SEPARATION DEED ON CHILDREN OF MARRIAGE RESUMPTION OF CO-HABITATION.

In re Spark, Spark v. *Massey* (1904), 1 Ch. 451, shews that the general rule that a separation between husband and wife is put an end to by the parties subsequently resuming co-habi-

tation is subject to an exception in favour of children taking an interest under the deed. In this case a separation deed had been made and thereby the husband had assigned property to trustees for his wife for life, and after death, for the benefit of the existing children of the marriage. The parties afterwards resumed co-habitation, and Kekewich, J., held that the settlement in favour of the children was not affected thereby.

HUSBAND AND WIFE—MARRIAGE—EVIDENCE OF MARRIAGE—PRESUMPTION FROM CO-HABITATION.

In re Shepherd, George v. *Thyer* (1904) 1 Ch. 456. A summary application to determine the question of legitimacy. The parties in question were the children of an English man and woman who, in 1873, left England for France, with the intention of getting married. They landed in France, travelled some distance on the railway and then went through a form of marriage. Neither of them could recollect the name of the town where they landed, or the place where the alleged marriage took place, and neither of them knew the French language. The marriage was arranged by a lady, who took them to the place where they were married, and witnessed the marriage, but she had been dead many years. The ceremony was performed in French. The alleged wife said that she did not sign any document but put on a ring. They returned to England and ever since three weeks after their return, in 1873, had lived together as man and wife, and had issue nine children, of whom six were living, whose legitimacy was in question. On this state of facts Kekewich, J., held that even assuming that the alleged marriage was impossible, according to French law and the habits of law abiding people in France, yet that was not sufficient to rebut the legal presumption in favour of their having been a valid marriage arising from the long-continued co-habitation of the parties as man and wife and, therefore, gave judgment in favour of the legitimacy of the children.

VENDOR AND PURCHASER—VENDOR RECEIVING RENTS AFTER DATE FOR COMPLETION—APPROPRIATION OF PAYMENTS—ARREARS OF RENT DUE BEFORE DATE FIXED FOR COMPLETION, BUT PAID AFTERWARDS.

In *Plews* v. *Samuel* (1904) 1 Ch. 464, Kekewich, J., decided that where a vendor continued in possession of the property sold after the day fixed for completion, and received rents, he was not

entitled as against the purchaser to appropriate such payment to arrears, if any, due before the date of the contract.

HUSBAND AND WIFE—POST NUPTIAL SETTLEMENT—TRUST FOR WIFE DURING CO-HABITATION—PUBLIC POLICY.

In re Hope Johnstone, Hope Johnstone v. *Hope Johnstone* (1904) 1 Ch. 470. Kekewich, J., held that a trust in a post nuptial settlement, made by a husband in favour of his wife for life "or so long as she shall continue the co-habiting wife or widow" of the settlor, was valid and effectual and not contrary to public policy, and that on the husband and wife ceasing to co-habit the trust in her favour ceased.

PARTNERSHIP—ARTICLES OF PARTNERSHIP—EXPULSION OF PARTNER—BREACH OF DUTY AS PARTNER—CONVICTION OF PARTNER FOR FRAUD—INTERIM INJUNCTION TO RESTRAIN EXPULSION OF PARTNER.

Carmichael v. *Evans* (1904) 1 Ch. 486, was an action by a partner for an injunction to restrain his co-partner from expelling him as a partner. The articles provided that if either of the junior partners became "addicted to scandalous conduct detrimental to the partnership business," or should be guilty of "any flagrant breach of the duties of a partner" the senior partner might expel the offender on giving him six days' notice. The plaintiff, one of the junior partners, had been convicted by a police magistrate for travelling without a ticket, and fined, and was thereupon served with notice of expulsion, and now applied for an interim injunction to restrain his expulsion. Byrne, J., refused the motion on the ground that as the fact of the plaintiff having been convicted of dishonesty was not denied, the notice of expulsion was justified.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ex. C.] McARTHUR *v.* THE KING. [April 27.

Public works—Lands injuriously affected—Closing highway—Inconvenient substitute.

The owner of land is not entitled to compensation where by construction of a public work he is deprived of a mode of reaching an adjoining district and obliged to use a substituted route which is less convenient.

The fact that the substituted route subjects the owner at times to delay does not give him a claim to be compensated as it arises from the subsequent use of the work and not its construction and is an inconvenience to the public generally.

The general depreciation of property because of the vicinage of a public work does not give rise to a claim by any particular owner.

Where there is a remedy by indictment mere inconvenience to an individual or loss of trade or business is not the subject of compensation.

Judgment of the Exchequer Court, 8 Ex. C.R. 245; 39 C.L.J., 445, reversed. Appeal allowed with costs.

Chrysler, K.C., for appellant. *Maclennan*, K.C., and *Maclennan*, for respondent.

Ont.] MIDLAND NAVIGATION CO. *v.* DOMINION ELEVATOR CO. [April 27.

Shipping—Time limit for loading—Loading at port—Custom—Obligation of charterer.

A ship, by the terms of the charter, was to load grain at Fort William before noon, Dec. 5.

Held, affirming the judgment of the Court of Appeal (6 O.L.R. 432, 39 C.L.J., 782), GIROUARD and NESBITT, JJ., dissenting, that to load at Fort William meant to load at the elevator there; that the obligation of the shipowner was to have the vessel placed under the elevater in time to be loaded before the expiration of the time limit; and where, finding several vessels ahead of him, the captain saw that he could not be loaded by the time fixed and left to save insurance, the obligation was not fulfilled and the owner could not recover damages. Appeal dismissed with costs.

Borden, K.C., and *Hodgins*, K.C., for appellants. *Aylesworth*, K.C., and *Moir*, for respondents.

Ont.] WATER COMMISSIONERS OF LONDON *v.* SAUNBY. [April 27.

Water commission—Act of incorporation—Construction—Appropriation of water—Power.

The Act for construction of waterworks in the City of London empowered the commissioners to enter upon any lands in the city or within 15 miles thereof and set out the portion required for the works, and to divert and appropriate any river, pond, spring or stream therein.

Held, (SEDGEWICK and KILLAM, JJ., dissenting) that the water to be appropriated was not confined to the area of the lands entered upon, but the commissioners could appropriate the water of the River Thames by erection of a dam and setting aside of a reservoir; and that such water could be used to create power for utilization of other waters and was not necessarily to be distributed in the city for drinking and other municipal purposes. Appeal allowed with costs.

Aylesworth, K.C., and *Meredith*, K.C., for appellants. *Hellmuth*, K.C., and *Ivy*, for respondents.

N.B.] MILLER *v.* ROBERTSON. [April 27.

Court of Equity—Title to land—Declaratory decree—Cloud on title—Injunction—New grounds of appeal.

A Court of Equity will not grant a decree confirming the title to land claimed by possession under the Statute of Limitations nor restrain by injunction a person from selling land of another.

Per TASCHEREAU, C.J.—Where leave to appeal per saltum has been granted on the ground that the court of last resort in the Province had already decided the question in issue the appellant should not be allowed to advance new grounds to support his appeal. Appeal allowed with costs.

Gormully, K.C., and *Fred. Taylor*, for appellant. *Teed*, K.C., for respondent.

N.B.] MADDISON *v.* EMMERSON. [April 27.

Crown lands—Adverse possession—Grant during.

Though there has been adverse possession of Crown lands for more than twenty years, the Act 21 Jac. 1, c. 14, does not prevent the Crown from validly granting the same without first re-establishing title by information of intrusion. DAVIES, J., dissenting.

Judgment appealed from (36 N.B. Rep. 260) reversed.

Powell, K.C., for appellant. *Pugsley*, K.C., and *Friel*, for respondent.

Ont.] OTTAWA DAIRY CO. *v.* SORLEY. [April 27.

Joint Stock Company—Subscription for shares—Principal and agent—Authority of agent—Conditional agreement.

S. signed a subscription for shares in a company to be formed and a promissory note for the first payment, both of which documents he delivered to the promoter of the company to which they were transferred after incorporation. In an action for payment of calls S. swore that the stock was to be given to him in part payment for the goodwill of his business which the company was to take over. The promoter testified that the shares subscribed for were to be an addition to those to be received for the goodwill.

Held, that though S. could, before incorporation, constitute the promoter his agent to procure the allotment of shares for him and give his note in payment, yet the possession by the promoter did not relieve the company from the duty of inquiring into the extent of his authority and whichever of the two statements at the trial was true the promoter could not bind S. by an unconditional application. Appeal dismissed with costs.

McVeity, for appellants. *Fraser*, K.C., and *Burbidge*, for respondent.

Province of Ontario.

COURT OF APPEAL.

From Divisional Court.] [Jan. 25-26.

PUTERBAUGH *v.* GOLD MEDAL FURNITURE COMPANY.

Libel and slander—Publication—Privilege—Dictating letter to stenographer.

Appeal from judgment of Divisional Court, reported 5 O.L.R. 680., allowed on the ground that as to publication and privilege this case cannot be distinguished favourably to the defendants from that of *Pullman v. Hill*, [1891] 1 Q. B. 524, the Court not being at liberty to refuse to follow that case unless it could see that it is opposed in principle to other authority binding upon the Court,—subject, however, to the plaintiff consenting to reduce the damages to $50. Otherwise the order for a new trial to stand on the ground of excessive damages, and the appeal to be dismissed with costs.

Du Vernet, for plaintiff, appellant. *F. C. Cook*, for defendants, respondents.

From Maclennan, J.A.] CENTAUR CYCLE CO. *v.* HILL. [Feb. 29.

Court of appeal—Security—Money paid into Court—Payment out after purpose answered—Further appeal.

A party who has paid money into Court as security upon his appeal to the Court of Appeal is entitled, after his appeal has been allowed with costs, to take the money out, although his opponent is prosecuting a further appeal to the Supreme Court of Canada or the Judicial Committee of the Privy Council. An appeal to the Court of Appeal is a step in the cause, but a further appeal is not so.

Order of MACLENNAN, J.A., affirmed.

C. W. Kerr, for defendant Hill. *Middleton*, for plaintiffs.

From Boyd, C.] HIGHWAY ADVERTISING CO. *v.* ELLIS. [April 18.

Company—Promoter—Fiduciary capacity—Profit—Action to recover.

The defendant Hotchkiss was the owner of a patent for certain improvements for advertising boards, and in April, 1898, induced the other defendants to take an interest in it with him with a view to introducing the patented article into public use, and it was agreed between them that each should have a joint interest in the patent and jointly endeavor to make it a successful undertaking. They then decided to form a company. Hotchkiss had not at this time actually assigned to the other defendants any interest in the patent, but he did this in June, 1898, pending the issue of the letters of incorporation, the expense of which the other defendants at the same time undertook to bear: and by agreement of even date the defendants agreed with one Maughan, to sell to the company when incorporated the patent and all improvements, in consideration of the company paying them $5,000 and crediting $45,000 in respect to 500 shares subscribed or to be subscribed by them. In August, 1898, after incorporation of the company an instrument was executed by the defendants and the company adopted and confirmed the agreement above mentioned, and the patent was assigned to the plaintiffs. The plaintiffs now sought to recover the $5,000 on the ground that the defendants when they made the agreement of June, 1898, to transfer to the plaintiffs, had become holders of the patent for the benefit of the plaintiffs, and were disentitled to any profit on the transaction.

Held, that the action must fail inasmuch as the defendants did not become promoters until after they had become entitled by agreement to interests in the patent, which were afterwards and before incorporation actually transferred to them.

Semble, that even if the defendants had acquired their interests without consideration that would be of no consequence to the plaintiffs unless acquired for them.

Aylesworth, K. C., and *J. M. McEvoy*, for plaintiffs, appellants. *Shepley*, K. C., and *W. H. Irving*, for defendant Ellis, *Heighington*, for defendant McCutcheon.

From Divisional Court] HOPE *v.* PARROTT. [April 18.

Bills of sale and chattel mortgages—Security of form in absolute sale—Non-compliance with Chattel Mortgage Act—Invalidity.

In case of a transaction which is in effect one giving a security for an existing debt or loan, the lender or grantor cannot evade compliance with the sections of the Bills of Sale and Chattel Mortgage Act, R. S. O. 148, which relate to such a transaction, merely by adopting a form of security appropriate to an absolute sale. If, however, the real transaction is a sale with a right of repurchasing upon certain terms, the vendor can only be required to observe the requirements of section 6 of that act.

Held, therefore, in this case that since what purported to be Bills of Sale of certain goods were given in fact as transfers for security only, as was established by the facts of the case, as for example, by the fact that the consideration named had no relation to the selling price of the chattels, and that the chattels were intended to remain and did remain in the possession of the grantors, and were used by them without any rent or hire paid or agreed to be paid therefor, and the grantee admitted that from the first he expected to be repaid the consideration money, although he denied, apparently erroneously, that any right of redemption was reserved to the grantors at the time or as part of the transaction, the instruments were within ss. 2 and 3 of the said Act, and since the requirements of the said Act with regard to Chattel Mortgages had not been complied with, they were invalid.

Shepley, K. C., for defendant, appellant. *Master*, for plaintiffs, respondents.

From Britton, BRIDGMAN *v.* ROBINSON. [April 18.

Vendor and purchaser—Conditional sale—Recumption of possession—Implied contract.

Certain goods were delivered to the plaintiff by the vendor on the terms of two conditional sale agreements. The total price was $600, to be paid part in 30 days after delivery, and the balance in 3 months with interest. It was agreed that until payment in full the goods were to remain the property of the vendors, and that on default for one month of any of the payments, or of any extended payment, the whole balance of the purchase money should become due and the company, notwithstanding action or judgment recovered therefor, might resume possession and resell, etc. The plaintiff got into default although he continued in possession, and in August, 1902, an agreement was come to between him and the vendors that he should pay $50 on account, and the balance of $242, made up of arrears of principal and interest, in quarterly instalments of $30 with interest. The plaintiff paid the $50. In October, 1902, the defendant who had a judgment against the plaintiff paid the vendors the whole balance

due and procured an assignment and transfer of the goods to himself subject to the plaintiff's right. In November, 1902, the defendant went to the plaintiff's house and seized the goods. The plaintiff was not then in default under the agreement for extension of August, 1902.

Held, 1, the seizure was wrongful and the defendant liable to damages, because an implied contract arose between the plaintiff and the vendors from the delivery of the goods to the plaintiff on the terms of the receipts, that the right of resumption by the vendors should not be exercised—should not arise—while the goods remained in the plaintiff's possession until default had been made for one month of any of the payments provided for by the agreements "or of any extended payment," by which was plainly intended a default after an extension of time for payment

2. The fact that under the agreement of August interest was to be paid upon interest then in arrear as well as upon principal, was sufficient consideration for that new agreement.

3. The lowest measure of damages was the sum which the plaintiff had paid to the vendors on account of the price, inasmuch as this was the value of his interest in the goods which had been wrongfully taken out of his possession.

Tremeear, for defendant, appellant. *Denton*, K. C., for plaintiff, respondent.

From McMahon, J.] [April 18.

VICTOR SPORTING GOODS CO. *v.* HAROLD A. WILSON CO

Patents—Construction and sale of articles previous to patent—Right of continuing to sell after patent—Consent of inventor—R.S.C. c. 61, s. 46.

On March 7, 1901, the plaintiffs being manufacturers of sporting goods in the United States, lodged at Ottawa an application for a patent for a punching bag. On April 3, 1901, the defendants saw a description of it in a catalogue issued by the plaintiffs, and ordered and obtained from the plaintiffs a sample on which were the words "pat. applied for" and the plaintiffs' trade mark.

In May, 1901, the defendants had 100 punching bags manufactured in accordance with the sample, and inserted mention of the same under the name of the Wilson New Era Punching Bag, and illustrations thereof, in their annual catalogue issued in September, 1901, which illustrations were exact copies of the plaintiffs': and took no notice of a remonstrance from the plaintiffs in November, 1901, wherein the plaintiffs contended that their rights were protected by their pending application for a patent at Ottawa. In January, 1902, a patent was issued to the plaintiffs, but notwithstanding the patent the defendants insisted on their right to dispose of the remainder of the articles which they had manufactured in the previous May.

Held, that the defendants' contention must be sustained by virtue of s. 46 of the Patent Act, R.S.C. c. 61, whereby every person who before the

issuing of a patent, has purchased, constructed or acquired any invention for which a patent is afterwards obtained under this Act, shall have the right of using and vending to others the specific article, machine manufacture or composition of matter patented and so purchased, constructed or acquired before the issue of the patent therefor, without being liable to the patentee or his legal representatives for so doing'; and it made no difference that the defendants had done what they did without the consent and allowance of the inventor.

E. Bayly and *Eric Armour*, for defendants, appellants. *J.W. Nesbitt*, K.C., for plaintiffs, respondents.

From Meredith, J.] PATCHELL *v.* RAIKES. [April 18.

Municipal corporations—Bonus—Interest—Illegal payment—Liability of councillors—Arbitration and award.

In the year 1899 by special Act an agreement between the corporation of a town and a company was confirmed, by which, on completion of certain works, the company was to be paid a bonus. The works were proceeded with but alterations became necessary and a new agreement was entered into, in accordance with which the works were completed in January, 1900. In April of that year another special Act was obtained authorizing the payment of the bonus notwithstanding the alterations, nothing being said as to interest. The bonus was thereupon paid, and the company claimed payment of interest on the amount from the date of completion of the works. After some negotiation the town and the company agreed to obtain the opinion of counsel, who, on an incomplete (as was found) statement of facts advised the payment of the claim, and payment was made in spite of the protest of the plaintiff.

Held, in an action by the plaintiff on behalf of himself and all other ratepayers, that there was no right to interest; that the payment was illegal and a breach of trust; that there had not been an award by an arbitrator but merely an expression of opinion which was no protection and that the councillors who had authorized the payment, and the company who had received it, were bound to make good the amount to the corporation, which was made a party to the action to receive payment.

Semble, the council of a municipal corporation may perhaps refer to arbitration a question of fact falling within their ordinary administrative duties, but cannot refer a question of law.

Judgment of MEREDITH, J., reversed.

Kappele, for appellant. *Finlayson*, for respondents.

From Falconbridge, C.J.K.B.] [April 18.

CANADA COMPANY *v.* TOWN OF MITCHELL.

Assessment and taxes—Local improvements—General by-law.

The defendant corporation provided by a by-law under section 667 of the Municipal Act, that every petition for or against the construction of a sidewalk as a local improvement should be left with the clerk of the council

whose duty it should be to examine it, and to report at the next meeting of council whether it was sufficiently signed, what real property would be benefited and the respective frontages, and the probable lifetime and probable cost of the sidewalk. A petition for the construction of a sidewalk as a local improvement was handed to the clerk, who examined it and came to the conclusion that it was signed by two-thirds of the owners. It was on the same day presented to the council, who resolved that the petition should be granted, and that the clerk should determine forthwith whether the petition was sufficiently signed. The clerk immediately reported that it was sufficiently signed and his report was received and adopted, but he did not report as to the other matters. The council then proceeded under section 672 to have the work done, and on its completion the clerk prepared, and certified to the correctness of, a schedule of the frontages and assessments, etc., and the council passed a by-law directing the assessment of the lands, and, subject to appeal to the Court of Revision, adopted the particulars set out in the schedule and directed notice to be given to the owners affected.

Held, that the assessment was valid, the clerk's failure to observe the provision as to reporting at the next meeting of the council being a mere irregularity and not a fatal objection.

Judgment of FALCONBRIDGE, C.J., affirmed.

G. G. McPherson, K.C., for the appellants. *F. H. Thompson*, for the respondents.

Osler, J.A.] ROSS *v.* ROBERTSON. [April 20.

Appeal—Notice—Extending time.

Under the present practice relief will be granted against a slip in practice, such as in this instance the failure to give notice of appeal in time, whenever the justice of the case requires it, and no injury to the opposite party which cannot be compensated for by costs or otherwise has resulted

In considering what justice requires in such a case regard is to be had to the bona fides of the applicant; the delay, whether great or trifling, as affecting the question of prejudice to the opposite party; and, especially where the application is made after default, whether the appeal appears to be groundless or frivolous.

Where therefore a bona fide intention to appeal had been made out, the points raised were open to argument, and the delay was very short, no sittings of the court having been lost, leave to serve notice of appeal was given.

C. A. Moss, for applicant. *Slaght*, for defendant.

HIGH COURT OF JUSTICE.

Street, J.] ROSS *v.* ROBERTSON. [Feb. 1.

Limitation of actions—Account—Co-owners of land—Partnership—Principal and agent—Trustee—Outlay on land—Rents.

The plaintiff sold a half interest in land to the defendant, and they agreed to build houses thereon at their joint cost and to raise part of the money for the purpose by mortgages upon the property, and to contribute the remainder in equal shares. The houses were completed and rented in 1891; the defendant, who was on the spot, the plaintiff living in another province, collected the rents on joint account, and paid out of them the interest on the mortgages and the taxes and other outlays upon the property, sending accounts from time to time to the plaintiff. The plaintiff alleging that the defendant did not contribute his just share of the cost of the houses, and that he had not properly accounted for the rents, brought an action for an account on August 5, 1902.

Held, that the plaintiff was barred by the Statute of Limitations in respect of his claim as to the cost of the houses, and also with regard to the rents except for six years before the commencement of the action; the plaintiff and defendant were not partners, nor was the defendant an express trustee for the plaintiff; he was an ordinary agent without any special fiduciary character. *Coyne* v. *Broddy*, 15 A.R. 159; *Burdick* v. *Garratt*, L.R. 5 Ch. 233, and *Lyell* v. *Kennedy*, 14 App. Cas. 437, distinguished.

J. H. Moss, for plaintiff. *H. L. Drayton*, for defendant.

Street, J.] KNAPP *v.* CARLEY. [Feb. 6.

Master in Chambers, jurisdiction—Summary dismissal of action.

The Master in Chambers has no power under Rule 261 or otherwise to order the dismissal of an action upon the ground that no cause of action is shewn upon the plaintiff's own statement.

Grayson Smith, for plaintiff. *C. A. Moss*, for defendant.

Britton, J.] LANE *v.* CITY OF TORONTO. [Feb. 25.

Municipal corporations—Inquiry into municipal election—Powers of Council—Municipal Act, 1903, s. 324 (1)—"Good government of the municipality"—Ratepayer—Injunction—Conduct of inquiry—Evidence—Witnesses—Ballot papers.

Held, that the council of a city had power under s. 323 (1) of the Municipal Act, 1903, to order an inquiry by a County Court Judge into an election for members of the council and Board of Education, at which it was alleged that corrupt practices had prevailed; the election being a

"matter connected with the good government of the municipality," within the meaning of the enactment.

Held, also, that the High Court would not, in an action by a ratepayer for an injunction, interfere with the conduct of the inquiry by the judge in regard to the admission or rejection of evidence, the examination of ballot papers, compelling witnesses to answer incriminating questions, etc.

Dewart, K.C., for plaintiff. *Fullerton*, K.C., for defendant corporation. *Riddell*, K.C., for defendant Winchester.

Falconbridge, C.J.K.B., Street, J., Teetzel, J.] [Feb. 29.

ONTARIO WIND ENGINE AND PUMP CO. *v.* LOCKIE.

Conversion—Goods obtained by fraud—Sale to innocent purchaser—Title—"Agent"—"Intrusted with the possession"—R.S.O., c. 150.

One McK., who was in the habit of taking orders from persons desirous of obtaining the plaintiffs' machines, and forwarding the orders to the plaintiffs to be filled, but who was not employed by the plaintiffs to sell their machines, by a course of falsehood and forgery obtained a machine from the plaintiffs, which he sold to the defendant, and the price of which he received from the defendant, who believed that he was purchasing from McK., and did not know the plaintiffs in the transaction, while the plaintiffs believed they were selling to the defendant, having received an order for the machine and a promissory not for the price, both purporting to be signed by the defendant, whose signature was forged by McK.

Held, in an action for conversion of the machine, that McK. never had any title thereto, and, therefore, at common law could pass none to the defendant, and at common law there was no defence; nor was McK. an agent of the plaintiff, or "intrusted with the possession" of the machine, within the meaning of R.S.O. 1897, c. 159, and therefore the plaintiffs were entitled to succeed. Judgment of the County Court of Waterloo reversed.

Card and *Spence*, for plaintiffs. *Du Vernet*, for defendant.

Boyd, C.] IN RE BETHUNE. [March 2.

Will—Construction—Bequest to widow—Use during lifetime—Power to dispose of moiety by will.

The testator by his will gave to his wife all his real and personal property for her use during her lifetime, and directed that at her death his executors should sell the real and personal property and give one-half the proceeds to his cousin, and that his wife should make her will during her lifetime instructing his executors "who she wishes to give her half to among her relations."

Held, that the widow as entitled to one moiety absolutely and to a life enjoyment of the other moiety.

Middleton, for the widow. *Raymond*, for the executors.

Britton, J.] IN RE HASKILL AND G.T.R.W. CO. [March 28.

Railway — Expropriation of land — Notice — Withdrawal after taking possession — New notice for same land — Invalidity — Increase in compensation money — Arbitrator — Costs.

A railway company having given notice of requiring certain land for their railway and having taken possession of it, cannot abandon their notice and give a new notice for the same land. *Canadian Pacific R.W. Co.* v. *Little Seminary of Ste. Therese*, 15 S.C.R. 606, applied.

Where the company named in their new notice a larger sum of compensation money than in their original one, and a different arbitrator;

Held, upon a motion by the landowner to compel the company to proceed with the arbitration that although the new notice was ineffective, and the arbitration could proceed only under the original notice, the appointment of a new arbitrator should be confirmed (the landowner not objecting), and the company should be allowed to increase their offer, but not so as to prejudice the owner as to anything that might have occurred before the new notice, and the offer of the increased sum might be taken into consideration upon the question of costs.

W. F. Kerr, for landowner. *D. L. McCarthy*, for railway company.

Boyd, C.] IN RE ARCHER. [April 4.

Will.—Construction—Gift to a class—Ascertainment of persons entitled.

A testator bequeathed the sum of $500, as to income to be applied for the support of the testator's grandchildren, children of his son John, and as to principal to be paid to them equally as they respectively attained the age of twenty-one years.

Held, that the members of the class entitled to share were to be ascertained at the time when the eldest of the class attained the age of twenty-one years and that those grandchildren born after the death of the testatrix and before that time were entitled to share.

M. D. Fraser, and *F. P. Betts*, for various parties.

Idington, J.] DOYLE *v.* DIAMOND FLINT GLASS CO. [April 19.

Executor and administrator—Lord Campbell's Act—Action before administration.

An action was brought to recover damages because of the death of a workman, the plaintiff alleging that she was his widow. Her status was put in issue and she obtained letters of administration as the deceased's widow and by amendment claimed also as administratrix:

Held, that having failed to prove her status as widow she could not succeed as administratrix, the rule that letters of administration relate back

to the time of the bringing of the action not applying where the person setting them up was not really entitled to obtain them. *Trice* v. *Robinson* (1888) 16 O.R. 433, distinguished.

Clute, K.C., for plaintiff. *Shepley*, K.C., and *R. H. Green*, for defendants.

Anglin, J.] IN RE ZIMMERMAN. [April 20.

Dower—Equitable charge—Legacies—Mortgage.

A testator devised a farm to his son subject to the payment by him of certain legacies. The son mortgaged the farm, his wife joining to bar her dower, and paid the legacies out of the proceeds. The son died seized of the farm and the mortgage was then in force:

Held, that the son took under the will the legal seisin in the farm and not a mere equitable estate and that his widow was entitled to dower out of the full value of the land.

McLaughlin, K.C., for the widow. *Harcourt*, for the infants.

Teetzel, J.] IN RE CHAMPAGNE ST. JEAN *v.* SIMARD. [April 21.

Executor and administrator—Costs of unsuccessful action—Personal estate exhausted—Right to resort to real estate.

An executor without direct authority or obtaining indemnity brought an action to recover a sum of money alleged to belong to the testator, and this action was dismissed with costs, the personal estate being insufficient to pay the costs of the opposite party.

Held, that though the general rule is that an executor acting in good faith is entitled to be recouped his costs of an unsuccessful action, this rule would not justify the executor resorting for this purpose to specifically devise real estate.

Chrysler, K.C., for applicant. *G. F. Henderson* and *J. M. Hall*, for adult defendants. *Bethune*, for infant defendants.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [May 5.

REX *v.* POLLAKOFF.

Profanation of the Lord's Day, C.S.U.C., c. 104, s. 1 and 13—Canada Evidence Act, 56 Vict., c. 31, s. 3—General and special act—Implied repeal.

The defendant had been convicted before R. E. Kingsford, one of the Police Magistrates in and for the City of Toronto, for exercising his ordinary calling on Sunday.

On the hearing the informant was called and sworn as a witness for the prosecution. C.S.U.C. c. 104, s. 13, enacts by its closing paragraph "that the party who makes the charge in writing before the justice shall not be admitted as a witness in the case." 56 Vict. (Dom.) c. 31, s. 3, enacts "that a person shall not be incompetent to give evidence by reason of interest or crime."

Held, sanctioning the principle of *Arscott* v. *Lilley*, 14 A.R. 283, and applying the doctrine, generalia specialebus non derogant, that the latter fact did not operate to repeal the former in this respect.

Chisholm, for the prosecutor. *J. E. Jones*, for the defendant.

Anglin, J.] SMITH *v.* CLARKSON. [May 5.

Staying proceedings— Vexatious action—Security for costs.

A special assignment for the benefit of creditors had been made by the plaintiff and his then partner to the defendant, who realized the assets and wound up the estate. The defendant's accounts were after notice to the plaintiffs passed by a Surrogate Judge. The plaintiff then brought this action asking for an account and complaining of certain items of expenditure and compensation.

Held, on the evidence, that there were grave doubts as to the bona fides of the action; that an order to stay proceedings would be justified, but that in the exercise of discretion the action might be proceeded with upon security for costs being given.

Middleton, for defendant. *F. E. Hodgins*, K.C., for plaintiff.

Meredith, C.J., MacMahon, J., Teetzel, J.] [May 5.

REX. *v.* BIDGOOD.

Liquor License Act, R.S.O. c. 246, ss. 49, 97, 99—Jurisdiction of Police Magistrate—Evidence in writing—R.S.O. c. 87, ss. 18 and 30.

The defendant had been convicted before D. M. Brodie (alleging himself in the conviction to be Police Magistrate in and for the Town of Sudbury, but having his appointment for the District of Nipissing), for selling liquor without a license. R.S.O. c. 246, s. 97, requires that the offence of selling liquor without a license should be heard and determined by two justices, while s. 99 provides for the evidence being taken down in writing. Sec. 18, R.S.O. c. 87, authorizes the appointment of a Police Magistrate for a District, and s. 30 declares that "a Police Magistrate,

sitting as such shall have power to do alone whatever is authorized by any statute in force in this Province relating to matters within the legislative authority of the Legislature of the Province, to be done by two or more Justices of the Peace, and every such Police Magistrate shall have such power while acting anywhere within the county for which he is ex officio a Justice of the Peace." The evidence in the case had been taken in short-hand, and the notes afterwards extended.

Held, 1. The first part of s. 30 applies to every Police Magistrate, but under the last part only a Police Magistrate for a county might have sat elsewhere than at the place for which he was appointed.

2. The conviction should be amended by giving the Magistrates proper style of office.

3. The provisions of s. 99 are directory.

Reg v. *Scott*, 20 O.R. 646, followed.

W. N. Ferguson, for the defendant. *Cartwright*, K.C., for the Magistrate.

Teetzel, J.] REX *v.* WALTERHOUSE. [May 20

Habeas Corpus—Crim. code ss. 144 and 205—Assault on a constable—Erroneous description of offence.

The prisoner had been convicted on an information charging him with an assault upon a constable whilst on duty.

Held, that whether jurisdiction was enjoyed by Justices of the Peace to convict summarily under s. 144 or not, the expression "on duty" was not equivalent to "acting in the execution of his duty," which are the words of the section, and the prisoner was ordered to be discharged.

Bradford, for the prisoner. *Cartwright*, K.C., for the Crown.

Cartwright—Master in Chambers.] [April 25.

REX EX REL. SEYMOUR *v.* PLANT.

Municipal corporations—Councillors—Disqualification—Diversion of sinking fund.

The provisions of s. 4183 of the Consolidated Municipal Act, 3 Edw. VII., c. 19, do not apply to debentures payable in annual instalments, there being in such a case no "sinking fund" to be provided. *Reg. ex rel. Cavanagh* v. *Smith* (1895) 26 O.R. 632, distinguished.

Watson, K.C., and *J. Grayson Smith*, for relator. *Rodd*, for respondents.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [March 8.

DOMINION IRON AND STEEL CO. *v.* MCDONALD.

Statutes—Error in printing—Effect of amending Act—Absence of word giving retrospective effect.

The Assessment Act, R.S. (1900), c. 73, s. 4, sub-s. (p.), rendered liable to assessment property of the plaintiff company, which had previously been exempted. It was admitted that the words imposing the liability were not contained in the manuscript revision of the statutes but was inserted by error in printed copy deposited in the office of the Provincial Secretary, which it was declared should be held to be the original. By an Act of the following year, Acts of 1902, c. 25, the error was corrected by striking out of sub-s. (p.) of R S. c. 73, the word "exempted."

Held, 1. By this amendment the Court was precluded from coming to the conclusion that the insertion of the word exempted in the chapter of the Revised Statutes amended was a mistake, and inserted and printed accidentally; it being assumed in the amending Act that the section amended was in full force and effect from the time it came into operation, and the amendment being one that would be out of place if the legislature had intended from the first that the word should not be there.

2. In the absence of words giving the amendment a retrospective effect, it could not be so read, and the Act, as amended, would only apply to future assessments.

3. The liability of the plaintiff company having been fixed by R.S. c. 73, and there having been no appeal, the amendment would not have the effect of preventing the collection of the rate complained of.

H. A. Lovett, for plaintiff. *J. A. Chisholm*, for defendant.

Full Court.] HAWLEY *v.* WRIGHT. [March 8.

Electric elevator—Negligence of employee—Action by parent—Common law rule—Contributory negligence—Improper rejection of evidence.

Plaintiff's son, who was employed as a watchman by the Government of Canada, and boarded at home with his father, was killed as the result of an accident while attempting to leave a passenger elevator in defendant's building. The deceased had entered the elevator for the purpose of seeing a tenant whose office was situated on one of the upper floors of the building, and not finding the person in whom he desired to see had continued to ride up and down in the elevator. He finally attempted to leave the elevator as another passenger entered, and just as the boy in charge started

the elevator, and was in the act of closing the door, and was caught between the floor of the building and the upper part of the elevator cage, and received injuries from which he died. In an action by plaintiff personally and as administrator of deceased claiming damages the jury awarded plaintiff "for loss of deceased's services since death $1,500."

Held, that this part of the verdict could not be sustained without overruling the common law rule that in a civil court the death of a human being cannot be complained of.

On the trial evidence was offered of the proceedings in a judgment dismissing a former action brought by plaintiff as administrator suing for and on behalf of himself as father, and the mother of the deceased, under the Act corresponding to Lord Campbell's Act, in respect to the same alleged negligence.

Held, that the evidence was improperly rejected, and that for this reason also this part of the verdict could not stand.

The jury, in addition to the damages above mentioned, awarded "for damages to deceased's estate from the happening of the accident to death, and for necessary expenses $37.50."

Held, that there being no contract for safe carriage, and the case being simply one of tort for alleged negligence, the action died with deceased.

Held, also, that there was evidence of negligence on the part of deceased, in attempting to leave the elevator at the time he did, which contributed to the happening of the accident, and which should have been submitted to the jury.

The learned trial judge, in summing up, said to the jury: "I cannot understand, myself, how the negligence of the deceased contributed to this accident."

Held, that this was equivalent to telling them that there was no evidence of the fact, and was misdirection.

Held, also, that the direction to the jury, that if they found that deceased pushed open the closed door to get out they might find that there was contributory negligence, was calculated to hinder the jury from considering any evidence which they, themselves, might be able to discover tending to shew that there was contributory negligence.

D. McNeil and *W. F. O'Connor*, for plaintiff. *R. E. Harris*, K.C., and *W. E. Thomson*, for defendant.

Full Court.] FLYNN *v.* KEEFE. [March 8.

Negligence—Action against contractor—Damages for personal injury and shock—Not severable—Remedy where insufficient damages awarded.

Defendant, a contractor, engaged in the construction of a building in the city of H. obtained permission to enclose a part of the street with a fence during the progress of the work. A portion of the fence was made movable, so as to permit the passage of teams, etc. During the day time it was defendant's custom to move this portion of the fence to one side and

set it up against the stationary portion, leaving the area occupied by his workmen open to the street. The movable portion of the fence fell upon the plaintiff, M. K., while passing along the street, and caused injuries for which damages were claimed. The trial judge assessed the damages at $25, and ordered judgment in favor of plaintiff for that amount. Plaintiff's solicitor took an order for judgment for the amount awarded, taxed his costs, and immediately demanded payment from the defendant under threat that if not paid judgment would be entered and execution issued. Subsequently an appeal was asserted from the judgment in so far as the same restricted the damages awarded to external injuries suffered by M. K., and refused to allow damages for shock consequent upon such external injuries.

Held, dismissing the appeal with costs, that in order to succeed plaintiff must have the whole judgment set aside for errors alleged in the assessment of damages; that the case was not one in which the damages were severable: and that if the trial judge erred in not awarding greater damages the only course open to plaintiffs was to appeal.

W. F. O'Connor, in support of appeal. *R. E. Finn*, contra.

Full Court.] McECHEN v. McDONALD. [March 8.

Specific performance of agreement to convey land—Measurements controlled by description.

In an action, brought by plaintiff, claiming the specific performance of an agreement for the conveyance of land and a declaration that plaintiff was entitled to a reduction in the price of the land in proportion to the amount of land which defendants might be unable to convey. It appeared that defendants' testator entered into an agreement with plaintiff for the sale to him of "the house and premises on P. street, now occupied by Mrs. L., 32 feet more or less frontage on P. street, and 67 more or less in depth." It further appeared that the land in question measured 67 feet in depth on one side, but that on the other side, at the rear, a piece of land measuring 13 feet by 14, had been taken out of the land previous to the time at which it was acquired by defendants' testator, and was fenced off from the portion conveyed to deceased and occupied by L.

Held, 1. The implication as to the uniform depth of the lot which would arise from the measurements given ought not to prevail, there being a certain description expressed in the agreement, viz.: the occupation by L.

2. Assuming that the distance to the rear line, from the measurements given, must be equal, the case was one in which the maxim falsa demonstratio non nocet applied, it being absolutely necessary to take the occupancy of L. in order to obtain the base line.

3. The description answering to the holding of deceased ought to prevail over the implied description or subsequent addition which would be false.

G. A. R. Rowlings, for appeal. *H. A. Lovett*, contra.

Townshend, J.] [May 7.

McDONALD *v.* WARWICK GOLD MINING CO.

Special endorsement.

The writs of summons in five actions brought against the defendant company were specially indorsed, in four cases for so many days labour at so much per day, and in the fifth case for goods sold and delivered at a named price. On motion for judgment under the provisions of O. 14.

Held, dismissing the motion, costs reserved, that, to bring the claim within the terms of the order, it must be clearly shown in the endorsement that defendant agreed or contracted for the labour or the goods at the prices specified, and that the endorsement, being defective, could not be made good by affidavits showing a good claim for a specially indorsed writ.

H. B. Stair, for plaintiff. *E. P. Allisen*, for defendant.

COUNTY COURT, DISTRICT No. 1.

Wallace, Co. J.] McCOLL *v.* BOREHAM. [May 12.

Overholding Tenants Act, R.S. 1900, c. 174—Statute of Frauds—Oral letting.

An application was made by the original lessee for a writ of possession against a tenant, the lessee alleging that the tenant continued to occupy under a verbal agreement, sub-letting to him for one year which year had expired. The tenant alleged that the agreement to sub-let covered the whole period of three years granted by the landlord to the original lessee. There being a bona fide dispute as to the duration of the term for which the premises were sub-let, and the parties being equally reputable the judge held that the applicant had failed to establish that the tenant was wrongfully holding possession and a writ of possession was refused: *Re Myers v. Murrans*, 40 C.L.J. 317, and also, in addition to the cases there cited, *Moore v. Gillies*, 28 O.R. 358.

It was also contended on behalf of the applicant that even if the version of the tenant were accepted it appeared from such version that the oral agreement for the sub-letting for three years was made in January, 1902, and was for a term to begin in the following May and cover a period of three years from May, 1902, and was therefore void under the Statute of Frauds.

Held, following *Hodson v. Heuland*, 2 Ch. D. (1896) 428, that the continuance in possession after the parol agreement was a part performance of the contract sufficient to take the case out of the Statute of Frauds.

H. A. Lovett and *G. F. Pearson*, for original lessee. *A. A. Mackay* and *W. H. Fulton*, for tenant.

Province of New Brunswick.

SUPREME COURT.

En banc.] KING *v.* DELEGARDE. [April 22.

Summary conviction—Steps to appeal—Failure of magistrate to certify proceedings—Circumstances indicating fraud—Certiorari.

An information was laid before Delegarde, J.P., for assault against the applicant and one J. C. No summons was served, but the defendants having heard of the matter went to the magistrate and promised to enter into recognizance to appear. The magistrate then gave them a written notice, not in the form of a summons, stating when the trial would be held. Some days afterwards the applicant was informed by the magistrate that the trial would take place on the day stated, but a day or two later the defendants received through the mail a post-card from the magistrate stating that the trial was postponed until August 7, and that it would not be necessary to appear before then. On July 31 the applicant was arrested under a warrant and taken before the magistrate when the trial was proceeded with against both defendants notwithstanding the absence of J. C. Both were convicted. They gave notice of appeal to the County Court for the next November term. They asked the magistrate to certify the proceedings and duly entered into recognizance for the appeal, but the magistrate failed to certify the proceedings and the County Court Judge decided he could not go on with the appeal for this reason.

Held, 1. On motion to make absolute a rule nisi for certiorari to remove the conviction, that certiorari would lie notwithstanding section 887 of the Criminal Code, and notwithstanding the steps taken to appeal, the applicant having been thwarted in the prosecution thereof through failure of duty on the part of the magistrate.

2. The magistrate had no jurisdiction to proceed against both defendants in the absence of one of them, and there were circumstances indicating that the magistrate acted fraudulently, which of themselves would warrant the granting of the writ.

Rule absolute for certiorari.

G. G. Gilbert, in support of rule. *Barry*, K.C., for contra.

En banc.] READ *v.* MCGIVNEY. [April 22.

Negligence—Fire set by servant in violation of master's orders—Misdirection.

In an action brought in the York County Court to recover damages for the destruction of plaintiff's lumber and woodland by a fire alleged to have been negligently set by the defendant, and to have extended to the plaintiff's land, the defendant testified that he and a hired man, B., went to his fallow on the day in question (when a high wind was blowing during

the season of an unprecedented drought) for the purpose of clearing the land and piling up the remnants of fires which he had been burning the previous day, with a view of burning them at a future time; that he directed B. not to set any fires that day because of the danger from the wind, but that notwithstanding this B. did set fires, which extended out of the fallow. The trial judge directed the jury that if they believed that the defendant told B. not to set fire in the fallow and he did it in violation of orders the defendant was not responsible for the consequences.

Held, on appeal from a judgment of the County Court Judge refusing a motion for a new trial, that the trial judge was in error in the direction complained of; that there was evidence that the servant was acting within the scope of his employment and that unless it were found, as a matter of fact, that the servant was not so acting within the scope of his employment which question the direction complained of withdrew from the jury, the prohibition to the servant would not exempt the master from liability Appeal allowed with costs.

Crocket, for appellant. *Barry*, K.C., for respondent.

En banc.] ROYAL BANK OF CANADA *v.* HALE. [April 22.

Postponement of trial—Change of venue.

An application was made to Mr. Justice Landry at the Victoria Circuit in behalf of the defendant to postpone the trial of this cause for want of material and necessary witnesses. The application was granted but upon terms that the venue should be changed from Victoria to Carleton.

Held, on motion to rescind this part of this order that the defendant having shewn an unquestionable right to have the cause postponed in consequence of the absence of witnesses, and it being the first time that an application to postpone had been made, the trial judge was not justified in imposing as an additional term the change of venue.

Carvell, for defendant. *Connell*, K.C., for plaintiff.

Province of Manitoba.

KING'S BENCH.

Perdue, J.] FERGUSON *v.* BRYANS. [March 28.

Fraudulent preference—Assignments Act, R.S.M. 1902, c. 8, ss. 40, 48—Action by creditor to set aside preference when no assignment under Act—Amendment of statement of claim after expiration of time limited for suit.

This was an action commenced on the 2nd November to set aside as a fraudulent preference an assignment to defendant dated 5th September by one Cockerill of certain moneys payable under fire insurance policies

to secure defendant's claim against Cockerill. No assignment having been made by Cockerill under the Assignments Act, R.S.M., 1902, c. 8, plaintiff alleged that they brought this action "on behalf of themselves and all other creditors of Cockerill who are willing to join in and contribute towards the payment of the expenses thereof; but under s. 48 of the Act where there has been no assignment, such an action must be brought "for the benefit of creditors generally or for the benefit of such creditors as have been injured, delayed or prejudiced." On 4th Dec. plaintiff amended the statement of claim by adding, after the words above quoted, the words "and the same is brought for the benefit of the creditors generally of the said debtor." Sec. 40 requires that such an action should be brought within 60 days from the time the transaction impeached took place.

Held, that there was no suit brought for the benefit of the creditors generally, or of such as had been injured, delayed or prejudiced, to impeach the transaction in question until the amendment of 4th December was made, which was more than sixty days after the date of the impeached transaction; and that this objection was fatal notwithstanding the provision in in s. 48 (b) that "in case any amendment of the statement of claim be made, the same shall relate back to the commencement of the action for the purpose of the time limited by the 40th s. hereof."

The right to sue and the relief to be given are created by the statute and must be construed strictly. The amendments referred to in that provision must, in strict construction, be confined to allegations of law or fact upon which the relief is to be founded, and that provision presupposes an action to have been commenced in the form provided within sixty days.

If the suit had been instituted in the name of the plaintiffs simply, without any statement as to the capacity in which they were suing, the objection would have had less force; but here they stated specifically that they were suing, not on behalf of creditors generally or on behalf of the class of creditors mentioned in the statute, but on behalf of those only who should be willing to join in and contribute towards the payment of the expense of the suit.

Cases such as *Byron* v. *Cooper*, 11 Cl. & Fin. 556; *Dedford* v. *Boulton*, 25 Gr. 561; *Weldon* v. *Neal*, 19 Q.B.D. 394, and *Hudson* v. *Fernylaugh*, 61 L.T.N.S. 722, deciding that when defendants are added by amendment the suit must as regards statutes of limitation be taken as commenced against them only when they are so added, are analogous and so are cases in our own courts, as *Irwin* v. *Beynon*, 3 M.R. 14, and *Davidson* v. *Campbell*, 5 M.R. 250, decided under the former Mechanics' Lien Act as to material amendments made in plaintiff's bill after the expiration of the time limited by the statute.

On the merits, also, the findings of fact were in favour of the defendant, and that the impeached assignment was not a fraudulent preference within the meaning of the Act. Action dismissed with costs.

C. H. Campbell, K.C., A.-G., and *Haskin*, for plaintiff. *Howell*, K.C., and *Mathers*, for defendant.

Richards, J.] A. *v.* B. [April 18.

Scandalous matter in affidavits—Disclosure by solicitor of confidential communication from client.

Plaintiff's claim was for payment of $6,000 which she alleged defendant had received for her as the purchase money of certain real estate belonging to her which she had employed defendant to sell for her. She alleged that he had only paid over $500 of the money. Defendant who is a solicitor of this Court applied for an order for security for costs on the ground that the plaintiff was permanently resident out of Manitoba, and in support of the application defendant filed his own affidavit in which he set forth certain communications alleged to have been made by plaintiff to him as her solicitor and which, if true, showed that she was not legally married to her alleged husband, and stated in effect that plaintiff had returned to and was living with such alleged husband who was a non-resident. On plaintiff's application to have the affidavit taken off the files of the court, it was argued on behalf of the defendant that the facts thus sworn to were relevant to the question whether plaintiff was permanently resident out of the jurisdiction or not as tending to shew that she was greatly under the influence of the alleged husband and therefore likely to remain permanently with him.

Held, allowing an appeal from the Referee that the affidavit should be ordered off the files as containing matter which plaintiff was entitled to have treated as privileged from disclosure, and which was scandalous and irrelevant to the application. The facts sought to be set up rather weakened than strengthened the case for an order for security for costs as removing the presumption arising from the duty of a wife to remain with her husband. Defendant to pay the costs of the application and appeal forthwith after taxation, such taxation to be as between solicitor and client.

Ratts, for plaintiff. *Minty*, for defendant.

Richards, J.] ALLOWAY *v.* ST. ANDREWS. [April 18.

Real Property Act—Application for leave to file second caveat while first one stands.

The defendants applied for a certificate of title under the Real Property Act, R.S.M. 1902, c. 148, for a parcel of land bought in by themselves at a sale for arrears of taxes. The plaintiff filed a caveat claiming title under a former sale by the same municipality for arrears of taxes, and issues were ordered to be tried; first as to whether plaintiff had acquired a good title under the first tax sale, and, in the event of his succeeding in this,

second, as to whether defendants had acquired a title as against the plaintiff. Subsequently the plaintiff having acquired title to the same property through the original grantee of the Crown, applied under section 140 of the Act for leave to file a second caveat setting up such title without removal or dismissal of his caveat already filed.

Held, that such application could not be granted, for the Court has no jurisdiction to order the filing of a new caveat until after the discharge, lapse or withdrawal of an existing caveat.

Mathers, for plaintiff. *Heap*, for defendants.

Richards, J.] NEWTON *v.* SILLY. [April 26.

Fraudulent preference—Assignments Act, R.S.M., 1902, c. 8, ss. 38-42—Novation—Rescission of contract partly performed.

A. M. Monat & Co., general merchants, being indebted to the defendants, the Gault Bros. Co., Limited, amongst other creditors, and not making payments satisfactory to the Gaults, the latter pressed them for payment though not in a peremptory manner. The defendant, Silly, then offered to buy out Monat & Co.'s stock in trade if the Gaults would accept him as their debtor in the place of Monat & Co. The Gaults having agreed to do so, Silly bought the stock at 82½ cents on the dollar and bound himself to Monat & Co. to pay their debt to Gaults and to procure a release from Gaults to them. He then paid to Monat & Co. in cash the difference between the purchase money and the amount of their debt to Gaults and bound himself to Gaults to pay Monat & Co.'s debt to them and procured from Gaults and delivered to Monat & Co. a release to them in full. This release involved the release also of Gault's claim against one Brown, a guarantor of Monat & Co.'s debt to them to the extent of $1,200. Silly paid Gaults a part of the debt before this action. Within sixty days after the novation Monat & Co. made an assignment to the plaintiff as official assignee for the benefit of their creditors, and plaintiff then brought this action to set aside the transaction between the defendants, Silly and the Gaults as being fraudulent and void as against the plaintiffs and the creditors of Monat & Co. According to the finding of the trial judge, Gaults did not know Monat & Co. to be insolvent or have reasonable ground for suspecting that they were at the time when the arrangement was entered into, but entered into it partly because they thought Silly likely to be prompter in making payment than Monat & Co. and partly because they wished to secure him as a customer and expected to get him as such as a result of the arrangement.

Held, that as the contract had been partly performed and the parties could not be placed in substantially the same position as they occupied before it was made, it should not be rescinded. Giving the Gaults a right to rank on the estate, for dividends would not restore to them their rights

as against the members of the firm of Monat & Co. and as against Brown, which they had given up in good faith.

Quære, whether, in any case, a novation, such as here occurred, can be successfully attacked under the Assignments Act.

Haggart, K.C., and *Haskin*, for plaintiff. *C. P. Wilson*, for Silly. *Aikins*, K.C., for Gaults.

Perdue, J.] RYAN *v.* TURNER. [May 4.

Overholding tenant — Summary proceedings — Forfeiture for breach of covenant.

This was an application by way of summary proceedings under ss. 11-17 of the Landlords and Tenants Act, R.S.M. 1902, c. 93, as amended by 3 & 4 Edw. 7, c. 29, ss. 1-2, to recover possession of a hall let to defendants for five years from 1st November, 1901, at a rental of $15 per month. The lease as in writing under seal and the lessees by it covenanted that they would not permit the hall to be used for the purpose of dancing except to lodges renting the hall, and that any breach of that covenant should at once at the option of the lessor operate as a forfeiture of the lease.

The lessees having rented the hall to five young men not connected with any lodge for the holding of a dance, the lessor gave them a notice declaring the lease to be forfeited and demanded possession.

Held, following *Moore* v. *Gillies*, 28 O.R. 358, that under the statute as amended, the judge can now try the right of the tenant to hold over, and that defendants had forfeited the lease and that a writ of possession should be issued in the landlord's favour.

Taylor, for plaintiff. *Andrews*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] MILTON *v.* SURREY. [Nov. 20, 1903.

Evidence—Finding based on positive evidence.

Appeal from judgment of MARTIN, J., awarding the plaintiff damages for injury caused to his land by water cast thereon through a culvert built by the corporation. At the trial the contention between the parties was as to whether or not the construction of the ditch had increased the flow of water

over the plaintiff's lands; the plaintiff, who lived on the land and his witnesses swore that the flow was increased; some of the witnesses for the corporation swore that it was impossible while others swore that it was not likely.

Held, dismissing the appeal, that where the trial judge accepts positive in preference to the negative testimony the full court will not interfere unless he is clearly wrong.

Morrison, K.C., and *Whiteside*, for appellants. *E. P. Davis*, K.C., and *R. L. Reid*, for respondent.

Full Court.] [April 18.

PLATH *v.* GRAND FORKS & KETTLE RIVER R. W. Co.

Railways—Barbed wire fence—Injury to horse therefrom.

The company maintained along its line of railway through a farming country a barbed wire boundary fence without any pole, board or other capping connecting the posts: plaintiff's horse, picketed in his field adjoining, became frightened from some cause unexplained and ran into the fence and received injuries on account of which it had to be killed.

Held, that the fence was not inherently dangerous and therefore the company was not liable.

The test is whether the fence is dangerous to ordinary stock under ordinary conditions and not whether it is dangerous to a bolting horse.

Judgment of LEAMY, Co. J., reversed, IRVING, J. dissenting.

J. A. Macdonald, for appellant. *W. H. P. Clement*, for respondent.

COUNTY COURT.

Bole, C.J.] SHEAVES *v.* GILLEY. [April 12.

Maritime Law—Contributory negligence.

Action for damages caused by the defendants' tug steamer "Flyer" having run into and partially destroyed plaintiff's fishing net. On the night in question, plaintiff, about 9.30 o'clock, was fishing off the southern bank of the Fraser River, when he first saw the steamer, which was then a considerable distance west of his boat, coming up river to New Westminster. She was on her proper course, keeping the starboard shore aboard, both because of sailing regulations and owing to the fact that deep water lies along the southern bank. Plaintiff thereupon commenced to pull in his

net and shouted, but did not waive his lantern which showed only a white light and placed in the bow of the boat, the boat being north of the net, which thus drifted into the ship's channel, along which the steamer's course lay. It was too dark to make it possible to see a net in the water at any distance beyond a few feet from the point of observation. The steamer came along, passed plaintiff's boat on the south side, running within about 30 fathoms thereof when the accident complained of occurred. The captain of the tug swore that although on the look out for fishing boats, he heard no shouts and saw no signal that would indicate that he was too close to plaintiff's boat or that there was a net out and that in fact he did not know he had injured the net till plaintiff so informed him the following morning. The defendants claimed that there was contributory negligence on the part of the plaintiff and a non-observance of the provisions of R.S.C., c. 79, s. 2., article 10, which (a) requires fishing boats and open boats to have ready at hand a lantern with a green glass on the one side and a red glass on the other side, (c) a fishing vessel when employed in drift net fishing shall carry on one of her masts two red lights in a vertical line one over the other not less than three feet apart, and that plaintiff had not complied with article (a) or article (b), on the contrary he only exhibited a white light which according to article (c) of s. 2 would simply indicate he was at anchor. Sec. 7 of the Act, sub-s. (a) says that "vessel" includes every species of vessel used in navigation.

Held, that plaintiff was guilty of contributory negligence in not waiving his lantern and in displaying a signal which merely indicated a boat at anchor, not then engaged in drift fishing, and the defendants could not by the exercise of ordinary care and diligence have avoided causing the injury complained of. See *Radley* v. *L.N.W.R.W. Co.*, (1877) 46 L.J. Ex. (H.L.) 575.

Myers Gray, for plaintiff. *F. W. Howay*, for defendants.

Book Reviews.

A Treatise on the Law of Landlord and Tenant in Canada. By EDWIN BELL, LL.B., of Osgoode Hall, Barrister-at Law, joint author of Bell & Dunn's Law of Mortgages; 997 pp. Half-calf, $7.50. Canada Law Book Company.

As a result of the increase in values, following upon the growth of population, lands in this country are now held upon lease much more extensively than formerly, and the law of landlord and tenant has become one of the most important of legal subjects. No book on this branch of the law has been published in Canada for upwards of ten years, and

meanwhile a large body of statutory enactments and legal decisions relating to landlord and tenant has come into existence.

In this work the author presents a convenient and logical subdivision and arrangement of the subject. Part I deals with the relationship of landlord and tenant. Part II treats of the terms of their relationship, as, for instance, rent, etc. In Part III the rights and liabilities of the assignee of the term and the assignee of the reversion are considered. Part IV is a discussion of the modes of determining tenancies and of the rights and remedies of the parties upon determination. There is added in Part V a collection of forms both for conveyancing and for use in various proceedings relating to tenancies. The chapters on rent and distress are worthy of particular commendation as able and exhaustive treatises on these important subjects. The arrangement of the book is so excellent that the table of contents is in itself almost a sufficient guide to the reader, but a good index is added. The author, whose former works are favorably known to the profession, is to be congratulated upon this important addition to our legal literature. It may be added that the printing and binding are in the style of the best English law publications.

The Law of Contracts by THEOPHILUS PARSONS, LL.D. Ninth edition. Edited by John M. Gould. Boston: Little, Brown & Company, 1904.

In 1853 the learned author produced the first edition of "this monument in the law." This work is so well known, that it is only necessary to say that a ninth edition has just been issued by the enterprising publishers. Mr. Parsons has done for the United States what Mr. Addison did for England. In this country we need the former as well as the latter of these great works; for in several matters there must needs be, from similarity of conditions, a strong family likeness between contracts in the United States and the Dominion.

In the present edition, the author's text has occasionally been shortened and altered both to meet new orders of things, and also in view of the settlement by recent decisions of many points discussed in previous editions. The fact that some six thousand authorities are added in the present edition shews the amount of labour expended on the work by Mr. Gould. We notice that numerous monographic articles and notes are referred to in addition to the cases cited. English authorities also abound; but, of references to cases in our Courts, there is a lack, which might well be supplied in the next edition. The work is an encyclopædia as well as a treatise.