# Canada Law Journal.

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A bill was introduced at the last sittings of the Provincial Legislature of Ontario in reference to that clause of the Municipal Act which requires a seven days' notice to a municipality of an accident as a sine qua non to an action for negligence. As was pointed out in committee seven days is quite too short a time to give. In rural municipalities the time given is one month, which is short enough. The one-week clause was originally introduced at the suggestion, we understand, of the City of Toronto, the reason alleged being that in accidents caused by snow and ice it is necessary to make an immediate inquiry, but, as had to be admitted, to be of any benefit in such cases the notice would have to be given within a few hours. Owing to the matter having come up for discussion as the Municipal Committee was closing its sittings nothing was done. The law will doubtless, however, be amended next year, and certainly should be. At present it is one-sided and frequently works gross injustice.

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Another attempted item of legislation was that mortgages should no longer involve personal liability. Those who favour the measure argue in this way:—Those who have passed through land booms have seen how thoughtless even careful business men can become in giving covenants for balance of purchase money, thereby often beggaring themselves as well as causing disastrous complications in various business relations. It is true that the gambling spirit cannot be cured by Act of Parliament but anything that tends to check reckless speculation is in the right direction The Act as drawn could not become law, but there is a germ of reasonableness and propriety in it, and the principle involved is recognized as sound in some of the States to the south of us, where the practice is to give a mortgage which is merely a charge on the land, and if it is intended that there should be a personal liability in addition a bond is given for that purpose. There is much to commend in this practice. There is a manifest difference between a mortgage given as balance of purchase money and a mortgage to secure a loan. In the latter case there is some

reason for giving a mortgage on all you possess, present and prospective, but in the former it would seem reasonable to let each property bear its own burden. We should like to hear this matter discussed.

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## *SIR JOHN HAWKINS HAGARTY, D.C.L.*

On the 27th April last Sir John Hawkins Hagarty, ex-Chief Justice of the Province of Ontario, died at his residence in Toronto, at the ripe old age of 83. Although a man of somewhat delicate constitution he outlived most of his contemporaries, and was the last of the judges who occupied the Bench of this Province in 1857, and not a few of the subsequently appointed judges have preceded him to that bourne from which no traveller returns.

Sir John Hawkins Hagarty was the son of Matthew Hagarty, who formerly held the post of Examiner in His Majesty's Prerogative Court for Ireland. His father was a man of superior educatio , and from him his gifted son no doubt inherited both his fine literary tastes and also a predilection for the law. Sir John was educated at a private school at Dublin, from which he proceeded to Trinity College, Dublin, in his sixteenth year, but he could have hardly completed much more than one year at that well-known seat of learning when he left Ireland for Canada in 1834. His school education there terminated comparatively early, but he had nevertheless acquired a taste for literature, which was to him a life-long source of delight. On his arrival in Canada he went first to a farm near Bowmanville, but in the following year he reached Toronto, then but lately known as "Muddy little York," and there he continued to reside until his death.

Upon coming to Toronto he began the study of the law in the office of Mr. George Duggan, afterwards Recorder of Toronto, and who ultimately succeeded the Hon. Samuel Bealey Harrison as Judge of the County Court of York. In 1840 the future Chief Justice was called to the Bar of Upper Canada, and very soon attained a conspicuous position in its ranks. On the same day two other men signed the roll of solicitors, both of whom afterwards attained distinction, viz., Zacheus Burnham, for many years the highly-respected County Judge of Ontario, and Samuel Black Freeman, an eminent Queen's Counsel, who practiced in Hamilton.

Among other causes celebres he was concerned in the case of *In re John Anderson.* Among Mr. Hagarty's contemporaries were W. H. Blake, W. B. Richards, J. C. P. Esten, Adam Wilson, P. M. S. Vankoughnet, J. W. Gwynne, J. C. Morrison, and Lewis Wallbridge, all of whom were subsequently elevated to the Bench.

Shortly after commencing practice on his own account Mr. Hagarty formed a partnership with the late Hon. John Crawford, afterwards the Lieutenant-Governor of Ontario, and the firm of Crawford & Hagarty speedily established a large and lucrative business. The firm subsequently became Crawford, Hagarty & Ardagh, by the addition of Mr. W. D. Ardagh, who at the time of his death was County Judge at Winnipeg. At the Bar Mr. Hagarty acquired a high reputation as an acute and learned lawyer with great powers of persuasion before a jury. In 1850 he was created a Queen's Counsel, and in 1855 received the honorary degree of D.C.L. from Trinity College, Toronto.

Mr. Hagarty was appointed to a puisne judgeship in the Common Pleas on February 3rd, 1856. Sir W. H. Draper was created Chief Justice of that Court, the late Sir W. B. Richards being its other member. In that position Mr. Hagarty continued until 1863 when he was transferred to the Queen's Bench. In 1868 he went back to the Pleas as its Chief, and ten years later he went back to the Queen's Bench as Chief Justice. There he remained until 1884 when he succeeded the late John Godfrey Spragge as the Chief Justice of the Province and President of the Court of Appeal. This exalted position he held until 5th April, 1897, with entire satisfaction to his colleagues, the profession and the public, thus completing a judicial career of rather more than forty-one years.

After his retirement from the Bench a large and highly representative meeting of the Bench and Bar of the Province was held at Osgoode Hall, in June, 1897, at which an address expressive of the admiration and respect of all the members of the profession was presented to the late Chief Justice. (See 33 C.L.J., 476.) On the 28th September following Her Majesty was pleased to confer on him the dignity of a knight of the United Kingdom.

To say that he was a man of polished and ready wit does not express the brilliancy of many of the bon mots and clean cut but withal good natured sallies with which he often relieved the dull monotony of a prosy argument. With an even temper and genial

cheery manner was combined the courtesy of a gentleman of the old school. He was a sound and well read lawyer with a keen mind, rapidly grasping the salient points of a case, and quick to detect a fallacy.

Strongly conservative in his views he took no pleasure in change or modern freaks, legislative or otherwise, and cared not for the fusion of law and equity, preferring to the last the ways of the common law, in the law and practice of which he was an adept. As is well known he had a cultivated taste in general literature, and it is said of him, what can be said of few others, that he had read all the books in his large and carefully selected library, and to a remarkable extent he remembered what he read. In his leisure moments the late Chief Justice amused himself and delighted his friends by writing several short poems of no ordinary merit which should be collected and published, and we hope this may be done.

His career was the result of sterling ability and not due to politics or extraneous causes, for he sought no honors, but was on the contrary a modest, retiring man, who always deprecated being thrust into notority. His memory will be cherished by the profession as the memory of an able, conscientious and learned judge ever deserves to be, and he linked us to the best traditions of the Bench and Bar of old Upper Canada. To his large circle of private friends he was all that the profession recognized in him and much more, for they will have to mourn not only the loss of the public man, but also the kind friend whose wit and fancy and warm sympathies so often brightened the hours of social intercourse. He was above all a God-fearing man and a sincere Christian, his religion finding its chief utterance not so much in words as in quiet deeds of charity. He has gone to his rest, leaving the record of a well-spent life.

## *OUTRAGE ON THE WELLAND CANAL.*

From whatever point of view the recent attempt upon the Welland Canal may be regarded, the matter is a serious one, and, in its consequences, may be more serious still. Whatever the motive which prompted the action, from whatever source the funds required to carry it out were obtained, whatever association, social, political or commercial was concerned in it, the facts must be ascertained, and the actors made to pay the penalty due to a crime

so atrocious. And not only the facts, but the secret springs and motives which led to the crime and the ultimate effects which were intended, must be laid bare. And when this is done the people of this country, and of the Empire at large, will be more than justified in asking for some better protection than international law now seems to afford against the repetition of conduct of which this is not a solitary instance.

The evidence so far discloses nothing as to the motives of the criminals, or the objects of the crime. One thing indeed is clearly ascertained—the outrage was planned in American territory, and its perpetrators, so far as known, are American citizens. It is significant of the temper in which the men arrested were acting that the one who appeared to be the leader of the gang declared himself an American citizen, and impudently demanded that, on that account, the ordinary rules of procedure in criminal investigations should be set aside on his behalf.

Awaiting further developments, we may now consider the only two suggestions which are put forward as to the motives which inspired the outrage, and the objects to be promoted. Of these the one is that the object was commercial, the other that it was political. We are, in the first case, asked to believe that either an industrial association, or a company of business men engaged in the forwarding trade, and both dependent upon maintaining the advantages of Buffalo, and of the Erie Canal, over the St. Lawrence route, had determined to wreck the Welland Canal as a necessary link in that route, regardless of all moral considerations, all international obligations, and of the destruction of private as well as public property, and the almost certain loss of human life, which the success of the attempt would have brought about. We know, it is true, something of the lengths to which commercial companies, or combinations will go in order to crush rival enterprises, or secure greater profits. We know also too much of the cruel methods which industrial organizations have adopted to accomplish their ends; but nothing so audacious, or so outrageous, as to destroy the public property of a friendly state and in so doing endanger the lives and destroy the dwellings of unoffending workpeople has never yet been laid to the charge of either of these associations. If it should be proved that there is any foundation for such an accusation then indeed a new danger not only to the public peace, but to the comity of nations, has arisen which

must be dealt with, not only by domestic legislation, but also by international agreement.

If, on the other hand, the object of the outrage was political, we stand on more familiar ground, and are face to face with a danger not less serious because we have had to encounter it before. The nature of the attempt to destroy the canal, its folly and its wickedness; its callous disregard to human life; its audacity in projection, and its uselessness if accomplished; and lastly the clumsy way in which the details were carried out, are strongly suggestive of what we know of Fenian exploits of a similar character The probability of this suggestion being the correct one is enhanced by the fact of the close sympathy both in Ireland and America between the Fenian and pro-Boer elements. Each of these has striven to involve Great Britain in difficulties with foreign powers of which advantage might be taken either in Ireland or South Africa. An Irish agitator has been the chief speaker at pro-Boer meetings in the United States, and has been the most persistent in denouncing the conduct of the British Government. Why the people of Canada, who have neither act nor part in the government of Ireland, and who indeed have not been wanting in expressions of sympathy for the Irish cause, should be made the victims of Fenian machination has often been a puzzle to the people of this country, but, apparently, animosity to the British Empire is too strong in the Fenian mind for any minor consideration of either justice or reason.

It is, however, with the international aspect of the case rather than with the criminal vagaries of Fenian or Boer agitators that we are concerned. A retrospect of our relations with the United States is not indeed reassuring. Twice has the soil of this country been made the theatre of war with the avowed intention of holding the country by right of conquest, regardless of the wishes of the people. Two boundary disputes have been settled by the sacrifice, for the sake of peace, of our rights, and our interests; and it would appear that the one now pending can only be peacefully settled by a similar sacrifice. When an unauthorized attempt was made during the Crimean war to obtain men in New York for the British army an abject apology had to be made, and for the St. Alban's raid immediate compensation had to be paid, but the Fenian organization was allowed, openly and without hindrance and with the knowledge of the American authorities, to carry on

its preparations for the invasion of Canada, and not till the attempt had been made and failed did those authorities interfere. Yet when a claim for compensation was made for the injury done to this country it was peremptorily refused. The Alabama claims were paid twice over, but hardly an apology was made for the blood shed by American citizens at Ridgeway and Fort Erie.

Coming now to the present time, we find that there is going on in the United States an anti-British agitation of just such a nature as to lead to the commission of outrages akin to that of destroying the Welland canal. All that has been said about the obligation of the United States to Great Britain for her action during the war with Spain is disregarded or forgotten. Not only is Great Britain denounced for an alleged attempt to destroy the independence of the South African Republic, but the people of the United States are told that the existence of Canada, under monarchical institutions, is something that good Americans cannot, and ought not, to tolerate. By the leaders of one of the great parties, intervention in South Africa is demanded, and the feeling in favor of it is said to be so strong that the other party, whatever their convictions may be, dare not oppose it. Upon this overt act of hostility to Great Britain the result of the presidential election is said to depend, and we in Canada are told that we must patiently abide the result of the humors of an irresponsible mob which must be petted and indulged, but not controlled, so as best to suit the interests of the unscrupulous politicians to whom the destinies of the republic are committed.

It would, no doubt, be unreasonable to hold Mr. McKinley and his cabinet responsible for the sayings and doings of Mr. Bourke Cochrane and Mr. Webster Davis, though the latter was lately holding an important office. In fact it is not with a government able to control and answer for the people, such as we find in other parts of the civilized world, that we have to deal, but with an irresponsible mob. What avails it that there is, as we are told, a fraction among the American people who are neither ignorant, nor prejudiced, and upon whose good opinion we can rely. They may have all the good qualities in the world, but they have in fact no voice in the government of the country. They do not to any degree sway the government of the country and are helplessly swamped by the great mass of ignorant and prejudiced voters before whom both political parties abase themselves.

Under these conditions our position is a peculiar and certainly not a satisfactory one. The history of the past gives no guarantee for the future. Will Mr. McKinley be as willing to bow to mob dictation in the matter of intervention in South Africa as Mr. Cleveland was with regard to Venezuela? Will any more strenuous effort be made to check the kind of agitation which bears fruit in the destruction of our canals, than was made to prevent the Fenian invasion of 1866? Time will tell. In the meantime as appeals to international law and custom appear to be useless, the authorities had better look to the defence of our frontier. With a slight inversion the maxim *Inter arma leges silentur* might seem to apply.

## ENGLISH CASES.

### *EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.*



**ADMINISTRATION**—DE BONIS NON—GRANT OF ADMINISTRATION TO BENEFICIARY IN RESPECT OF PROPERTY IN WHICH LEGAL ESTATE OUTSTANDING.

*In the Goods of Agnese* (1900) P. 60, was an application by a trustee in bankruptcy for a grant of administration de bonis non to the estate of one Agnese, who had died legally entitled to certain shares in foreign railway companies, the beneficial interest in which formed part of the bankrupt's estate. Agnese had died intestate, and administration had been granted to his estate, but the administrator had died, leaving part of the estate unadministered. Jeune, P.P.D., granted the application, limiting the grant to the shares in question.

**EVIDENCE**—FOREIGN LAW, PROOF OF—COLONIAL MARRIAGE.

In *Cooper-King* v. *Cooper-King* (1900) P. 65, the only question determined is a point of evidence. It became necessary to prove the validity of a marriage celebrated in Hong-Kong. It was stated on behalf of the petitioner that the only legal expert evidence available to give evidence of the marriage being valid according to the law of Hong-Kong demanded a prohibitive fee,

and the Court, therefore, gave the petitioner leave to prove the marriage by an affidavit of an ex-Governor of the colony, who, although not a member of the legal profession, deposed that he was conversant with the laws and ordinances in force in the colony.

**SPECIFIC PERFORMANCE**—VENDOR AND PURCHASER—PROPERTY USED AS A DISORDERLY HOUSE AT TIME OF SALE.

*Hope* v *Walter* (1900) 1 Ch. 257, is an instance of the way in which the Court acts in granting or refusing specific performance of a contract for the sale of land. In the present case the property was described in the particulars of sale as 'an eligible freehold.' After the contract had been made, the purchaser discovered that the property was being used by the tenant in possession as a disorderly house. Neither party before the sale knew of this, and the tenant was guilty of a breach of an express covenant in so using the premises. Cozens-Hardy, J., thinking the case governed by *Lucas* v. *James* (1849) 7 Hare, 410, thought the vendor entitled to specific performance, (1899) 1 Ch. 879, (see ante, vol. 35, p. 668); but the Court of Appeal (Lindley, M.R., and Williams and Romer, L.JJ.) have reversed his decision, because under the Criminal Law Amendment Act, 1885 (48 & 49 Vict., c. 69), s. 13 (3), which does not appear to have been adopted in Canada, a lessor becomes criminally liable if he knowingly permits the demised premises to be used by his tenant as a brothel. In *Lucas* v. *James* the objection of the purchaser was that there was a disorderly house near the property which was the subject of the contract, and that was held to be no ground for refusing the vendor specific performance, and, without saying whether that decision was right or wrong, the Court of Appeal considered it did not cover the facts of the present case. It might be a question in Ontario how far *Hope* v. *Walter* would be binding, having regard to the decision being based on the statute above referred to; but notwithstanding that no criminal liability might attach to a purchaser, it might be still held that it would be, to use the language of the Master of the Rolls, "contrary to those principles of justice and fairness by which this Court is always guided in exercising that extraordinary jurisdiction," to compel a purchaser specifically to perform a contract under such circumstances.

**CONFLICT OF LAWS**—CONTRACT—LEX LOCI CONTRACTUS—LOCUS SOLUTIONIS —CONTRACT TO BE PERFORMED IN DIFFERENT COUNTRIES.

*South African Breweries* v. *King* (1900) 1 Ch. 273, turns upon the question by what law the contract in question in the action was to be governed. It was made in writing at Johannesburg in the South African Republic by the plaintiff company's predecessors in title, a company which had its head office in London, England, but carried on business in South Africa, the other party to the contract being the defendant, a British subject, resident at Johannesburg. By the contract the defendant agreed to serve the company as a brewer or otherwise in its business carried on in Johannesburg, or in the Colony of Natal, or elsewhere in South Africa, and provision was therein made for the defendant's residence in Johannesburg; the contract was in English form and in the English language. Kekewich, J., decided (1899) 2 Ch. 173 (noted ante, vol. 35, p. 760) that the law of the South African Republic governed the contract, and the Court of Appeal (Lindley, M.R., and Williams and Romer, L.JJ.) have affirmed his decision.

**HIGHWAY**—OBSTRUCTION OF HIGHWAY—REASONABLE USER—INJUNCTION.

*Attorney-General* v. *Brighton & Hove Co-Operative Association* (1900) 1 Ch. 276, is a case which, in these days of co-operative and departmental stores, may possibly excite some interest. The action was in the nature of an information brought to restrain the defendants, a large co-operative association, from obstructing a highway. The facts were: That for the purpose of carrying on their business the defendants were accustomed to keep as many as six vans during every alternate hour of the day, loading and unloading goods at their premises, the roadway in which the vans stood being less than 20 feet, and the vans occupied about half its width, thus causing a serious obstruction to the passage of other vehicles through the street. Kekewich, J., granted a perpetual injunction against the defendants, restraining them from "wilfully" obstructing the road by excessive and unreasonable user, from which the defendants appealed; but the Court of Appeal (Lindley, M.R., and Williams and Romer, L.JJ.) held that the decision was right, though they struck out the word "wilfully." Romer, L.J., lays it down that the question of reasonable user is necessarily one of degree, and that it does not at all follow,

because a man's user of a highway is necessary for carrying on his business, that it is therefore reasonable having regard to the rights of others to the use of the highway.

**WILL**—CONSTRUCTION—HOTCHPOT CLAUSE—REAL PROPERTY LIMITATION ACT—RENT DUE TO TESTATRIX IN RESPECT OF PROPERTY OF WHICH CHILD ACQUIRES POSSESSORY TITLE.

*In re Jolly, Gathercole* v. *Norfolk* (1900) 1 Ch. 292, a hotchpot clause in a will was under consideration. The testatrix gave her property among her four children, and directed that all moneys owing to her at her death by any child for rent or otherwise should be brought into hotchpot in ascertaining the share of such child. One son had been let into the possession of a farm by the testatrix in 1868. He paid rent to 1881, when he ceased to pay rent and acquired a title by possession as against the testatrix, who died in 1899. On making a division of the estate, it was claimed on behalf of the other children that the son must bring into hotchpot rent for the farm for a period of twelve years between 1881 and 1893, when the testatrix's title was extinguished under the Real Property Limitation Act. The son contended that the extinguishment of the title was equivalent to a conveyance, and that the rent as incident to the reversion became vested in him, and, there being no covenant to pay rent, the rent had ceased to be a debt due to the testatrix. Norton, J., however, held that although the title of the testatrix was extinguished, yet that the title so acquired did not confer the same rights as are acquired by conveyance, and that the rent in arrear remained a debt due to the testatrix, and, as such, was properly within the hotchpot clause of her will.

**COMPANY**—ARTICLES OF ASSOCIATION PURPORTING TO DEPRIVE SHAREHOLDERS OF STATUTORY PRIVILEGE.

*Payne* v. *The Cork Co.* (1900) 1 Ch. 308, may be briefly noted here for the fact that Stirling, J., decides that articles of association of a limited company which purport to deprive shareholders of a privilege conferred on them by statute are inoperative. The statute in question in this case was one which entitled shareholders who objected to a sale of the undertaking of the company, of which they were shareholders, to any new company, to be paid the value of their shares, instead of accepting shares in such new company. This privilege, it is held, cannot be taken away by articles of association.

**HUSBAND AND WIFE**—MARRIAGE CONTRACT—PROMISE BY WIFE'S FATHER TO LEAVE HER "A SHARE" OF HIS ESTATE- SPECIFIC PERFORMANCE.

*In re Fickus, Farina* v. *Fickus* (1900) 1 Ch. 331, was an action by husband and wife against the executors of the wife's deceased father's estate for the specific performance of a promise made by the wife's father prior to the plaintiffs' marriage to leave her "a share" of his estate. The promise was made in a letter to the intended bridegroom, in which the father, referring to his daughter, said: "She will have a share of what I have after the death of her mother," &c. After the marriage, the father had acquired a fortune of £100,000, but had only left the female plaintiff a legacy of £2,000. Cozens-Hardy, J., who tried the case, was of opinion that the statement in the letter did not amount to a contract, but was a mere expression of intention, and that on that ground the plaintiffs could not succeed; but even assuming it did amount to a contract, that the legacy of £2,000 satisfied the obligation. The action was, therefore, dismissed with costs.

**BILL OF SALE**—INTEREST ON DEBT AFTER SALE OF PROPERTY.

In *West* v. *Diprose* (1900) 1 Ch. 337, the plaintiff had given the defendant a bill of sale of chattels as security for a loan of £500 and interest thereon at the rate of £60 per cent. per annum, the principal to be repaid by monthly instalments. One monthly instalment only was paid, when the parties entered into an agreement that the mortgaged property should be sold, and the loan paid out of the proceeds. The sale having been made, the defendant claimed to hold the purchase-money and apply it in payment of his principal and interest as it fell due, according to the proviso for repayment, to which the plaintiff not unreasonably objected, and contended that he was only entitled to his principal and interest up to the date of sale. Cozens-Hardy, J., held that the defendant, having elected to proceed on the plaintiff's authority to sell the goods and apply the proceeds in payment of the debt, was bound to carry out the direction, and that from the moment the money was received interest ceased to run. This is another case which reveals the utterly unconscionable ways of some money-lenders. The wretch Gordon, referred to in a former note, we see has gone to his account, followed by a chorus of execration.

# Correspondence.

## *PROFESSIONAL COSTUME.*

*To the Editor of the* CANADA LAW JOURNAL:

Sir,—In a recent issue there appears a very excellent portrait of Mr. Matthew Wilson, Q.C. Without the explanation that was given one would have been puzzled to understand the meaning of the head gear. At the first glance it seems rather anomalous that in British Columbia only of all the provinces the wig is part of the barrister's costume, but that province has always been particularly English and has in matters pertaining to the courts carefully followed English practice. But after all would it not be rather an advantage in this province to adopt the wig? A good many learned counsel are not overburdened with hair on the top of their heads and would be rather improved by the addition of such a wig as counsel wear when appearing before the Privy Council. Then too, the wearing of wigs by the judge would increase the dignified appearance and uniformity of their lordships and possibly they might not be averse to such a covering. It would be interesting to know what the bar generally think about this.

Yours, etc.,

PI.

[Whilst everything that tends to add dignity and solemnity to matters pertaining to the administration of justice should be encouraged, it would seem rather late at the end of the nineteenth century to suggest a change in the direction indicated. It may have been that from a utilitarian point of view a wig was desirable in former days to protect bald heads on the bench or at the bar from draughts, but in these days and in modern court houses even that reason for their use would not be of importance.—Ed. C.L.J.

## REPORTS AND NOTES OF CASES.

# Dominion of Canada.

## SUPREME COURT.

N.S.] HART *v.* MCMULLEN. [April 2.

*Easement—Sale of land—Severance of possession—Right of purchaser to easements.*

The owner of two adjacent properties conveyed them to different parties. One of the purchasers erected a dam on his land in the use of which he caused the water collected to flow back on the other property which was on a higher level. In an action claiming damages for this injury, there was evidence that the former owner had also had a dam on the land but it had been abandoned years before, and was not in use at the time of the conveyance.

*Held*, affirming the judgment of the Supreme Court of Nova Scotia, 32 N.S.R. 340, that where two properties of one owner are sold at the same time, and each of the purchasers has notice of the sale to the other, any continuing easement passes with the sale, but the same must have been substantially enjoyed by the vendor at the time of the sale. Therefore, as the right to use the dam in this case did not exist when the conveyance was made it could not be claimed by the purchaser. Appeal dismissed with costs.

*Borden*, Q.C., and *Harris*, Q.C., for appellant. *Drysdale*, Q.C., and *Layton*, for respondent.

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N.S.] WALKER *v.* FOSTER. [April 2.

*Donatio mortis causa—Evidence of delivery—Delivery to third person.*

W., wishing to dispose of his property after death without making a will, placed certain promissory notes in envelopes addressed to each of his children and kept them for some years in a desk in his bedroom. When on his deathbed, he delivered the keys of the desk to one D., instructing him to deliver after his death the envelopes to his children as addressed. The contents of the respective envelopes were shown to D. and then the envelopes were sealed up in his presence. They were delivered by D. as directed. In an action by the administrators of deceased's estate to recover from one of the children damages for the conversion or detention of the property so delivered to him,

*Held*, reversing the judgment of the Supreme Court of Nova Scotia, 32 N.S.R. 156, that D. was not the agent of the donor in the matter, but received the property for the benefit of the donee; that it was not material

that the donee neither assented to the gift nor knew of it; that the property itself was delivered to D., but if only the key had been delivered, it would have been sufficient to effect a donatio mortis causa. Appeal allowed with costs.

*Roscoe*, Q.C., for appellant. *J. J. Ritchie*, Q.C., for respondents.

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N.S.] HALIFAX ELECTRIC TRAMWAY CO. v. INGLIS. [April 2.

*Negligence—Electric car—Excessive speed—Prompt Action—Contributory negligence.*

A cab driver was endeavoring to drive his cab across the track of an electric railway when it was struck by a car and damaged. In an action against the Tramway Co. for damages, it appeared that the accident occurred on part of a down grade several hundred feet long, and that the motorman after seeing the cab tried to stop the car with the brakes, and that proving ineffectual, reversed the power, being then about a car length from the cab. The jury found that the car was running at too high a rate of speed, and that there was also negligence in the failure to reverse the current in time to avert the accident; that the driver was negligent in not looking more sharply for the car; and that notwithstanding such negligence on the part of the driver, the accident could have been averted by the exercise of reasonable care.

*Held*, affirming the judgment of the Supreme Court of Nova Scotia, 32 N.S. Rep. 117, that the last finding neutralized the effect of that of contributory negligence; that as the car was on a down grade and going at an excessive rate of speed, it was incumbent upon the servants of the company to exercise a very high degree of skill and care in order to control it if danger was threatened to anyone on the highway; and that from the evidence given it was impossible to say that everything was done that reasonably should have been done to prevent damage from the excessive speed at which the car was being run. Appeal dismissed with costs.

*Harrington*, Q.C., and *Covert*, for appellant. *Borden*, Q.C., for respondent.

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Que.] ASBESTOS & ASBESTIC CO. *v.* DURAND. [April 2.

*Negligence—Use of dangerous materials—Cause of accident—Arts. 1053, 1056 C.C.—Employer's liability.*

To permit an unnecessary quantity of dynamite to accumulate in dangerous proximity to employees of a mining company in a situation where opportunity for damage might occur from the nature of the substance or through carelessness or otherwise, is such negligence on the part of the company as will render it liable in damages for the death of an employee from an explosion of the dynamite, though the direct cause of such explosion may be unknown. GWYNNE, J., dissenting.

*Held*, further, that as the doctrine of common employment does not prevail in the Province of Quebec, acts or omissions by fellow servants of the deceased could not exonerate the employes from liability for the negligence of a servant which may have led to the injury. *The Queen* v. *Filion*, 24 S.C.R. 482, and *The Queen* v. *Grenier*, 30 S.C.R. 42, followed. Appeal dismissed with costs.

*Laflamme*, for appellant. *L. C. Belanger*, Q.C., for respondent.

## Province of Ontario.

### COURT OF APPEAL.

From Divisional Court.] [Sept. 12, 1899.

IN RE GLEN. FLEMING *v.* CURRY.

*Local Master—Resignation—Concurrent appointments.*

While an appeal from his report was pending, a local master sent a letter of resignation to the Attorney-General's Department, and, without any acceptance of this resignation, a commission was issued appointing another gentleman "a local master" for the county in question. Subsequently the appeal was allowed and the report was referred back to "the master" for the county:—

*Held*, that there could not be two local masters; that the action of the Executive was equivalent to an acceptance of the resignation; and that the reference must proceed before the new incumbent of the office. Judgement of a Divisional Court affirmed.

*S. H. Blake*, Q.C., for appellant. *Aylesworth*, Q.C., and *O. E. Fleming*, for respondent.

From Falconbridge, J.] REGINA *v.* ST. CLAIR. [Jan. 31.

*Criminal law—Summary trial—Habeas corpus—Certiorari—Writ of error—Appeal—Evidence—Depositions in other proceedings—Counsel's consent.*

A conviction by a magistrate under the sections of the Criminal Code relating to the summary trial of indictable offences may be brought up for review by writs of habeas corpus and certiorari; a conviction under those sections not being matter of record in such sense as to make it reviewable only by writ of error.

Upon the hearing of a charge under these sections, evidence in other proceedings against another prisoner is admissible upon the consent of the accused's counsel. Judgment of FALCONBRIDGE, J., affirmed.

*E. B. Stone*, for appellant. *John R. Cartwright*, Q.C., for the Crown.

From Rose, J.] CALDWELL *v.* TOWN OF GALT. [March 27.

*Municipal corporations—Highways—Obstruction — By-Law—Injunction.*

In an action to restrain the defendants from enforcing a by-law to compel the plaintiff to remove a verandah projecting some distance over one of the streets of the town, it was held, on the evidence, that the verandah had been built after the street had been dedicated and laid out, and that it was therefore an unlawful obstruction; but as it had been in existence for a great many years and as no special necessity for its removal was made out, the Court refused to grant the defendants a mandatory injunction against the plaintiff for its removal, leaving them to enforce their by-law in such way as they should be advised. Judgment in 35 C. L. J. 232 varied.

*James Bicknell*, for appellant. *Du Vernet*, and *Card*, for respondents.

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From Divisional Court.] RYAN *v.* WILLOUGHBY. [March 27.

*Contract—Breach—Condition precedent—Inability to perform—Municipal corporations—Resignation of councillor.*

The defendant, who was a municipal councillor, entered into a sub-contract with the plaintiff to do the brick and mason work under the plaintiff's contract with the municipality to build a town hall, that contract providing that the contractor should not sub-let the work or any part thereof without the consent in writing of the architect and municipality, and this consent the plaintiff was to obtain. The municipality refused to consent to the sub-contract on the ground that the defendant's services would be of value in the oversight of the contract:—

*Held*, that there could not be imported into the defendant's sub-contract an agreement to resign his seat, as such an agreement to resign a public trust for private gain would be contrary to public policy and illegal, and that the defendant was not liable in damages because of the breach of an implied obligation to resign, though his resignation might, as the plaintiff contended, have enabled the plaintiff to fulfil the condition precedent on his part of obtaining the municipality's consent. Judgment of a Divisional Court, 30 O.R. 411, reversed.

*Watson*, Q.C., and *J. A. Allan*, for appellant. *Shepley*, Q.C., for respondent.

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From Divisional Court.] [March 27.

MCMILLAN *v.* MCMILLAN.

*Will—Construction—Inconsistent clauses—Executory devise—Failure of issue.*

A testator, by the third clause of his will, devised a lot of land to a son, "his heirs and assigns forever," and in the fourth clause stated it to be

"my will and desire, provided my (said) son shall have no lawful heir or children, that the above mentioned tract of land, after his death, that (the plaintiff) shall have it with all the right and title that my (said) son had to it heretofore." By the fifth clause he gave to his wife "the use" of half the lot, "during life; after her decease my will is that the same shall belong to my (said) son, his heirs and assigns forever." The son died after the testator without having had any children:—

*Held*, that the fifth clause removed from the operation of the third and and fourth clauses one half of the lot which vested in the son subject to the mother's life estate, while as to the other half the son had under the third clause an estate in fee simple subject under the fourth clause to an executory devise over in favour of the plaintiff, which, in the events which had happened, had taken effect. Judgment of a Divisional Court, 35 C.L.J. 445; 30 O.R. 627, affirmed.

*R. Smith*, for the appellant. *J. H. Moss*, for the respondent.

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From Armour, C. J.] [March 27.

CHOATE *v.* ONTARIO ROLLING MILLS COMPANY.

*Master and servant—Negligence—Dangerous process—Want of warning.*

The plaintiff while employed in removing the cut pieces from a pair of shears worked by steam power was struck by a flying piece of metal and severely injured. The machine was perfect of its kind and it was not shown that a screen or guard could have been used, and the plaintiff was aware that there was danger. The danger when steel was being cut was greater than when iron was being cut, and the accident happened when steel was being cut.

*Held*, that there should have been some warning that steel was about to be cut, and that this means of reducing the possible danger not having been adopted, the defendants were liable in damages as at common law. Judgment of ARMOUR, C.J., affirmed.

*Osler*, Q.C., and *John Greer*, for appellants. *Teetzel*, Q.C., and *A. M. Lewis*, for respondent.

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From Meredith, C.J.] EWING *v.* HEWITT. [March 27.

*Nuisance — Highway — Obstruction — Continuing nuisance created by another.*

The owner of a house abutting on a highway placed without authority a trap-door in the sidewalk in order to obtain an entrance to his cellar, the hinges of the trap-door projecting about an inch above the sidewalk. The defendant obtained title from this owner and continued to use the trap-door, and the plaintiff, while lawfully using the highway, stumbled against the hinges and was hurt.

*Held*, that the defendant could not be held to be continuing the nuisance as she had no title to the highway, and no right, strictly speaking, to remove the trap-door constructed by another, and that, as the accident was not caused during or by her user of the trap-door, she was not liable. Judgment of MEREDITH, C.J., ante p. 23, reversed.

*Marsh*, Q.C., for appellant. *John MacGregor* and *R. G. Smyth*, for respondent.

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From Meredith, C.J.] [March 27.

STRUTHERS *v.* TOWN OF SUDBURY.

*Assessment and taxes — Exemptions — "Public hospital"— R.S.O. c. 224, s. 7 (5).*

A hospital carried on by and for the benefit of two medical practitioners, and used chiefly by patients paying fees, though to some extent by indigent patients, and in receipt of a government grant under The Charity Aid Act, R.S.O. c. 320, is a public hospital within the meaning of sub-s. 5 of s. 7 of the Assessment Act, R.S.O. c. 224, and exempt from taxation. Judgment of MEREDITH, C.J., 35 C.L.J. 72; 30 O.R. 116, affirmed.

*Nesbitt*, Q.C., and *J. H. Clary*, for appellants. *Aylesworth*, Q.C., for respondents.

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From Armour, C.J.] BREWSTER *v.* HENDERSHOT. [March 27.

*Trust—Church—Possession—Religious Institutions Act—R.S.O. c. 307.*

Land was conveyed to certain persons in trust for a religious body called The United Brethren in Christ, and a congregation was organized and a church built. Subsequently a division took place in the religious body and it was held, in *Itter* v. *Howe* (1896) 23 A.R. 256, that the party to which the congregation in question adhered were seceders. This congregation continued to use the church and, some of the original trustees having died, appointed new trustees to act with the survivors, and these trustees refused to give up possession to the representatives of what had been declared to be the true body:—

*Held*, that the trustees must be treated as being trustees for the true body, who were entitled to enforce the trust and to have possession of the church, and that it was not necessary to organize another congregation and appoint new trustees for that congregation under The Religious Institutions Act. Judgment of ARMOUR, C.J., 35 C.L.J. 394, reversed.

*German*, Q.C., for appellants. *Cowper*, for respondents.

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From Meredith, C.J.] PEACOCK *v.* COOPER. [March 27.

*Evidence—Negligence—Fire—Sparks from steamer.*

In an action to recover the value of buildings destroyed by fire started, as was alleged, by sparks escaping from the defective smokestack of a

steamboat, evidence that on prior and subsequent days sparks of large size escaped from the smokestack may be admissible to prove its defective construction, but opinionative evidence that having regard to the force and direction of the wind on the day in question sparks of this size if they escaped might have been carried to the building in question is too conjectural and speculative. Judgment of MEREDITH, C.J., affirmed.

*Matthew Wilson*, Q.C., for appellants. *J. S. Fraser*, for respondent.

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From Street, J.] [March 27.

FLOER *v.* MICHIGAN CENTRAL RAILWAY COMPANY.

*Trial—Jury—Failure to agree—Dismissal of action—Rule 780.*

When in an action tried with a jury the presiding judge holds that there is evidence to submit to the jury and refuses a nonsuit, he cannot, upon the jury disagreeing, himself decide under Rule 780 in the defendant's favour upon his own view of the evidence. Judgment of STREET, J., 35 C.L.J. 416; 30 O.R. 635, affirmed.

*D. W. Saunders*, and *J. Montgomery*, for appellants. *F. A. Anglin*, for respondent.

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From Street, J.] [March 27.

HOOD *v.* COLEMAN PLANING MILL AND LUMBER COMPANY.

*Principal and surety—Application of payments—Mechanic's lien.*

The plaintiff, who was a director of a company for which the defendants were doing work, endorsed the company's note in the defendants' favour for part of the defendants' claim. The note was discounted by the defendants and was dishonoured and the holders obtained judgment against the plaintiff who did not, however, pay any part of the claim. Subsequently the defendants obtained, in mechanic's lien proceedings instituted by other creditors, a dividend of eighty-one cents on the dollar of their total claim including the portion covered by the note.

*Held*, that they were not bound to apply the amount received first in satisfaction of the portion of the claim covered by the note, nor entitled to apply it first in satisfaction of the portion of the claim not covered by the note, but were bound to apply it pro rata on the whole claim. Judgment of STREET, J., affirmed.

*Washington*, Q.C., for appellants. *D'Arcy Tate*, for respondent.

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From Street, J.] SCOTT *v.* MELADY. [March 27.

*Sale of goods—Statute of frauds—Delivery—Acceptance.*

The defendants agreed to buy from the plaintiff ten thousand bushels of No. 2 red wheat, at $1.12 per bushel, to be delivered f.o.b. a vessel to be provided by the defendants, who were to pay freight and insurance, and

delivery was to be made to them on payment of a sight draft for the price. The captain of the vessel gave the plaintiff a bill of lading describing him as the consignor, and in it, under the heading "consignees" was written "Order of Bank of Montreal, advise Melady & McNairn (defendants)." A draft for the price, drawn by the plaintiff upon the defendants, was attached to the bill of lading and discounted, but the defendants refused to accept this draft.

*Held*, that there was, upon these facts, no final appropriation of the wheat or delivery thereof to the defendants, and that the property therein would not pass to them until acceptance of the draft, or payment or tender of the price.

*Held*, also, that neither the shipment in the vessel provided by the defendants, nor the taking by the defendants of samples of the cargo for inspection, constituted an acceptance within the statute. Judgment of STREET, J., affirmed.

*Aylesworth*, Q.C., and *Rankin*, Q.C., for appellants. *Charles Millar*, for respondents.

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From Robertson, J.]. ARMSTRONG *v.* LYE (No. 2).

*Merger—Equitable right to a charge—Subsequent acquisition of the fee—R.S.O. c. 121, ss. 8, 9, 10.*

In taking the accounts under the judgment reported, 27 O.R. 511, and 24 A.R. 543, it was held that the defendant Lye had no right to an equitable charge, in priority to the plaintiff's claim, for sums paid by Lye to prior encumbrances before the conveyance of the land to him, his potential equity not bringing him within ss. 8, 9 and 10, of R.S.O. c. 121, and there being no evidence of intention to preserve the right to the equitable charge. Judgment of ROBERTSON, J., affirmed.

*Aylesworth*, Q.C., and *Hilton*, for appellant. *Osborne*, for respondent.

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From Divisional Court.] [March 27.

MCINTOSH *v.* PORT HURON PETRIFIED BRICK COMPANY.

*Conversion—Tenant in common—Removal of chattel to foreign country.*

An action for conversion of his interest in a chattel lies by one tenant in common against his co-tenants in common if the chattel owned in common is destroyed by them, or so dealt with by them as, in effect, to put an end to his rights.

In this case the removal of a brick making machine to a foreign country was held sufficient to support the right of action, the plaintiff's power of enforcing his rights in the courts of this province being thus interfered with. Judgment of a Divisional Court reversed,

*S. H. Blake*, Q.C., and *D. S. McMillan*, for appellants. *Aylesworth*, Q.C., and *J. H. Moss*, for respondents.

From Drainage Referee.] [March 27.

IN RE TOWNSHIP OF COLCHESTER NORTH, AND TOWNSHIP OF GOSFIELD NORTH.

*Drainage — Report of engineer — Failure to take oath — Amendment of report.*

Taking the oath prescribed in s. 5 of "The Municipal Drainage Act," R.S.O. c. 226, is an essential prerequisite to the exercise of jurisdiction by the engineer under s. 75 of that Act.

While an appeal to the Drainage Referee against a report is pending the initiating municipality cannot refer back the report to the engineer for amendment. Judgment of the Drainage Referee reversed.

*Britton*, Q.C., and *Langton*, Q.C., for appellants. *A. H. Clark*, for respondents.

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From Drainage Referee.] [March 27.

IN RE TOWNSHIP OF ORFORD AND TOWNSHIP OF HOWARD (NO. 2.)

*Drainage—Natural watercourse.*

Under sub-s. 3 of s. 3 of R.S.O. c. 226, lands in one municipality from which water has been caused to flow upon and injure lands in another municipality, either immediately, or by means of another drain, or by means of a natural watercourse, may be assessed and charged for the construction and maintenance of a drainage work required to relieve the injured lands from such water.

*In re Townships of Orford and Howard* (1891), 18 A.R. 496; *In re Townships of Harwich and Raleigh* (1894), 21 A.R. 677; and *Broughton* v. *Township of Grey* (1897), 27 S.C.R. 495, distinguished. Judgment of the Drainage Referee affirmed.

*Douglas*, Q.C., for appellants. *Matthew Wilson*, Q.C., for respondents.

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SMYLIE *v.* THE QUEEN. [April 4.

*Crown — Timber licenses — "Manufacturing condition." — Constitutional law.*

The Act 68 Vict., c. 19 (o), making applicable to timber licenses the condition approved by order-in-council of the 17th February, 1897, that all pine timber cut under such licenses shall be manufactured into sawn lumber in Canada, is intra vires, and applies to licenses issued after the passing of the Act in renewal of licenses in force at the time of its passage. Judgment of STREET, J., 35 C.L.J. 761; 31 O.R. 202, affirmed.

*H. J. Scott*, Q.C., for appellants. *S. H. Blake*, Q.C., and *Walter Gow*, for respondent.

From Falconbridge, J.] [April 4.

SNELL *v.* TORONTO RAILWAY COMPANY.

*Master and servant—Negligence—Street railway—Motorman—Person in charge or control—Workmen's Compensation for Injuries Act, R.S.O. c. 160, s. 3, sub-s. 5.*

The motorman of a car running on an electric system is a "person who has the charge or control" thereof within the meaning of sub-s. 5 of s. 3 of the Workmen's Compensation for Injuries Act, R.S.O. c. 160, and his employers are liable in damages to a fellow servant for injuries sustained while in discharge of his duty, owing to the motorman's negligence in passing too close to a waggon which is moving out of the way of the car. Judgment of FALCONBRIDGE, J., affirmed.

*James Bicknell*, for appellants. *T. C. Robinette*, and *J. M. Godfrey*, for respondents.

## HIGH COURT OF JUSTICE.

Armour, C. J.] GIRARDOT *v.* WELTON. [April 3.

*Costs—Counterclaim—Relief obtainable without cross-action—Set-off*

The counterclaim of a defendant, properly so-called, is a claim by the defendant for a relief which cannot be obtained by him in the action; and calling a claim made by the defendant a counterclaim cannot make it one.

The plaintiff claimed a declaration that his interest as a chargee upon land could not be sold under the power in the defendant's mortgage upon such land, and, in the alternative, that he was entitled to redeem the defendant. By her pleading in answer the defendant alleged certain facts justifying her right to exercise the power of sale, and "by way of counterclaim" claimed payment of her mortgage, sale or foreclosure, possession, costs and damages. The action was at the trial dismissed with costs, the defendant not desiring a foreclosure, which she was offered.

*Held*, that the relief claimed by the defendant was obtainable by her in the action brought against her, and was not the subject of a cross-action or counterclaim; and the only costs taxable by the plaintiff against the defendant were such costs as were occasioned to the plaintiff by reason of the claim made by the defendants, treating it as a claim properly made in the action and dismissed; and such costs should be set off *pro tanto* against the defendant's costs of the dismissal of the action. The judgment dismissing the "counterclaim" with costs meant that such costs should be taxed as were appropriate to it in its true character.

*Semble*, that in this province the law as to set-off is different from the English law, and here a set-off should not be treated as a counterclaim nor be pleaded as such.

*F. E. Hodgins*, for plaintiff. *S. White*, for defendant.

Meredith, C.J., Falconbridge, J.] [April 4.

TANNER *v.* WEILAND.

*Security for costs—Appeal to Divisional Court—Rule 825.*

Rule 825, providing that no security for costs shall be required on a motion or appeal to a Divisional Court, does not preclude a defendant from obtaining an order for security for costs where the plaintiff has taken up his residence abroad after a judgment dismissing his action without costs, from which his appeal to a Divisional Court is pending. *Arnold* v. *Van Tuyl*, 30 O.R. 663, distinguished.

*Grayson Smith*, for plaintiff. *Haverson*, for defendant Christina W. Weiland.

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Boyd, C., Robertson, J., Meredith, J.] [April 6.

REGINA *v.* KEMPEL.

*Criminal law — Extortion — Accusation — Information — Criminal Code, ss. 405, 558.*

The word "accuses" in s. 405 of the Criminal Code, providing for the punishment of anyone who, with intent to extort or gain anything from any person, *accuses* that person or any other person of certain offences, includes the accusing of a person by laying an information under s. 558 of the Code.

*J. R. Cartwright*, Q.C., for the Crown. *David Robertson*, for the prisoner.

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Meredith, C.J., Falconbridge, J.] [April 10.

ALLISON *v.* BREEN.

*Limitation of actions—Judgment—Reviver—Time—Notice—Ex parte order—Application to set aside.*

Decisions of STREET, J., and the Master in Chambers, ante p. 165, refusing to set aside order reviving judgment, affirmed on appeal.

*Boice* v. *O'Leane*, 3 A.R. 167, as to the lifetime of a judgment, followed in preference to English decisions.

The practice of dealing with the question raised on an application to set aside an ex parte order as if the application were a substantive one for such order, approved.

*Tytler* and *C. J. McCabe*, for the appellant. *R. J. Maclennan*, for the plaintiff by revivor.

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Armour, C.J., Street, J.] [April 10.

BOTHWELL *v.* BURNSIDE.

*Criminal procedure—Court of General Sessions—Appeal—Costs—Criminal Code, ss. 880, (e), 897.*

On an appeal to the General Sessions of the Peace from a conviction of a Police Magistrate, the chairman gave judgment, signing the following

minute: "Appeal in this case dismissed with costs to be taxed by the Clerk of the Peace within five days." No formal order was ever drawn up in pursuance of this minute, but the Clerk of the Peace afterwards taxed the costs and on his certificate at a subsequent sittings of the Court of General Sessions an order was applied for and obtained for the issue of a distress warrant, for the amount of such costs.

*Held*, that under ss. 880 (e) and 897 it was necessary for a formal order to be drawn up in pursuance of the above mentioned minute and that therefore there was no warrant or authority for the certificate of the Clerk of the Peace or for the order of the Court of General Sessions directing the distress warrant, and the same must be quashed.

Appeals from summary convictions and the costs payable in respect thereof are founded upon the statute law, and the provisions of the law regarding them in England and in this country are essentially different. In this country in view of section 880 (e) and (f) of the Criminal Code, the necessary formal order in pursuance of the above minute might be drawn up at a future sittings of the Court of General Sessions, which is a continuing Court, and the costs included therein nunc pro tunc if necessary; and the power to grant costs and determine what costs are just and reasonable is not with us as it is in England confined to the justices at the same general sessions at which the appeal is heard.

*Du Vernet*, for appellant. *J. H. Moss*, for respondent.

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Armour, C.J., Street J.,] APPLEBY *v.* TURNER. [April 18.

*Judgment—Action on bond—Rule 580—Writ of summons—Special indorsement—Statement of claim—Service by posting—Rule 574—Motion for judgment—Assessment of damages.*

An action against the sureties in an appeal bond to recover the plaintiffs' costs of an appeal is in the nature of a claim for damages requiring assessment (see Rule 580), and a special indorsement of the writ of summons is inappropriate, and a judgment for default of appearance or default of defence is a nullity not curable by delay or acquiescence.

The defendants in this case not having appeared, the plaintiffs filed and posted up copies of a statement of claim, without filing the writ of summons and affidavit of service.

*Held*, that the posting of the statement could not, having regard to Rule 574, be treated as a service upon the defendants. But, even if it could be so treated, a motion for judgment thereon and an assessment of damages would be necessary. *Star Life Assurance Society* v. *Southgate*, 18 P.R. 151, followed.

*Hislop*, for defendants.

Meredith, C.J., Falconbridge, J.] [April 23,

SYDNEY CHEESE AND BUTTER ASSN. *v.* BROWER.

*Discovery—Action for account—Denial of right—Production of books—Prejudice.*

To an action by an incorporated association of cheesemakers against the president and salesman for an account of all moneys received by him for or on behalf of the plaintiffs for three years past, and the application thereof, and for delivery up of all books and documents in his possession belonging to the plaintiffs, and for an account of profits made by the defendant, one of the defences was that the defendant undertook the sale of the plaintiffs' cheese as a part of his own business, and that it was expressly agreed that he should not be called upon to divulge the names of the persons from whom he received orders, or give any other information touching his business or the account of sales or the bank account in connection with his business, and when examined for discovery he objected to produce his books and documents showing sales and prices realized and persons to whom sales made, because, as he alleged, that would in effect give the plaintiffs what they sought in the action before they had established their right to it, which was expressly contested.

*Held*, that, as the fiduciary relationship existing between the parties was practically admitted, the position of the plaintiffs in seeking accounts and inquiries was not exactly like that of a plaintiff whose right depended on his establishing a case for them at the hearing. The defendant set up an extraordinary agreement, the probability of establishing which was not very great, and this was an element in determining the matter in the exercise of a sound discretion. The plaintiffs were, therefore, entitled to the discovery.

*Shepley*, Q.C., for defendant. *A. Hoskin*, Q.C., and *S. Masson*, for plaintiffs.

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Boyd, C.] BELL *v.* WILSON. [April 30.

*Costs—Slander—Verdict for $1.*

Where, in an action of slander, the jury returned a verdict for the plaintiff for $1, the trial judge refused to deprive the plaintiff of costs, his conduct not having been reprehensible, and the small verdict being explained by the condition of the defendant at the time the words were uttered.

*A. C. Shaw*, for plaintiff. *Watson*, Q.C., for defendant.

# Province of Nova Scotia.

## SUPREME COURT.

Full Court.] RYAN *v.* CALDWELL. [Feb. 7.

*Mortgage—Action on covenant to recover difference between amount due and proceeds of sheriff's sale—Property in hands of third party and plaintiff not in position to give defendant further right to redeem.*

Defendant mortgaged certain real estate to A. and afterwards conveyed the equity of redemption to E. P. A. who conveyed it to L. A. assigned the mortgage to the plaintiff, who foreclosed without making defendant a party to the proceedings. At the sheriff's sale plaintiff purchased the property for an amount less than the amount due for principal and interest on the mortgage, and afterwards conveyed to F.

Plaintiff having sued on the covenant contained in the mortgage to recover from defendant the full amount due, deducting the proceeds of the sheriff's sale.

*Held*, following *Kinnaird* v. *Trollope*, 39 Ch. D. 636; *Almon et al.* v. *Busch Ritchie's Equity Decisions* 362; and *Miller et al.* v. *Thompson* (unreported) that plaintiff could only sue for the amount by which the proceeds of the sheriff's sale fell short of the amount due on the mortgage on giving defendant a further opportunity of redeeming, and that as this could not be done, the property having been disposed of to a stranger, there should be judgment for defendant. *Kenny* v. *Chisholm*, 19 N.S.R. 497 (affirmed on appeal to the Supreme Court of Canada), distinguished.

MEAGHER J. dissented.

*A. Drysdale*, Q.C., for appellant. *W. A. Henry*, for respondent.

# Province of New Brunswick.

## SUPREME COURT.

En Banc.] EX PARTE VANBUSKICK. [April 20.

*Canada Temperance Act—Election—Irregularities—Scrutiny—Certiorari.*

The holding of a polling station in an election under the first part of the Canada Temperance Act outside the territorial limits of the district for which such poll is held is not such an irregularity as will vitiate the election so long as the persons entitled to vote have had a fair opportunity of exercising their franchise and the election has been held in substantial accordance with the provisions of the Act.

Rule discharged for certiorari to remove certificate of County Court Judge on a scrutiny confirming declaration of returning officer.

*M. G. Teed,* in support of rule. *Harvey Atkinson,* contra.

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En Banc.] EX PARTE GREEN. [April 20.

*Profanation of Lord's Day—62 Vict., c. 11.*

The above Act to prevent the profanation of the Lord's Day, is intra vires the Provincial legislature.

Rule discharged for certiorari to remove conviction for selling cigars on Sunday.

*Pugsley,* Q.C., and *A. W. Macrae,* in support of rule. *A. S. White,* Q.C., and *Stockton,* Q.C., contra.

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En Banc.] MELLON *v.* MUNICIPALITY OF KINGS. [April 20.

*Execution for taxes—Direction by Secretary-Treasurer — Municipality liable for false arrest.*

The Secretary-Treasurer of the Municipality directed the issue of an execution against the plaintiff for taxes. The latter was arrested thereunder and confined in goal for fifteen days. In an action for false imprisonment the jury found that the plaintiff was not a resident of the county and did not own any real or personal estate within the county, and assessed the damages at $250.

*Held,* on motion for a non-suit, that the municipality was liable for the act of the assessors in assessing the plaintiff and of the Secretary-Treasurer in directing the execution. Non-suit refused.

*Stockton,* Q.C., for plaintiff. *A. S. White,* Q.C., for defendant.

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En Banc.] RUNCIMAN *v.* STAR LINE STEAMSHIP CO. [April 21.

*Negligence causing death—Action by the father of deceased—Reasonable expectation of pecuniary benefit.*

Plaintiff's son while boarding defendant's steamer on the River Saint John fell off the steamer's steps and was drowned. In an action by plaintiff, as administrator, for damages, the jury found that the steamer was started too quickly and that the steamer people were guilty of negligence. The deceased was about twenty-eight years of age and had always made his home with the plaintiff, his father. There was evidence that for several years he paid the plaintiff $30 per month for board and lodging, but a year or two before his death he established himself in business in which he was assisted by the plaintiff to the amount of three or four hundred dollars, and since which time the plaintiff had received nothing from him. The jury found for plaintiff and assessed the damages at $3,500.

*Held*, on motion for a non-suit, that there was no sufficient evidence of pecuniary loss to the plaintiff, that the circumstances were such as to afford a reasonable expectation of pecuniary benefit to the plaintiff had the deceased lived, and that this was enough to warrant the case being given to the jury, though there was nothing to justify so large an assessment. Nonsuit refused, but new trial on ground of excessive damages.

*D. Mullin*, Q.C., for plaintiff. *L. A. Currey*, Q.C., for defendant.

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EX PARTE DUPUIS.

*Review—Non-suit erroneously ordered by review judge—Certiorari.*

The Judge of the St. John County Court on review from a justice's court set aside a judgment recovered by the plaintiff and ordered a non-suit on the ground that a prior suit before a Parish Court for the same cause of action, in which the plaintiff had elected to become non-suit, was still pending.

*Held*, on motion to make absolute an order nisi for certiorari, that the order of the review judge was improper and that certiorari would lie to remove the review order. Rule absolute.

*J. D. Phinney*, Q.C., in support of rule. *J. H. McFadyen*, contra.

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# Province of Manitoba.

## QUEEN'S BENCH.

Bain, J.] QUEEN *v.* GREAT WEST LAUNDRY CO. [April 9.

*Criminal law—Criminal Code, s. 3, sub-s. (t), ss. 213, 220, 639, 958—Manslaughter—Negligence causing death—Corporation.*

The defendant company was indicted, under sections 213 and 220 of the Criminal Code, 1892, for negligence in maintaining machinery in a condition dangerous to life, resulting in the death of one of its employees. There was also a count for manslaughter. Defendant demurred to the indictment.

*Held*, that notwithstanding sub-s. (t) of s. 3 of the Code, by virtue of which sections 213 and 220 generally apply to corporations as well as individuals, an indictment will not lie against a corporation for manslaughter, and even if a coporation were indicted and convicted of such an offence, there is no provision of law under which any punishment could be imposed.

The punishment for manslaughter being imprisonment for life under section 236 of the Code, section 958 does not apply and a fine cannot be imposed in lieu of imprisonment. The general provision of section 639 that in case of the conviction of a corporation, the court "may award such judgment and take such other and subsequent proceedings to enforce the same as are applicable to convictions against corporations," could not be interpreted so as to affect or modify the positive enactment of section 236.

*Patterson* and *A. J. Andrews*, for the Crown. *Howell*, Q.C., for defendant.

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# Province of British Columbia.

## SUPREME COURT.

Full Court.] SULLIVAN *v.* JACKSON. [Jan. 9.

*Practice—Application to dismiss for want of prosecution after notice of trial —Rule 340.*

Appeal to the Full Court by defendant from an order of Forin, Loc. J.S.C., dated 22nd December, 1899, dismissing defendant's summons to have the action dismissed for want of prosecution. The local judge held that once notice of trial has been given it is not open to the defendant to apply to have the action dismissed for want of prosecution.

*Held*, allowing the appeal, that a judge sitting in Chambers has power to dismiss an action for want of prosecution, notwithstanding that the action has been entered for trial.

*Galt*, for appellant. *A. E. McPhillips*, for respondent.

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Full Court.] BAKER *v.* KILPATRICK. [Feb. 22.

*Malicious prosecution—Reasonable and probable cause—Belief of defendant —Malice—Questions to jury.*

In an action for malicious prosecution the judge intimated that he thought there was no evidence to go to the jury but he decided to let the case go to the jury so that the Full Court might have the benefit of the findings in case an appeal was taken. The jury found that the defendant had not taken reasonable care to inform himself of the facts before he proceeded against the plaintiff, and that he did not honestly believe in the charge, being actuated by an indirect motive, viz.: to obtain recompense for the loss of his horse. Damages were assessed at $200.00.

On motion for judgment, McCOLL, C.J., dismissed the action holding that there was not a want of reasonable and probable cause.

*Held*, by the Full Court, reversing McCOLL, C.J., that on the findings the plaintiff was entitled to judgment. *Shrosbery* v. *Osmaston*, (1877) 37 L.T.N.S. 792, followed.

*Martin*, Q.C., for appellant. *Yarwood*, for respondent.

## Book Reviews.

*A Preliminary Treatise on Evidence at the Common Law*, by J. B. Thayer Weld Professor of Law at Harvard University. Boston: Little, Brown & Co., 1898.

The well-known Digest of the Law of Evidence by the late Sir James Stephen has systematized very satisfactorily that department of our jurisprudence by summing up in clear and succinct propositions the actual effect of the decisions. But the plan of that work necessarily excluded any adequate elucidation of the subject from a historical standpoint. To those who are desirous of examining under this aspect a topic of such deep interest to the profession we can cordially recommend an attentive perusal of the above-mentioned treatise. The author is a distinguished member of that body of scientific jurists who have within recent years so worthily co-operated on this side of the Atlantic in the investigations by which such writers as Sir Frederick Pollock and Professor Maitland have thrown light upon the growth of the common law. The objects of Professor Thayer, as stated in his preface are these: "By tracing the development of trial by jury, to throw light on the beginnings and true character of our rules of evidence; by a more accurate analysis and a fuller illustration than is common, of the distinction between law and fact, to make plainer the respective functions of the jury and the court; and by an investigation of certain important topics, ordinarily, but, as he believes, improperly treated as belonging to the law of evidence, to discriminate from that part of the law, and to set them in their proper place." In the dissertations outlined by these titles the learned author has accumulated a great quantity of useful information which he has worked up in a clear and readable style. Not the least valuable feature of the book is the running commentary of acute and pregnant criticism which accompanies his account of the evolution of the various doctrines discussed. We feel confident that few lawyers, however much attention they may have devoted to the scientific aspects of our law, will refuse to admit that they have added very appreciably to their stock of ideas, when they have finished the perusal of the chapters on "Law and

Fact in Jury Trials;" "Judicial Notice;" "Presumptions;" The Burden of Proof;" "The 'Parol Evidence' Rule," and "The 'Best Evidence' Rule." With these topics Professor Thayer has been able to deal in a manner which would be inappropriate in an ordinary law book compiled for the use of practitioners, and the value of his discussions is in a great measure due to the freedom of treatment which is suggested and warranted by the the character of the treatise as a companion of and introduction to works which aim merely at stating what the law is, and do not concern themselves, except incidentally, with its development or with the anomalies which are the result of the processes in which that development has been carried on. There is a great deal in Professor Thayer's dissertations that is calculated to ruffle the feelings of the optimists who adhere with a pathetic fidelity to the creed that our system of law is really as well as theoretically the essence and embodiment of common sense. But those who cannot discern any sufficient reason why that system should be exempt from the searchlight of modern criticism any more than the various other products of the "wisdom of our ancestors," which in these days have been compelled to justify their existence, will be glad to profit by his thoughtful remarks. What he has to say is of special utility to students, and his book should be in the library of every law school.

## *APPOINTMENTS TO OFFICE.*

J. F. J. Cashman, of the Town of Gore Bay, in the Provisional Judicial District of Manitoulin, to be District Crown Attorney and Clerk of the Peace for the said District. (13th January, 1900.)

James Craig, of the Town of Renfrew, in the Province of Ontario, Barrister-at-Law, to be a Judge of the Territorial Court in and for the Yukon Territory. (26th April, 1900.)