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The Court Room of the King's Bench Division at Osgoode Hall is now resplendent with the Royal Arms (see ante p. 93). They surmount the seats occupied by the judges. Some have said that they seem somewhat too ornate and brilliant in their gold and colour, but we scarcely see that they could be otherwise than as they are. Time may perhaps dull the gilding, but may they, together with the bas relief of the blind goddess with the even balances that stands behind them, be ever suggestive of that untarnished justice which has made the Greater Britain resplendent among the nations.

The terrible tragedies connected with the trial of the three desperadoes concerned in the Aurora and Parkdale bank robberies near Toronto are fresh in the minds of our readers. One of these men, Rice, on their way to the gaol in a cab murdered Constable Boyd in cold blood. Another, Jones, died of wounds inflicted by Constable Stewart in their attempt to escape, and the third, Rutledge, committed suicide at the county gaol two days afterwards. The many incidents connected with these occurences have been so fully discussed in the daily papers as to leave little to be said. The very careless and inefficient way in which the prisoners were guarded made it comparatively easy for men of this sort to do as they did. It surely should have occurred to any one that the provision of one cab to carry three desperate ruffians with two free hands, guarded only by two constables, only one of whom was armed, was entirely inadequate. There being no proper prison van there should have been three cabs and two policeman with each prisoner. Another stupid proceeding was allowing these prisoners to have, as they had, frequent opportunities of communicating with each other. We should think that the officials who were responsible in this matter must have an uncomfortable feeling that they had a share in the death of Boyd. Notwithstanding, however, the many faults and failures connected with these prosecutions from the beginning to the end, there is the consoling reflection that in this country the mills of justice though they may "grind slowly, grind exceeding

small"; and that criminals in this Dominion find, as a rule, that "the way of transgressors is hard." This knowledge moreover has a greater terror for criminals than even the cruelty and promptitude of lynch law, which happily has not taken root in this country.

We have more than once called the attention of the Ontario practitioner to the necessity of closing the pleadings against non-appearing defendants, in cases where judgment has to be obtained against them by motion. Those who are acquainted with the old Chancery practice find no difficulty in following the new practice, but there are some who seem to find it hard to understand it. The principle involved is after all very simple—whenever the case is of such a nature that under the Rules a motion for judgment is necessary as against a non-appearing defendant, then such defendant must be served with the statement of claim and if he fails to put in a defence the pleadings must be noted closed as against him, and he is then, under Rule 586, to be deemed to admit all the statements of fact made in the statement of claim; and, the plaintiff, on the case coming on for trial against the other defendants, if any, is then in a position to ask for judgment pro confesso as against the defendant as to whom the pleadings have been noted closed. In order to prevent cases being brought to trial before they are in a proper state to be heard as against all parties, the judges made a regulation directing officers passing records to certify as to the state of the cause against non-appearing defendants; but it is one thing to make regulations, and another to get them carried out. Solicitors who do not wish to get into difficulty with their cases would do well to be careful to see that the regulation is observed, and not enter cases for trial until the cause is ready to be heard as against all parties.

In reference to the question of security for costs in libel suits, which came up in *Neil* v. *Norman* (ante pp. 315, 316) a correspondent kindly informs us that the learned Judge, who overruled the decision of His Honour Judge Ermatinger in that case, relied on the judgment in *Egan* v. *Miller*, decided by the Common Pleas Divisional Court in November, 1887. In that case the Court upheld the decision of Armour, C.J., that a casual correspondent of a newspaper sued for libel contained in a letter published in a news-

paper, was not entitled to security for costs under the Act. We do not see, however, that that decision can be said to cover the case of one who is on the regular staff of the newspaper in which the alleged libel is published, as the defendant in *Neil* v. *Norman* appears to have been.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] OTTAWA ELECTRIC CO. *v.* BRENNAN. [May 7.

Appeal per saltum—Jurisdiction to grant—R.S.C. c. 135, s. 26 (3).

The plaintiffs, Brennan and others, whose lands were expropriated by the Electric Co., appealed to the High Court of Justice from the award of arbitrators appointed to determine the value of said lands. The appeal was heard before Mr. Justice MCMAHON who increased the amount of the award. The company having no right of appeal to the Court of Appeal, according to a late decision of that Court, *Birely* v. *Toronto, Hamilton & Buffalo Railway Co.*, 25 O.A.R. 88, applied to a judge of the Supreme Court of Canada, in chambers, for leave to appeal direct from the decision of MCMAHON, J., under s. 26, sub-s. 3 of the Supreme and Exchequer Courts Act. The application was referred by the judge to the full court.

Held, that to give jurisdiction to a judge to grant leave to appeal per saltum under s. 26, sub-s. 3 of the Act it is essential that there should be a right of appeal to the Court of Appeal, and it not being shewn that there was such a right in this case, the motion should be refused. Motion refused with costs.

Glyn Osler, for appellants. *G. F. Henderson*, for respondents.

N.B.] JONES *v.* CITY OF ST. JOHN. [May 7.

Assessment and taxes—Appeal from assessment—Judgment confirming—Payment under protest—Res judicata.

J. having been assessed in 1896 on personal property as a resident of St. John, N.B., appealed without success to the appeals committee of the common council and then applied to the Supreme Court of New Brunswick for a writ of certiorari to quash the assessment which was refused. An execution having been threatened he then paid the taxes under protest.

In 1897 he was again assessed under the same circumstances and took the same course with the exception of appealing to the Supreme Court of Canada from the judgment refusing a certiorari, and that Court held the assessment void and ordered the writ to issue for quashing. J. then brought an action for re-payment of the amount paid for the assessment in 1896.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the judgment refusing a certiorari to quash the assessment in 1896 was res judicata against J., and he could not recover the amount so paid. Appeal dismissed with costs.

Currey, K.C., for appellant. *C. J. Coster*, for respondent.

Province of Ontario.

COURT OF APPEAL.

From Divisional Court.] [April 4.

WAKEFIELD *v.* WAKEFIELD.

Will—Construction—Tenant for life—Carrying on business—Profits.

A testator devised and bequeathed all his property real and personal to his wife "to be used and enjoyed by her for and during the term of her natural life and widowhood, and after her decease or marrying again" to named members of his family. At the time of his death he was carrying on business as a brickmaker upon premises leased by him, he having the right to take clay. The widow, with the assent and co-operation of members of the family, carried on the business and developed it, using the plant and renewing it when necessary, and when the lease fell in some years after the testator's death she took a new lease of the same and other premises, and at her death the business had increased very much in value:—

Held, that the personal estate should have been converted into money and not used in specie by the widow, but that having been so used the increased value of the business enured to the benefit of the remaindermen and did not form part of the widow's estate. Judgment of a Divisional Court, 32 O.R. 36, affirmed.

F. E. Hodgins and *E. Coatsworth*, for appellants. *N. Murphy*, K.C., and *R. G. Smyth*, for adult respondents. *Armour*, K.C., for infant respondents.

From Falconbridge, J.] [May 14.

ROBINSON *v.* TORONTO RAILWAY COMPANY.

Negligence—Street railway.

The motorman of an electric car is not necessarily guilty of negligence because he does not at once stop the car at the first notice that a horse is

being frightened either at the car or at something else. All that can be expected is that the motorman shall proceed carefully, and it is in each case a question whether that has been done.

Held, (ARMOUR, C.J., and LISTER, J.A. dissenting). Upon the facts of this case that the evidence did not justify a finding of negligence, and the judgment in the plaintiff's favour was therefore set aside.

J. Bicknell, for appellants. *W. R. Riddell*, K.C., for respondent.

From MEREDITH, J.] ROBINSON *v.* MA..N. [May 14.

Chattel mortgage—Endorsement of note—Bills of exchange and promissory notes.

While the endorsing by a person not a party to a note of his name upon it before it has been endorsed by the payee is not an endorsement in the legal sense so as to make that person legally liable to the payee, a chattel mortgage to the intending endorser to secure him against the liability intended to be incurred cannot be set aside by the mortgagor's assignee for creditors after the mortgagee has paid the note in question. Judgment of MEREDITH, J., affirmed.

F. B. Ryckman and *A. T. Kirkpatrick*, for appellant. *Hellmuth*, for respondent.

From FERGUSON, J.] MCCOSH *v.* BARTON. [May 14.

Fixtures—Mortgage—Plant.

A mortgage of an electro-plating factory "together with all the plant and machinery at present in use in the factory" does not cover patterns used in the business, sent from time to time from the factory to foundries to have mouldings made, and not in the factory at the time of the making of the mortgage. Judgment of FERGUSON, J., 1 O.L.R. 229, reversed.

Aylesworth, K.C., *F. W. Casey*, *Harley*, K.C., and *W. C. Livingston*, for the various appellants. *Wilkes*, K.C., and *G. J. Smith*, for respondents.

From ROSE, J.] MITCHELL *v.* CITY OF HAMILTON. [May 14.

Street railway—Highway—Removal of snow.

By the provisions of a municipal by-law, to which a street railway company were bound to conform, the company were obliged to remove snow from their tracks in such manner as not to obstruct or render unsafe the free passage of sleighs or other vehicles along or across the street. After a heavy snowfall the company removed the snow from their tracks, the result being that there was a bank of several inches at each side of the tracks to the level of the snow-covered portions of the street:—

Held, that the company had not discharged their obligation and that they were liable to indemnify the city against damages recovered against

the city by a person who had in consequence of the b[illegible]k been upset while driving along the street. Judgment of ROSE, J., affirmed.

P. D. Crerar and *W. W. Osborne*, for appellants. *MacKelcan*, K.C., and *J. L. Counsell*, for respondents.

From ROSE, J.] [May 14.

HARGROVE *v.* ROYAL TEMPLARS OF TEMPERANCE.

Benevolent society—Misstatement of age—Rules regulating mode and amount of payment.

A benevolent society's certificate provided for payment to the plaintiff upon his total disability or upon his attaining the age of seventy years, out of the total disability fund, in accordance with the laws governing the fund, sums not exceeding in the aggregate one thousand dollars. In his application, upon which it was declared the certificate was founded, the plaintiff gave his age as fifty-four when it was in fact fifty-five, the latter age being within the age allowed for entrance and the assessments and fees chargeable being the same for both ages. The plaintiff attained the age of seventy on the 10th of December, 1899, and brought this action on the 15th of May, 1900, asking for payment of $1000.00. The jury found that the plaintiff's age was not material to the contract and that the statement as to age was made in good faith and without any intention to deceive:—

Held, that the certificate was binding, and that the plaintiff was entitled to payment thereunder upon in fact attaining the age of seventy, but that the "laws governing the fund" applied though not set out, and that under them the plaintiff was entitled at the time of action brought only to an instalment of $225.00. Judgment of ROSE, J., reversed.

Washington, K.C., for appellant. *Gallagher*, for respondents.

From MACMAHON, J.] [May 14.

LEGGO *v.* WELLAND VALE COMPANY.

Bailment—Fire—Damages—Sale of goods.

The defendants agreed to make for the plaintiff certain tools used in making hubs of a special kind, and, in consideration of being allowed to use the tools, to make also a number of the hubs:—

Held, that the use of the tools was an unconditional appropriation thereof to the contract, so that the property in them had passed to the plaintiff; that while using them the defendants were bailees thereof for hire, and after ceasing to use them, gratuitous bailees; that the defendants having neglected to send the tools to the plaintiff after repeated requests, were liable to him in damages; but that these damages were nominal only, and that the plaintiff could not, upon the destruction of the tools by an accidental fire while retained by the defendants, recover from them their

value, that destruction not being damage such as might fairly and reasonably be considered as arising from the breach, or in contemplation of the parties. Judgment of MACMAHON, J., affirmed.

Du Vernet and *Courtney Kingstone*, for appellant. *Lynch-Staunton*, K.C., and *A. W. Marquis*, for respondents.

From ROSE, J.] SIM *v.* DOMINION FISH COMPANY. [May 14.

Master and servant—Defective plant.

As a fisherman employed by the defendants was dragging by its wooden handle, according to the usual practice adopted on the defendants' fishing tug, a heavy box of fish along the deck, the handle, which was made of a poor quality of wood, broke, and the man fell overboard and was drowned:—

Held, that the defendants were bound even at common law to exercise due care to furnish to their men material and plant in a sound and proper condition, and that they were liable in damages. Judgment of ROSE, J., affirmed.

Garrow, K.C., for appellants. *Lynch-Staunton*, K.C., for respondent.

From MEREDITH, C.J.] [May.

BROWN *v.* LONDON STREET RAILWAY.

Negligence—Contributory negligence—Jury—Trial—Form of questions.

When contributory negligence is set up in an action to recover damages for negligence, which is being tried before a jury, the plaintiff is entitled to a clear and distinct finding upon the point. In an action against a street railway company to recover damages, the jury, after finding in answer to questions, that the defendants were guilty of negligence, in running at too high a rate of speed, not properly sounding the gong and not having the car under proper control, and that the plaintiff's injury was caused by this negligence, said in answe to further questions, that the plaintiff was guilty of contributory negligence, in not using more caution in crossing the railway tracks:—

Held, that this answer was ambiguous and unsatisfactory, and, in view of the previous distinct answers, not fairly to be treated as a finding of contributory negligence.

Per OSLER, J.A. Instead of putting in such cases the question, "Was the plaintiff guilty of contributory negligence?" involving, as it does, both the fact and the law, it would be better to ask, "Could the plaintiff, by the exercise of reasonable care, have avoided the injury?" and to provide for the case of an affirmative answer by the further question, "If so, in what respect do you think the plaintiff omitted to take reasonable care?" Judgment of MEREDITH, C.J., reversed.

Gibbons, K.C., for appellant. *Hellmuth*, for respondents.

From STREET, J.] [May 14.

TOWNSHIP OF ELIZABETHTOWN *v.* TOWNSHIP OF AUGUSTA.

Drainage—Artificial obstruction—Failure of scheme—New report without examination.

A dam in a stream in the defendant township had the effect of penning back the water in and of preventing logs and other obstructions from making their way down the portion of the stream in the plaintiff township. The plaintiff township initiated a scheme under the drainage clauses of the Municipal Act for the removal of the dam and other obstructions, and an engineer made the necessary examination and report in due form, but this scheme was set aside as unauthorized. After the amendment in 1886 of the drainage clauses by the addition of sub-ss. 18, 19 and 20 to s. 570 of the Consolidated Municipal Act, 1883, the plaintiff township again initiated the scheme and referred it to the same engineer, who, without any further examination, rewrote his report adopting his previous estimates and assessments. Notice was served in due course upon the defendant township and there was no appeal, and the plaintiff township did the work and brought this action for payment of the proportion of the cost assessed against the defendant township:—

Held, that the scheme was authorized by the amending sections, but, per OSLER and LISTER, JJ.A., that the report of the engineer was invalid and the scheme not binding. ARMOUR, C.J.O., and MOSS, J.A., taking the contrary view. In the result the judgment of STREET, J., in favour of the defendants, was affirmed.

Watson, K.C., and *W. W. Osborne*, for appellants. *J. A. Hutcheson*, for respondents.

From MACMAHON, J.] [May 14.

TRUSTS AND GUARANTEE COMPANY *v.* TRUSTS CORPORATION OF ONTARIO.

Limitation of actions—Annuity—Will—Charge on land—Arrears—Lunatic.

By a will made in 1872 a testator, who died in the same year, devised land to two sons, "subject to the payment by my said two sons of the sum of $200.00 per annum, for the benefit of my son Thomas Anson, which said sum, or annuity, or so much thereof as shall be reasonably necessary for the support and maintenance of my said son Thomas Anson, shall be paid yearly and every year, for and during the natural life of my said son Thomas, to the person or persons who may be his guardian or guardians." The son Thomas Anson was of age at the time of the testator's death, but was of unsound mind and he was declared a lunatic in 1898, and the plaintiffs were appointed committee of his person and estate. After the

father's death the son lived with his mother, to whom, from time to time, till Feb., 1889, payments were made on account of the annuity.

Held, that the annuity was charged on the land; that it was, therefore, by virtue of s. 2 (3) of the Limitations Act, R.S.O. 1897, c. 133, rent within the meaning of that Act; that the payments to the mother, who was the natural guardian, were good, and that the statute did not begin to run till the last of them was made; that apart from the question of disability the right of action would have been barred at the expiration of ten years from that time; but that by ss. 43, 44 the time was extended for five years from the removal of disability, or for twenty years; and that, therefore, an action brought in Feb. 1900, was in time, and that six years' arrears could be recovered. Judgment of MACMAHON, J., 31 O.R. 504; 36 C.L.J. 215, affirmed.

Aylesworth, K.C. for appellants. *A. C. Macdonell* and *J. T. C. Thompson*, for respondents.

From Divisional Court.] [May 16.

KIRKPATRICK *v.* CORNWALL ELECTRIC RAILWAY.
BANK OF MONTREAL *v.* KIRKPATRICK.

Street railway—Mortgage—Future acquired property—Fixtures—Rolling stock—Execution—Company.

An electric street railway company, incorporated under the Ontario Joint Stock Companies Letters Patent Act, R.S.O. 1887, c. 157, and subject to the provisions of the Street Railway Act, R.S.O. 1887, c. 171, gave to trustees for holders of debentures of the company a mortgage upon the real estate of the company, together with all buildings, machinery, appliances, works and fixtures, etc., and also all rolling stock and all other machinery, appliances, works, and fixtures, etc., to be thereafter used in connection with the said works, etc. The by-laws of the directors and shareholders, (who were the same persons and only five in number) authorizing the giving of the mortgage directed it to be given upon all the real estate, plant, franchises and income of the company, and the debentures stated that they were secured by mortgage of the real estate, franchises, rolling stock, plant, etc., acquired or to be acquired:—

Held, that s. 38 of R.S.O. 1887, c. 157, does not restrict the power of mortgaging to the existing property of the company and that a company is invested with as large powers to mortgage its ordinary after acquired property as belong to a natural person; that the mortgage in terms covered future acquired property, and even if not authorized in this respect upon a strict reading of the by-laws had been acquiesced in and ratified and was binding. Judgment of a Divisional Court affirmed.

Held, also, that the rolling stock, poles, wires, etc., formed an essential part of the corpus of what must be regarded as an entire machine, and

were, therefore, fixtures and not seizable under execution to the prejudice of the mortgagees. Judgment of ARMOUR, C.J., affirmed.

Armour, K.C., and *R. A. Pringle*, for appellants. *Aylesworth*, K.C., and *C. H. Cline*, for respondents.

Moss, J. A.] OATMAN *v.* MICHIGAN CENTRAL R. W. Co. [May 18.

Appeal—Settlement of book—Appointment—Onus.

Having regard to Rules 798 et seq., relating to appeals to the Court of Appeal, the burden of procuring from "the Court appealed from, or a Judge thereof" (Rule 798), an appointment to settle the appeal case or book, the parties being unable to agree, is upon the appellant. Rule 801 (3) enables the respondent to move in the matter, if so disposed; but it is the appellant's duty to enter the case with the Registrar and set down the appeal for argument; this he cannot regularly do without depositing the appeal books (Rule 812); and before they are deposited they must be settled.

W. N. Ferguson, for plaintiff. *D. W. Saunders*, for defendants.

From Divisional Court.] [May 22.

MARSHALL *v.* INDUSTRIAL EXHIBITION ASSOCIATION.

Negligence—License—Invitation.

An appeal by the defendants from the judgment of a Divisional Court, reported 1 O.L.R. 319, was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 21st and 22nd of May, 1901, and at the conclusion of the argument was dismissed with costs, the Court agreeing with the judgment below.

W. Nesbitt, K.C., and *C. L. Smith*, for appellants. *Lindsey*, K.C., and *W. R. Wadsworth*, for respondents.

Practice.] [June 14.

IN RE TOWNSHIP OF METCALFE AND TOWNSHIPS OF ADELAIDE AND WARWICK.

Costs—Scale of—Appeal from judgment of Drainage Referee.

The costs of an appeal to the Court of Appeal from the decision of the Drainage Referee in a proceeding under the Drainage Act initiated before him should (if awarded to either party) be taxed on the scale applicable to appeals in cases begun in the High Court of Justice.

Decision of a Divisional Court, 19 P.R. 188, reversed.

Langton, K.C., and *C. A. Moss*, for appellants. *Folinsbee*, and *H. E. Rose*, for respondents.

HIGH COURT OF JUSTICE.

Meredith, C.J., MacMahon, J., Lount, J.] [May 9.

DONAHUE *v.* CAMPBELL.

Action for wrongful distress for taxes—Assessment—Taxes—Distress—Personal property.

Held, that under s. 135*a* (1) 3, added to the Assessment Act, R.S.O. c. 224, by 62 Vict., (2) c. 27, s. 11, O., goods which are not in the possession of the person assessed in respect to them, cannot be distrained for the taxes against them. In this case the goods which had been mortgaged were, when seized, in possession of the bailiff of the mortgagee, who had taken possession on default in the mortgage.

Held, also, that the plaintiff, being a bailiff in possession, had a right to bring the action.

J. Montgomery, for plaintiff. *D. B. Doherty*, for defendant.

Boyd, C.] FISHER *v.* BRADSHAW. [May 13.

Chattel mortgage—Agreement for—Affidavit of execution—Validity.

Interpleader issue. Where an agreement to give a chattel mortgage is registered in the proper office under R.S.O. c. 148, s. 11, that Act does not operate to merge it in the subsequently executed and registered mortgage. The two may well stand together in an honest transaction for the purpose of mutual support. When the latter instrument is grafted, so to speak, on the former and refers to and recites the agreement therein contained, the whole contract in its inception and completion may be regarded as one transaction and may be read as one instrument.

W. A. J. Bell, for plaintiff. *Gibbons*, K.C., and *Stephens*, for defendant.

Falconbridge, C. J.] LAWRY *v.* TUCKETT-LAWRY. [May 28.

Practice—Frivolous action—Cons. Rules 259-261.

Held, that as *Lellis* v. *Lambert* (1897) 24 A.R. 653, leaves nothing to be said in support of the plaintiff's right to maintain this action, the statement of claim must be struck out on the ground that it discloses no reasonable cause of action, and the action dismissed with costs.

E. Martin, K.C., for defendant. *Teetzel*, K.C., and *G. C. Thompson*, for plaintiff.

Falconbridge, C.J.] [June 5.

NEW HAMBURG MANUFACTURING CO. *v.* BARDEN.

County Court appeal—Order dismissing motion to commit—Finality.

An appeal by the plaintiffs from an order of the Judge of the County Court of Waterloo in Chambers in an action in that Court dismissing a motion by the appellants to commit the defendant Barden for refusing to be sworn and examined as a judgment debtor upon the ground that a proper foundation had not been laid for his examination by a return of nulla bona to a fi. fa., or an affidavit stating that such would be the return.

W. M. Douglas, K.C., for the defendant Barden, objected that no appeal lay, because the order appealed against was not in its nature final, but merely interlocutory, within the meaning of s. 52 of the County Courts Act, R.S.O., c. 55; citing *Gallagher* v. *Gallagher*, 31 O.R. 172, and *O'Donnell* v. Guinane, 28 O.R. 389, and pointing out that in *Baby* v. *Ross*, 14 P.R. 440, the remarks at p. 443 shewed that such an order as this should be regarded as merely interlocutory, although an order to commit would be final.

Du Vernet in answer to the objection relied on the decision in *Baby* v. *Ross* as in his favour.

Held that the order was clearly not in its nature final, and quashed the appeal with costs.

Falconbridge, C. J., Street, J.] [June 7.

MCLAUGHLIN v. LAKE ERIE AND DETROIT RIVER R.W. CO.

Pleading—Reply—Departure—Contract—Repudiation—Reformation.

An appeal by the defendants from an order of MEREDITH, C.J., in Chambers, reversing an order of the Master in Chambers striking out the reply.

Shortly stated, the pleadings were as follows: The plaintiffs said they supplied the defendants, under an agreement, with patent brakes for use on their railway, and that the defendants altered them and infringed their patent. The defendants said that they had a right under their agreement with the plaintiffs to do what they had done. The plaintiffs, by their reply, denied any such agreement, and alleged that if the written agreement did give any such right, it was not the true agreement, and they asked to have it reformed.

Held, that there was no departure in the reply; for the fact that, by mutual mistake, the written agreement did not set forth the true agreement between the parties in this particular respect was a perfectly good answer to the plea of the agreement, and it was not necessary that the agreement should be actually corrected before the mistake could operate as an answer to its terms: *Breslauer* v. *Barwick*, 36 L.T. 52; Bullen & Leake, 5th ed., 788-9; *Hall* v. *Eve*, 4 Ch. D. 341.

Held, also, that, even if the portion of the agreement upon which the

defendants relied was contained in the same instrument as the "agreement" mentioned in the statement of claim, the plaintiffs might, consistently with their relying upon one part of it, ask to have another part reformed. Appeal dismissed with costs to the plaintiffs in any event.

A. W. Anglin, for defendants. *F. C. Cooke*, for plaintiffs.

COUNTY COURT OF THE COUNTY OF YORK.

CULVER *v.* LESTER.

Common carrier—Licensed expressman—Carrying goods for hire—Liability for loss by fire.

The defendant, duly licensed as an expressman by virtue of a city by-law, was engaged to carry for hire a load of furniture to the railway station in one of his waggons. Before delivery the goods were destroyed by fire, not caused by the act of God or the King's enemies, and not arising from any inherent quality or defect of the goods themselves: —

Held, that the defendant was acting as a common carrier and, as such, not having limited his liability by any condition or contract, was responsible for the loss.

Brind v. *Dale*, 2 C. & P. 207, doubted; *Farley* v. *Lavery*, 54 S.W. Reporter 840 (U.S.), concurred in.

[Toronto, April 10—McDOUGALL, Co. J.

This was an action brought to recover from the defendant, a carrier, the value of certain articles of household furniture destroyed by fire while the same were in the possession of the defendant in transit to the railway station to be shipped to a point outside of Toronto. The plaintiff, desiring to have his household furniture packed for shipment by rail, employed the defendant to take his furniture from his house to the Union Station, and there delivered to the railway company. The defendant purported to carry on a cartage agency at two places in the city of Toronto. He was a duly licensed expressman under By-Law 26 of the Police Commissioners of Toronto. His bill head reads: "John Lester, cartage agency, double and single vans for the removal of furniture, baggage, pianos and all kinds of merchandise. The Lester Storage Company in connection;" and on the left-hand corner of his bill-head these additional words: "Vans for picnic and sleighing parties, lorries and express waggons at reasonable rates." No price was named or special terms stipulated for the work, the defendant being hired by the hour. The furniture was packed and loaded upon three waggons of the defendant, each waggon being in charge of one of the defendant's drivers. The waggons started for the Union Station, two of them arrived safely, the third load in charge of the defendant's son and a driver reached the station and the waggon was standing a few minutes on the weigh-scales of the railway to get the weight before being

driven to the car where it was to be unloaded, when suddenly it was discovered to be on fire. Although every effort was made to extinguish the flames and save the furniture, the furniture was practically destroyed. Indeed so rapid was the progress of the flames that the waggon was partly burned and the horses singed before they could be detached from the waggon. The parties did not ask to have the amount of the damage ascertained, but sought only to have the question of the defendant's liability, if any, for the loss determined. The defendant was unable to account for the fire. His son who drove with the waggon from Woodlawn Avenue to the station declares that neither he nor the driver had been smoking and could give no explanation which would account for the fire. The son stated that some furniture on this particular load had been packed with the packing material commonly used and known as "excelsior," which is a fine wood shaving, and highly combustible, but young Lester states he did not believe that the fire could have arisen from spontaneous combustion. All that appeared from the evidence was that while the waggon was on the weigh scales, young Lester being in the weigh-house ascertaining the weight, he glanced out of the window and saw flames bursting out at the top of the load.

Shepley, K.C., for the plaintiff. The defendant is a common carrier, and, as such, liable for this particular loss since the destruction of the goods could not be attributed to either "the act of God or the King's enemies."

E. T. Malone, K.C., contra. The defendant is a private carrier and therefore liable only for a loss occasioned by his own negligence or that of his servants. The loss in question was not due to any such actionable negligence. The origin of the fire was so mysterious and inexplicable,—starting as it did apparently at the top of the load,—that it ought only to be treated as an inevitable accident. The mere occurrence of the loss, he being a private carrier, raises no presumption of negligence for which he can be held responsible, but even if it should be considered that the occurrence of the fire did raise any such presumption, then the evidence given for the defence entirely disproves negligence and displaces any onus cast upon him to further account for the loss.

McDOUGALL, Co. J.—A perusal of the latest text books and authorities indicates that the law on the subject of what constitutes a common carrier, or what circumstances will create the liability of a common carrier, is not defined with great clearness. Perhaps a fairly general definition may be thus expressed: Any person undertaking for hire to carry the goods of all persons indifferently is to be considered a common carrier. Bevan on Negligence, 2nd ed. p. 1021. Alderson, B., in *Ingate* v. *Christie*, 3 C. & K. 61, states the principle as follows: "The criterion is whether he carries for particular persons only or whether he carries for everyone. If a man

holds himself out to do it for everyone who asks him he is a common carrier, but if he does not do it for everyone but carries for you and me only, that is a matter of special contract." And accordingly in *Ingate* v. *Christie* he held that where the defendant at his countinghouse had displayed on the doorpost the word "Lighterman," and carried goods in his lighters from the wharves to the ships for anybody who employed him, he was a common carrier. He further said: "If a person holds himself out to carry goods for everyone as a business . . . he is a common carrier." Story defines a common carrier as "one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place."

In Chitty on Carriers, 1st ed. p. 53, the learned writer, adopting the language of Story in his work on Bailments, thus defines a common carrier: "A common carrier is one who, by ancient law, held, as it were, a public office, and was bound to the public. To render a person liable as a common carrier he must exercise the business of carrying as a public employment, and must undertake to carry goods of persons indiscriminately and hold himself out as ready to engage in the transportation of goods for hire as a business and not as a casual occupation, pro hac vice."

Hoymen (*Wardell* v. *Mevrillian*, 3 Esp. 693); Wharfingers (*Mevering* v. *Todd*, 1 Stark, N.P.C. 72); Bargemen (*Ritchie* v. *Kneeland*, Cro. Jac. 330; *Amies* v. *Stephens*, 1 Stra. 128); Masters and Owners (*Ellis* v. *Turner*, 8 Term R. 531; *Gale* v. *Lawrie*, 5 B. & C. 156; *Bennett* v. *Peninsula and Oriental Steamboat Co.*, 6 C. B. 775); Or rather the actual possessors of vessels (*James* v. *Jones*, 3 Esp. 327); Though one of the termini of their voyages may be beyond the sea (*Bennett* v. *P. & O. Steamboat Co.*); Watermen and Boatmen who commonly carry goods for hire (*Lovett* v. *Hobbs*, 2 Show. 128); Ferrymen (*Churchman* v. *Tunstall*, Hardres 162; *Walker* v. *Jackson*, 10 M. & W. 161); Keelmen (*Dale* v. *Hall*, 1 Wilson 281); And Lightermen (*East India Co.* v. *Pullen*, 1 Stra. 690; *Ingate* v. *Christie*, 3 C. & K. 61); have all been held to be common carriers. The liability of a carrier by water has, according to Cockburn, C.J., been derived from the liability of land carriers. (See his remarks in *Nugent* v. *Smith*, 1 C.P.D. 439). Brett, J., in *Nugent* v. *Smith*, in his judgment in the Court below, 1 C.P.D. p. 27, thus expresses his view as to what the test should be as to when a man is a common carrier: "The real test of whether a man is a common carrier, whether by land or water, therefore really is whether he has held out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying as a public employment or whether he carries to a fixed place, but whether he holds out either expressly or by a course of conduct that he will carry for hire, so long as he has room, the goods of all persons indifferently who sent him goods to be carried. If he does this his first responsibility naturally is that he is bound by a promise implied by

law to receive and carry for a reasonable price the goods sent him upon such an invitation." In *The Liver Alkali Company* v. *Johnson*, L.R. 7 Exch. 267, and in appeal, L.R. 9 Exch. 338, it was held that a barge owner who let out his vessels for the conveyance of any goods to any customer who applied, and who did not ply between particular places was a common carrier. In this case the place from which and to which the goods were to be carried were fixed by the customer. Blackburn, J., in his judgment expressed the opinion that the defendant was a common carrier, and it was not necessary to inquire whether the defendant, as a carrier, was liable to an action for not taking goods tendered to him.

There is no doubt that at common law a common carrier was under no obligation to treat all his customers equally. He may limit his business in what manner he chooses, and, unless his prices are fixed by law, may fix what prices he chooses to charge: *Smith* v. *Horne*, 8 Taunt. 144; *Garnett* v. *Willan*, 5 B. & Ald. 53, 57; *Wild* v. *Pickford*, 8 M. & W. 461; *Hunter* v. *Dibban*, 2 Q.B. 646.

In the present case the defendant holds himself out as a person carrying on a cartage agency, and as possessing single and double vans for hire to move furniture and other goods. He holds himself out as a person who will carry the goods of everyone who may employ him at reasonable rates. This is his business, and the fact that he associates another business of storage with that of a cartage business does not destroy the character or liabilities which he assumes by carrying on a cartage agency. The defendant is a resident of Toronto, and could not use his vans regularly for hire in the city without first procuring a license to do so from the proper authorities. In applying for and obtaining his license he also agrees to become bound by the terms of the Police Commissioners' by-laws. He could not make a charge for the use of his vans in excess of the rates fixed by the by-law (s. 19). Under s. 21 he is bound to serve the first person requiring his services, unless he has been previously engaged by another person, or the person proposing to employ him owes him any amount for any previous service. By s. 23 he is bound to keep his engagements punctually, and to serve within the limits of the city anyone requiring his services, unless he has been previously engaged. A breach of any of the foregoing obligations subjects him to the penalties of the by-law. No person can carry on the business of a private carrier for hire in the city of Toronto. It is true he may possibly contract to carry all the goods of some person or persons and on others, as for instance, to transport regularly the goods of some firm or company, but the moment he desires to carry goods of any person who may desire to employ him, or in other words, holds himself out as being willing to carry for hire the goods of all persons—the public—he becomes a common carrier, and he cannot engage in any such business without first

conforming to the terms of the by-law and assuming the legal obligations cast upon him as licensee.

The defendant sought to shew that in carrying on his business of cartage he discriminated in his selection of customers, and that in some instances he refused to undertake the work of a carrier for those applying, but the effect of his evidence was that this was only where he had too many engagements, or that his men or horses were worn out or over-worked by the engagements he had undertaken or performed, and in consequence they both needed rest before resuming work. Apart from these special circumstances it is abundantly evident that he took the orders of all who might apply and who were esteemed good pay, and his billheads contained clear intimation that he was open to undertake the work of all persons seeking to employ him. He admits as to the plaintiff in this action he made no contract, stipulated no settled terms, and set no fixed prices; he simply took the order and understood that he was working by the hour. His account is rendered on this basis; he charged for the vans 60 cents per hour, being 15 cents less per hour than authorized by the tariff in by-law 26 of the Police Commissioners. He charges for the material used in the packing, and for the packers at so much an hour. In every particular he acted as one engaged in a public employment, and so far as reward was concerned appeared to assume that there was no necessity of making any special contract. His maximum prices, it is clear, were regulated by the by-law. He rendered his account at a moderate amount, somewhat below the fixed tariff, and was paid his charge by the plaintiff. The defendant further stated that as far as his business was concerned none of his vans for some years past had stood on any of the public express stands. This circumstance cannot alter his status. In carrying furniture it was open to him to limit his liability to any loss which might occur in carrying out his employment; he might have made a special contract upon special terms as to liability. The only limitation that was placed upon him was, he could not charge higher rates than those stated in the tariff. After a careful consideration of the whole case, I find no facts or circumstances in the evidence which support any other conclusion than that the defendant must be regarded as a common carrier.

A recent American case, *Farley* v. *Lavery*, 54 South Western Reporter (Kentucky) 840, in the Court of Appeals, January 13th, 1900, adopts the same conclusion in a case on all fours with the present case. It was there held that a person who held a license so to do and hauls goods within the limits of a city for any person desiring his services is a common carrier, and that as such common carrier he is liable for the loss of goods by fire, unless the fire was caused by the act of God, the public enemy, or the inherent quality of the goods. The goods in the case were household goods, and the fire occurred in much the same manner as in the present case, the carrier repudiating any negligence of himself or servants, and was unable to account for the occurrence of the fire. The Court thus expressed

its opinion: "We are of the opinion that upon the evidence of the appellant himself it is shewn he was a common carrier within the limits of the city of Lexington. He admits he hauled for all or any persons, and had obtained a license so to do. Being a common carrier the appellant could have been compelled to haul for the appelee within the territory in which he was engaged." A verdict for $400 for the plaintiff was upheld.

In opposing the contention that the defendant was to be deemed a common carrier, his counsel relies strongly upon the case of *Brind* v. *Dale*, 2 C. & P. 207, where Lord Abinger held that a town carman whose cart plied for hire near the wharves, and who let them out by the hour, day, or job, but did not carry from one known place to another, or at any fixed rate, or the goods of several persons at the same time, was not a common carrier. This decision has been much questioned. Story on Bailments at page 496, Note 3, finds it impossible to reconcile it with the cases of hoymen, lightermen or bargemen plying to different places in the same town or taking jobs by the hour or day. These latter persons have all been held to be common carriers. He says: "What special distinction is there in the case of persons who ply for hire in the carriage of goods for all persons indifferently whether the goods are carried from one town to another or from one place to another in the same town? Is there any substantial difference whether the parties have fixed termini of their business or not, if they hold themselves out as ready and willing to carry goods for any persons whatever to or from any place in the same town or in different towns?

In *Ingate* v. *Christie*, decided after *Brind* v. *Dale*, the Court did not adopt the limitation suggested in the former case. Some of the facts in *Brind* v. *Dale*, according to the criticism of Mr. Bevan in his work on Negligence, would go to shew that in that case there was a special contract which would relieve the defendant, as in *Scaife* v. *Farrant*, L.R. 10 Exch. 358, of his common law liability. *Brind* v. *Dale* is also explained in the *Liver Alkali* v. *Johnston*, 9 Exch. 338, where Blackburn, J., states that Lord Abinger reserved a point, but that the jury having found in favour of the defendant on the question of whether the goods were received by him as a common carrier, it was never reviewed in banc. I think I may safely say that the judgment in *Brind* v. *Dale* has not been accepted as an authority in later times.

Upon the whole case I am of the opinion that in relation to moving the plaintiff's goods the defendant acted as a common carrier, and that as such common carrier he was bound to deliver safely unless a loss arose from the "act of God or the King's enemies." I must hold he was legally responsible for their loss by fire under the circumstances detailed in the evidence given at the trial.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] THE KING *v.* WIPPER. [March 5.

Canada Temperance Act—Jurisdiction of provincial magistrates—Power to adjourn case—Service of summons—Proof of, not necessary as a preliminary—Reasonable delay.

Defendant was convicted before two justices of the peace for the county of Kings of the offence of having unlawfully kept for sale in his hotel at K. in the said county, intoxicating liquors contrary to the provisions of the second part of the Canada Temperance Act then in force in said county. The conviction was attacked on the following among other grounds: (1) Because the justices who made the conviction were not clothed with jurisdiction by proper legislative authority to sit as a Court of summary criminal jurisdiction. (2) Because the justices had no jurisdiction to adjourn the trial from the hour named in the summons to a later hour of the same day, and in so adjourning lost jurisdiction. (3) Because the justices at the time they made the adjournment had no evidence before them to prove the service of the summons.

Held,—1. The Provincial Legislature having made provision for the appointment of justices of the peace, and having conferred jurisdiction upon them to impose penalties and punishments for the enforcement of provincial statutes, it was competent for the Parliament of Canada by statute to provide that punishments and penalties for the enforcement of laws of the Parliament of Canada might be recovered and inflicted before these Courts.

2. The magistrates had jurisdiction and the motion to quash the conviction must be dismissed.

3. The justices having met at the hour appointed did not lose jurisdiction by the fact of their having adjourned the hearing until a later hour of the same day.

4. Proof of the service of the summons being a part of the hearing it was not necessary that the justices should have had such proof before them as a preliminary to making the adjournment.

5. The delay in the hearing of the case from the hour of ten o'clock in the morning until about two o'clock in the afternoon of the same day was not unreasonable.

J. J. Power, in support of motion. *W. E. Roscoe*, K.C. contra.

Full Court.] GRANT *v.* ACADIA COAL CO. [April 13.

Coal mine—Explosion of gas causing death of workman—Failure to fence off or inspect unused place—Negligence of fellow-workman—Mines Regulation Act R.S. (5th series) c. 8, s. 25.

The Mines Regulation Act R.S. (5th series) contains the following among other provisions:

(1) That in every mine worked for coal once in twenty four hours, within five hours before commencing work, a competent person shall inspect that part of the mine worked and the roadways leading thereto and shall make a true report as to the condition of ventilation, and no workman shall be allowed to go to work until the same are stated to be safe.

(2) That all entrances to any place in a mine not in actual course of working and extension shall be properly fenced so as to prevent persons inadvertently entering the same.

A balance in defendant's mine which had not been in actual course of working or extension for a period of six months was left unfenced during that time, and was inspected only at intervals for the purpose of seeing that no roof fell on the stock or on the roadway. The deceased was sent into the balance for the purpose of removing some stock which had been left there when work was stopped, and was killed by an explosion which ensued. Deceased was sent in by orders of the overman, who, prior to giving deceased his instructions, asked the underground manager if the place would be all right, and was told that there would be nothing in there, meaning that the place would be free from explosive gas.

Held, that the accident was due to the negligence of a fellow workman and that the trial judge was right in withdrawing the case from the jury.

Per TOWNSHEND, J.—Where the mine owners have placed in the hands of their officials the statutory regulations with directions to follow them, they cannot be made responsible for the neglect and disobedience of the officials whom they are required by the statute to place in charge; especially in the absence of evidence of knowledge of such neglect on the part of the company or its directors.

Held, also that the violation of the regulations shewn did not amount to evidence of a "defective system."

Per GRAHAM, E.J., dissenting. There was a case for the jury.

H. Mellish, for appellant. *W. H. Fulton*, for respondent.

Full Court.] COGSWELL *v.* GRANT. [April 13.

Mortgagor and mortgagee—Foreclosure and action on bond—Plea of statute of limitations—Evidence to take case out of—R.S. (5th series) c. 112, s. 21.

A mortgage and bond given by G. to C. to secure the repayment of a sum of money were dated January 7th, 1877. The last payment of interest

was made in September, 1879. C. was absent from the province when the mortgage and bond were given and did not return until 1880. Plaintiffs as executors of C. brought two actions, (1) to foreclose the mortgage and to recover the amount secured by the mortgage and bond, and (2) to obtain possession of the land. The only defence set up to both actions was that of the statute of limitations.

Under one of the clauses of the mortgage the mortgagee was empowered to make payment of insurance premiums, in default of payment by the mortgagor, and "to charge such payments with interest at the rate aforesaid upon the mortgaged premises," but there was no provision in terms making the advance a part of the principal sum secured by the mortgage.

Held, 1. The effect of the provision was merely to make the advance a lien upon the land for its payment with interest, and was only in the nature of a further charge or additional mortgage.

2. The repayment by the mortgagor of the amount advanced was not such a payment on account of the principal sum secured as would take the case out of the statute of limitations.

3. An entry in the books of the solicitor for the mortgagee shewing the payment of the amount advanced for insurance and the subsequent repayment of the amount was not sufficient evidence of an advance by and repayment to the mortgagee, such entries being consistent with the view that the solicitor advanced the money on his own account on the credit of the mortgagor.

4. Renewal receipts for premiums of insurance, taken in connection with a clause in the policy making the loss if any payable to the mortgagee were not acknowledgments in writing within section 21 of the statute.

Held, also, following *Sutton* v. *Sutton*, 22 Ch. D. 511, and *Steward* v. *England* (1895) 2 Ch. 820, that the limitation imposed by s. 21 of the Act applied as well to the remedy on the bond as to that under the mortgage against the land.

G. Ritchie, for appellant. *A. E. Silver*, for respondent.

Full Court.] THE KING *v.* CLEMENTS. [April 27.

Liquor License Act of 1895—Compelling attendance of witness—Payment of fees—Judgment of stipendiary magistrate as to—Not reviewable on habeas corpus.

On a prosecution before the stipendiary magistrate of the City of Halifax for a violation of the Liquor License Act, 1895, service was proved of a summons on M., who it was claimed was a material witness for defendant, but without tendering witness fees, and an application was made to the magistrate for a warrant to compel the attendance of the witness, the fees being at the same time tendered to the magistrate. The application was refused on the sole ground that fees were not tendered in

the first instance to the witness, and the defendant was convicted. On application for a writ of habeas corpus,

Held, that the question whether, in a case under the Liquor License Act, the witness could be compelled to attend, or the party was entitled to a warrant, unless the fees had been paid, was open to debate, but that even if the decision of the stipendiary magistrate was erroneous it could not be reviewed by habeas corpus proceedings, and the application must be dismissed.

Per WEATHERBE, J., dissenting. The statute imperatively required the magistrate to issue the warrant and that having refused to do so he had no power to convict, and the conviction must be set aside.

J. J. Power in support of application.

Full Court.] THE KING *v.* KEEPING. [May 20.

Criminal law—Offence of "keeping" a bawdy house—Word implies continuous offence.

Defendant was convicted by the stipendiary magistrate for the City of Halifax of the offence of "keeping a disorderly house; that is to say, a common bawdy house on the 21st April, 1901, and on divers other days and times during the month of April, 1901," and was fined the sum of $54, and in default of payment of the fine four months' imprisonment. On motion for a habeas corpus,

Held, dismissing the application that the offence as charged did not constitute more than one offence. The word "keeping" implies a continuous offence.

J. J. Power, for applicant. *H. S. Blachadar*, for the Attorney-General, contra.

Province of New Brunswick.

SUPREME COURT.

En Banc.] YORK ELECTION CASE. [April 20.

Dominion Controverted Elections Act—Order for substitute service.

An order for substitute service of the notice of the presentation of an election petition under s. 10 of the Dominion Controverted Elections Act, as amended by s. 8 of c. 20 of the Acts of 1891, is not invalid by reason of its being applied for and made after the expiry of the time allowed for personal service.

Rule nisi to rescind order discharged with costs.

A. J. Gregory, for respondent, in support of rule. *O. S. Crocket*, for petitioner, contra.

En Banc.] KING *v.* WILSON, EX PARTE IRVING. [April 20.

Habeas corpus—Jurisdiction of County Court Judge.

A judge of a County Court has no jurisdiction under s. 108 of the County Court Act to deal with an application for an order for discharge by way of habeas corpus, unless the applicant is confined in the gaol of the county for which he is judge.

Rule absolute for certiorari.

G. W. Allen, K.C., in support of rule. *J. D. Phinney*, K.C., contra.

In Equity, Barker, J.] [May 21.

AMHERST BOOT & SHOE CO. *v.* SHEYN.

Assignments and Preferences Act, 58 Vict., c. 6, s. 1—Confession of judgment—Pressure—Absence of collusion.

A confession of judgment upon which judgment is signed, and fi. fa. issued given by an insolvent debtor under pressure of the preferred creditor who knew of the debtor's insolvent circumstances at the time, is not fraudulent and void against other creditors of the judgment debtor within s. 1 of Act 58 Vict., c. 6, in the absence of collusion.

J. D. Phinney, K.C., and *G. W. Allen*, K.C., for defendants. *L. A. Currey*, K.C., and *Robidoux*, for plaintiffs.

In Equity, Barker, J.] GUPTILL *v.* INGERSOLL. [May 21.

Tenants in common—Chattel—Account for profits.

A tenant in common of personal property is not liable to account to his co-tenant for profits derived from having the exclusive use of the property where such profits are not receipts within the statute 4 Anne, c. 16.

Cockburn, for plaintiff. *McMonagle*, for defendants.

In Equity, Barker, J.] IN RE KEARNEY. [May 21.

Dower—Admeasurement of—Commissioners' Report—Motion to confirm—Affidavits on motion.

The primary object of a proceeding for admeasurement of dower under s. 237 of 53 Vict., c. 4, is to set off the portion of land to which the widow is entitled, and a sum of money is not to be paid to her in lieu of dower because of inconvenience to the other occupants of the land if the admeasurement can in fact be made.

Affidavits will not be received in relation to facts upon which the report of Commissioners to admeasure is based on motion to confirm the report.

L. Young, for widow. *Vince*, K.C., for D. Kearney.

Province of Manitoba.

KING'S BENCH.

Dubuc, J.] JOHN ABELL ENGINE ETC. CO. *v.* MCGUIRE. [April 25.

Contract—Conditional Sale—Rescission of contract—Expense of repairs to engine retaken on default in payment—Expense of resuming possession—Warranty.

Defendants in March, 1896, gave a written order to plaintiffs for a threshing engine and separator, which were delivered in the following August. The order provided for a conditional sale of the machines for the sum of $2,875, for which promissory notes payable at intervals were to be given, and on the usual term that the property in them should remain in the plaintiffs until full payment of the price agreed on, and contained the following warranty: "The above machinery is warranted, with proper usage, to do a good work and to be of as good materials and as durable with proper care, as any of the same class made in Canada. . . . If the machinery cannot be made to fill the warranty, it is to be immediately returned by the purchaser to the place where received, free of charge, and another substituted therefor which shall fill the warranty, or the money and notes returned. Continued possession shall be evidence of satisfaction." The agreement further provided that on default of payment, the plaintiffs might resume possession of the goods sold and sell the same, and apply the proceeds after paying the expenses of taking possession and of such sale, towards payment of the amount remaining unpaid, and proceed for the balance by suit or otherwise. There were some weak or defective parts in the machines, and plaintiffs, on being notified, sent experts to remedy the defects. They put the machines in somewhat better shape, but delays were incurred, and defendants claimed that the machines never worked properly. Defendants, however, used the machines during the threshing seasons of 1896 and 1897 and for part of the season of 1898, when, on one of the pieces breaking, the machine was left in a field, where it remained unprotected until June, 1900. They had paid about $1,200 of the purchase money when plaintiffs resumed possession of the machines at a cost of $40, made repairs to them at a cost of $466.35, and then entered into a conditional re-sale of them to a Mr. Weaver, for the sum of $2,000, no part of which had been received by the plaintiffs at the time of bringing the present action, which was to recover the amount still due by defendants on their original purchase, viz. $1677.09.

Held, 1. The defendants, having failed to return the machinery after trial, having used it during three seasons and paid nearly $1,200 on account,

were barred, under the terms of the agreement, from claiming that the machinery was not good and that payment therefor should not be enforced.

2. The agreement was not rescinded by plaintiff retaking possession and reselling. *Sawyer* v. *Pringle*, 18 A.R. 218, distinguished. *Watson Manufacturing Co.* v. *Sample*, 12 M.R. 373, followed.

3. The plaintiffs had a right, under the circumstances, to charge the cost of the repairs and of resuming possession against the proceeds of the resale, as it was shewn that such repairs had enhanced the value of the machinery in the state in which it was when the plaintiffs retook it, by more than their cost. A vendor retaking possession under the terms of such an agreement and in circumstances like those of this case may be deemed in the position of a mortgagee in possession, and such cases as *Shepard* v. *Jones*, 21 Ch. D. 469, and *Henderson* v. *Astwood* (1894) A.C. 150, would apply.

4. The defendants were not entitled to be credited in this action with anything on account of the proceeds of the conditional sale to Weaver as nothing had yet been received by the plaintiffs on that account.

Quære, whether, if the sale to Weaver had been an absolute sale on credit, the defendants would not have been so entitled. If the sale to Weaver should be carried out and the money paid to the plaintiffs, defendants would then have their recourse for the amount coming to them out of the proceeds.

5. The plaintiffs were not entitled to charge the cost of the repairs to the machinery as against the defendants in this action or to deduct the amount from certain sums they had collected in cash on collaterals and by the sale of certain parts of the machinery which sums must be credited in this action, but must look to the proceeds of the sale of the remainder of the machinery to recoup themselves for the repairs.

6. The plaintiffs were entitled to collect in this action the amount expended by them in retaking possession of the machinery under the terms of the contract.

Howell, K.C., and *Mathers*, for plaintiffs. *Metcalfe*, for defendants.

Bain, J.] GREEN *v.* MANITOBA ASSURANCE CO. [April 29.

Fire insurance—Conditions—Variations from statutory conditions—"The Fire Insurance Policy Act," R.S.M. c. 59—Proofs of loss—Interest—Valuation of property.

Defendants objected to the plaintiff's claim for loss of property insured under a policy of fire insurance issued by the defendants on the ground that at the time of the loss a portion of plaintiff's note given for the premium for the insurance was unpaid, and relied on a condition indorsed on the policy that the company should not be liable for any loss or damage that

might occur to the property mentioned while any promissory note or obligation or part thereof given for the premium remained due and unpaid. What purported to be the statutory conditions prescribed by "The Fire Insurance Policy Act," R.S.M. c. 59, were printed on the back of the policy, and following these, under the heading, "Variations in conditions," were several other conditions, including the one relied on by defendants, printed in ink of a different color, but in type of apparently the same size as that of the statutory conditions, and which the judge held was not conspicuous type within the meaning of the Act. What purported to be the statutory conditions printed on the policy differed in several important particulars from the words found in the statute; and after the heading, "Variations in conditions," the company had omitted to print the part of the heading prescribed by section 4 of the Act, "This policy is issued on the above statutory conditions, with the following variations and additions," or any other words to the same effect.

Held, following *Sly* v. *The Ottawa Agricultural, &c., Co.*, 29 U.C. C.P. 28; *Sands* v. *Standard Insurance Co.*, 27 Gr. 167, and *Ballagh* v. *Royal Mutual Fire Insurance Co.*, 44 U.C.R. 70; 5 A.R. 87, that the requirements of the statute are imperative, and that plaintiff was not bound by the condition on which the defendant relied.

Held, further, that the insured was not precluded from showing what the real value of the property insured was, by the fact that he had, under peculiar circumstances, offered to sell it for less than the amount insured on it.

The policy contained in the body of it the words, "The company is not responsible for loss caused by prairie fires," and defendants contended that, as plaintiffs had alleged the contract of insurance to be an absolute one, he could not recover without an amendment setting up the policy correctly and proof that the loss was not caused by a prairie fire.

Held, that such qualification or exception to the absolute contract of the company must be regarded as a condition of the insurance within the meaning of the Act, and that as it was not one of the statutory conditions it would be legal and binding on the assured only if it were indicated and set forth in the policy in the manner prescribed by the Act, which it was not, and in pleading the plaintiff might ignore it altogether as he had done.

The defendants also objected at the trial to the sufficiency of the proofs of claim; but, although they had objected to payment of the loss on other grounds than for imperfect compliance with the conditions regarding proofs of loss, they did not notify the plaintiff in writing that his proof was objected to.

Held, that, under section 2 of the Act, they could not now take advantage of any defect in the proofs.

Held, also, that the plaintiff was entitled, under 3 & 4 Wm., c. 42. s. 29, to interest on the insurance money, but only from the expiration of

thirty days from the time he sent in his corrected and completed proofs of loss, as he thereby admitted that his first proofs were imperfect.

Howell, K.C., and *Metcalfe*, for plaintiff. *Ewart*, K.C., for defendants.

Full Court.] RITZ *v.* SCHMIDT. [May 6.

Retroactive legislation—Construction of statutes—Queen's Bench Act, 1895—Rules 803, 804—60 Vict., c. 4.

Appeal from verdict of DUBUC, J., in favor of the plaintiff in an action for recovery of possession of land bought by the plaintiff at a sale made under an order of the Court of Queen's Bench, dated in March, 1896, providing for the realization of the amount of a judgment of a County Court of which a certificate had been registered. The order had been made in a summary way under the power conferred by Rule 803 of the Queen's Bench Act, 1895, and not in an independent action, and it had been held by the Full Court in *Proctor* v. *Parker*, 11 M.R. 485, decided 28th February, 1897, that that Rule did not authorize such summary proceedings to be taken in the case of a judgment of a County Court. Defendants contended that the order was a nullity, and that all the proceedings under it were invalid and of no force to support the plaintiff's title. The Legislature of Manitoba had, however, at its next session passed the Act, chapter 4 of 60 Victoria, assented to 30th March, 1897, amending "The Queen's Bench Act, 1895," by inserting the following Rule after Rule 807: "Rule 807 (*a*). In the case of a County Court judgment an application may be made under Rule 803 or Rule 804, as the case may be. This amendment shall apply to orders and judgments heretofore made or entered, except in cases where such orders or judgments have been attacked before the passing of this amendment." This enactment came into force after the completion of all the proceedings upon which the plaintiff relied for title. It was admitted that the defendants had notice of the proceedings under the order in question, and that it had been in no way "attacked" prior to the coming into force of the amending act.

Held, that, while the intention of the Legislature was not well expressed, it was manifest, when all the facts were considered, that it intended to make valid not only the orders which had been made, but also any proceedings which had been taken under them, except where the validity of the orders had been questioned in some suit, action, or proceeding before 30th March, 1897, and that plaintiff's verdict must be sustained.

Tupper, K.C., for plaintiff. *Phillips*, for defendants.

Province of British Columbia.

SUPREME COURT.

McColl, C.J.] [Nov. 2, 1900.

THE QUEEN *v.* MUNICIPAL COUNCIL OF THE DISTRICT OF MISSION.

Municipal law—Limitation of action against municipality—Whether action includes mandamus proceedings.

Mandamus to compel the defendant to appoint an arbitrator for the purpose of determining the compensation to be awarded Robert Law for land taken for road purposes. The objection was taken that the action was barred by s. 244 of the Municipal Clauses Act, as the land was taken some five or six years previous to the issue of the writ of mandamus.

Held, by McCOLL, C.J., dismissing the motion, that the limitation of one year prescribed by s. 244 of the Municipal Clauses Act for commencing actions against a municipality applies to mandamus proceedings to compel a municipality to appoint an arbitrator to determine the amount of compensation for land taken for road purposes.

J. R. Grant, for the motion. *Godfrey*, contra.

COUNTY COURT OF KOOTENAY.

Forin, J., in Chambers.] [June 7.

LINDBURG *v.* MCPHERSON.

Garnishee before judgment, for damages, together with liquidated demand —Affidavit verifying debt.

This was an application by defendant to set aside a garnishee summons (and service) issued before judgment, and for payment out of Court of moneys paid in by the garnishee. Sec. 102 of County Court Act (R.S.B.C. 1897, c. 52) provides that "a plaintiff at the time of issuing a summons for a debt or liquidated demand, or at any time thereafter previous to judgment upon filing . . . and affidavit verifying the debt . . . may obtain a summons" (i.e., garnishee summons), etc. The summons was issued, claiming $2.50 for hire of horse and sleigh, together with $60 damages for the destruction of the sleigh through defendant's negligence. The affidavit verifying the debt ran: "My claim against the defendant is for the sum of $2.50 hire of rig hired by the defendant from me on the 14th day of February last, and for the "sum of $60 damages for the destruction of the said rig or vehicle." Plaintiff's council contended that

as a portion of the demand was liquidated, s. 102 had been satisfied, and consequently the whole debt due from the garnishee to the defendant was attached, under the authority of *Yates* v. *Terry*, 70 L.J.Q.B. 24, and must remain in Court until the trial of the action.

Application granted; garnishee summons and service set aside and money ordered to be paid out of Court to the defendant.

R. W. Hannington, for application. *H. E. Wilson*, for plaintiff.

North-West Territories.

JUDICIAL DISTRICT OF NORTHERN ALBERTA.

SUPREME COURT.

Scott J.] HAWKEY *v.* BURLAND. [Jan. 1, 1897.
VANWART *v.* BURLAND.

Married Woman—Terms of judgment and execution.

The defendant, a married woman, was sued by different plaintiffs as a feme sole and there was nothing in the pleadings to shew that she was possessed of separate estate. Judgments were entered against her in default of appearance. The judgments were drawn up against her personally, as if unmarried, no mention being made in them of separate estate, and executions were issued. She then applied to set the judgments and executions aside on the grounds that she was a married woman, and that the judgments and executions were against her personally and not limited to her separate estate. Sec. 40 of the North-West Territories Act, R.S.C. c. 55, provides that "any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts, as if she were unmarried."

Held, that a limitation of the judgments and executions to her separate estate was not necessary under the Act, and that therefore they were neither irregular nor void upon the grounds taken by the defendant in her application.

Rouleau, J.] MONGENAIS BOIVIN *v.* BEAUPRE. [Oct. 18, 1898.

Striking out appearance—Rule 103—Time for pleading.

Held, following *Hobson* v. *Monks*, W.N. (1884), 8, that the time for pleading does not run pending a summons to strike out an appearance.

SCOTT J.] RE BANFF ELECTION, BRETT *v.* SIFTON. [Oct. 30 1899.

Controverted Election Ordinance—Time for particulars—Jurisdiction of Judge to extend.

Sec. 10 of the Controverted Election Ordinance provides that the respondent may at any time within twenty days of the service of the petition upon him, apply to a judge to set aside the petition, upon certain grounds specified in that section. Sec. 11 provides that the respondent, "may at any time within twenty days after the service of the petition upon him (unless he makes an application under the last preceding section and if he does then within five days after such application is disposed off if it is refused or dismissed) apply to the judge for particulars or for further and better particulars of the facts and grounds relied on to sustain the prayer of the petition." The respondent made an application, within the twenty days after service, to set aside the petition on the ground that it was not signed by the petitioner which ground was not included in those specified in s. 10.

His application was dismissed by the judge and he appealed to the Court en Banc. He then, pending the appeal, applied for a stay of all proceedings pending the decision of the appeal and for an order that the time for applying for an order for particulars be extended until ten days after the decision of the appeal.

Sec. 18 of the Ordinance provides that "the petition and all the proceedings thereunder shall be deemed to be a cause in the court and all the provisions in the Judicature Ordinance so far as they are applicable and not inconsistant with the provisions of this Ordinance shall be applicable to such petition and proceedings."

Sec. 548 of the Judicature Ordinance provides that "the court or a judge shall have power to enlarge or abridge the time appointed by the Ordinance or rule of court for doing any act or taking any proceeding."

Held, that he had jurisdiction by virtue of the provisions of s. 18 and s. 548 above set forth, to direct a stay of proceedings and enlarge the time for applying for particulars and the proceedings were stayed and the time enlarged accordingly.

McCarthy Q.C., for respondent. *R. B. Bennett*, for petitioner.

Rouleau, J.] MACDONALD v. TOWN OF EDMONTON. [Jan. 10.

Municipal taxation—Exemption—Property leased to the Crown.

The plaintiff was owner in fee of certain lots in the town of Edmonton, which, with the buildings thereon, had been leased to the Government of Canada, through the Commissioner of the North-West Mounted Police, and were used as a barracks for that force at the Edmonton post. The

municipal authorities in the years 1895, 1896 and 1897 assessed the plaintiff for taxes in respect of these lots, and, the taxes being unpaid, were proceeding to sell the said lots under the provisions of the Municipal Ordinance. Sub-s. 1 of s. 121 of that Ordinance exempts from taxation "all property held by Her Majesty or specially exempt by the Parliament of Canada or for the public use of the Government of the Territories."

Held, following *Attorney-General of Canada* v. *City of Montreal*, 13 S.C.R. 352, that the entire estate in the lands, including both the reversion and the leasehold, was exempt under the Ordinance.

McCarthy, Q.C., for plaintiff. *Muir*, Q.C., for defendant.

Book Reviews.

A Treatise on the Law Relating to the Devolution of Real Estate on Death, under Part I. of the Land Transfer Act, 1897, and the Administration of Assets, real and personal, by the late L. G. G. ROBBINS and F. T. MAW, Barristers-at-Law. Third edition. London: Butterworth & Co., 12 Bell Yard, Temple Bar, W.C., 1901.

Mr. Robbins' book of 1898 was the recognized authority on the subject of the England Land Transfer Act 1897, the first and second editions dealing specially with that legislation, which follows in effect the Ontario Devolution of Estates Act of 1886. The book before us alters the arrangement and increases the scope of the first work. It consists of four parts:—(1) Dealing with the creation of the offices of executor and administrator and indicating the nature of the trust of administration subject to which the real and personal estate of a deceased person devolved upon his personal representative; (2) The administration of the estate in payment of debts; (3) The distribution of a surplus remaining after payment of debts; (4) The liability of the representative. The result is that we have in this work a concise and well-arranged treatise on the law relating to real and personal assets, dealt with in the manner above referred to. The law in this province is so similar to that in England that the book will be of great value here. The tables of cases and statutes are prepared with more than ordinary completeness, and the index is both full and scientifically arranged. The mechanical work, coming from such a firm, is, of course, excellent.

A Summary of the Law of Torts, by ARTHUR UNDERHILL, Barrister-at-Law. Seventh edition, by the author assisted by H. S. Moore, Barrister-at-Law. London: Butterworth & Co., 12 Bell Yard. Canadian edition by A. C. Forster Boulton, of the Inner Temple and of Osgoode Hall, Barrister-at-Law. Toronto: The Canada Law Book Company.

It is the Canadian edition that we have before us and a most excellent work it is. Nothing need be said commendatory of Mr. Underhill's work.

It is as well and favourably known in this country as in England. The author's desire (which was carried out with great success) was to set forth the principles of this branch of the law, giving such illustrations as were necessary to exemplify his propositions. Mr. Boulton has added the Canadian cases in their proper connection, doing his work excellently well. As he states in the preface, "the basis of the Canadian law on the subject of torts is the common law of England, and therefore a purely Canadian work is unnecessary; indeed such a work would be incomplete without numerous references to the leading English cases." The present edition therefore may be claimed as, and will certainly prove, a welcome addition to the legal literature of the Dominion.

Flotsam and Local Items.

UNITED STATES DECISIONS.

ELECTRICITY—NEGLIGENCE—LIABILITY OF LIGHT COMPANY—NOTICE TO AGENT:—

1. Where plaintiff hired contractors to wire his property for electric lighting, and afterwards contracted with a lighting company to furnish a current to light the building, the lighting company was not responsible for injury from fire caused by negligent wiring.

2. Where plaintiff hired contractors to wire its property for electric lighting, a company which afterwards furnished a current to light the building was not chargeable with notice of the negligent manner in which the wiring was done, merely because a superintendent of construction of such company casually saw the work as it was being done; it not appearing that he was an officer or director of the company, or examined the wire, or was impressed that the work was being done negligently, or that he was still employed for the company where the loss from alleged negligent wiring occurred *National Fire Ins. Co.* v. *Denver Electric Co.*—Colorado Court of Appeals.

NOTICE.

A meeting of delegates from the County Law Library Associations of the Province of Ontario and other members of the legal profession, will be held at Osgoode Hall, on June 29th, 1901, at 10 a.m. to discuss the following topics:—Publication of a work on practice by the Law Society—Further help to County Law Library Associations by deductions from Law Society fees—Further help from Dominion Government—Cheapening litigation—The Attorney-General's Bill—Closer relations of County Law Library Associations—A System of nominating Benchers and the more frequent election of Benchers.