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WE again have to deplore the loss of one who, in the early days of this journal, took a great interest in its welfare, and in conjunction with Mr. Robert A. Harrison, afterwards Chief Justice of the Queen's Bench, was one of its editors. We allude to His Honour Judge W. D. Ardagh of Winnipeg. He was on his return from a well-earned holiday, which he had spent with his family in Italy, when, on landing in New York, apparently in good health, he fell lifeless on the dock. His sudden death—resulting, doubtless, from heart disease—was a great shock to his many friends. His stricken wife and children have the deep sympathy of all in their sad bereavement.

It can scarcely be out of place, in these pages, to testify to his worthy and consistent life in all its relations, whether in the family circle, as a professional man, or as a citizen. He was a true man, a trusty friend, and loved most by those who knew him best. The most prominent feature of his character was, not merely that he was unselfish, but rather that in all his dealings and intercourse with others, and in the little matters of everyday life, self was sunk out of sight. He appeared to be continually on the watch for opportunities to benefit not only friends, but even casual acquaintances, no matter what trouble it might entail on himself.

As a judge, he had the respect and confidence of the Bar and the public. He never shirked his work, did it well, and managed to get at the rights of a case and decided it promptly. A good judge of character, he knew better than many on the Bench of larger legal attainments when a witness was telling the truth or otherwise. The Benchers of the Law Society of Manitoba, after receiving the news of his death, by resolution in Convocation, bore testimony "to his unquestioned rectitude and uprightness of

character, and his courtesy to the members of the profession." In the discharge of his judicial duties, he was most upright and conscientious, but perhaps over-painstaking in seeking to make his court a court of equity and good conscience. He hated wrong-doing in the abstract, as distinguished from wrongness in method or decision, and sometimes what seemed good reasoning and authority was wasted on him, as his mind was always seeking the ultimate right and an equitable decision as between man and man. This might not tend to make him popular with the profession, and may be admitted to have been an element of weakness in his character as a judge, but one cannot but admire and respect the thought that dominated his mind. A sketch of his life appears in another place.

SPECIALLY INDORSED WRITS.

In the recent case of *Munro* v. *Pike*, 15 P.R. 164, Armour, C.J., affirmed the decision of the Master in Chamber, refusing an order for a summary judgment under Rule 739, on the ground that the whole of the plaintiff's claim as indorsed on the writ was not the subject of a special indorsement.

The indorsement was as follows:

"The plaintiff's claim is on a mortgage dated the 11th day of November, A.D. 1890, made by the defendant, as mortgagor, to George A. Shaw, as mortgagee, and assigned by the said George A. Shaw to the plaintiff by indenture dated 11th March, 1890.

The following are the particulars:

Principal money - - - - -	$650.00
Interest due 2nd Nov., 1892 - - - -	22.75

By the terms of the said mortgage, on default in payment of the interest, the principal becomes due. Default took place in payment of the interest due on the 2nd day of November, A.D. 1892. The plaintiff claims interest on $650, from 2nd November, 1892, at the rate of seven per cent., and on $22.75 at the rate of six per cent., until judgment."

The Master in Chambers held that the writ was sufficiently indorsed so far as the setting forth of the covenant for the payment of the amount of the mortgage was concerned; but he held the indorsement defective as a special indorsement for omitting to state

the dates from which the plaintiff claimed interest, and, further, by claiming interest upon interest without setting out the contract for such interest. He therefore refused the motion, with costs, and, as we have said, his decision was affirmed by Armour, C.J.; but the learned Chief Justice apparently based his judgment solely on the fact that interest on interest was claimed without any contract for its payment being alleged. But this, after all, was merely adding to the claim, which was properly the subject of a special indorsement, a claim for unliquidated damages.

No doubt, according to the English cases relied on by the Master in Chambers and the Chief Justice, this latter ground was quite sufficient to invalidate the whole indorsement as a special indorsement. But those cases proceed, as we have before pointed out, on the assumption that the word "only" in the first line of Rule 245 really does mean "only," and that therefore only claims which come within the category stated in that rule can be indorsed on a "specially indorsed writ"; and that if any other claims are stated in the indorsement which do not come within that category, then the introduction of such claim vitiates the whole indorsement as a "special indorsement," and that neither final judgment can be signed for default of appearance to such a writ, nor can a summary judgment be obtained thereon under Rule 739 as to any part of the claim. But both the Master in Chambers and the Chief Justice have omitted to notice the cases of *Mackenzie* v. *Ross*, 14 P.R. 299; *Huffman* v. *Doner*, 12 P.R. 492; and *Hay* v. *Johnston*, *ib.*, 596, which appear to have created an important variation in the construction of Rule 245. According to those cases, the word "only" in that Rule does not mean "only" so as to restrict the joining of other claims with such as come within the category of that Rule as the English authorities have decided; but it merely has the effect of preventing the plaintiff from obtaining a final judgment for default of appearance, or a summary judgment under Rule 739, in respect of such added claims. If these cases are correct, then the plaintiff in *Munro* v. *Park* ought at least to have had judgment for as much of his claim as was properly indorsed, and should have been left to carry on the action as to the residue of his claim. So far as the construction of Rule 245 is concerned, *Mackenzie* v. *Ross* and the other cases before referred to may not seem to be very satisfactory; but when that Rule is read in connection with Rule 711, of which there is no counterpart

in the English Rules, and which was added on the consolidation of our Rules without, perhaps, due consideration of the wording of Rule 245, it must be admitted that it does afford some ground for the assumption that in this Province it is contemplated that claims for "detention of goods and pecuniary damages, or either of them," at all events, may be added to claims which are properly the subject of a "special indorsement" without impairing the right of the plaintiffs to take all proceedings in the action as regards the latter claims as if they were the *only* claims indorsed. *Mackenzie* v. *Ross* and the other cases, however, even go farther, and lay down that claims for equitable relief may also be added to claims which are the subject of a special indorsement, without prejudice to the plaintiff proceeding so far as the latter claims, as if they were the only claims indorsed.

At present the practice on this point seems to us to be drifting into a muddle: and, as it is one of everyday concern, it is to be hoped that it may be soon placed on a more intelligible basis.

CURRENT ENGLISH CASES.

The Law Reports for April comprise (1893) 1 Q.B., pp. 373-521: (1893) P., pp. 57-85: and (1893) 1 Ch., pp. 401-617.

ARBITRATION. APPEAL. LOSS OF PROFITS.

In re Kirkleatham, (1893) 1 Q.B. 375, the case of *In re Knight & The Tabernacle Building Society*, (1892) 2 Q.B. 613 (noted *ante* p. 14), is distinguished. In this case an arbitrator had made an award, subject to the opinion of the court, on a certain question of law, and it was held by the Court of Appeal (Lindley, Bowen, and Smith, L.JJ.) that the decision of the Divisional Court on this question was appealable. Bowen, L.J., says that in the *Knight* case the arbitrator had not stated his award in the form of a special case, but had asked the opinion of the court by way of interlocutory proceeding, in order to assist him to form his judgment. While in that case, therefore, the order of the Divisional Court would not be an effective determination of the rights of the parties, in the present case it was. On the merits, the Court of Appeal affirmed the decision of the Divisional Court, the question being whether upon fixing the value of water

mains, etc., and other appliances of a waterworks board, upon a compulsory sale of its property to another public body, the loss of profits to the board resulting from its being deprived of the right of supplying water could be taken into account; the court holding that it could not.

ARBITRATION—REFERRING BACK AWARD—DISCOVERY OF MATERIAL EVIDENCE AFTER MAKING OF AWARD—ARBITRATION ACT, 1889 (52 & 53 VICT., C. 49, S. 10) (R.S.O., C. 53, S. 37).

In re Keighley & Durant, (1893) 1 Q.B. 405, the Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.) affirmed the decision of a Divisional Court, holding that under the Arbitration Act, 1889, s. 10 (see R.S.O., c. 53, s. 37), the Court may remit an award back to arbitrators for reconsideration when it is shown that new and material evidence has been discovered since the making of the award.

PRACTICE—WRIT OF SUMMONS—SERVICE OUT OF JURISDICTION—CO-DEFENDANT WITHIN JURISDICTION—ACTION OF TORT—ORD. XI., R. 1 (G) (ONT. RULE 271 (G)).

Croft v. *King*, (1893) 1 Q.B. 419, was an action for malicious prosecution, and was brought against Frederick & Co., and also against Frederick King, their managing director. Frederick King was served within the jurisdiction, but the company were domiciled out of the jurisdiction, and it was claimed by the plaintiff that the alleged malicious prosecution had been instituted by the defendant Frederick King at the instance of the company, and that therefore the company was a proper party to the action against Frederick King; an order having been made allowing service of the writ on the company, the company appealed therefrom to a Divisional Court (Day and Collins, JJ). Some observations of Huddleston, B., and Cave, J., were relied on as showing that the jurisdiction to allow service out of the jurisdiction in actions of tort had been taken away by the Rules of 1883; but the Divisional Court held that the company was a proper party to the action against King, and therefore the service could be properly allowed under Ord. xi., r. 1 (g) (Ont. Rule 271 (g)).

PRACTICE—APPLICATION OF DEFENDANT TO ADD DEFENDANT—NON-JOINDER—FOREIGNER RESIDENT OUT OF JURISDICTION—ORD. XVI., R. 11—(ONT. RULE 324).

Wilson v. *Balcarres Brook Co.*, (1893) 1 Q.B. 422, was an action brought by the plaintiffs against one of two joint contractors, the other being a foreigner resident out of the jurisdiction. The defendant applied to have his co-contractor added as a defendant; but the Court of Appeal (Lord Esher, M.R., and Bowen and Smith, L.JJ.) affirmed the decision of Day and Collins, JJ., that under Ord. xvi., r. 11 (Ont. Rule 324), the defendant was not entitled as of right to have the other joint contractor added as a defendant, and that under the circumstances, as a matter of discretion, the court ought not to order him to be added.

PRACTICE—SERVICE OUT OF JURISDICTION—ORD. XI., R. 1 (G)—(ONT. RULE 271 (G)).

Witted v. *Galbraith*, (1893) 1 Q.B. 431, is another case upon the construction of Ord. xi., r. 1 (*g*) (Ont. Rule 271 (*g*)). The action was brought under Lord Campbell's Act to recover damages for causing the death of the plaintiff's husband. The writ was in the first instance served on Galbraith & Co., who were shipbrokers, carrying on business in London. The defendants, Dunlop & Co., were the owners of a vessel, the *Queen Adelaide*, on which the deceased was killed by falling down a hatchway. The deceased was a servant of a dock company employed by Galbraith & Co. to unload the vessel. The plaintiff having obtained leave to serve Dunlop & Co. out of the jurisdiction, these defendants then moved to set aside the writ and service; but Lord Coleridge, C.J., and Hawkins, J., refused the application, holding that Dunlop & Co. were properly made parties under Ord. xi., r. 1 (*g*) (Ont. Rule 271 (*g*)).

PRACTICE—PARTIES—DEFENDANTS SUED IN REPRESENTATIVE CAPACITY—SUING ONE OF A NUMBER OF PERSONS ON BEHALF OF ALL—TRADES' UNION—ORD. XVI., R. 9 (ONT. RULE 315).

In *Temperton* v. *Russell*, (1893) 1 Q.B. 435, an unsuccessful attempt was made to stretch the provisions of Ord. xvi., r. 9 (Ont. Rule 315). The action was brought against the presidents and secretaries of several trades' union societies, as representing not only themselves, but all the members of each of the societies, for maliciously procuring persons to break their contracts with the plaintiff. The judgment of the Court of Appeal (Lord Esher,

M.R., and Lindley and Bowen, L.JJ.) was delivered by Lindley, L.J., holding that the Rule did not enable the plaintiff to sue the defendants as representing any other members of the respective societies of which they were officers.

PRACTICE—SPECIAL ENDORSEMENT—NON-AVERMENT OF CONDITION PRECEDENT.

In *Bradley* v. *Chamberlyn*, (1893) 1 Q.B. 439, it became necessary to consider the sufficiency of a special endorsement. The endorsement was as follows: "The plaintiff's claim is £210, payable to the plaintiff on demand under an agreement bearing date June 21, 1892, made by the defendant in favor of the plaintiff for value. Particulars—Oct. 13, 1892. To amount due, £210. The following is a copy of the agreement:

June 21, 1892.

To A. M. BRADLEY, Esq.

Dear Sir,—If you deliver to my husband, Mr. A. H. Chamberlyn, the three bills you hold accepted by Edwards & Chatterton, I undertake to pay the sum of £210, which he owes you for cash advanced.

Yours truly,

MAY CHAMBERLYN.

The defendant is sued in respect of her separate estate possessed by her at the time the above agreement was signed by her."

On motion for a summary judgment, Wright, J., thought the endorsement defective for not alleging the performance of the condition precedent; but Day and Collins, JJ., were both agreed that the endorsement was sufficient; and the defendant having relied before on Wright, J., on the technical objection only, they held it was too late on appeal to apply to file an affidavit of merits.

CRIMINAL LAW—MANSLAUGHTER—NEGLECT TO PROVIDE AN ADULT WITH FOOD OR MEDICAL AID.

The Queen v. *Instan*, (1893) 1 Q.B. 450, was a case stated by Day, J. The prisoner was convicted of manslaughter under the following circumstances. She lived with her aunt, and was over 33 years of age. Her aunt was about 73, and until a few weeks before her death was healthy, and able to take care of herself. She was possessed of a small income. The two women lived together in a house taken by the aunt; no one lived with, or in any way attended to, them. Shortly before her death the aunt

suffered from gangrene in the leg, which rendered her, during the last ten days of her life, helpless. No one but the niece knew of her conditi The niece continued to live in the house at the cost of her aunt, and took the food supplied by the tradespeople, but did not give any to the deceased, nor procure any medical or nursing attendance. Her death was caused by the gangrene, but was accelerated by the lack of food and nursing and medical attendance. All these wants would and could have been supplied had any of her neighbours been notified of her condition. Lord Coleridge, C.J., and Hawkins, Cave, Day, and Collins, JJ., were of opinion that the niece was properly convicted.

RAILWAY COMPANY—NEGLIGENCE—ROBBERY OF PASSENGER—REFUSAL TO DETAIN TRAIN—OVERCROWDING CARRIAGES—DAMAGES—REMOTENESS.

Cobb v. *Great Western Railway Co.*, (1893) 1 Q.B. 459, we have already referred to *ante* p. 239; and it is perhaps only necessary here to say that the ground on which the Court of Appeal (Lord Esher, M.R., and Bowen and Smith, L.JJ.) affirmed the decision of Day and Collins, JJ., was principally this: that although the suffering of a carriage to be overcrowded might be evidence of negligence on the part of a railway company, yet that the robbery of a passenger was not a necessary consequence of such overcrowding, and therefore that damage was too remote. From the observations of Lord Esher, M.R., it would appear that if the company's servants had known that the plaintiff was being assaulted or robbed, it would be their duty to interfere to protect him; but when a passenger has been assaulted and robbed in the course of the journey, it is no part of the duty of the company's servants to assist him in any way to obtain redress. Owing to the mode of constructing English railway carriages, the company's servants can have very little oversight over passengers while the train is in motion, and it is a wonder that long before this the American pattern of railway carriages has not been adopted th ..

SCHOOLMASTER—PUNISHMENT OF PUPILS FOR ACTS DONE ON THE WAY TO SCHOOL.

Cleary v. *Booth*, (1893) 1 Q.B, 465, was a case stated by justices. The defendant was the headmaster of a board school, and had corporally punished the plaintiff, a pupil, for fighting with another boy on his way to school. It was claimed by the

plaintiff that the defendant had no authority to punish him for anything done outside of the school. The court (Laurance and Collins, JJ.) held that the authority delegated by a parent to a schoolmaster to inflict reasonable personal chastisement upon him is not limited to offences committed by the pupil upon the school premises, but extends to acts done by the pupil on his way to or from school.

NEGLIGENCE—SURVEYOR — MISREPRESENTATION—LIABILITY OF THIRD PERSON FOR INJURY CAUSED BY HIS MISREPRESENTATION—ACTION OF DECEIT.

Le Lievere v. *Gould*, (1893) 1 Q.B. 491, is an instance of the application of the doctrine of *Peek* v. *Derry*, 14 App. Cas. 337. The plaintiffs were mortgagees of the interests of a builder under a building agreement, and advanced money to him from time to time on the faith of certificates given by the defendant, a surveyor, that certain specified stages in the progress of the buildings had been reached. The defendant was not employed by the plaintiffs, and there was no contractual relation between them. Owing to the negligence of the defendant, but without any fraud on his part, the certificates given by him contained untrue statements as to the progress of the buildings, and the plaintiffs claimed to recover from him the moneys advanced on the faith of such erroneous statements. Wills and Collins, JJ., held that he was liable; but the Court of Appeal (Lord Esher, M.R., and Bowen and Smith, L.JJ.) were unanimous that the case was governed by *Peek* v. *Derry*, and that in the absence of proof of fraud in giving the certificates the action was not maintainable, and they were also agreed that the effect of *Peek* v. *Derry* is to overrule *Cann* v. *Wilson*, 39 Ch.D. 39.

TRESPASS—CHATTEL MORTGAGE—REMOVAL OF GOODS—TENDER AFTER DEFAULT—INJURY TO GOODS BY REMOVAL.

Johnson v. *Diprose*, (1893) 1 Q.B. 512, was an action for trespass to goods. The plaintiff had given the defendant a chattel mortgage, and having made default the defendant seized the chattels. Before removal the plaintiff tendered the amount due for principal, interest, and expenses; but the defendant refused to accept the money, and removed the goods. Damages were claimed for the alleged trespass in removing the goods at all, and also for injury caused to the goods by negligence in their removal. The

Court of Appeal (Lord Esher, M.R., and Bowen and Smith, L.JJ.) were of opinion that after default the mortgagee became legally entitled to possession, and the mortgagor had then a mere equitable right to redeem, but that this equitable title would not enable him to maintain trespass even though the defendant improperly refused to accept the tender, which was bad as a tender owing to its being clogged with conditions. The plaintiff was held entitled to damages caused by defendant's negligence in the removal of the goods.

PRACTICE—NOTICE OF TRIAL—REPLY—CLOSE OF PLEADINGS—ORDS. XXIII., R. 1; XXVII., R. 13; XXXVI., R. 11—(ONT. RULES 381, 392, 654).

In *Robinson* v. *Caldwell*, (1893) 1 Q.B. 519, Lord Coleridge, C.J., and Hawkins, J., decided that where a plaintiff omits to file a reply he cannot give notice of trial until the lapse of twenty-one days from the filing of the statement of defence, as until then the pleadings are not closed, though they may be closed in the meantime by filing a reply, when notice of trial may be at once given

None of the cases in the Probate Division call for any notice here.

Notes and Selections.

BENCH AND BAR.—The *Albany Law Journal* also has its little say about judges who refuse to adjourn for lunch during an assize in the following words: "A hungry court is notoriously an ill-natured court, and it is subjecting a prisoner to an unfair burden to compel him to stand trial before a judge who has not eaten anything for nine hours. Our only wonder is that the Chief Justice did not punish for contempt that Q.C. who persisted in ruining his health by those interpolated biscuits. Counsel in his courts would do well to adopt 'hunger belts.'"

CONSPIRACY TO REGULATE PRICES.—The retail coal dealers of a city formed an association, the main purpose of which was to fix a minimum retail price of coal for the city and vicinity, with the design practically to compel, under prescribed penalties, every coal dealer in the city to join it and regulate his business by its

constitution and by-laws, which prohibited soliciting business, except as provided therein, and the taking of club orders of associated buyers at reduced prices, and provided for keeping the retail price of coal uniform, so far as practicable, and required a certain vote of the association to change the price. The constitution also provided that no price was to be made amounting to more than a fair and reasonable advance over wholesale rates, or more than the current prices of the coal exchanges at certain designated neighbouring cities when figured upon corresponding freight tariffs, and the retail price of coal actually fixed by the association was a fair price. Held, that the association constituted a combination in restraint of trade, and membership in such association would support a conviction on an indictment for conspiracy to commit acts injurious to trade. *People* v. *Sheldon*, New York Supreme Court.—Hun's Reports.

JURIES AND THEIR VERDICTS.—An apt illustration of the influences which often govern juries in rendering their verdicts is found in the following incident narrated by Montagu Williams, Esq., in his Reminiscences: "It is remarkable what the personal influence of counsel will do with the jury, especially in the country. On one occasion I went down to Worcester on the Oxford circuit. They were not my sessions, but I was specially retained. While I was waiting for my case to come on, I witnessed a striking illustration of the truth of that which I have just said. The leader of the sessions was Mr. C., who was afterwards county court judge, and has since retired. These were the last sessions in the county that he would attend, for he had just been made a Queen's Counsel. For a number of years he had been a leading man in the county, and he was a favourite with all classes. C. was defending a man for horse-stealing, and the evidence against the accused was of the most damning character. He had been seen in the immediate neighbourhood of the field from which the horse was stolen shortly before the theft took place; he was seen driving the animal from the spot; and he was further identified as the man who subsequently sold the beast at Wycombe fair. At the close of the prosecution, C. addressed the jury in something like the following terms: 'Gentlemen, I have been among you for a number of years. I was born in your county, and my

people were with you for two or three generations. You have always been friendly with me, man and boy, and I don't think I have ever had an angry word with one of you. A change has now come over my life. Her Majesty has sent for me to make me one of her own counsel.' The jury sat with open mouths, evidently under the impression that their favourite was about to be summoned to Buckingham Palace, Windsor Castle, or some other royal residence to have a *tête-à-tête* with the Queen. Continuing, C. said: 'I shall never address you again. This is the last time my voice will be heard in your ancient hall.' From the display of pocket handkerchiefs at this point, I am under the impression that one or two of the jurymen were in tears. 'Let us part,' said the learned counsel, 'as we have always been—the best of friends'; and, without saying one single word as to the merits of the case before the jury, he sat down. The chairman of the Quarter Sessions, in due discharge of his duty, addressed himself to the evidence, ignoring entirely the observations that had fallen from the learned counsel for the defence. The jury put their heads together, and, after barely a moment's deliberation, turned round again. The foreman, with a peculiar shake of his head, said: 'We finds for Muster C.' The chairman informed the jury that their verdict must be either one of 'guilty' or 'not guilty' as against the prisoner; thereupon, without waiting for their foreman, they all shouted out with one accord: 'Not guilty, sir.' The prisoner was accordingly released."—*American Law Review.*

READ. JUDGMENTS AT LENGTH.—The following is from the *Albany Law Journal:* "We believe that the *New York Law Journal* is in error in stating that the practice of reading opinions from the bench 'still survives in the Supreme Court of the United States.' Unless we have been misinformed, it was discontinued several years ago, except in very rare instances in cases of exceptional importance. At any rate it ought to be, and in New Jersey too, for it cannot answer a single useful purpose, and it wastes time that might be employed to good ends. The *New Jersey Law Journal* seems to regard the practice as a good medium for informing the lawyers of the decisions. We do that in this State by the newspapers. Are there no newspapers in New Jersey? But the decisions may be announced silently by filing. There is no virtue

nor interest in having the reasons for the decisions read aloud and at length. But if they must be so read, let them be read in an ante-room by the crier, *sotto voce.*" The writer, in our opinion, is partly right and partly wrong. It is a waste of time for solicitors or counsel to attend in court, to hear a lot of judgments read in which they have no interest whilst they wait for those in which they are interested. It is also a waste of time to listen to lengthy reasons for a decision; but it is not a waste of time—on the contrary, very necessary—that the judgment should be pronounced in open court, so that any manifest mistake may be corrected, omission supplied, or unsettled matter determined, etc.

ELECTRIC STREET RAILWAYS.—The case of *Detroit City Ry.* v. *Mills*, 48 N.W. Rep. 1007, decided by the Supreme Court of Michigan, and very recently affirmed by the case of *Dean* v. *Ann Arbor St. Ry. Co.*, 53 N.W. Rep. 396, almost convinces one of the perfect elasticity of the common law. But in spite of the court's appeal to the progressive tendency of the times, common experience and observation arouse a feeling of dissent from the proposition that "the use of a street by an electric railroad, with poles and overhead wires, is not an additional servitude for which abutting owners may demand compensation."

It seems well established that at the present time an ordinary steam railroad imposes a new burden, and that a horse railroad does not; and the distinction, which is one of degree, turns on the different effects produced on the streets occupied by the railroads, and on the beneficial use of abutting property. In allying the legal position of the electric railroad to that of the horse railroad, the Michigan court seem to have made assumptions and statements of fact which will not bear close examination. Grant, J., tells us that electric cars are not more noisy, do not cause greater obstruction of hindrance, impose no greater burden, except by their poles, than horse-cars; and that they do not occupy more space than horse-cars with the horses that draw them. From these propositions we must, with all deference, dissent. The noise and jar of the ordinary electric cars, often joined in trains, the speed with which they run, the danger of driving along and upon the tracks, or even across them, the risk of injury or death from contact with broken wires, the unsightliness of the poles and cars

and cross-wires and guard-wires and trolley-wires, are all matters of common knowledge.

That telegraph and telephone poles are an additional servitude is fairly well settled, the cases to the contrary, such as *Pierce* v. *Drew*, in Massachusetts, being based on highly artificial analogies between the ancient and modern use of highways for purposes of communication. To avoid this class of decisions, the Michigan court would say, with the Supreme Court of Rhode Island, that telegraph and telephone wires are only very indirectly used to facilitate the use of streets for travel and transportation, whereas the poles and various wires of the electric railroad are distinctly ancillary to the use of the streets as such. This distinction is, as Judge Dillon remarks, "so fine as to be almost impalpable."

It is said that the streets of a city may be used for any purpose which is a necessary public one, and the abutting owner will not be entitled to new compensation, in the absence of a statute giving it. As it stands, this statement can scarcely be maintained. Granting that the abutting owner dedicates to the public the whole beneficial use of part of his land for the purposes of a street, his property rights of light, air, and access free from danger to his remaining land still subsist. Surely the need of the public for steam railroads is much greater than its need for electric railroads, yet steam railroad corporations would not be allowed to run their trains on public streets merely as a new method for using an old easement, and if they would lay their tracks across lands not belonging to them they must obtain the right to do so by purchase or condemnation, into which consequential damages enter as an element. The need of the public is to be considered when the right to take the property is under consideration, and not when the courts have to decide whether compensation shall be allowed.

If the public needs a new method of transportation, the public can and should pay for private property rights destroyed or impaired in establishing that new method of transportation.—*Harvard Law Review.*

THE PUNISHMENT OF INSULTS.—The growing frequency and malignity of personal vituperation in contemporary politics is admitted on all hands to be a very serious evil. It is one, too, for which the law supplies no adequate remedy. Towards wrongs

that affect the pocket, directly or remotely, the law is very tender and considerate, and for bodily wounding damages may be recovered and the aggressor visited with punishment. But for wrongs that affect the mind, and for the wounding of men's self-respect, where neither the pocket nor the body is concerned, the law affords no adequate remedy at all. The reason is not far to seek. The men who made the laws dealing with such matters were a high-spirited and warlike race of men. The infliction of punishment for mere insult they, as it were, retained in their own hands. They considered that it was the duty and privilege of every gentleman to defend his own honour, and that men who were not gentlemen could not be insulted—they could only be scolded and abused, and had the remedy in their own hands, for they could give as much as they got, and when called "liars" could retort "blackguards," etc., etc. This view of the matter was once set out by Dr. Johnson, in the heat of colloquial controversy, with his characteristic energy. "A poor man," roared the doctor, "has no honour." The great moralist's own life contradicted this saying in the most effective manner; for, though always poor, there was no one who so fiercely resented anything like personal disparagement or slight as he did. In short, insulting language is not a wrong of which the law takes cognizance, the lawmakers having been of opinion that the insulted person, if a gentleman, should avenge himself with sword or pistol, and, if not a gentleman, might pocket the insult or retort in kind. The old Brehon laws of Ireland were very different in this respect. Their provisions against insult, as such, without any reference to its injurious effect upon the material interest of the insulted party, are numerous, and the punishment awarded for that class of offence very clear and specific. In these laws the wrong which we call insult is always referred to as "the reddening of the face" of the aggrieved party. Faces, no doubt, pale, too, at an insult, but flushing is certainly the more natural and wholesome outward sign of internal wrath at the use of contemptuous and insulting language. The Brehons awarded a carefully graduated scale of punishments for the wrong known generally as "the reddening of the face," always having due respect to the rank of the insulted person. However primitive may be the old Brehon code, it contains a good deal of common sense here and elsewhere. The Brehons regarded insult as a wrong which the law should

punish. We, so far as our laws are concerned, do not regard it as a wrong at all, though the average unsophisticated man regards it not only as a wrong, but as a very great wrong, indeed. The inconveniences and worse which arise from this condition of things are patent; they increase day by day. The political world, growing more democratic, more and more resounds with contumelious phrases. Are vituperators and insulters to enjoy complete license, or should insulted persons chastise the wrong-doer, and what view should judges and juries take of such chastisement? On the other hand, the insulted person may be physically weak and unable to chastise the insulter. Is it possible that in course of time some enactment resembling the Brehon code in that respect may be made, with the consent of all parties, which shall arrest this flow of insulting and degrading language, which bids fair to repel self-respecting men from taking part in public life? The difficulties are, no doubt, great, but then the evil which we seek to abate is greater. History, too, supplies precedents enough: for courts of honour have been set up in many countries.—*Irish Law Times.*

LEGAL ASPECT OF THE HOME RULE BILL.—The constitutional difficulties in the way of the new Home Rule Bill tend to increase rather than to diminish now that the actual text of the measure is before us. Take the provisions relating to the Irish judges, on whose position under the bill we commented by anticipation last week. The Exchequer judges are to have jurisdiction, *inter alia*, over all legal proceedings which touch any matter not within the powers of the Irish Legislature, or affected by any law which the Irish Legislature have not power to repeal or alter. If a decree pronounced by one of the judges is unpopular—and there is no rashness in predicting that, even under the Home Rule Bill, offences must come—how is it to be enforced? The sheriffs and the constabulary are subject to the control of the Irish executive, representing, *ex hypothesi*, the popular party opposed to the judge's decree; will they be ready, or, if ready, will they be permitted to carry it into effect? Curiously enough, the draughtsman of the bill has foreseen this contingency, and has endeavoured to meet it. "If it is made to appear to an Exchequer judge," the bill provides, "that any decree or judgment in any such

proceeding as aforesaid has not been duly enforced by the sheriff or other officer whose duty it is to enforce the same, such judge shall appoint some officer whose duty it shall be to enforce that judgment or decree; and for that purpose such officer and all persons employed by him shall be entitled to the same privileges, immunities, or powers as are by law conferred on a sheriff and his officers." A more fabulous and clumsy device never struggled for a place in the statute book. Will it be so easy to find a substitute for the recalcitrant sheriff or constable, and, if found, what treatment will he receive at the hands of the hostile Irish executive? Compared with this cardinal difficulty, all the other objections to which we recently called attention—the probability that the Irish members at Westminster will attack the position and the emoluments even of the Exchequer judges, and the certainty that the salaries and the pensions of the ordinary judges will from time to time be assailed by the Irish Parliament—sink into insignificance. The right of appeal, for which the bill provides, from the Exchequer judges to the Privy Council, viewed as a safeguard against the evil in question, is absolutely nugatory. For, in the first place, what is wanted is not judgment, but execution; and, in the second place, the affirmance of an unpopular decree by the Judicial Committee will merely give it an "alien" character and render its enforcement more difficult than ever. We have nothing to do with the political aspect of the Home Rule Bill, but we are bound to say that the position in which it places the contemplated Exchequer judges is simply untenable, and that the attempt to enforce the decrees of these judges would inevitably lead to civil war.

The bill gives a right of appeal to the Privy Council from the Exchequer judges, and also from any court from which an appeal now lies to the House of Lords. But the validity of an Irish Act can apparently only be challenged by a reference to the Privy Council at the instance of the Lord Lieutenant or a Secretary of State; and for the determination of such important questions as the delimitation of Irish from British affairs, and the cases in which the Irish members are entitled to take part in debates in the House of Commons, no provision whatever seems to be made. Suppose that the Irish Parliament legislates on one of the prohibited subjects. The Act is void. But how is it going to be avoided? The Exchequer judges, if we read aright the section in which

their powers are defined, have no jurisdiction in the matter. The Lord Lieutenant is not likely to bring under the adverse notice of the Privy Council a measure passed by the Irish ministry, and the interference of a British Secretary of State would simply provoke a political crisis. Again, suppose that the Irish members at Westminster persistently violate the section of the bill which restricts their voting power, or that questions arise as to the interpretation of that section, how are such obvious and probable difficulties to be encountered? On these material points the bill is absolutely silent. Not even a pretence of giving a right of appeal to the Privy Council is made. If the American constitution—in the consolidation and maintenance of which the Supreme Court of the United States has borne such a majestic part—had been put together in this light-hearted and—to use a now historic expression—happy-go-lucky manner, it would long ere this have been resolved into its original elements.—*Law Journal.*

Reviews and Notices of Books.

The Municipal Index, being an index to the provisions contained in the Revised Statutes of Ontario (1887) *and the annual volumes of statutes for subsequent years, affecting municipal corporations, their councils and officers.* By Allan Malcolm Dymond, Barrister-at-Law, Law Secretary to the Attorney-General of Ontario and Law Clerk to the Legislative Assembly. The Carswell Co. (Ltd.), publishers, 1893.

The title page sufficiently indicates the object of this work. It will enable persons who consult it, without loss of time, to find the various provisions scattered throughout several volumes which affect municipal corporations. So far as we have had occasion to use the index, we can speak of its correctness and completeness. It will doubtless be found very useful to practitioners, as well as to all those engaged in the administration of municipal law. In form and execution it is all that can be desired.

Correspondence.

INJUNCTIONS.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—The extension of the facilities for obtaining an injunction in cases of emergency afforded by the Act 52 Vict., c. 11, which empowers a local judge of the High Court to grant an interlocutory order under subsection 8 of section 53 of the Judicature Act in an action in the High Court brought in his county suggests a question as to the power of the local judge to grant an injunction in the County Court over which he presides, and is sole judge under the provisions of the County Courts Act.

The 77th section of the Judicature Act of 1881 conferred certain powers and equity jurisdiction upon the County and Division Courts which they had not possessed before; and reading the 77th section with decisions of the Queen's Bench Division of the High Court in England, it would be hard to find a tenable argument against the power of the county judge to grant injunctions both in the County Court and the Division Court in certain cases; and, if not, it would be still harder to say that they have not an equity as well as a common law jurisdiction.

We find that 77th section now embodied in two different chapters of the Revised Statutes of 1887, *i.e.*, the 21st section of the County Courts Act (p. 507, R.S.O., c. 47), and the 73rd section of the Division Courts Act (R.S.O., c. 51). The provision is the same in substance as that of the English Judicature Act under which the judges of the Queen's Bench Division and the Lord Justices in Appeal, in cases argued before them, all held that the power exists not only of granting an injunction by the County Court, but also of attaching for contempt in case of disobedience to its order. *Ex parte Martin*, 4 Q.B.D. 212, and *Martin v. Bannister*, in appeal, 4 Q.B.D. 491, are in point. The first of these cases was an action for a nuisance, and after judgment for the plaintiff therein it was held to be an incident of the jurisdiction of the County Court under the sections, and essential that the court should have power to grant the order, and to issue an attachment for contempt in case of disobedience.

We have only to point to the full and exact wording of the sec-

tion as similar to our own statutes, and refer, in order to bring conviction to the minds of our readers, to the able and unanimous judgments of the courts in the cases named, and to the subsequent one of *Richards* v. *Cullerne*, 7 Q.B.D. 623, under which the right to commit under the provision in the English Act was held to exist. It was also held to extend to all interlocutory as well as final orders of injunction. Jessel, M.R., said: "The section applies in every case where, if the action is in the High Court, a party could be committed for disobedience"; and Brett, L.J., held: "The County Court, then, has the same power as the High Court at every stage."

Coming down to our own courts and statutes, what can be fuller in expression or more comprehensive than "every County Court (or 'every Division Court') shall as regards all causes of action within its jurisdiction, for the time being, have power to grant, and shall grant, in any proceeding before such court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, including the power to relieve against penalties, forfeitures, and agreements for liquidated damages, and shall in every such proceedings give such and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court"?

What power or jurisdiction has any court more than this?

If there be no doubt as to the existence of this special remedy, the question of expediency comes in. Some may, no doubt, hold that the conferring of such a power and the exercise of it is desirable, whilst others would hold that it was not intended, and that it is not desirable; *that it was the mere copying of an English enactment, and embodying it into our Judicature Act, without due consideration of its effects!* (Some men can find an excuse for everything!) With this last view or contention (if it be contended), we have nothing whatever to do. The question with us is, Does it exist?

We do not doubt that there are judges and professional men who would hesitate as to the advisability, as well as the power, of either our County or Division Courts dealing with remedies of so special a character, and which have been considered hitherto as belonging to the High Court only. The cases cited leave

no room for doubt; and as the rules of the County Courts in England, framed, as they have been, by eminent and able judges, and sanctioned by the Lords High Chancellor and the Chief Justice, the Master of the Rolls, and other judges of the High Court there, for carrying into force similar provisions, we doubt if there should not be either a set of rules and forms furnished for carrying out the same in our Division Courts, or that a repeal of the sections to which we refer should be had.

With that provision upon the statute book, applicable to both the County and Division Courts of the province alike, it is hard to see upon what foundation the idea rests that they have not equitable jurisdiction. Yours, etc.,

D.J.H.

St. Thomas, April 26th, 1893.

[We have pleasure in publishing the above letter from our esteemed correspondent. We would, however, refer, in connection with the subject of his letter, to volume 28, *ante* pp. 33 & 34, and to *Foster* v. *Reeves*, 2 Q.B. 255, which would seem to conflict with the view he expresses that County Courts and Division Courts have the jurisdiction claimed for them. The matter is one of interest, and we should be glad to hear from others on the subject. —Ed. C.L.J.]

Obituary.

THE LATE JUDGE W. D. ARDAGH.

The subject of this sketch (who died suddenly at New York on his arrival from Italy on the 16th of April) was born on the 21st of March, 1828, in the County of Tipperary, Ireland. He was a son of Mr. Stephen Ardagh, of that county, who traced his ancestry to a Welsh family that settled in Ireland about the time of Edward I.

Mr. Ardagh, when about twenty years of age, came to Barrie, and finished his education at the Grammar School here. He entered upon the study of his profession with the late Mr. Strathy (who was at that time practising at Barrie), and was called to the Bar in 1855. Mr. Ardagh then settled in Toronto, and commenced the practise of his profession in partnership with Mr. Crawford, afterwards Lieut.-Governor, and Mr. Hagarty, now Chief Justice of this province. Two or three years later Mr. Hagarty went on the Bench, the firm was dissolved, and Mr. Ardagh returned to Barrie. He then practised in partnership with the Honourable James Patton, and subsequently Colonel Hewitt Bernard entered the firm.

When that partnership was dissolved Mr. Ardagh and his brother-in-law, the present Judge J. A. Ardagh, carried on its business for some years, until the firm was increased by taking into it Mr. H. H. Strathy, and this partnership existed until Mr. Ardagh, entering into other pursuits, retired from practice.

Some years later he went to Manitoba, where his abilities soon obtained for him the position of Deputy Attorney-General of that province. While occupant of that office he was very largely instrumental in framing the laws of the Province of Manitoba, and his ability as a legal draftsman was so marked that the Acts drafted by him were, we understand, seldom altered in any material particular. In 1883 he was elevated to the Bench as Judge of the Eastern Judicial District of the Prairie Province, which position he held at the time of his death.

During his residence in Barrie, Mr. Ardagh was most zealous and active in his efforts to advance the interests of the town, and this the people recognized by electing him as their reeve for eight consecutive years (during the latter three of which he was warden of the county), and as mayor of the town for several years subsequently. At no time were the interests of Barrie and its people better looked after, or more zealously guarded, than when the subject of our sketch was its chief officer and head.

The popularity of the late judge was not, however, confined to his own town, as upon two occasions he was elected to serve in the Provincial Assembly as the representative of the riding. He was, while in the House, a supporter of the Liberal-Conservative party, though not by any means a strong party man.

The subject of our sketch was also well known as an able journalist. For many years he was associated with the late Chief Justice Harrison as editor of THE CANADA LAW JOURNAL, and he, at the same time, and for several years afterwards, was editor of this paper.

He was married in 1858 to the third daughter of the late Rev. S. B. Ardagh, who with their two children survive him. We cannot, in a short sketch of this nature, do more than merely allude to the various public positions occupied by its subject; but we cannot but refer to the kindness of heart and sincerity of purpose that characterized all the actions and life-work of Mr. Ardagh, and his death, we think we can safely say, produced among the people who knew him a greater shock and more evident sorrow than anything that has occurred for very many years.

The funeral of the late judge to St. James' cemetery took place in Toronto on Wednesday, e 19th inst. Among those in attendance we noticed Chief Justice Hagarty, Judge Osler (a former student of the deceased), Hon. G. W. Allan, Hon. J. C. Aikins, ex-Governor of Manitoba; Prof. Goldwin Smith, Col. O'Brien, Col. Grasett, Mr. John Hoskin, Mr. Charles Moss, Messrs. Henry and L. R. O'Brien, Dr. Baldwin, H. H. Strathy, J. A. Strathy, T. E. Rawson, Capt. William Hall, and many other of his old friends. We extend our deepest sympathy to his sorrowing wife and children, who have so suddenly been bereaved of a most loving husband, father, and friend.—*Northern Advance.*

ERRATUM.—On page 221, *ante*, after the word "would" in the second line from the foot of the page insert the word "not."

DIARY FOR MAY.

1. Monday.....Law School ends. St. Thomas Chancery sittings. Hamilton Assizes.
2. Tuesday.....Supreme Court sits. J. A. Boyd 4th Chancellor, 1881.
3. Wednesday..London Assizes.
4. Thursday....Mr. Justice Henry died, 1888. 2nd Intermediate Examination (last).
6. Saturday....Lord Brougham died, 1868, aged 90.
7. Sunday.....*Rogation Sunday.*
8. Monday.....St. Catharines Assizes.
9. Tuesday.....Ct. of Appeal sits. Gen. Sess. and Co. Ct. sittings for trial in York. Exam. for Certificate of Fitness.
10. Wednesday..Examination for Call.
14. Sunday.....*Sunday after Ascension.*
15. Monday.....Easter Term begins. Toronto Chy. sittings begin. Chy., Q.B., and C.P. Divisions H.C.J. sit.
16. Tuesday.....Convocation meets.
18. Thursday....Brantford Chancery sittings.
19. Friday.....Convocation meets.
21. Sunday.....*Pentecost. Whit Sunday.* Confederation proclaimed, 1867.
22. Monday.....Earl of Dufferin, Governor-General, 1872.
24. Wednesday..Queen Victoria born, 1819.
25. Thursday....Guelph Chancery sittings.
26. Friday .....Convocation meets.
27. Saturday....Habeas Corpus Act passed, 1679.
28. Sunday.. ...*Trinity Sunday*
29. Monday.....Peterborough Chancery sittings.

Reports.

FIRST DIVISION COURT OF THE COUNTY OF ONTARIO.

(Reported for THE CANADA LAW JOURNAL.)

AUGUSTUS *v.* LYNDE.

Barbed wire fence—Injury to animals—Negligence.

The use of barbed wire for fencing purposes having received legislative and judicial recognition is not unlawful if maintained in accordance with municipal regulation; but, failing such, its erection or maintenance becomes illegal if it be placed or constructed so as to be dangerous to others in the exercise of their lawful rights.

[WHITBY, Nov., 1892.

The plaintiff and defendant were occupiers of adjacent properties, there being no fence between them. The plaintiff occupied his land as pasturage for horses and cattle. The defendant, for the protection of the crops upon his land, placed upon the division line an erection of slight posts from twenty to thirty feet, or more, apart and loosely let into the ground, and stretched from post to post two strands of barbed wire. This was so carelessly done that the wires sagged, and in many cases trailed upon the ground. A horse of the plaintiff became entangled in part of this trailing wire, and was so lacerated thereby as to necessitate its being destroyed, and this action was brought to recover its value, which was shown to be at least $60. It was also shown in

evidence that no line fence had been established between the parties, and that such described fence, or protection to his crops, which the defendant had constructed in no sense complied with the township by-law regulating barbed wire fences.

DARTNELL, J.J.: As far as I know, the only case in our own courts in which barbed wire fences have received judicial consideration is that of *Hillyard* v. *Grand Trunk Railway*, 8 O.R. 583, in which it was held that, in the absence of municipal regulation, such a fence was not a nuisance.

Since the judgment in *Hillyard* v. *Grand Trunk Railway Co.* (1885), the necessity, and therefore the use, of barbed wire as a mode of fencing has largely increased; and inasmuch as under the Municipal Act authority is given, in cases of cities and towns, to altogether prohibit, and in other municipalities to regulate it, its use has thus received legislative sanction.

The defendant had a perfect right to protect his crops against animals in his neighbour's fields. But the maxim, *sic utere tuo ut alienum non lædas*, surely applies.

In *Firth* v. *Bowling Iron Company*, 3 C.P.D. 254, it was held that where an obligation exists to fence, the fencing must be done in such a way as not to cause injury, not only while the fence is efficient, but from the natural effects of decay. In that case there was what may be termed *apathetic* negligence, for which the defendants were held liable. This defendant, by the gross carelessness evidenced in the construction and maintenance of a protection for his crops, has been guilty of *active* negligence, and ought to suffer in damages for the injury the plaintiff has sustained.

"A person who brings on his land any thing which, if it should escape, may damage his neighbour does so at his peril, negligence or not being quite immaterial": *Rylands* v. *Fletcher*, L.R. 3 H.L. 330; *Shirley's L.C.*, 104.

Judgment for plaintiff for $60.

Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Full Court.] [March 4.

REGINA *v.* HAZEN.

Summary conviction—Information—Two offences—Liquor License Act—R.S.O., c. 194, s. 105—P.S.C., c. 178, ss. 26, 28, 80, 87, 88—Defect in substance—Objection not taken before magistrate—Quashing conviction—Costs.

An information laid before a police magistrate charged that the defendant did on the 30th and 31st days of July, 1892, sell intoxicating liquor without the license therefor by law required. Upon the hearing evidence was adduced

to show that the defendant had sold intoxicating liquor on those days. The magistrate adjudged the defendant guilty, and made a minute thereof and of the punishment imposed. A few days afterwards he returned a conviction of the defendant for having sold liquor without a license on the two days named; and a month later returned a second conviction as for an offence committed on the 31st only.

Held, that the information charged two offences, and it and the proceedings thereon were in direct contravention of s. 26 of the Summary Convictions Act, R.S.C., c. 178; and that the misjoinder of the two offences was not a defect in substance within the meaning of s. 28.

Rodgers v. *Richards*, [1892] 1 Q.B. 555, not followed.

Hamilton v. *Walker*, [1892] 2 Q.B. 25, referred to.

Held, also, that the objection to the information and subsequent proceedings was open to the defendant upon motion to quash the convictions, although it was not taken before the magistrate.

Held, lastly, that, under the circumstances, neither s. 105 of R.S.O., c. 194, nor ss. 80, 87 & 88 of R.S.C., c. 178, as amended by 53 Vict., c. 37, applied to the convictions.

And the convictions were quashed, with costs to be paid by the prosecutor.

Tremeear for the defendant.

Langton, Q.C., for the magistrate and prosecutor.

Div'l Court.] [Feb. 6.

IN RE WASHINGTON.

Medical practitioner—College of Physicians and Surgeons of Ontario—Erasure of name from register—R.S.O., c. 148—Disgraceful conduct in a professional respect—Advertising—False representations to patient—Publishing symptoms of disease—Committee of council—Evidence—Report.

Upon an appeal by a registered medical practitioner, under R.S.O., c. 148, s. 37, as amended by 54 Vict., c. 26, s. 5, from an order of the council of the College of Physicians and Surgeons of Ontario directing that the name of the appellant should be erased from the register, it appeared that the appellant had advertised extensively in newspapers and handbills, setting forth and lauding in extravagant language his qualifications for treating catarrh, showing that that disease led to consumption, stating the symptoms of it, and giving testimonials from persons said to have been cured by him.

Held, that mere advertising was not in itself disgraceful conduct in a professional respect; but that the advertisements published by the appellant were studied efforts to impose upon the credulity of the public for gain, and were disgraceful in a professional respect within the meaning of s. 34 of the Act.

It appeared also that the appellant had represented to two persons, who were, in fact, in the last stages of consumption, that they were suffering from catarrhal bronchitis, and that he had power to cure them, and had taken money from them upon the strength of such representations.

Held, that this was conduct disgraceful in the common judgment of mankind, and much more so in a professional respect.

Held, however, that publishing broadcast the symptoms of the disease known as catarrh was not in itself disgraceful conduct in a professional respect.

The council referred the complaint against the appellant for injury and report to their discipline committee, who took evidence, and reported it with their conclusions thereon to the council.

Held, that the report of the committee could not be set aside or treated as a nullity because they took unnecessary evidence, or because they drew conclusions from the facts ascertained by them.

S. H. Blake, Q.C., *Moss*, Q.C., and *R. G. Smyth* for the appellant.

Osler, Q.C., for the respondents.

Div'l Court.] [March 4.

IN RE SEAR AND WOODS.

Mechanics' liens—"The price to be paid to the contractor"—R.S.O., c. 126, ss. 7, 9, 10—53 Vict., c. 38—Contract abandoned—No money payable by owner to contractor—Existence of liens—Wage-earners—Priority—Enforcing liens—Taking benefit of proceedings by other persons.

The words used in ss. 7 & 9 of the Mechanics' Lien Act, R.S.O., c. 126, as amended by 53 Vict., c. 38, "The price to be paid to the contractor," and other like expressions in the same sections, all mean the original contract price, and not that part of the contract price to the extent of which the contractor has done work or supplied materials.

And where the owner has, in good faith and without notice of any lien, paid the contractor the full value of the work done and materials furnished, and the value thereof does not exceed eighty-seven and a half per cent. of the contract price, and the contractor has abandoned his contract, and no money is payable to him in respect thereof, no lien can exist or be enforced against the owner in favour of any one.

Wage-earners are not, by virtue of s. 9, s-s. 3, and s. 10, as amended, entitled to twelve and one-half per cent. of the contract price if it never becomes payable by the owner to the contractor; giving priority to the lien of the wage-earners is not equivalent to enacting that the owner shall pay the percentage, whether the contract price ever becomes payable or not.

Persons who have registered liens, but have taken no proceedings to realize them, cannot have the benefit of proceedings taken by other persons to enforce liens against the same lands, where the liens of such other persons are declared not to be enforceable.

Goddard v. Coulson, 10 A.R. 1, followed. *Re Cornish*, 6 O.R. 259, not followed.

Aylesworth, Q.C., for Woods, the owner.

Snelling, Q.C., for the wage-earners.

Frank Denton for Kieran and McAdam.

Div'l Court.] [March 4.

HOWARTH *v.* MCGUGAN.

Municipal corporations—Negligence—Hammer left in highway by contractor—Accident—Want of repair—Limitation of action—Municipal Act, s. 531—Improper user—Corporate assent—Liability of contractor—Finding of jury—New trial—Surprise—Corroborative evidence.

In an action against a municipal corporation and a contractor to recover damages for injuries sustained by the plaintiff by reason of her horse shying at a hammer left upon the highway by a contractor, it was found by the jury that the hammer was the cause of the accident; that leaving it on the highway was a negligent act; that the corporation had sufficient notice of its being there; and that they were guilty of negligence in not erecting a railing at the side of the road, which would have prevented the accident. The action was not begun till after three months from the accident.

Held, that if the action as against the corporation was to be regarded as based upon want of repair of the highway, it was barred by s. 531 of the Municipal Act.

And if based upon an improper user of the highway, it could not succeed against the corporation in the absence of evidence of any corporate assent to the contractor's leaving the hammer in the highway.

But the contractor was liable for improper user, and was not relieved by the finding as to the railing.

New trial, on the ground of surprise and discovery of new evidence, refused where the evidence was merely in corroboration.

E. D. Armour, Q.C., for the plaintiff.

W. B. Doherty for the defendant corporation.

Tremeear for the defendant McGugan.

Div'l Court.] [March 4.

YOUNG *v.* SAYLOR.

Justice of the peace—Summary Convictions Act—Power to commit for contempt—Power to exclude from court-room—Privilege of counsel—Review by court of justice's proceedings.

A barrister and solicitor acted as counsel for certain persons charged with a misdemeanour before a justice of the peace, holding court under the Summary Convictions Act, and while so acting was arrested by a constable by the order of the justice, without any formal adjudication or warrant and excluded from the court-room, and imprisoned for an alleged contempt and for disorderly conduct in court.

In an action by the counsel against the justice and the constable for assault and false arrest and imprisonment,

Held, (1) that the justice had no power summarily to punish for contempt *in facie curiæ*, at any rate, without a formal adjudication, and a warrant setting out the contempt.

Armour v. *Boswell*, 6 O.S. 153, 352, 450, followed.

(2) That he had the power to remove persons who, by disorderly conduct, obstructed or interfered with the business of the court; but upon the evidence, the plaintiff was not guilty of such conduct, and had not exceeded his privilege as counsel for the accused; and the proper exercise of such privilege could not constitute an interruption of the proceedings so as to warrant his exclusion.

If the justice had issued his warrant for the commitment of the plaintiff, and had stated in it sufficient grounds for his commitment, the court could not have reviewed the facts alleged therein; but, there being no warrant, the justice was bound to establish such facts upon the trial as would justify his course.

Aylesworth, Q.C., for the plaintiff.

Clute, Q.C., for the defendants.

Common Pleas Division.

Div'l Court.] [March 4.

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

Railways—Negligence—Evidence—Suffering of—Nonsuit—New trial.

The plaintiff was an assistant yardsman in the defendants' employment, whose duty it was to marshal and couple cars subject to orders of G., the conductor of the shunting engine, to whose orders the engine-driver was also subject. According to the plaintiff's evidence, while attempting to carry out specific instructions received from G., which G. denied, as to the coupling of certain cars, G. negligently allowed the engine to be backed up, thus driving the cars together and injuring the plaintiff. The plaintiff had for a long time been in defendants' employment, was thoroughly experienced in his duties, had never received specific instructions of this character before, and he knew before he went in between the cars that the engine was in motion backing up, and only eight feet distant. On a motion to set aside a verdict found by the jury for the plaintiff the court, though not satisfied with the verdict, was of opinion that there was evidence for the plaintiff to be submitted to the jury, and therefore refused to interfere, either by granting nonsuit or a new trial.

W. R. Smyth for the plaintiff.

Osler, Q.C., *contra.*

Div'l Court.] [March 4.

REGINA *v.* MCCAY.

Liquor License Act—Druggist—Conviction for allowing liquor to be consumed on the premises—Validity of—Imprisonment, validity of—Power to amend.

It is an offence under the Liquor License Act, R.S.O., c. 194, and amendments thereto, for a chemist or druggist to allow liquor sold by him, or in his

possession, to be consumed within his shop by the purchaser thereof, and it is not essential that he should be registered, and a conviction therefore was sustained.

Held, also, that the conviction did not charge an alternative offence, the only offence charged being the consumption on the premises.

The adjudication and conviction, besides imposing the money penalty under s. 70, further imposed imprisonment for three months, as provided by that section.

The court differed as to the validity of the term of imprisonment imposed, but held that in any event the conviction could be amended under 53 Vict., c. 37, s. 27 (D.), so as to comply with s. 67 of the Summary Convictions Act.

Du Vernet for the motion.

Langton, Q.C., *contra*.

Div'l Court.] [March 4.

REGINA *v.* FARRELL.

Liquor License Act—Admission of guilt—Right to object to legality of rules and regulations—Right to impose costs and imprisonment.

On an information charging that the defendant, on his premises, being a place where liquor may be sold unlawfully, did have his barroom open after ten o'clock in the evening, contrary to the rules and regulations for license-holders passed by the license commissioners, etc., on April 28th, 1893, the defendant signed an admission, stating that the information, having been read over to him, he desired to plead guilty to the charge, which was the only evidence before the court, and on which the defendant was convicted.

Held, following *Regina* v. *Brown*, 24 Q.B.D. 357, that this did not preclude defendant from objecting to the power of the license commissioners to pass such rules or regulations; but on authority of *McGill* v. *License Commissioners of Brantford*, 21 O.R. 665, the objection must be overruled.

By the conviction herein a fine and costs were imposed; and in default of payment, distress; and in default of sufficient distress, imprisonment.

Held, under s. 98 of the Liquor License Act, R.S.O., c. 194, incorporating s. 427 of the Municipal Act, costs and imprisonment could properly be imposed.

Du Vernet for the motion.

Langton, Q.C., *contra*.

Div'l Court.] [March 4.

ROGERS *v.* HAMILTON COTTON CO.

Master and servant—Accident to servant—Liability under the Workmen's, etc., Act—Factories Act, construction of—Volenti non fit injuria—Applicability of—53 Vict., c. 23, s. 7 (O.).

In the defendants' dyehouse, over the tanks containing the dye, there was certain machinery, consisting of a series of rollers for wringing the dye out of the warp as it came from the tanks, having cogwheels at the ends thereof where they connected with the frame of the machine. There were spaces between the

tanks where planks were placed for the workmen to pass along, and which were always in a slippery condition. The plaintiff, a workman employed by the defendants, while returning along one of these planks on the discharge of his duty in disentangling the warp, slipped, and by reason, as was found by the jury, of the defendants' negligence in not guarding the wheels the plaintiff, in trying to save himself, caught his hand therein and was injured. It was also found that the plaintiff knew of the non-guarding, but did not consider it a defect.

Held, that the cogwheels constituted part of the machinery, and, being dangerous, should have been guarded under s. 15, s-s. 1, of the Factories Act, R.S.O., c. 208; and that the non-guarding constituted a "defect in the condition of the machinery" under the Workmen's Compensation for Injuries Act, R.S.O., c. 141, so that the defendants were liable for the injuries sustained by the plaintiff.

McCloherty v. *Gale Manufacturing Co.*, 19 A.R. 117, commented on.

Held, also, following *Baddeley* v. *Earl Granville*, 19 Q.B.D. 423, that the maxim *volenti non fit injuria* did not apply where the accident was caused by the breach of a statutory duty; but that any question in the matter is now set at rest by the 53 Vict., c. 23, s. 7 (O.), amending the Workmen's, etc., Act.

Contributory negligence was set up, but was disproved.

G. Lynch-Staunton for the plaintiff.

Crerar, Q.C., and *J. B. Crerar* for the defendants.

Div'l Court.] [March 4.

REGINA *v.* HODGE.

Liquor License Act—Search warrant for liquors—Obstructing officer executing—Punishment for offence—Indictment—Legality of warrant.

The defendants were committed for trial for obstructing a peace officer acting under a search warrant issued on an information charging that there was reasonable ground for the belief that spirituous, etc., liquors were being unlawfully kept for sale, contrary to the Liquor License Act, in an unlicensed house.

Held, that the search warrant must be deemed to have been issued under s. 131 of the Act, and it containing no provision for punishment in such case it must be by an indictment for a misdemeanour under R.S.O., c. 162, s. 134.

The court refused to determine as to the validity of the warrant on a motion of this kind, as it could be raised on the trial of the indictment if a true bill were found.

Where a justice of the peace is authorized to act for a police magistrate in case of the latter's illness, absence, or at his request, and the justice acts, the maxim *omnia presumuntur rite esse acta* applies, and the justice is presumed to have been properly authorized unless the contrary appear. *Rex.* v. *Simpson*, 1 Str. 46, followed.

DuVernet for the motion.

No one showed cause.

THE MASTER IN CHAMBERS.]
STREET, J.] [March 3.

REGINA EX REL. PERCY *v.* WORTH.

Municipal Act—Election—Disclaimer—Lowest candidate taking seat—Motion to set aside the election—Omission of interest of relator—Amendment—Con. Rule 444.

At an election under the Municipal Act, 55 Vict., c. 42 (O.), for a deputy-reeve of a town there were three candidates, and after the election and before the first meeting of the council the two who had received the highest and second highest number of votes successively disclaimed, whereupon the remaining candidate, who had received the lowest number of votes, made the declaration of office and took his seat. On a motion in the nature of a *quo warranto* made by the said candidate who had received the highest number of votes to have it declared that there was no election, and that the seat was vacant;

Held, that the motion failed, for what took place constituted an election of the respondent and entitled him to the seat; but in any event the question could not be raised by notice of motion.

The notice of motion did not show any interest in the relator as required by s. 187 of the Act; but it having been shown by affidavit that the relator was the said candidate, an amendment of the motion was allowed under Con. Rule 444.

Osler, Q.C., for the relator.
Aylesworth, Q.C., *contra.*

Practice.

THE MASTER IN CHAMBERS.] [Feb. 11.

RAMUS *v.* DOW.

Parties—Mortgage action—Personal representative of deceased mortgagor—Devolution of Estates Act—54 Vict., c. 18, s. 1.

A mortgage action against the surviving husband and infant children of the mortgagor, who died intestate in February, 1892, was begun before the lapse of a year from the death.

Held, that the plaintiff was entitled, after the lapse of a year, to judgment for the enforcement of her mortgage, without having a personal representative of the mortgagor before the court, no administrator having been appointed, and no caution registered under 54 Vict., c. 18, s. 1, amending the Devolution of Estates Act.

D. T. Symmo[illegible] for the plaintiff.
F. W. Harcourt for the official guardian.

MEREDITH, J.] [April 10.

SOUTHWICK *v.* HARE.

Contempt of court—Motion for attachment—Court or chambers.

An application to attach a person for contempt of court in publishing in a newspaper, while an action is pending, comments upon the matters in question therein is to be dealt with as a criminal matter, not affected by the practice or procedure under the Consolidated Rules; and should be made to the court, not to a Judge in Chambers.

DuVernet and *J. E. Jones* for the motion.

Masten, contra.

Notes of United States Cases.

SUPREME COURT OF PENNSYLVANIA.

[Jan. 30.

WINTER v. FEDERAL STREET RAILWAY CO.

Street railway—Electric road—Negligence—User of highway.

A teamster, for convenience in loading a safe, backed his wagon against the curbstone, allowing his horses to stand across the track of an electric street railway, although it was possible to have loaded his wagon without his horses being upon the track. An electric car ran into and injured one of the horses.

It was *held* that the failure to observe the new conditions made necessary by the introduction of electric and cable roads constituted contributory negligence on the part of the owner of the horses.

It appeared from the evidence that the accident occurred upon a dark evening, and that the owner of the horses stationed a person to watch for approaching cars. It was not clear, however, from the evidence, that proper notice of the presence of horses on the company's road was actually given or that the company was in fault; but the trial judge considered these points need not be considered in view of the broad fact of contributory negligence.

The following is an extract from the judgment: "Now that rapid transit is recognized and demanded as essential to the prosperity of, and the transaction of, business in our large cities, the use of the streets for individual convenience is necessarily qualified so as to make such transit possible, and to minimize its dangers. The substitution of cable and electric cars for the horse car and the omnibus is a change which renders impracticable and dangerous certain uses of the streets which were once permissible and comparatively safe. It introduces new conditions, the non-observance of which constitutes negligence. It is the duty of property owners on streets occupied by cable and electric lines of railway, and of persons crossing or driving upon such streets, to recognize and conform to these conditions. The risk of a crossing or possession of the tracks of a railway operated by horse-power is not to be compared with the peril involved in a crossing or occupancy of the tracks of a steam, cable, or electric railway. The conditions are notably unlike in the size, weight, and speed of the cars, and in the power by which they are moved."