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SUPREME COURT OF CANADA.

OTTAWA, 24 June, 1893.

COWEN v. EVANS.

Quebec.]

Appeal—Amount in controversy—R. S. C. ch. 135—54-55 *Vic. ch.* 25 *—Costs.*

C. brought an action against E. claiming 1o. that a certain building contract should be rescinded. 2o. $1900 damages 3o. $545 for value of bricks in possession of E. but belonging to C. The case was *en délibéré* before the Superior Court when 54-55 Vic. ch. 25 amending ch. 135 R. S. C. was sanctioned, and the judgment of the Superior Court dismissed C's claim for $1000 but granted the other conclusions. On appeal to the Court of Queen's Bench by E., the action was dismissed in 1893. C. then appealed to the Supreme Court.

Held, that the building for which a contract had been entered into having been completed over five years ago, there remained but the question of costs and the $545 claim for bricks in dispute between the parties, in the judgment appealed from, and that amount was not sufficient to give jurisdiction to the Supreme Court under R. S. C. ch. 135, sec. 29. (See *Moir* v. *Corporation of Huntingdon*, 19 Can. S. C. R. 363.)

Appeal quashed with costs.

Smith, for motion.

Archibald, Q. C., contra.

COWEN v. EVANS.

24 June, 1893.

Quebec.]

Jurisdiction—Amount in controversy—54-55 *Vic. ch.* 25, *sec.* 4.—*Appeal—Right to.*

On the 30th September, 1891, when the Statute 54-55 Vic. ch. 25, sec. 4, was passed, enacting that the amount demanded and not that recovered should determine the right to appeal when the right to appeal is dependent upon the amount in dispute, the Superior Court had *en délibéré* an action of damages brought by the respondent against the appellant for $3050 of damages.

The Superior Court on the 5th December, 1891, dismissed the respondent's action.

On appeal to the Court of Queen's Bench for Lower Canada (appeal side) the Court on the 23rd February, 1893, reversing the judgment of the Superior Court, granted $880 damages to respondent with interest from the 16th June, 1887.

On appeal to the Supreme Court of Canada :

Held, that the Statute 54-55 Vic. ch. 25, did not apply to cases pending, and as the amount of the judgment appealed from was under $2,000 the case was not appealable, following on the question of the non-retroactivity of the Statute, *Williams* v. *Irvine*, (22 Can. S. C. R. 108) and as to the amount in dispute, *Monette* v. *Lefebvre*, 16 Can. S. C. R. 357.

Gwynne, J. dissenting.

Appeal quashed with costs. (1)

Mr. Smith, for motion.

Archibald, Q. C., contra.

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24 June, 1893.

MITCHELL v. TRENHOLME.

Quebec.]

Jurisdiction—Appeal—Right to—Amount in dispute—54-55 *Vic. ch.* 25, sec. 4.

In an action brought by the respondents on the 25th July 1889, claiming $5,000 damages alleged to have been sustained by them by the production of a plea and incidental demand by

(1) The appeal of *The Montreal Street Railway Co.* v. *Carrière*, argued at the October Session, 1893, was quashed on the same grounds.

appellants in a case before the Superior Court for the district of Montreal, under number 528, the Superior Court on the 27th day of September, 1890, granted $300 damages to the respondents.

The appellants (defendants) then appealed to the Court of Queen's Bench and that Court on the 28th day of February 1893, confirmed the judgment of the Superior Court.

On appeal to the Supreme Court of Canada:

Held, following the decision in *Williams* v. *Irvine*, 22 Can. S. C. R. 108, that 54-55 Vic. ch. 25, did not apply to cases *en délibéré* before the Superior Court on the 30th September, 1891, and the appeal should be quashed for want of jurisdiction. Gwynne, J., dissenting.

Appeal quashed with costs.

Buchan, for motion.
Delisle, contra.

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24 June, 1893.

MILLS et al. v. LIMOGES.

Quebec.]

Right of appeal—54-55 *Vic. ch.* 25, *sec.* 4—*Amount in dispute*—*Jurisdiction.*

In an action of damages for $5,000 brought for the death of a person by a consort, the Superior Court in April, 1891, granted $1,000 damages and the judgment was acquiesced in by the plaintiff, but defendant appealed to the Court of Queen's Bench and that Court affirmed the judgment of the Superior Court in December, 1892. 54-55 Vic. ch. 25, sec. 4, declaring that "whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered, if they are different," was sanctioned 30th September, 1891.

On appeal to the Supreme Court of Canada:

Held, that 54-55 Vic. did not apply to such a case, and that the case was not appealable. *Monette* v. *Lefebvre*, (16. Can. S. C. R. 357); *Williams* v. *Irvine*, (22 C. S. R. 108).

Appeal quashed with costs.

H. Abbott, *Q. C.*, and *E. Lafleur*, for appellants.
Demers, for respondent.

24 June, 1893.

LEFEUNTUN v. VERONNEAU.

Quebec.]

Venditioni exponas—Order of Court or judge—Vacating of Sheriff's sale—Arts. 553, 662, 663, 714 *C. P. C.—Jurisdiction.*

A petition *en nullité de décrêt* has the same effect as an opposition to a seizure, and under arts. 662 and 663 C. C. P. the sheriff cannot proceed to the sale of property under a writ of *venditioni exponas* unless said writ is issued by an order of the Court or a judge.—*Bissonnette* v. *Laurent* (15 Rev. Leg. 44) approved.

Per Fournier, J.—Where the text of the law is clear and positive, a practice even long established should not be followed.

Taschereau and Gwynne, JJ., dissented.

On the question of want of jurisdiction raised by respondent it was held that a judgment in an action to vacate the sheriff's sale of an immovable is appealable to the Supreme Court under sec. 29 (*b*). *Dufresne* v. *Dixon* (16 Can. S. C. R., 596) followed.

Appeal allowed with costs.

Mercier, Q. C., and *Gouin*, for appellant.

Bonin, for respondent.

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24 June, 1893.

QUEBEC CENTRAL RY. CO. v. LORTIE.

Quebec.]

Railway accident to passenger—Damages—Negligence—Art. 1675 *C. C.*

L. was a holder of a ticket, and passenger of the company's train from Levis to Ste. Marie Beauce. When the train stopped at Ste Marie Station, passengers alighted, but the car upon which L. had been travelling, being some distance from the station platform, and the time for stopping having nearly elapsed, L. got out at the end of the car, and, the distance to the ground from the steps being about two feet and half, in so doing he fell and broke his leg, which had to be amputated.

The action was for $5,000 damages, alleging negligence and want of proper accommodation. The defence was contributory negligence. Upon the evidence the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, gave judgment

in favour of L. for the whole amount. On appeal to the Supreme Court of Canada,

Held, reversing the judgments of the Courts below, that in the exercise of ordinary care, L. could have safely gained the platform by passing through the car forward, and that the accident being wholly attributable to L's own default in alighting as he did, he could not recover. Fournier, J., dissenting.

Per Gwynne, J.—Every man travelling by rail in this country must have known that it was not the way he should have alighted, or by which there was any necessity for his so alighting, or was ever intended that he should alight.

Appeal allowed with costs.

Brown, Q. C., for appellants.
Lavery, for respondent.

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24 June, 1893.

STEWART v. ATKINSON.

Quebec.]

Sale of deals—Contract—Breach of—Delivery—Acceptance—Quality— Warranty as to—Damages—Arts. 1073, 1473, 1507 *C. C.*

In a contract for the purchase of deals from A. by S. *et al*, merchants in London, it was stipulated *inter alia*, as follows:—"Quality—Sellers guarantee quality to be equal to the usual Etchemin Stock and to be marked with the Beaver Brand," and the mode of delivery was f. o. b. vessels at Quebec, and payment by drafts payable in London 120 days sight from date of shipment. The deals were shipped at Quebec on board vessels owned by P. & Bros. at the request of P. & P. intending purchasers of the deals. When the deals arrived in London they were inspected by S. et al, and found to be of inferior quality, and S. et al, after protesting A. sold them at reduced rates. In an action of damages for breach of contract,

Held, reversing the judgment of the Court below, that the delivery was to be at Quebec, subject to an acceptance in London, and that the purchasers were entitled to recover under the express warranty as to quality, there being abundant evidence that the deals were not of the agreed quality. Arts. 1507, 1473, 1073 C. C. The Chief Justice and Sedgewick, J., dissenting.

Appeal allowed with costs.

Fitzpatrick, Q. C., and *Ferguson, Q. C.*, for appellants.
Casgrain, Q. C., for respondent.

1 May, 1893.

C. P. R. Co. v. Cobban Manufacturing Co.

Ontario.]

Practice—Trial—Disagreement of jury—Questions reserved by judge —Motion for judgment—Amendment of pleadings—New trial— Judicature Act., rule 799—Jurisdiction—Final judgment.

In an action brought to recover damages for the loss of certain glass delivered to defendants for carriage, the judge left to the jury the question of negligence only, reserving any other questions to be decided subsequently by himself. On the question submitted the jury disagreed. Defendant then moved in the Divisional Court for judgment, but pending such motion the plaintiffs applied for and obtained an order of the Court amending the statement of claim, and charging other grounds of negligence. The defendants submitted to such order and pleaded to such amendments, and new and material issues were thereby raised for determination. The action as so amended was entered for trial but was not tried before the Divisional Court pronounced judgment on the motion, dismissing plaintiffs' action. On appeal to the Court of Appeal from this judgment of the Divisional Court it was reversed. On appeal to the Supreme Court,

Held, affirming the judgment of the Court of Appeal, that the action having been disposed of before the issues involved in the case, whether under the original or amended pleadings, had ever been passed upon or considered by the trial judge or the jury, a new trial should be ordered, and that this was not a case for invoking the power of the Court, under rule 799, to finally put an end to the action.

Held, also, that the judgment of the Court of Appeal, ordering a new trial in this case was not a final judgment, nor did it come within any of the provisions of the Supreme Court Act authorising an appeal from judgments not final.

Appeal dismissed with costs.

Nesbitt, for appellants.

J. Osler, Q. C., and *Holden*, for respondents.

24 June, 1893.

CORPORATION OF THE VILLAGE OF NEW-HAMBURG v. COUNTY OF WATERLOO.

Ontario,]

Ontario Municipal Act—Construction of bridges—Liability for construction and maintenance—Width of stream—R. S. Q. (1887) *ch.* 184 *sec.* 532, 534.

By the Ontario Municipal Act, R. S. Q. (1887) p. 184 sec. 532, the council of any county has " exclusive jurisdiction over all bridges crossing streams or rivers over one hundred feet in width within the limits of any incorporated village in the county and connecting any main highway leading through the county," and by sec. 534 the county council is obliged to erect and maintain bridges on rivers and streams of said width. On rivers or streams of one hundred feet or less in width bridges must be constructed and maintained by the respective villages through which they flow.

The river Nith flows through the village of New-Hamburg and in dry seasons when the water is low the width of the river is less than one hundred feet, but after heavy rains and freshets, it exceeds that width.

Held, reversing the decision of the Court of Appeal (20 Ont. App. R. 1) and of the Divisional Court (22 O. R. 193) that the width at the level attained after heavy rains and freshets in each year should be considered in determining the liability under the act to construct and maintain a bridge over the river; the width at ordinary high water mark is not the test of such liability.

Appeal allowed with costs.

Meredith, Q. C., for the appellants.

King, Q. C., for the respondents.

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24 June 1893.

CITY OF LONDON v. WATT.

Ontario.]

Assessments and taxes—Ontario Assessments Act, R. S. O. (1887) *ch.* 19, *ss.* 15, 65—*Illegal assessment—Court of revision—Business carried on in two municipalities.*

Sec. 65 of the Ontario Assessment Act (R. S. O. 1887, ch. 193)

does not enable the Court of Revision to make valid an assessment which the statute does not authorize.

Sec. 15 of the act provides that "where any business is carried on by a person in a municipality in which he does not reside, or in two or more municipalities, the personal property belonging to such person shall be assessed in the municipality in which such personal property is situated." W., residing and doing business in Brantford, had certain merchandise in London stored in a public warehouse used by other persons as well as W. He kept no clerk or agent in charge of such merchandise, but when sales were made a delivery order was given upon which the warehouse keeper acted. Once a week a commercial traveller for W. residing in London, attended there to take orders for goods, including the kind so stored, but the sales of stock in the warehouse were not confined to transactions entered into at London.

Held, affirming the decision of the Court of Appeal, that W. did not carry on business in London within the meaning of the said section, and his merchandise in the warehouse was not liable to be assessed at London.

Appeal dismissed with costs.

Meredith, Q. C., for the appellants.

Gibbons, Q. C., for the respondents.

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24 June, 1893.

INTERNATIONAL COAL CO. v. COUNTY OF CAPE BRETON.

Nova Scotia.]

Assessment and taxes—Tax on Railway—Nova Scotia Railway Act —Exemption—Mining Company—Construction of Railway by— R. S. N. S. 5 Ser. ch. 53.

By R. S. N. S. 5 ser. c. 53, sec. 9, sec. 30, the road-bed, etc., of all railway companies in the Province is exempt from local taxation. By sec. 1 the first part of the act from secs. 1 to 33 inclusive applies to every railway constructed and in operation or thereafter to be constructed under the authority of any act of the legislature, and by sec. 4, part 2 applies to all railways constructed or to be constructed under authority of any special act, and to all companies incorporated for their construction and working. By sec. 5, subsec. 15, the expression "the company" in the act means the company or party authorized by the special act to construct the railway.

The International Coal and Ry. Co. was incorporated by 27 Vic. ch. 42 (N. S.) for the purpose of working coal mines in Cape Breton, and for the further purpose "of constructing and making such railroads and branch tracks as might be necessary for the transportation of coals from the mines to the place of shipment, and all other business necessary and usually performed on railroads," and with other powers connected with the working of mines "and operation on railways." Under these powers a railway twelve miles in length was built and used to carry coal from Bridgeport to Sydney Harbour, and the Company having become involved its property, including said railway, was sold at sheriff's sale and the purchasers conveyed the same to the International Coal Co.

By 48 and 49 Vic., ch. 20 (*a*) it was enacted that the International Coal Co. might hold and work their railway for the purposes of their own mines and operations, and might hold and exercise such powers of working the railway for the transport of passengers and freight generally for others for hire as might be conferred on the company by the legislature of Nova Scotia, and by 49 Vic., ch. 145, sec. 1 (N. S.) the company were authorized to hold and work the railway "for general traffic and the conveyance of passengers and freight for hire, as well as for all purposes and operations connected with said mines in accordance with and subject to the provisions of part second of ch. 53, R. S. N. S., 5 ser., entitled "of railways."

The municipality of Cape Breton having assessed the company for local taxes in respect of said Railway,

Held, reversing the decision of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that the company was exempt from such taxation; that the railway was one constructed under authority of an act of the legislature of Nova Scotia (27 Vic., ch. 42) and in operation under the authority of another act (49 Vic. ch. 145); that the company was a "railway company" within the meaning of sec. 9, subsec. 30 of c. 53; that part one of that chapter applies to railways constructed under any act of the legislature and not only under acts exclusive of those to which part two applies; and that the reference in 49 Vic., ch. 145, sec. 1 to part two does not prevent said railway from coming under the operation of the first part of the act.

Appeal allowed with costs.

Harris, Q. C., for the appellants.
Borden, Q. C., for the respondents.

June 24, 1893.

YORK v. CANADA ATLANTIC STEAMSHIP CO.

Nova Scotia.]

Negligence—Passenger vessel—Use of wharf—Invitation to public—Accident in using wharf—Proximate cause—Excessive damages.

A company owning a steamboat making weekly trips between Boston and Halifax occupied a wharf in the latter city leased to heir agent. For the purpose of getting to and from the steamer there was a plank sidewalk on one side part way down the wharf and persons using it usually turned at the end and passed to the middle of the wharf. Y. and his wife went to meet a passenger expected to arrive by the steamer between seven and eight o'clock one evening in November. They went down the plank sidewalk and instead of turning off at the end, there being no lights and the night being dark, they continued straight down the wharf, which narrowed after some distance and formed a jog, on reaching which Y's wife tripped and as her husband tried to catch her they both fell into the water. Forty-four days afterwards, Mrs. Y. died.

In an action by Y. against the company to recover damages occasioned by the death of his wife, it appeared that the deceased had not had regular and continual medical treatment after the accident, and the doctors who gave evidence at the trial differed as to whether or not the immersion was the proximate cause of her death. The jury when asked:—Would the deceased have recovered, notwithstanding the accident, if she had had regular attendance? replied, "very doubtful." A verdict was found for the plaintiff with $1,500 damages, which the Supreme Court of Nova Scotia set aside and ordered a new trial. On appeal from that decision:

Held, that Y. and his wife were lawfully upon the wharf at the time of the accident; that in view of the established practice they had a right to assume that they were invited by the company to go on the wharf and assist their friends in disembarking from the steamer; and that they had a right to expect that the means of approach to the steamer were safe for persons using ordinary care, and the company was under an obligation to see that they were safe.

Held, further, that it having been proved that the wharf was

only rented to the agent because the landlord preferred to deal with him personally, and that it was rented for the use of the company whose officers had sole control of it, the company was in possession of it at the time of the accident.

Held, also, that the evidence and finding of the jury having left it in doubt that the accident was the proximate cause of Mrs. Y's death, the jury not having been properly instructed as to the liability of the company under the circumstances, and the damages being excessive under the evidence, the order for a new trial should be affirmed.

Appeal dismissed with costs.

Newcombe, for appellant.
Borden, Q.C., for respondents.

24th June, 1893.

TOWN OF PRESCOTT v. CONNELL.

Ontario.]

Negligence—Proximate cause—Danger voluntarily incurred.

C. having driven his horses into a lumber yard adjoining a street on which blasting operations were being carried on, left them in charge of the owner of another team, while he interviewed the proprietor of the yard. Shortly after a blast went off, and stones thrown by the explosion fell on the roof of a shed in which C. was standing and frightened the horses, which began to run. C. at once ran out in front of them and endeavoured to stop them, but could not, and in trying to get away he was injured. He brought an action against the municipality conducting the blasting operations to recover damages for such injury.

Held, affirming the decision of the Court of Appeal (20 Ont. App. R. 49), Gwynne, J. dissenting, that the negligent manner in which the blast was set off was the proximate and direct cause of the injury to C.; that such negligent act immediately produced in him the state of mind which instinctively impelled him to attempt to stop the horses; and that he did no more than any reasonable man would have done under the circumstances.

Appeal dismissed with costs.

Meredith, Q.C., for appellants.
Murcheson, Q.C., for respondent.

INDIANA SUPREME COURT.

June 13, 1893.

EBERHART v. STATE.

Rape—Resistance—Evidence.

Defendant, a quack, pretending to cure by charms, after several times visiting a girl thirteen years old, who had for two years had epileptic fits, was placed in a room with her, at his instance, by her ignorant and credulous parents, where, on the fifth night, he called her to his bed, telling her he had something to tell her which would cure her. Her testimony that she tried to make him quit, but he would not, was uncontradicted. Held, *that there was not a failure to show sufficient resistance because she made no outcry, and concealed the crime committed on her.*

Appeal from Circuit Court, Clinton county; S. H. Doyle, J. Lewis Eberhart was convicted of rape, and appeals.

HOWARD, J. The appellant was indicted for the crime of rape, was tried therefor, and found and adjudged guilty. It is contended that the evidence does not sustain the verdict. The prosecuting witness, Lottie G. Mohler, was thirteen years of age, past, and for two or three years had been subject to epileptic fits. Her father was a day laborer, while both father and mother were ignorant and credulous to an extreme degree, though apparently well-minded persons. The girl herself had not gone to school since she had been afflicted with epilepsy, and had gone out nowhere except when accompanied by her father.

Appellant was a pretended travelling doctor, and about fifty years of age. He had travelled over parts of Illinois and Michigan, as well as in this State, professing to cure diseases by charms or spells, but not laying claim to any great medical knowledge. The parents of the prosecuting witness were advised to make trial of his powers to relieve her of her malady, and called him to treat her during one of his visits to the neighborhood. His first treatment was to take her to a private room and tie a string of woollen yarn around her person, charging her to tell no one what he had done. She did not tell this to her mother, and the mother did not want to know what the doctor had done when she learned that he told the girl not to tell. This was in December, 1892. In January, and also in February, he came again, and the treatment was repeated. Before the February visit he wrote the following letter to the mother:

PERTH, IND., Feb. 1, 1893.

"MRS. MATTIE MOHLER:

"This night I received your letter, and would say it would be necessary for me to see her again, and sleep in the same room with her now and then. You will see the change, for I make it a point to operate on these cases the third time after night, and, if possible, when the spell is on. It is possible that I may see you before Saturday night, and have a room to ourselves.

Yours truly,

"LEWIS EBERHART.

"Try and get out of her what makes her cry. I am of a notion that her disease is a curse. Does she make any religious profession, or not? Look for me, and ask her if she is very anxious to see me, or not. I will use Latin phrases altogether on behalf of her. Yours,

"L. E."

The parents consented to this astounding proposition. The prosecuting witness slept in a small room down stairs on a couch, while the doctor slept in the same room on a bed. The rest of the family slept upstairs. On the fifth night that they so slept in the same room, he waked her up, after she had been some time asleep, and called her to his bed, saying he had something to tell her that would cure her of her fits. As soon as she reached his bed, she testifies, he pulled her in, and committed the crime charged; she trying, as she says, "to make him quit, but he would not do it." Her mother and sister-in-law found evidence of the truth of her statement, although at first she refused to tell, because, as she says, the doctor forbade her to say anything about it.

Appellant's counsel say that the crime is not proved, because there was no outcry at the time, and there was concealment for a few days afterward. In *Anderson* v. *State*, 104 Ind. 467, it is said: "The nature and extent of resistance which ought reasonably to be expected in each particular case must necessarily depend very much upon the peculiar circumstances attending it; and it is hence quite impracticable to lay down any rule upon that subject as applicable to all cases involving the necessity of showing a reasonable resistance. *Ledley* v. *State*, 4 Ind. 580; *Pomeroy* v. *State*, 94 id. 96; *Com.* v. *McDonald*, 110 Mass. 405; 2 Bish. Crim. Law, §1122." In the case of Ledley v. State, *supra*, the court said: "What seemed inconsistent in her conduct might

have been accounted for, in the minds of the jury, by that species of moral duress which the evidence tends to show that the prisoner exercised over her. She was young—only sixteen—and seemingly artless, wholly inexperienced, and by no means intelligent. * * * Under such circumstances, his influence over her must have been great. * * * The jury saw the witnesses and the parties. They have come to a conclusion which in our view of the case, is perhaps supported by the evidence. * * * Unless we respect such verdicts, there would be little hope of bringing the guilty to punishment. Bish. Crim. Law, *supra*, says: "Some of the cases, both old and modern, are quite too favorable to the ravishers of female virtue, and ought not to be followed, on this question of resistance. * * * The better judicial doctrine requires only that the case shall be one in which the woman 'did not consent.' Her resistance must not be mere pretense but in good faith." In *Huber* v. *State*, 126 Ind. 135, the court held that "the rule does not require that the woman shall do more than her age, strength and the attendant circumstances make it reasonable for her to do in order to manifest her opposition.

Pomeroy v. *State*, 94 Ind. 96, 7 Leg. News, 278, was a case in many respects similar to that before us. In that case the prosecuting witness, who was twenty-one years of age, was afflicted with epileptic fits, and Pomeroy was an itinerant doctor, who said he could cure her, and in pretending to treat her as a physician, accomplished her ruin. She too made no outcry at the time, but the court says: "If the jury believe, as they might well have done, under the evidence, that the appellant, as a physician, obtained possession and control of Rebecca's person, under her mother's command * * * and that she never in fact gave her consent, through fraud or otherwise, * * * then it seems to us that the appellant was lawfully convicted of the crime of rape." *Queen* v. *Flattery*, 2 Q. B. Div. 410, referred to in the same opinion, was also similar to the case before us. In the case at bar the prosecuting witness was a child but little over the age of consent, as then fixed by law, and under such age as now fixed by our more humane statute. She was an epileptic, and had been so afflicted for about two years. In obedience to the direction of her parents, she was placed in the power of the charm doctor, who had wormed himself into her confidence, and into that of her almost equally feeble-minded parents. Her uncon-

tradicted statement shows that she did not give her consent, and that she "tried to make him quit, but he wouldn't." The appellant claimed to exercise great influence over her, and the evidence showed that she obeyed him implicitly, as one who was to cure her of her malady. Weak in intellect and credulous, as she was, both from disease and heredity, and subjected for months to the will of her pretended physician, it was rather a matter of surprise that she offered any resistance to him. The crime committed by appellant was not only rape, as the jury found, but of a most aggravated character; and the jury would have been justified, from the evidence, in inflicting the most severe penalty.

The eighth instruction asked by appellant was properly refused by the court. We think it clear, from what has been already said, that a charge would have been improper which assumed that, under the circumstances, the prosecuting witness ought to have made an outcry that would have waked her parents upstairs. Nor do we think the evidence would justify that part of the instruction which assumed that appellant was received by the family on friendly terms on one occasion after the commission of his crime. What we have said before applies also to this last feature of the instruction refused.

Appellant also contends that he should have been allowed to call and cross-examine the prosecuting witness after the case of appellee had been closed. The court permitted appellant to make the prosecuting witness his witness, for the purpose of eliciting any further evidence she might be able to give. This was all he was entitled to. Appellee's witnesses could not be cross-examined after appellee's case was closed, and without the consent of appellee and of the court. We have found no available error in the record.

The judgment is affirmed.

GENERAL NOTES.

EXCENTRICITIES OF PRACTICE IN VIRGINIA.—A Lynchburg, Va., special, August 11, says: "Yesterday afternoon, during the trial of Hugh J. Shott against the Norfolk and Western Railroad, the opposing counsel, J. C. Wysor and General James A. Walker, became involved in a difficulty by Walker accusing Wysor of appealing in his speech to the passion and the prejudice of the

jury. Wysor gave Walker the lie. Walker asked for a knife, and Wysor drew his knife and handed it to him. Walker refused the proffer, and borrowed one from a bystander, and the fight commenced. Several blows were struck and Wysor was stabbed in his shoulder, and his face was slit from his mouth to his ear. Wysor then borrowed a gun and tried to force Walker's room door to shoot him, when both were arrested and put under a bond of $5,000. Wysor is badly hurt. Both men are among the most prominent lawyers in south-western Virginia."

OFFENCES COMMITTED BY MINORS.—A boy of sixteen has been sentenced to death at Leeds, in England, for the murder of his infant brother. Commenting on this sentence, the *St. James Gazette* observes that, "of course" the young convict will not be hanged, but that equally of course, he will be kept in penal servitude for life. In some countries, *e. g.*, in Prussia, Spain, and parts of Switzerland, capital punishment is not inflicted on young persons, the ages of liability being sixteen, eighteen, and twenty respectively, and even in England, where any boy or girl above the age of seven can be capitally convicted and executed, if only *malitia supplet ætatem*, it is doubted whether any person under the age of seventeen has been hanged for the last fifty years. However this may be, the *London Law Times* says that the life sentence in cases of commutation is merely a nominal one, and that the culprit usually regains his liberty after a period of some twenty years, though the practice of the home office in this matter is wisely not expressed in any general rules such as those which followed the passing of the Penal Servitude Act 1891, and apply to sentences of penal servitude for fixed periods, which are invariably less than the nominal periods if only the convict's behavior is good.

HYPNOTISM.—Hypnotism has been brought to the notice of a court in the State of Washington, where, at Tacoma, the complainant in a suit for damages is accused of hypnotizing a witness in court. The plaintiff is said to have given evidence of mesmeric power on many previous occasions. The court at first declined to receive the complaint, but seems to have taken it under advisement and the case was adjourned. The witness showed a deficient memory, which was said to improve when some one stood between him and the alleged hypnotizer.