Canada Law Journal.

VOL. XXXIII. NOVEMBER 1, 1897. NO. 18.

The opening of the next Michaelmas Sittings of the Law Courts in England is to be preceded by a public religious service in Westminster Abbey, to be attended by the judges, the officers of the Courts and the Bar. Such a function conducted and attended in a religious spirit and not as a mere matter of form or as a spectacular exhibition, is eminently proper and cannot but be impressive and edifying. The English have been often described as a religious people, and they certainly have a way of bringing their religion into their daily affairs not common in other countries; for instance they have never discarded the ancient custom of preceding the opening of the Assizes by a public religious service, moreover all the of Inns of Court are provided with beautiful chapels for the use of their members. How far the purity of the English Bench may be due to this consistent public recognition by the judges and lawyers of their duty to the Supreme Judge of all, we do not pretend to say. At least it appears to be a commendable proceeding and one deserving of being followed.

The effect of the Statute of Limitations on the rights of mortgagees has received considerable attention lately. We have received (amongst others) a well-considered communication on the subject from Mr. A. M. Lewis, barrister, Hamilton, in which he discusses the subject at considerable length. His article was written before the recent case of *Thornton* v. *France* (referred to on pp. 593-677) was published. We notice that he arrived at the same conclusion as was reached by the English Court of Appeal in that case. As the point discussed has already received even more than its share of space, it is impossible, in view of the crowded state of our columns to do more than refer to Mr. Lewis' communication. We shall hope, however, to hear from him again at an early date.

An enterprising contemporary hailing from the United States is on the eve of a new departure. The wise man these days is never surprised at anything. Peace of mind is only possible by a mental attitude of resigned acceptance of what the demon of change may inaugurate. If we have bicycles, roller boats, departmental stores, trolley cars and other electric appliances approaching the prophecy of Bulwer Lytton's "Vril" man, why should not a legal journal publish a legal romance. The name chosen by the author is after all comparatively tame, at least it is hardly up to, though it smacks of, the dime novel resplendent in many colours beloved as well by the bowery girl as by the cow boy of the wild and wooly West. It is simply "A Living Dead Man, or the strange case of Moses Scott, an accurate and truthful narration of the complications caused by a litigant's return from the Lethean Shore." Warren's "Ten Thousand a Year" pales before it, and the upturned nose of Tittlebat Titmouse will be out of joint, and his carrotty hair forever remain green with jealousy.

THE PRISONER AS A WITNESS.

In dealing with the question of calling the accused as a witness on his own behalf in a criminal prosecution, the only practical arguments available are those based on experience. In this branch of legal work, precepts and wise theories are of no value. So much depends on the nature of the offence charged, the quality of the evidence for the Crown, the character, appearance, and temperament of the person prosecuted, and the impression on the jury at the close of the Crown's case, that it is almost impossible and certainly unsafe to lay down a rule to be adopted in all cases as the wisest thing for counsel to do. A general rule with its proverbial exceptions is the extent prudence permits one to go, and that rule is, *never put the accused in the box.* At times it may be safe and absolutely necessary to allow the prisoner to give evidence on his own behalf, but these are the very rare

exceptions. Generally, and whether innocent or guilty, he assists, by his story of the facts, in convicting himself, and the reasons for this are apparent when some degree of consideration is given to the matter.

A suspected witness is a witness condemned. As a rule, the accused does not reach the stage of trial unless the facts are such as are likely to tell against him in the minds of the jurors, Jurymen are like other people. What affects ordinary outsiders, affects them. They do not lose their characteristics of humanity by assuming the role of jurors. Foreign elements not infrequently act upon their minds, just as the minds of the neighbors of the accused are acted upon by matters, to the legal mind, wholly irrelevant. Simplifying the question in this way, we can readily trace the growth of suspicion until it develops into convicting facts, and we can easily understand how it is that guilt more likely than innocence stands in the dock.

First, there is, perhaps, only a whisper when a crime is committed. This rises to the level of suspicion as people piece the circumstances together. Afterwards, a concrete fact is evolved and as this is one of a chain of facts, its discovery naturally connects it with others. Later on, the trail becomes more distinctively marked, and just as one link leads to another until the chain is moderately complete, so the knowledge of one circumstance unearths or leads to others in close proximity, and what was originally the indication of suspicion becomes at least the prima facie evidence of guilt. These facts, many of which cannot be denied by the person suspected, carry conviction to the minds of his neighbors and he is tried by them and condemned in the great tribunal of common sense. Then comes the preliminary investigation by the magistrate and the formal and aggregate record of the loose ends gathered up by the constables, who, as a rule, are honest men, but who, nevertheless, do not seek to minimize the facts which tell most strongly against the prisoner. A committal follows, and if the trial be by jury, there is the pronouncement of the Grand Jury, by sending a true bill before the Court for final disposition. We have, therefore,

practically three tribunals saying there is evidence of guilt, to say nothing of the fourth—the press—which generally manages to convict in the first instance.

With this state of affairs present in nearly every criminal case, it is perhaps not going too far to say that in most instances, the person who, in the minds of ordinary men, is guilty, stands before the court as the proper person to plead to the indictment. Putting such a man in the witness box means, therefore, that he must lie to save himself, or tell the truth and aid in his own conviction. There are many things he is confronted with, even if he is a skilful witness, which he cannot explain. If he is really guilty, his evidence, other than a direct admission of guilt, must be false, and the false witness takes terrible chances. A skilful cross-examination demolishes his story. A more moderate degree of skill on the part of Crown counsel generally demonstrates confusion, contradiction, and false reasons in incidental matters, although the main facts of his testimony may be undisturbed. In any event, there is sure to be some corroboration of the Crown case in his evidence. If then, the guilty man is on trial, it is dangerous beyond measure to call him as a witness. Counsel, however, cannot always decide these matters. The client must be heard in the determination. To take the responsibility of refusing to call him when he insists upon it, is a position counsel do not care to assume. It is a grave question whether counsel should not assume it. His judgment should govern. He, and not his client, conducts the case, and upon him should devolve its sole management and direction. In many instances I have assumed it, in some I have yielded to the pressure of the client, and my experience is that the only safe course is to take the responsibility, and keep the prisoner in the dock.

Another strong argument, and again it is more the result of experience than of theory, is that the evidence of a man on trial for a crime, however small the crime may be, is greatly weakened by reason of the existence of the powerful influence of self-preservation. Juries know this as well as lawyers do. In the case of murder, what would not most men swear

to in order to save their lives? And in less serious offences such as larceny, forgery and the like, it is a safe prediction that the man who is criminal enough to commit such an offence is generally quite criminal enough to swear falsely. The crimes of intent, such as stealing, arson, counterfeiting, etc., are the acts of men criminal at heart. Unlike murder and assaults, and even unlike rape, which are largely the result of passion overcoming the better nature of the offender, they are the outcome of a man of wicked and evil spirit—the man who is the true criminal, and to whom perjury has few terrors on moral grounds. The position taken by the accused in giving evidence is a trying one. Assume his innocence to be a fact, he feels the importance of his testimony to such an extent that the thought unnerves him. His evidence may be perfectly true. His manner of giving it, for the reasons suggested, may be convincing as to its falsehood. On the main facts, he may be compelled, if a truthful man, to corroborate the case for the prosecution and yet be innocent of the crime charged in the indictment. The color given to an honest act by its relative surroundings may so change its character as to make it proof of guilt in the eye of the jury. It is always easier to deny a statement than to explain its collateral bearings, and an experienced counsel seldom attacks the main facts deposed to, but leads the witness quietly and unsuspectingly into the by-ways and lanes leading up to the principal issue. Here, he secures admissions and statements favorable to the Crown, and the denials of the chief facts alleged in evidence against the accused are so weakened or qualified as to render them of no value.

Where evidence, other than the prisoner's, is called for the defence, it will be found that it is either positive or explanatory. If the jury do not believe this testimony, it is almost unnecessary to argue that they will not believe the story of the prisoner. His statements cannot do more as a rule than corroborate the witnesses already called on his behalf, and if these witnesses are not believed, very little, if any, weight will be given to the corroboration. If they do believe his witnesses, there is an

end of the case, if the facts are at all material, and a great risk is avoided, and many apparent dangers escaped by not calling the accused. Many a clean, strong defence is utterly ruined by the suspicion cast upon it through the hesitating, nervous conduct of the prisoner as a witness. The jury are apt to find guilt not because the Crown case is strong, but more often because the accused having undertaken to prove his innocence, has not succeeded in doing so. It is the old story of an alibi. The Crown may not put forward a very convincing case as to the presence of the prisoner at the scene of the crime. If, however, the prisoner undertakes to show he was not there on the occasion alleged, and fails to do so conclusively, the jury are naturally, and perhaps not unreasonably quick to come to the conclusion that he committed the offence, because he has failed to show his absence from the locality of the crime. They try him upon his alibi, and not upon the issue. This is one of the peculiar phases of experience in jury trials where an alibi is set up. The weakness or failure of the defence in establishing its theory is made the criterion, and not the guilt or innocence of the person charged. It may be a wrong test to apply, but it is not an unnatural one, and juries often judge more by every day experience of the immediate world they live in than by strict logical deductions or rules of evidence. The fear of falling into a trap, the desire to put the best side of the story foremost, and the anxiety to explain away doubtful points, tend to increase the difficulties in the way of even an honest and innocent prisoner. These feelings and desires hamper a witness very much, and the moment hesitation in manner or speech becomes apparent, much injury is done to the defence. Women, as a rule, are safer witnesses to call on their own behalf than men. They are quicker to see a point, are more self-possessed, and are not subjected to the same force of cross-examination. Pressure brought by counsel in cross-examining women may prove disastrous to the examiner. He may not be as acute and sharp as the witness. If he is, and presses his advantage too strongly, the current of sympathy for the helpless woman unconsciously affects the

jury, and a step too far may aid more in securing an acquittal than most counsel are willing to admit. With the male prisoner, the case is entirely different. Every contradiction, however slight, is apt to be taken as another evidence of guilt, and that which is looked upon as the modest variances of a badgered woman is in the case of a man convincing proof of falsehood in his testimony.

There is a class of cases relating to the ownership of property and involving commercial transactions, where, perhaps, the evidence of the accused is of value. But in these instances, the evidence is not of so much weight as regards the truth or falsity of the charge as it is in determining the question of fraudulent intent, which is generally an element in that class of crimes. Where the main facts are practically not disputed, it is generally safe to call the accused to show an absence of evil intent. But in crimes where the intent is presumed, or where it is involved in the act itself, the case assumes a very different position, and is, I think, governed very largely by the considerations advanced in support of the general contention that it is unwise and unsafe to call the prisoner as a witness in his own behalf.

The result of trials shows that in the majority of cases, or at any rate, in a large number of them, there is guilt. All prisoners who stand their trial profess innocence. This fact bears heavily against belief in the truth of their evidence when given. Assume rightful convictions, and the evidence or denials of accused persons generally must be untrue. They therefore offer to the jury a statement which belongs to a class of testimony always false, in cases of conviction, if the conviction be proper. The guilty man denies his guilt. This weakens the denial by the innocent and detracts from its weight with the jury. Every man tried for crime cannot be innocent. Denials by the innocent are weighed in the same scales as the evidence of the guilty. When a prisoner goes before a petit jury, they are apt to look upon his assertions of innocence as a matter of course, and what may always be expected. We say when we hear of a prisoner giving evidence, "Of course, he will deny the charge." This feeling

creates the great element of doubt. Truth does not come as a matter of course. It must be the result of individual honesty. It is not the ordinary incident common to all criminal defences. Indeed, it may be said that the reverse is usually the case.

Another and a grave danger in examining the accused consists in the fact that the door is thereby opened to a question of character. The Crown can offer no evidence of bad character, except indirectly in showing other similar crimes in certain cases to prove the act to be that of design, and not of accident. But when the prisoner is called, his past life becomes the subject of enquiry, and it is not the happy lot of every man to be able to stand before a court and jury, and give his record without some fears and misgivings. Innocent acts may look black indeed, when viewed under such circumstances as exist in a criminal trial, where the accused is suspected and perhaps already convicted in the minds of the jury and spectators. Explanations do not always satisfy the listeners. Private and long-buried events are paraded in public. Sins of which the prisoner may have sincerely repented, or for which he has paid the full penalty, are raked up, and he is confronted with matters, now half forgotten, or for many reasons incapable of explanation. No man's record is so perfect, that it cannot be reached by the tongue of the slanderer or the knife of the enemy, and few men can produce evidence to support their contention of innocence after the lapse of many years, even if such evidence were admissible.

I have not dealt with the policy of the law in permitting a prisoner to give evidence in his own interest on his trial for a crime. It would, in my opinion, be better for all accused persons, if such law did not exist, but that is not the question now under discussion. As to the knowledge of jurors that a prisoner may give evidence on his own trial, I do not think it affects them one way or the other. Juries are very fair to prisoners. The only occasions on which they err is when they refuse to act upon their independent convictions, Given a moderately intelligent jury, and a reasonable defence,

they will be found to be very close to the true mark in their conclusions. They will not condemn a prisoner for not giving evidence. My own observation is that they are more apt to do so when he steps from the dock into the witness box.

E. F. B. JOHNSTON.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

COMPANY—DEBENTURE—INTEREST—STATUTES OF LIMITATIONS.

In the case of *In re Cornwall Minerals Ry. Co.* (1897), 2 Ch. 74, Williams J. determined that when debenture stock is authorized to be issued by a company by Act of Parliament, and the stock is accordingly issued, for which certificates are issued under the company's seal, the liability for both principal and interest is a statutory one, and the period of limitation is twenty years. In this case, the company had issued warrants for payment of interest on the stock signed by their secretary in 1885, which had never been presented for payment, altough notice was given that there were funds to meet it on presentation; the company went into voluntary liquidation in 1896, and it was contended by the liquidators that the claim for interest was barred, but Williams J. held that the issue of the warrant and the notice of there being funds to meet it, did not amount to a satisfaction of the original cause of action, and therefore that the claim for interest was not barred.

DEBTOR AND CREDITOR — APPROPRIATION OF PAYMENTS — RULE IN CLAYTON'S CASE.

In *Cory* v. *Owners of S.S. Mecca*, (1897) A.C. 286, the House of Lords (Lords Halsbury, L.C., and Herschell, Macnaghten and Morris) have shown that an important limitation on the rule laid down in Clayton's Case (1816) 1 Mer. 585, exists. The

action was brought in respect of a balance due on four bills of exchange, two of them fell due on the same date. The bills were given by the defendants in respect of necessaries furnished two ships, one of these was the "Mecca" and the other the "Medina." On the 15th August, 1894, a sum of £900 due o the defendants for salvage services rendered by the "Mecca" to the "Medina" was paid to the plaintiffs. And in a letter acknowledging the payment an account was rendered by the plaintiffs, in which the amounts due on the bills were set out, but the bill in respect of the necessaries furnished to the "Mecca" though due on the same day as that for necessaries furnished the "Medina" was entered before it in the account. At the foot of the account, which included some other items, credit was given for the £900 and the balance due on the whole account appeared to be £401, 2s. 9d, for which the action was brought against the "Mecca." The defendants contended that there had been an appropriation of the payment of the £900 to the payment of the "Mecca" bill under the rule in *Clayton's Case*, and that therefore the claim for which the action was brought was satisfied, and Bruce, J., so held, and his judgment was affirmed by the Court of Appeal (Lord Esher, M.R., and Kay and Smith, L.JJ.) Their Lordships have, however, reversed this decision, holding that the rule in *Clayton's Case* is only applicable to accounts current and not to separate and distinct transactions, though they may be included in the same account. And in any case the rule cannot be invoked, even in cases where it is properly applicable, as regards two items due the same day, one of which must necessarily be set down before the other in the account. Their Lordships were of the opinion that there had been no appropriation of the £900 and that the plaintiffs were entitled to appropriate it, and that they had done so by bringing the action.

COMPANY—WINDING UP—HOLDER OF SHARES ISSUED AT A DISCOUNT, LIABILITY OF.

Welton v. *Saffery* (1897) A.C. 299 is a case which was known in the courts below as *In re Railway Time Table Publishing Co.*, and involved an important question as to the extent of the

liability of the holders of shares issued at a discount in winding-up proceedings. The point at issue being, whether the holder of such shares is liable only to pay up the amount due thereon, so far as may be necessary to satisfy the claims of creditors, or whether or not he is not also bound to pay up any balance that may be due in order to adjust the right of the shareholders *inter se*. The Court of Appeal (affirming Kekewich J.) held that the full amount due on such shares must be paid, and that the holders liability is not limited to the amount necessary to satisfy creditors: (1895) 1 Ch. 255 (noted ante vol. 31, p. 255). It will be seen by reference to that note that some difficulty was occasioned by a contrary dictum of Lord Herschell. The majority of their Lordships (viz., Lords Halsbury, L.C., and Watson, Macnaghten, Morris, and Davy) affirmed the decision of the Court of Appeal, on the ground that the issue of shares at a discount is ultra vires of the company, and an act by which they are not bound. Lord Herschell however retained his former opinion, and dissented from the rest of the House.

ADMIRALTY—JURISDICTION—SALVAGE—GAS FLOAT—BEACON OR BUOY.

Wells v. *Whitton*, (1897) A.C. 337, was an action in the Admiralty Court to recover salvage in respect of a gas float shaped like a boat, but intended to be used as a beacon or buoy, which went adrift in a storm. The House of Lords (Lords Herschell, Watson, Macnaghten and Morris) affirmed the decision of the Court of Appeal (1896) P. 42, holding that the Admiralty jurisdiction does not extend to such things, not being a ship, part of a ship, or of her apparel or cargo, and that therefore it was not the subject of a claim for salvage within the Admiralty jurisdiction.

STATUTE—CONSTRUCTION—MALICIOUS PROSECUTION—MENS REA.

Bank of New South Wales v. *Piper*, (1897) A.C. 383, was an action for malicious prosecution which may be usefully referred to as bearing on the relative duty of judge and jury on the trial of such cases. The prosecution complained of was under a Colonial Statute which made it penal to sell stock

subject to a lien without the written consent of the person entitled to the lien. The statute was peculiarly worded, inasmuch as the first part made it penal to sell wool "with a view to defraud," but the latter part relating to the sale of stock was not so limited. It was proved at the trial that the plaintiff had in fact sold the stock in question without the written consent of the defendants, who were entitled to a lien, but that the sale had been made with the defendants' knowledge and oral consent. The jury in reply to questions put to them by the judge, found that the defendants did not believe that the plaintiff had committed an indictable offence. The Court below held that the object of the statute was to punish fraud, and that it was essential to constitute any offence under the Act that there should be mens rea, and judgment was given for the plaintiffs; but the Judicial Committee of the Privy Council (Lords Watson and Davey and Sir R. Couch) reversed the decision, being of opinion that it was for the judge at the trial to construe the section of the Act in question to determine whether or not any offence was proved, and that upon a proper construction of the section intent to defraud was not a necessary ingredient of the offence of selling stock without the written consent of the lienholder. The action was therefor dismissed.

COMPROMISE—SOLICITOR, AUTHORITY OF TO COMPROMISE—NO IMPLIED AUTHORITY BEFORE ACTION.

Macaulay v. *Polley*, (1897) 2 Q.B. 122, is an appeal from an order of Grantham, J., in Chambers, refusing to stay the action. The ground on which the stay was claimed was that before action the plaintiff's solicitor had agreed to a compromise of the plaintiff's claim, and had accepted a sum of money in satisfaction thereof. Grantham, J., held that a solicitor has no implied authority before action to compromise a claim of his client, and as no actual authority to enter into the alleged compromise was shown, nor had the plaintiff received the money, it was nugatory, and with this view the Court of Appeal (Lord Esher, M.R., and Smith and Chitty L.JJ.) agreed, following a decision of Willes, J., in *Duffy* v. *Hanson* (1867) 61 L.T. 332.

DISCOVERY—DOCUMENT TENDING TO CRIMINATE—OBJECTION TO DISCOVERY, HOW TO BE TAKEN—"OTHER PARTY,"—Ord. xxxi. r. 12—Ont. Rule 439.)

In *Spokes* v. *The Grosvernor and W. E. Ry. Hotel*, (1897) 2 Q.B. 124, the Court of Appeal (Smith and Chitty, L.JJ.) determine that where in an action brought by a shareholder against the company, the directors and another shareholder, alleging a conspiracy to defraud the company, and that the company had been defrauded thereby, and claiming damages, it is no answer to an application for discovery by the defendants, nor a ground for setting an order for discovery against them aside, that the discovery may tend to criminate them. Such an objection must be raised by oath in answer to the order. Also that the defendant company was in such a case "another party," and liable to be ordered to make discovery on the application of the plaintiff under ord. xxxi. r. 12 (see Ont. Rule 439.)

STATUTE OF LIMITATIONS—MORTGAGE—PERSON CLAIMING UNDER MORTGAGE—MORTGAGE AFTER STATUTE HAS COMMENCED TO RUN AGAINST MORTGAGOR—REAL PROPERTY LIMITATION ACT, 1837 (7 W. 4. & 1 VICT., C. 28.)—(R.S.O. C. 111, S 22).

Thornton v. *France* (1897) 2 Q.B., 143, deals with a question recently discussed in this Journal (see ante pp. 93, 181, 219), viz., the effect of the Statute of Limitations upon the right of a mortgagee whose mortgage is executed after the statute has begun to run against his mortgagor. The facts of the case were as follows: In 1886 the owner of an undivided moiety of the land in question, which had, during the previous eleven years, been in the sole possession of the owners of the other moiety, mortgaged his moiety; and in 1890, the premises having in the meantime continued and being still in the possession of the owners of the other moiety, he executed a conveyance of his moiety subject to the mortgage, to the plaintiff, who subsequently paid off the mortgage. The action was brought claiming a declaration that the plaintiff was entitled to an equal undivided moiety of the premises, and the defendant relied on the Statute of Limitations. The Court of Appeal (Lord Esher, M.R., and Smith and Chitty, L.JJ.) affirming the judgment of Grantham, J.—though not

on the same grounds as he had taken—held, (1) That the plaintiff did not on paying off the mortgage become a "person claiming under a mortgage," within the meaning of the Real Property Limitation Act, 1837, which, as modified by the Act of 1874, s. 9,—(See R.S.O. c. 111, s. 22)—gives such a person twelve years from the last payment of any part of the principal, money, or interest, secured by the mortgage for bringing an action to recover the land; and, (2) That the statute does not give a new starting point for the statute in favor of a mortgagee, as against a person then in adverse possession, and who is no party to the mortgage. It will thus be seen that the English Court of Appeal does not agree with the *dicta* of Maclennan, J.A., in the case of *Henderson* v. *Henderson*, 23 A.R. 577, which formed the subject of the discussion in the previous issues of this Journal. Chitty, L.J., who delivered the judgment, cites from the judgment of Lord Selborne in the well known case of *Pugh* v. *Heath* (1882) 7 App. Cas. 235, the passage where he said, "The possession of the mortgaged land by the mortgagor during the subsistence of the security, and while the mortgagee did not choose to take possession, was held (at law as well as in equity) to be at the will, or by the sufferance or permission of the mortgagee under a tacit agreement which the mortgagee might determine at his pleasure. It was of the nature of the transaction that the mortgagor should continue in possession." It will be noticed that this passage applies to a possession by the mortgagor, and does not at all apply to the case of a possession adverse to the mortgagor which could not be within the contemplation of a mortgagee. Then, after summarising the result of Lord Selborne's judgment, he goes on to say, "According to this judgment, which is of the highest authority, to bring the case within the statute 7 W. 4, & 1 Vict. c. 28, the mortgage must be a continuing or subsisting mortgage;" and he proceeds to point out that in both *Doe* v. *Eyre*, 17 Q.B. 366, and *Doe* v. *Massey*, 17 Q.B. 373, there was no adverse possession at the time of the execution of the mortgage. Therefore those cases were held to be inapplicable, even if not questionable as contravening the rule laid

down in *Pugh* v. *Heath*, that to be within the Act, the mortgage must be a subsisting mortgage. As regards the second point the judgment is very brief. As to that point the Lord Justice says: "Further, we think that that Act (7 W. 4, & 1 Vict. c. 28) does not confer a new right of entry on the mortgagee when at the time of making the mortgage, a man is in possession holding adversely to the mortgagor, and the statute 3 & 4 W. 4, has already begun to run in his favor against the mortgagor." This point would have borne, we think, a little more elaboration than it has received.

PRACTICE—LIBEL—CONSOLIDATION OF ACTIONS—LAW OF LIBEL AMENDMENT ACT, 1888 (51 & 52 VICT., C. 64, S. 5—(57 VICT., C. 27, S. 5, ONT.)

In *Stone* v. *Press Association*, (1897) 2 Q.B. 159, a Judge in Chambers had made an order under the Law of Libel Amendment Act, 1888, (51 & 52 Vict. c. 64,) s. 5, (see 57 Vict. c. 27, s. 5 (O)) consolidating this action with sixteen other actions brought by the same plaintiff against other defendants in respect of the same libel, which was contained in a paragraph of a libellous nature which had been supplied by the defendants the Press Association to the other defendants, who were owners of various newspapers. The order was made before the pleadings were closed, and it was contended by the plaintiff that there was no jurisdiction to make the order until the close of the pleadings, or at all events that it was an erroneous exercise of judicial discretion so to do. The Court of Appeal (Lord Esher, M.R., and Smith and Rigby, L.JJ.) held that there was clearly jurisdiction to make the order, and thought that under the circumstances the order was properly made, and dismissed the appeal.

REPORTS AND NOTES OF CASES

Dominion of Canada.

EXCHEQUER COURT.

BURBIDGE, J.] [Oct. 11.

THE QUEEN, on information of Attorney-General, *v.* POUPORE.

Contract—Public works—Negligence—Sufficiency of proof.

In an action by the Crown for damages arising out of an accident alleged to be due to the negligence of a contractor in the performance of his contract for the construction of a public work, before the contractor can be held liable the evidence must show beyond reasonable doubt that the accident was the result of his negligence, and must exclude all presumptions as to its having arisen in any other way.

B. B. Osler, Q.C., and *E. L. Newcombe*, Q.C., D.M.J., for plaintiff.

A. B. Aylesworth, Q.C., *W. D. Hogg*, Q.C., and *J. Christie*, for defendants.

BURBIDGE, J.] [Oct. 11.

DOMINION ATLANTIC RAILWAY COMPANY *v.* THE QUEEN.

Practice—Submission to arbitration—Award—Rule of Court—Judgment.

The Exchequer Court has no jurisdiction to entertain an application to make an award under a submission to arbitration by consent, in a matter ex foro, a judgment of the Court.

C. J. R. Bethune, for motion to make award judgment of Court.

F. H. Gisborne, contra.

Province of Ontario.

HIGH COURT OF JUSTICE.

BACON *v.* RICE LEWIS & SON (LIMITED).

Fixtures — Machinery — Mortgage of trade fixtures — Rights as between mortgagee of real estate and chattel mortgagee.

A chattel mortgage on de facto fixtures, although duly filed, will not prevail as against a subsequent purchaser or mortgagee of the land who registers his mortgage or conveyance, and has no actual notice of the prior chattel mortgage.

The bolting of machines to foundation timbers firmly embedded in the soil is equivalent to other recognized modes of attachment, e.g., nailing to a floor.

[TORONTO, Sept. 23, 1897.—FALCONBRIDGE, J.

This was an action brought by the executors and trustees of the will of John Bacon, deceased, against Rice Lewis & Son (Limited). In 1874 one John Perkins purchased the south-east corner of Front and Princess streets,

Toronto, upon which he erected a factory building, for the purpose of carrying on the business of manufacturing engines and boilers. The building was divided by a partition wall. One portion of the building was used for manufacturing boilers, and the other portion for manufacturing engines. The owner had placed in the boiler shop machinery required in the manufacturing of boilers, and in the machine shop machinery required in manufacturing engines, etc. Perkins carried on business in the buildings erected by him, manufacturing engines and boilers, with the machinery which he had placed upon the said premises, until shortly before the commencement of this action.

At the trial a list was put in by the plaintiffs (referred to in the judgment as Exhibit 9), showing the mode of attachment of the different machines in the machine shop and in the boiler shop.

Exhibit No. 9 was substantially as follows :

In Boiler Shop—(1) *Engine.*—Horizontal engine built on brick and stone foundation specially prepared, engine bolted to this foundation 4 feet deep with anchor bolts ; bolts are built in with the brick and stone foundation. Engine is enclosed in engine house within main building ; could not be removed without removing part of engine house ; even if nuts romoved engine could not be got out without breaking the joints of steam pipes, drip pipes, exhaust pipes and other connections with the boiler ; crank shaft or fly wheel is fastened to main building. (1*a*) *Boiler.*—Bricked in and resting on stone and brick foundation about one and a half feet deep ; held in position by four lugs, let into the brick work. Iron smoke stack is fastened to the boiler and to the roof ; steam pipes for heating building, feed pipes, etc., are connected with and fastened to the engine or boiler or both. (2) *One set of 7 feet power rolls.*—Bolted to timbers which are let in several inches into ground ; run off counter shaft, which was bought as part of machine. This counter shaft is securely fastened to ceiling timbers. Weight about 15,000 lbs. (3) *Large punching machine.*—Bedded in ground about one foot and bolted to timbers cased with wood around foundation. Run from main shaft. Weight about 3½ tons. (4) *One small lever punch.*—Bolted to timber let into ground several inches. Run off main shaft. Weight about 1,800 lbs. (5) *One small punch.* Bolted to timbers let some inches into ground. Run off main shaft. (6) *One horizontal punch.*—Bolted to stone foundation specially prepared and let into ground about one foot. Also fastened to sills of building by bolts. Run off main shaft. (7) *One shearing machine.*—Bolted to timbers which are embedded in ground several inches; run from main shaft. (8) *One bevel shears.*—Bolted on a large block, which in its turn was bolted on blocks embedded in ground. In addition to this they were bolted to pillars upporting the roof; run off main shaft. (9) *One marine drill.*—Bolted to main timbers of ceiling, strengthened by cross pieces of oak, specially put in for holding up machine to ceiling. This drill is for the purpose of drilling boilers, and is used in connection with a railway track, which is embedded and spiked into ground underneath. (10) *Reamer.*—Bolted to beams of building in souht-west corner. (11) *One set of three foot-power rollers.*—At present resting on the ground ; when Bacon mortgage given bolted to a stone laid into ground ; it was then used with steam power. Removed about two years ago by unfasten-

ing. It was only intended the removal should be temporary. (12) *Two forges.*—One in brick foundation; one in iron foundation. The foundations being laid into ground for several inches. (13) *Brass shop.*—The furnaces here are let into ground for two or three feet on a brick foundation and bricked in and connected to iron stack fastened to building. IN MACHINE SHOP. (1) *One break-gap lathe.*—Bolted to stone foundation specially built for this machine, with anchor bolts, built into stone work, stone foundation is several feet in ground. (Swing crane used as part of this machine; also bolted to stone foundation and to ceiling) run from counter shaft, which is bolted to ceiling. Counter shaft being bought as part of the machine. Weight about 9 tons. (2) *One B. G. lathe.*—40 inches over sheais. Lathe spiked to floor. There are holes in the feet for spikes, originally they were fastened down with coach screws. This is run off the counter shaft, securely fastened to ceiling. Counter shaft bought with and as part of machine. Weight about 6 tons. (3) *One B. G. Lathe.*—24 inch, swing 4 ft. gap. Fastened and sunk in the same way as machine last above mentioned. Weight about three tons. (4) *One B. G. Lathe.*—24-inch swing. Weight nearly four tons. Rests on cross pieces, embedded in the ground and spiked down, and the flooring has been cut away to let the legs of the machine go down. This is also run off counter shaft, which is part of the machine. Counter shaft securely fastened to ceiling. (5) *One 30-inch lathe.*—Rests on cross pieces, securely fastened to floor, driven off counter shaft, which is part of machine, and is securely fastened to ceiling. (6) *One 20-inch lathe.*—Six ft. bed. Two legs are bolted to floor. Driven off counter shaft. (7) *One 20-inch lathe.*—Six ft. bed, No. 2. Spiked to floor. Driven off counter shaft. (8) *One 20-inch lathe.*—Eight ft. bed, resting on floor, connected with belting, run off counter shaft, which is fastened to ceiling. Could not be run without being spiked down. (9) *One planer.* Fastened to timbers embedded in earth, nearly 1½ ft., with holes in ground to admit lower gearing. The hole in ground in which this machine is placed is about 18 inches, and below this are the timbers to which machine is bolted. Driven off counter shaft. Weight about fifteen tons. (10) *One planer.*—On wooden cross pieces embedded in the ground. Floor built around machine after it was set up. Driven off counter shaft. Weight about 6 tons. (11) *One planer.*—Square blocks of wood set in ground under two of the feet of planer. Planer fastened to this, driven off counter shaft. (12) *One shaper.*—Spiked to wooden blocks laid on floor, which blocks are spiked to floor. Brake of machine bolted to blocks on floor. Driven offcounter shaft. (13) *One milling machine.*—Weight 1,600 lbs. Laid on floor, driven off counter shaft, which is part of machine, and securely fastened to ceiling. Was spiked at one time until a few months ago, when it was temporarily shifted afew feet. (14) *One radial drill.*—Resting on timbers let into the ground. Driven off counter shaft. (15) *One Drill.*—Back gear and boring attachment securely bolted to timbers embedded in ground. Weight about 3,000 lbs. Driven off main shaft. (16 and 17) See 9 and 10, marine drill and reamer, in boiler shop. (18) *One bolt screwing machine.*—Was bolted to floor; bolts apparently withdrawn, and are now lying at feet of machine. Driven off counter shaft. (19) *One pipe screwing machine.*—Bolted to floor and driven

off counter shaft. (20) *One pipe screwing machine.*—Spiked to flooring. (21) *One power band saw.*—Laid on floor. Holes in legs of machine by which to bolt to floor; driven off counter shaft. (22) *One wood turning lathe.*—Bolted to floor. Driven off counter shaft. (23) *One emery wheel.* Bolted to post and floor. Driven off counter shaft. (24) All shafting, pulleys, belting, etc., necessary to run the same, and all the usual appliances. Shafting bolted to floor joists or beams; bolts goingclean through floor.

In 1890 Perkins gave a real estate mortgage to Northrop & Lyman on the premises on which said manufactory was situated, to secure $4,000. On the 8th July, 1892, he gave the defendants a chattel mortgage to secure repayment of $3,550. The description of the chattels in this chattel mortgage was as follows: 1 engine and boiler; 1 set 7-foot power rolls, built by McKechnie & Bertram; 3 punching machines; 1 shearing machine; 1 bevel shears; 2 drilling machines, one of them made by McKechnie & Bertram; 1 set 3-foot power rolls; 1 planer, 24 x 24 x 6, made by McKechnie & Bertram; 2 forges, and expander and all other tools, including boiler tools and appliances, which are used by the mortgagor in and about the business carried on by him, and known as The Toronto Engine Works, all which said goods and chattels, machinery, tools and appliances, are now lying and being, in, upon or about the premises where the said mortgagor is now carrying on business, and known as Nos. 201 and 203 Front street east, in the city of Toronto.

On June 1st, 1894, Perkins gave the plaintiffs a mortgage on the lands upon which said manufactory is situated, to secure repayment of $6,000 advanced to him by the plaintiffs. Part of the money loaned by the plaintiffs was applied in paying off the Northrop & Lyman mortgage, and the balance was paid to Perkins. On July 10th, 1895, Perkins gave a second chattel mortgage to the defendants to secure repayment of $5,378.55. This mortgage enumerated specifically the machinery, etc., covered by it, and included practically every machine referred to in Exhibit 9. Both chattel mortgages were properly renewed up to the time of the commencement of this action. The defendants having claimed the right to remove the machinery in the factory under their chattel mortgages, the plaintiffs commenced this action, and claimed an injunction restraining the defendants from interfering with or removing such machinery from said premises.

The action was tried before Falconbridge, J., at the Toronto non-jury sittings on the 2nd, 12th, 13th, 14th and 15th of April and 20th of May, 1897.

Ludwig, for plaintiffs.—A mortgage of real estate covers all fixtures on it unless they are expressly excepted: R.S.O., c. 107, s. 4. Where the owner of lands erects upon it a building specially designed as a factory for a particular kind of business, and places therein machinery necessary for carrying on that business, and after all the machinery has been put in and the business established, he executes a mortgage on the land, the mortgagee is entitled to insist that all the machinery which is affixed or let into the soil, and all the machinery resting by its own weight, which is necessary for the purposes of the business, is covered by his mortgage, unless some express exception is made therein: Ewell on Fixtures, pp. 21-25; *Dickson* v. *Hunter*, 29 Gr. 73; *Carscallan* v. *Moodie*, 15 U.C.R., pp. 317, 323, 325; *Robinson* v. *Cook*, 6 O.R. 590; *Voorhis* v. *Freeman*, 2 Watts & Sergeant (Penn. Sup. Ct. Rep.) 116.

If a machine is let into the ground so that in the removal of it the soil will be disturbed, it must be treated as a fixture: Ewell, p. 21; *Mather* v. *Fraser*, 2 K. & J. 536; *Longbottom* v. *Berry*, L.R. 5 Q.B. 123, 125. (See clauses 27, 35, 38, 39, 41, 42 and 44 in this case; *Ex parte Ashbury*, L. R. 4 Ch. App. 630. The engine and boiler are clearly fixtures: *Oates* v. *Cameron*, 7 U.C.R., 228, 231. So are all the other machines which are fastened in any way: *Richardson* v. *Ramsay*, 2 U.C.C.P. 460; *Wilstea* v. *Cotterell*, 1 E. & B. 674; *Climie* v. *Wood*, L. R. 3 Ex. 257; 4 Ex. 328; *Rogers* v. *Ontario Bank*, 21 O. R. 417.

As to machines in machine shop run off countershaft (which is clearly annexed to timbers of building), but not otherwise attached, these must be considered fixtures, because (1) Same were put up by the owner in a building specially constructed for the purpose of a machine or engine shop, and being essential for that purpose they must pass as part of the freehold, especially as the owner in placing them intended them to remain permanently, and form part of the works; (2) When the machines were brought into the shop they were spiked down, and the mere fact that in moving them round from place to place in order to get better light, or for any other purpose, the screws were not replaced, would not deprive these machines of their character as fixtures. The severance must be done by one having the right to sever, and with the intention of converting the article into the state of a chattel: Ewell, p. 44. See No. 20 referred to in *Gooderham* v. *Denholm*, 18 U.C.R. at p. 208; *Grant* v. *Wilson*, 17 U.C.R. 144. (3) And because it being admitted with regard to all machines run off countershaft that the countershaft is clearly annexed to the building, and it having been proved that the countershaft, with the cones and pulleys, was in every case bought with and formed part of the machines, and was essential to their use for the purpose of getting various speeds on the machines, the owner, by affixing the countershaft, with the cones and pulleys, to the building, clearly evidenced his intention to treat the machine as a whole as part of the freehold: *Mather* v. *Fraser*, 2 K. & J. 536.

Whilst a chattel mortgage on fixtures given by the owner of property may be good as against a mortgagor and those claiming under him with notice, such chattel mortgage would not under our Registry laws be valid as against the mortgagee of the land who had duly registered his conveyance, and had no actual notice of the prior chattel mortgage: *Hobson* v. *Gorringe*, (1897) 1 Ch. 182. *Landed Banking Co.* v. *Clarkson*, (unreported, decided by the Chancellor at Toronto non-jury Sittings, February 23rd, 1897.)

At the time the defendant's chattel mortgage of 1892 was given, the property was subject to a land mortgage to Northrop & Lyman, duly registered. The mortgage to plaintiffs was executed and registered before any discharge was registered of this mortgage, and under these circumstances effect could not be given to a chattel mortgage as a declaration of intention to make de facto fixtures chattels. If it should be held that the defendants have higher rights than the plaintiffs because of the priority of their chattel mortgage, then the plaintiffs contend that as their money went to pay off the Northrop & Lyman mortgage they should be subrogated to their rights: *Abell* v. *Morrison*, 19 O.R. 669.

A. Hoskin, Q.C., and *D. E. Thomson*, Q.C., for defendants.

Apart from *Hobson* v. *Gorringe*, (1897) 1 Ch. 182, it is submitted that the defendants' rights to these machines and pulleys is clearly established by a line of authorities in our courts extending back nearly 40 years: *Carscallen* v. *Moodie*, 15 U.C.R., at p. 318; *Rose* v. *Hope*, 22 U.C.C.P. 482; *Keefer* v. *Merrill*, 6 A.R. 121; *Hall Mfg. Co.* v. *Haslitt*, 11 A.R. 752; *Stevens* v. *Barfoot*, 13 A.R. 37; *Dewar* v. *Mallory*, 26 Gr. 618, 27 Gr. 303.

The Courts, both here and in England, have always insisted that, especially in matters relating to either titles or trade and commerce, a line of authorities once established should not be disturbed except by Legislative enactment: *Larocque* v. *Beauchemin*, 13 Times L.R. 337; *Spargo's Case*, L.R. 8 Ch. 407; *Andrews* v. *Gas Meter Co.*, 66 L.J. Ch. D. at p. 250; *Doyle* v. *Nagie*, 24 A.R. 166; *Hobson* v. *Shannon*, 27 O.R. 116. If *Hobson* v. *Gorringe* is not reconcileable with the rule which has been established and acted on by our Courts for 40 years, it is submitted that whatever freedom an appellate court might have on the point, a trial Judge here is bound to follow our own decisions rather than the decision of an English Court of Appeal. *Macdonald* v. *Macdonald*, 11 O.R. 187; *Macdonald* v. *Elliott*, 12 O.R. 98; *Moore* v. *Bank of B.N.A.*, 15 Gr. 308; *Chisholm* v. *London*, 28 O.R. 347; Jud. Act, 1895, s. 78. *Hobson* v. *Gorringe*, was a hire receipt case, and should not be extended beyond what it expressly holds. *Viscount Mill* v. *Bullock*, 13 Times L.R. 332, shows that *Hobson* v. *Gorringe* has not changed the rule as to what are fixtures. Any fastening to prevent lateral motion does not make a machine a fixture: *Gooderham* v. *Denholm*, 18 U.C.R. 207; *Keefer* v. *Merrill*, 6 A.R. 121.

The plaintiffs' contention as to the countershaft appears to be an inversion of the rule of constructive attachment. In *Longbottom* v. *Berry*, L.R. 5 Q.B. 125; and in *Gooderham* v. *Denholm*, 18 U.C.R. 206, machines were run off countershafts which were securely fastened, yet the Court in these cases held that the machines run off these countershafts were chattels. The machinery is equally of general adaptability, and has no relation to either the buildings or the particular business carried on by Perkins. In the case of a grist mill the evidence shows conclusively that the grist mill and the machinery are made for each other, and therefore *Dickson* v. *Hunter* does not apply.

Ludwig, in reply. *Carscallen* v. *Moodie*, ante, proceeded upon the ground that the articles referred to, were, in fact, chattels. In *Rose* v. *Hope*, 22 C.P. 482, it was apparently assumed that the person claiming under the realty mortgage had or must be treated as having had notice of the prior chattel mortgage, otherwise doubtless, the mortgagee of the realty would, on the argument, have invoked the aid of the Registry laws as a bar to the claim to the chattel mortgagee. At p. 485 Hagarty, C.J. refers to the fact that Mackenzie took *subject expressly* to mortgages. The head note in *Dewar* v. *Mallory*, 26 Grant, 618 is misleading, inasmuch as it does not point out that the chattel mortgage and the realty mortgage were both given to the same person. This decision was reversed 27 Grant, 303. In *Keefer* v. *Merrill*, 6 A.R. 121, the sole question for decision was as to whether the machines could be constructively held to be fixtures, and the Court under the circumstances of that case held that

they could not. In *Hall Mfg. Co.* v. *Haslitt*, 8 O.R. 465, no question arose as to the fact of annexation *by the owner* of the realty, or as to what articles affixed or placed by him on the land would pass with a conveyance of the land. In *Stevens* v. *Barfoot*, 13 A.R. 373, no decision was called for as to what would have been the legal position if the chattel mortgage had been given first, and the real estate mortgage afterwards. See judgment of Hagarty, C.J., p. 369. In *Rose* v. *Hope* the Court intimated that after the prior chattel mortgage is paid off the mortgage on the realty at once attaches on the fixtures, whilst in *Dewar* v. *Mallory* the Chancellor dissents from this view. Again in *Rose* v. *Hope* the opinion of the Court appears to be that a chattel mortgage on fixtures would be good as against a subsequent mortgagee of the realty, though not filed or kept on foot under the provisions of the Bills of Sale Act. On the other hand the judgment in *Carson* v. *Simpson*, and in *Stevens* v. *Barfoot* indicate that such chattel mortgage would be invalid as against a subsequent mortgagee of the realty, unless the provisions of the Bills of Sale Act were strictly complied with. So that it will be seen that the decisions on this point are not by any means uniform. There is no decision of the Court of Appeal, not even a decision of a single judge in this Province on a state of facts in any way similar to that presented in this case, and if there were a decision of the highest Court of Appeal in this Province on the express point, opposed to a later decision of the English Court of Appeal on the same point, the latter decision should be followed: *Trimble* v. *Hill*, 5 A.C. 342-344; *City Bank* v. *Barrow*, 5 A.C. 664; *Mason* v. *Johnson*, 20 A.R. 412; *Hollander* v. *Ffoulkes*, 26 O.R., 61. And therefore if *Rose* v. *Hope* holds what is contended for by defendants, then it is submitted that this decision is overruled by *Hobson* v. *Gorringe*, (1897) 1 Ch. 182. The maxim, Communis error facit jus does not apply to a case like this: *Caldwell* v. *Maclaren*, 9 A.C. 392.

FALCONBRIDGE, J.—I find as a fact that the plaintiffs when they advanced their money on their mortgage, advanced it on the security of the factory as a going concern, and supposed that all the machinery was covered by their mortgage. This is clearly proved by the evidence of Messrs. Ritchie, Campbell and Case, and I find further on the evidence of Messrs. Campbell and A. W. Smith, and the irresistible cogency of the facts relating to the insurance, that the agent of the mortgagor Perkins understood that the plaintiffs were advancing their money on the building and machinery, and that the machinery was to be covered by the mortgage. I find that Mr. Bullock is mistaken in his recollection of what took place in Mr. Campbell's office when the mortgage was read over to Perkins. Campbell directly contradicts Bullock, and it is utterly incredible that any solicitor of repute would complete the transaction in that form in face of such a declaration by the mortgagor.

I further find, which is hardly in dispute, that Perkins, the owner of the land, placed the machinery in buildings which he had specially constructed for the manufacture of engines, etc., that the machinery was specially adapted for and was essential for the carrying on of such manufacture, and that he intended the machines to remain there "as long as he lived, and to turn it over to his son after he was gone," i.e., permanently. In exhibit No. 9 is

set forth a substantially correct description of the various machines, and the mode in which they are severally annexed with certain modifications which are in the main as follows : Large punch (No. 3 boiler shop list). I do not think there is evidence to satisfy me that this was bolted to timbers, but it is imbedded in the earth, and if removed the soil would be displaced. Large planer (No. 9 engine list.) It has not been proved that this is bolted to timbers on which it rests, but I find that if it were removed the soil would be displaced and a gap or opening left, and in order to remove it, part of the flooring would have to be torn away.

There is, as to some of the machinery, contradictory evidence as to the extent to which they, or the timbers on which they rest, are imbedded in the ground, but I find it proved in respect of all of them that there is a bedding more or less substantial in the earth, and their removal would cause displacement of the soil. It is argued as to some of the machines which are bolted to timbers embedded in the ground, that by removing bolts or other fastenings the machines could be removed from the timbers without displacement of earth, but it appears to me that the bolting to foundation timbers firmly embedded in the soil is equivalent to other recognized modes of attachment, e.g., nailing to a floor.

I find on the evidence that when these machines were placed in the building, the earth was excavated so as to admit the machines or the timbers to which they were bolted, and I find against the contention that the embedding is the mere result of the accumulation of debris or refuse.

I do not agree with the contention of defendants' counsel that it has for years been supposed by lawyers or laymen that a chattel mortgage on de facto fixtures, if duly filed, would prevail as against a subsequent purchaser or mortgagee of the land who registers his conveyance, and has not actual notice of the prior chattel mortgage. My recollection of what was customary when I was in practice agrees with Mr. Ritchie's statement, viz. : that it was not usual for solicitors in searching titles to real estate to search in the office of the Clerk of the County Court. That state of facts was not presented to the Court in any of the cases cited by Mr. Thomson. The Chancellor points out in *Carson* v. *Simpson*, 25 O.R. 385, that the question of the Registry laws was not dealt with in any of them. *Hobson* v. *Gorringe*, (1897) 1 Ch. 182, followed by the learned Chancellor in *Landed Banking Co.* v. *Clarkson*, is strongly in favor of plaintiffs.

As a question of construction, and also on the evidence, I find that the word "tools" in the first chattel mortgage of defendants does not include the machines in the engine shops. The evidence shows that all the machines in the engine shops (other than the large planer and the shafting lathe) were spiked down or fastened to the floor when first placed in the factory. As other machines were from time to time brought in for purposes of light and convenience, new positions were assigned to machines and in some cases bolts or fastenings were not replaced, but I do not find that the omission to refasten was with intent that the machines should be regarded thereafter as chattels. All the machines which are now loose, are run from countershafts, which are, with pulleys and cones, securely fastened to the ceiling ; these countershafts, pulleys

and cones were bought with the machines for a lump price as integral parts thereof, and these appliances of one machine could not be used to operate another unless it was of the same size and description.

The mortgagor, Perkins, before he made a second chattel mortgage to defendants covering these machines, had made a mortgage to plaintiffs, and in view of my findings as above set out, of the fastenings of the machines, and of the mortgagor's intention, that they should form part of the premises, they must be regarded as part of the realty and so covered by plaintiffs' mortgage. See *Dickson* v. *Hunter*, 29 Gr. 73, and other cases on the same line.

There will be judgment for the plaintiffs in terms of the prayer of the statement of claim (with reference as to damages), as to all the goods except the following (here his Lordship enumerates a quantity of loose tools not in question in the action) with full costs of suit.

MCMAHON, J.] [August 24.

REGINA *v.* MURRAY.

Criminal law—Procedure—Commitment for trial—Dies non juridicus—Subsequent trial—Validity—Court of Record—Habeas corpus.

The prisoner was on a statutory holiday committed for trial by a magistrate upon a charge of attempting to steal from the person, and on being brought before the County Court Judge, in compliance with s. 766 of the Criminal Code, 1892, consented to be tried by the judge without a jury, and, being so tried, was convicted and sentenced to a term of imprisonment.

Held, upon the return to a writ of habeas corpus, that the fact that the prisoner was committed for trial and confined in gaol on a warrant that was a nullity, could not affect the validity of the trial before the Judge under the Speedy Trials Act.

D. O'Connell, for the prisoner.

A. M. Dymond, for the Crown.

(Upon appeal the Court of Appeal held that the County Court Judge's Criminal Court being a Court of record, its proceedings were not reviewable upon habeas corpus, but only upon writ of error.)

MEREDITH, C.J.] [Sept. 13.

IN RE JONES *v.* JULIAN.

Prohibition — Division Court—Jurisdiction—Trial by jury—Questions submitted—Verdict entered thereon by Judge.

Motion by the defendant for prohibition to the third Division Court in the County of Essex, on the ground that the Judge presiding therein, wrongfully and without jurisdiction, deprived the defendant of his right to a trial by jury, of all the questions arising in the action, and of his right to a general verdict at the hands of the jury.

The Judge, without objection, left certain questions to the jury, and upon their answers thereto entered a verdict for the plaintiff.

D. L. McCarthy, for the defendant, contended that all the matters in dispute were not covered by the questions put to the jury, and, even if otherwise, that the Judge had no power to enter a verdict upon findings, which was usurping the functions of the jury. He cited *Re Lewis* v. *Old*, 17 O.R. 610; *Gordon* v. *Denison*, 22 A.R. 315; 31 C.L.J. 349.

Douglas Armour, for the plaintiff.

MEREDITH, C.J., held, upon the evidence, that all the facts really in dispute had been submitted to the jury, and, having been found in favour of the plaintiff, the Judge had the power to enter the verdict upon the answers to questions submitted without objection.

Re Lewis v. *Old*, 17 O.R. 610, distinguished.

Held, also, that by s. 304 of the Division Courts Act, the practice of the High Court was applicable, and that placed the matter beyond doubt.

Motion refused with costs.

ROSE, J.] [Sept. 27.

ATTORNEY GENERAL *v.* CAMERON.

Revenue—Succession Duty Act, 55 Vict. C. 6 (O)—Final distribution—Duty payable.

Held, in addition to the findings reported in 27 O.R. 380; 32 C.L.J. 364, (the special case having been amended to raise the question) that under the Succession Duty Act, 55 Vict., c. 6 (O), the duty payable on the capital was deferred until the final distribution thereof, and that the duty then payable would be on the amount then actually distributed, whether increased by accumulations, or by the rise in value of lands or securities, or decreased.

J. R. Cartwright, Q.C., for the Attorney General.

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

MOSS, J.A.] [Oct. 1.

GILPIN *v.* COLE.

Costs—Taxation—Fee on taking mortgage account.

Where, in a mortgage action, the defendant disputes the amount only of the plaintiff's claim, and no reference as to incumbrances is desired, the officer signing judgment is entitled for taking the account to no greater fee than that allowed by item 55 of Tariff B.

BOYD, C., FERGUSON, J., MEREDITH, J. [Oct. 4.

GRIFFIN *v.* FAWKES.

Discovery—Production of documents—Deeds relating to plaintiff's title.

To deny the due execution of a deed sought to be protected, or to set up that it is forged, or to plead non est factum, does not give the defendants a right to have it produced on an affidavit of documents, where the deed is a

part of the title to be proved at the hearing by the plaintiff; for the onus of proving it lies upon him, and if he fails he can go no further.

Frankenstein v. *Gavin*, (1897) 2 Q.B. 62, ante p. 651, followed.

Decision of STREET, J., affirmed.

W. R. Smyth, for the plaintiff.

Bradford, for the defendants Shadrach and Drusilla Fawkes.

Divisional Court.] [Oct. 5.

IN RE GRANGER *v.* BLACK.

Children Protection Act—Right of appeal to General Sessions, 56 Vict., c. 45, 58 Vict., c. 52, O.

Judgment noted supra p. 535, affirmed.

ROSE, J.] [Oct. 6.

GOFF *v.* STROHM.

Will—Legacy—Vested interest—Period of payment.

Where a testator gives a legatee an absolute vested interest in a defined fund, the Court will order payment on his attaining 21, notwithstanding that by the terms of the will, payment is postponed to a subsequent period.

Rocke v. *Rocke*, 9 Beav. 66, followed.

H. M. Mowat, for the applicant.

ARMOUR, C.J., FALCONBRIDGE, J., STREET, J. [Oct. 7.

HAMMOND *v.* KEACHIE.

Costs—Married woman—Judgment against—Costs payable out of separate property—Costs payable to married woman—Set-off.

Judgment for debt and costs having been recovered by the plaintiffs against the defendant, a married woman, to be levied out of her separate estate, there was an appeal by the plaintiffs as to the form of the judgment, which was dismissed with costs. An application to vary the order made upon the appeal, by directing that the costs thereof should be set off pro tanto against the amount of the judgment was refused; but the Court intimated that the taxing officer, upon taxing the costs of the appeal, would have power under Rule 1164 to set them off pro tanto against the costs awarded by the judgment to be levied out of the defendant's separate property.

Pelton v. *Harrison*, (No. 2), (1892) 1 Q.B. 118, followed.

Aylesworth, Q.C., for the plaintiffs.

F. C. Cooke, for the defendant.

Divisional Court.] [Oct. 8.

CULL *v.* ROBERTS.

Conditional sale—Action for price—Defence of diminution of value.

Where there has been a conditional sale of a chattel, and an action is brought for the price, it may be pleaded in defence that there is a diminution in value because the article is not as represented.

Mabee, for the defendants.

J. Moss, for the plaintiff.

FERGUSON, J.] [Oct. 18.

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

Railway—Negligence—Sparks from engine—Circumstantial evidence.

Action for damages for negligence resulting in burning of the plaintiff's property, by sparks from defendants' engine. There was evidence that there was dry and inflammable material on the property of the defendant company, and that sparks from the engine might have fallen upon this and ignited it, and that fire may have so spread to the plaintiff's property.

Held, that proof that the fire was communicated by sparks or cinders from the defendants' engine may be by circumstantial evidence, and there were here relevant circumstances given in evidence fit to be submitted to the jury, and motion for non-suit refused.

Cowan, for the plaintiff.

Osler, Q.C., for the defendants.

BOYD, C.] [Oct. 21.

RICE *v.* CORPORATION OF WHITBY.

Municipal corporations—Highways—Obstruction—Liability.

Where an object is left on the highway, which is calculated to frighten horses, and by which a horse is frightened, and an accident results, and where the municipality though having notice, have taken no precautions to obviate danger, by placing lights or stationing signalmen to warn travellers, the municipality is liable, in the absence of contributory negligence; but entitled to be indemnified by the party who placed the obstruction, and left it unguarded and unlighted.

W. R. Riddell, for the plaintiff.

J. E. Farewell, Q.C., for the corporation defendant.

C. J. Holman, for the third party.

MUNICIPAL LAW.

REGINA EX REL. HUDGIN *v.* ROSE.

Municipal election—Quo warranto—Qualification of county councillor—Finality of assessment roll.

The rating in the last revised assessment roll is final and conclusive as to property qualification of candidate.

[PICTON—MERRILL, Co. J.

The right of the defendant to retain his seat as a county councillor for the second County Council Division of the County of Prince Edward was contested on two grounds; one only is necessary to be deal with, viz., that he was not possessed of the necessary property qualification.

Wright, (Picton) for the relator.

Widdifield, (Picton) for the defendant.

MERRILL, Co.J.—The only property upon which the defendant bases his qualification is land in the township of North Marysburgh, which appears rated in the last revised assessment roll for that township for the year 1896. The assessment therein claimed by the defendant to qualify him appears (as to the parts thereof material to this inquiry), as follows:—

No.	Names and description of persons assessed.			Description and value of real property.				Personal property	Aggregate value, etc.
1	2	4	6	8 Con.	9 No. of Lot	10 No. of Acres.	12 Value	14	17
364	Rose, G. Nelson	F M. F.	–	1 B S	54	25	$ 400	—	400
365	Rose, Frederick	F. M. F.	–	1 L S	16	100	2500	150	2650

These entries were not bracketed together.

Frederick Rose, the defendant's father, is the owner in fee of the 100 acres (part of lot No. 16) assessed at $2,500. As I understand the evidence, they live together on that place, the defendant doing or procuring to be done all the work thereon, and carrying on the farm business, taking, by agreement, three-fourths of the proceeds of all produce sold off the place, and giving his father one-fourth, his father taking no active part in the work or management of the farm. The defendant is the sole owner in fee of the 25 acres (part of lot 54) assessed at $400.

The County Councils Act, 1896, provides that the property qualification of a member of the County Council shall be the same as that of the reeve of a town. The Municipal Act 1892, s. 73, makes that qualification $600 of freehold, or $1,200 of leasehold, and it provides that "no person shall be qualified to be elected . . . reeve . . . unless such person . . . has, or whose wife has, at the time of the election, as proprietor or tenant, a legal or equitable freehold or leasehold, etc., rated in his own name, or in the name of his wife, on the last revised assessment roll, etc." It is evident, therefore, that upon the assessment as it stands in the last revised roll for the township of

North Marysburgh, the defendant has not sufficient property qualification. But it is urged on behalf of the defendant that as he had in fact such qualification, except for what is claimed to be an error in the entry in the roll in not having his name bracketed with that of his father, that error should be rectified, and the roll thus amended.

In making the assessment, the assessor carried with him a blank assessment book, in which he made the entries in pencil. This book contains columns, with headings and numbers, similar to those in the revised roll. It was referred to as the "blotter." It was not before the Court of Revision and contains no certificate as to correctness. In this blotter the entries regarding the defendant and his father and their lands are the same substantially as those in the revised roll. But the names are bracketed and the amounts assessed against them are carried out in a total opposite the name of Frederick Rose, of $3,050. The defendants afterward received a notice of assessment in accordance with this. The assessor was not able to explain how the variation between the form of assessment in the blotter and that in the revised roll occurred. He suggested that as his wife read to him from the blotter while he transcribed into the revised roll the variation may have thus happened.

Assessment notices were produced for the years 1893 and 1894 in which the form of assessment was similar to that in this "blotter." But in the roll of 1891, prepared by the defendant himself, when he was assessor, the form of assessment was the same as that in the present roll; the names not bracketed.

In support of the defendant's contention that I should now amend the present roll, or consider the defendant's qualification sufficient, notwithstanding any errors in the entries, the following among other cases are cited: *Reg. ex rel. Lachford* v. *Frizell*, 6 P.R. 12; *Reg. ex rel. McGregor* v. *Ker*, 7 U.C.L.J. 67; *The Stormont Case; Hodgins' Election Cases*, 21; *In re Johnson and the Corporation of Lambton*, 40 U.C.R. 297. I have failed to find in these cases authority for the defendant's contention.

In *Lachford* v. *Frizell*, the error or defect in the form of assessment dealt with was simply that the name of the defendant (Frizell) instead of being written under that of the tenant (Bowen) and bracketed with it, followed it on he same line, and was also on the same line with the property assessed. Mr. Dalton, Master in Chambers, correctly deals with the matter when he says (at p. 13, 6 P.R.): "The defendant's name, however, is written in a column embraced by the general heading 'names of taxable parties,' and that it was so written for the purpose of assessing him, is known from the other facts."

Re Johnson and the Corporation of Lambton deals with a somewhat similar defect, and certainly furnishes the defendant in this case with no further assistance.

In the *Stormont* case it was held that a voter being duly qualified in other respects, and having his name on the roll and list, but by mistake entered as tenant instead of owner, or occupant, or vice versa, was not thereby disfranchised. An apparently good reason for this would be found in the fact that under the statute a tenant has just the same right to a vote as a freeholder, and it could, of course, make no difference as to which character he should vote in, so long as he was properly qualified in either.

In *McGregor* v. *Ker*, two parcels of land were rated to the defendant with his brother William as occupants, and to him and his two brothers as "Wm. Ker & Bros." as owners. There could be thus no doubt that the lands rated, so far as appeared upon the face of the roll, were properly rated to William Ker and the defendant. The only doubt was as to the sufficiency in value arising from the uncertainty as to whether the defendant was a leaseholder of one of the parcels, or a freeholder as to both. And as to this point he was permitted to offer evidence. This, of course, would require no amendment of the roll, as the names were written opposite the description of the lands, and in the same line, and the letters F and H in the proper columns; the only question apparently being as to which was applicable.

For the relator the following, among other cases, were cited: *Reg. ex rel. Ford* v. *Cottingham*, 1 C.L.J. 214; *Reg. ex rel. Fluett.* v. *Semandie*, 5 P.R. 19; *Reg. ex rel. Carroll* v. *Beckwith*, 1 P.R. 278; *Reg. ex rel. Hamilton* v. *Piper*, 8 P.R. 225.

These cases seem to show that the revised assessment roll is conclusive as to rating: that although the candidate may have abundant property, if he be not rated for such in his own name (or in that of his wife) it cannot avail him. And see s. 65 of the Consolidated Assessment Act, 1892.

Now, to return to the present case. A moment's consideration will show that the mere bracketing of the names of the defendant and his father would not answer. The assessor could not have done this and have properly made the declaration required of him as to the correctness of the roll, upon its completion. It would not have been true. The parcel assessed to the defendant, the 25 acres, was his property—solely. His father had no interest whatever in it. If the names had been bracketed as they stand on the roll, it would have meant that they were joint owners of both parcels, and this would not have been correct as to either. The only way to rectify the assessment and show proper qualification in the defendant would appear to be to leave the assessment as to the 25 acres to stand as it is, separate from the other, and to amend the entry as to the 100 acres by entering the name of the defendant above that of his father, placing the letter T. opposite the defendant's name, and carrying out the particulars as to the property in the proper columns, as provided in the Assessment Act, and bracketing the names.

If it is in my power to thus amend the roll, in what respect would I not have the power to amend it? If I could do this why could I not also rearrange or vary all the entries on the roll? In such case where would be the raison d'être of the Court of Revision, and what force or effect would be left in s. 65 of the Consolidated Assessment Act, 1892? I think it much safer and more nearly in accord with both the letter and spirit of the Act, as well as with the authorities cited, to hold that I have no power or authority to amend the roll as suggested, or to "go behind" it; and, therefore, I adjudge that the defendant was not properly qualified as a County Councillor for the County of Prince Edward, and order that he be removed from the office.

As to costs, it was pressed upon me that if I should consider myself obliged to hold the defendant not qualified, as his want of qualification would result from a mere error in entering the assessment in the roll, the defendant

should not be required to pay costs. On considering the authorities, I find I cannot adopt this view. The plaintiff has made good his contention ; and the defendant could have disclaimed. And see as to this, the very pertinent language of Cameron, J., in *Clancy* v. *McIntosh*, 46 U.C.R., at p. 106. I therefore give costs to the relator.

DIVISION COURT.

FIFTH DIVISION COURT—NORTHUMBERLAND AND DURHAM.

KERR *v.* ROBERTS.

Chattel mortgage—Renewal.

Every statement made on the renewal of a chattel mortgage must show all payments made on account of the mortgage since the date of the mortgage. It is not sufficient to state only the payments in the year to which the statement refers.

[COBOURG—KETCHUM, Co. J.

Plaintiff and defendant were mortgagees of the same chattels ; defendant, under a mortgage made in December, 1889, and plaintiff under one made in February, 1894. Both mortgages were made in good faith and for valuable consideration. The plaintiff's mortgage was duly renewed in 1895, 1896 and 1897.

Statements, duly verified and intended to renew defendant's mortgage, were filed in each year from 1890 to 1896 inclusive. Payments were made on defendant's mortgage in 1890, 1891, 1892 and 1896, that in 1890 being the interest payable under the mortgage for that year. In the statements filed on renewal, each of these payments was shown and credited, but in the statement of the year in which it was made only. Thus the statement of 1891 contained no reference to the payment made in 1890, and showed and credited the payment made in 1891 only. The statement of 1892 contained no reference to the payments made in 1890 and 1891, and showed only the payment made in 1892. The statements of 1893, 1894 and 1895 contained no reference to any payments, and showed none ; and the statement of 1896 contained no reference to the earlier payments, and showed only the payment made in that year. The statements as to payments were in effect as follows : In 1891 and 1892, that no payments had been made except the payment made in that year ; in 1893 and 1894, that no payments had been made since last renewal ; in 1895, that no payments had been made, and in 1896, that no payments had been made on account of the mortgage, except the payment made in that year. The mortgage account, in the statements after 1891, is carried on from year to year as a continuous account, balanced yearly, beginning in each case with the balance or amount still remaining due at the date of the former statement, and dealing only with the charges and credits of that year. In the statement of 1891 the account began as follows : " Principal, $150." A charge for interest for a year, and another for costs of renewal, were added, and the payment of that year de-

ducted, leaving a balance of $136 as the amount still remaining due. The account in 1892 began with that balance, described as "Principal as per last renewal, $136," to which charges were added for interests and costs, and the payment made in 1892 deducted, leaving a balance that was carried forward as the beginning of the account in the following year. This process was repeated in each of the succeeding years, except that, as already stated, there was no credit or deduction in any year in which no payment was made, and in each statement the first item in the account was referred to as being the balance shown by the previous statement. There was, also, in each of the renewals from 1891 to 1896 inclusive a statement that the mortgage had been previously renewed, mentioning the year or years in which it was so renewed.

In April, 1897, the defendant seized and sold the chattels under his mortgage, and received the proceeds, amounting to $135. The plaintiff sued to recover those proceeds, claiming $100 and abandoning the excess, contending that the defendant's mortgage had not been legally renewed, and that it had ceased to be valid as against him.

E. C. S. Huycke, for the defendant. The renewals comply with the Act, and, as s. 11 of R.S.O. c. 125, (ss. 14, 17 of the Act of 1894 being re-enactments of ss. 11, 14 of R.S.O. reference is made only to the latter) requires a statement that manifestly covers only the preceding year, the statements under s. 14 will be "in accordance with the provisions of s. 11," if they also are each confined to the transactions of the preceding year. In any case the earlier statement being on file and open to inspection, and being referred to in the later ones in the manner described, they should be read with the later statements, so that each statement shall include all prior ones and show all the payments made; also, that as there was no fraud or improper motive on the part of the defendant, and all the payments have been duly credited, the alleged error should not be held fatal to the security.

There was no attempt to correct the statements under s. 15 of the Act of 1894.

KETCHUM, Co. J.: The words in s. 11, "And showing all payments made on account thereof" (which must be deemed to be incorporated in s. 14 by the language of that section) and the words of the form, schedule B, "No payments have been made on account of the said mortgage," or "The following payments, and no other, have been made on account of the said mortgage," are plain, and cannot be judicially construed to authorize the omission of payments that have not been made within a year, and that, to satisfy the plain requirements of the Act, every statement on renewal must show all payments made on account of the mortgage since the date of the mortgage.

The earlier statements in this case cannot be read with, or in aid of, the later statements, so as to supply the latter information required by the Act, which they lack; for (1) s. 14 requires "another statement." that is, a separate and distinct statement from that required by s. 11, and from any previously filed under s. 14; (2) the earlier statements were not filed with the later ones, or within the thirty days mentioned in s. 14, and statements filed prior to the thirty days mentioned are of no effect as renewals under that section: *Beaty*

v. *Fowler*, 10 U.C.R. 382; *Griffin* v. *McKenzie*, 46 U.C.R. 93; and (3) if a statement filed in one year could be re-filed with the statement of the following year, it could not be read in aid of the latter, unless it was referred to in the later statement in such a manner as to make it a part of that statement. and the references to the earlier renewals and statements contained in the later ones, in this case, are sufficient to connect the earlier with the later as parts of one statement.

Whilst admitting the good faith of the defendant, and the hardness of the decision in his case, the object and purpose of the Act demand a strict construction and observance of its provisions in all cases where a departure from that course would sanction questionable methods, which, though innocent and harmless in some cases, might in other cases be used for a fraudulent purpose; and where the statute expressly requires that certain information shall be given in a statement, the omission of that information from the statement, whether intentional or otherwise, must be regarded as a material omission and fatal to the validity of the statement and of the security.

The defendant's mortgage therefore ceased to be valid as against creditors, and subsequent purchasers and mortgagees in good faith, in December, 1891.

Judgment for plaintiff for $100 and costs.

Province of Quebec.

SUPERIOR COURT.

DAVIDSON, J.]

BELL TELEPHONE CO. *v.* MONTREAL STREET RY. CO.

Electric street railway—Interference with operation of telephone system—Use of streets.

The defendant company was authorized by statute (Que. 34 Vict., c. 45) to run its street cars by "motive power produced by steam, caloric, compressed air, or by any other means or machinery whatever." The plaintiff company operated a telephone service worked by the earth circuit system. This was interfered with by the defendant company, who had commenced to operate their railway by electricity, and this action was brought to recover. by way of damages, the cost to the telephone company of converting its system from the earth circuit system to the McCleur or common return system, a change necessitated by the operation of the street railway by electric power.

Held, 1. That the words "motive power produced by steam, caloric, compressed air or by any other means or machinery whatever," are broad enough to include undiscovered as well as then known modes of operation, and therefore included the operation of the railway of the defendant company by electricity.

2. The dominant purpose of a street being for public passage, any appropriation of it by legislative authority to other objects will be deemed to be

in subordination to this use, unless a contrary intent be clearly expressed; and therefore a telephone company having no vested interest in or exclusive right to the ground circuit or earth system as against a railway company incorporated by statute, can not recover by way of damages the cost of converting from such a system to some other system which would not be interfered with by the use by the railway company of electric power.

Geoffrion, Q.C., for plaintiff.

Beique, Q.C., and *Lafleur*, for defendant.

LORANGER J.]

RASCONI *v.* CITY OF MONTREAL.

Municipal law—Early closing by-law—Penalty and imprisonment—Discriminating by-law—Freedom of commerce—Regulation of working hours of shop-keepers.

By c. 50 of the statutes of 1894 of Quebec every municipal council of a city or town was authorized to make by-laws ordering that during certain hours, to be fixed by the by-laws, the stores of one or more categories shall be closed and remain closed; but no penalty was prescribed for the infraction of such by-laws. In accordance with the above statute the defendant corporation passed a by-law ordering the closing of stores during certain hours in the evening, but it excepted from the operation of the by-law those stores, among others, where fruits, confectionery, tobacco, or retail liquors were sold. The by-law provided a penalty not to exceed $40 for its infraction, or in default of payment, to imprisonment for a term not exceeding two months. The plaintiff, who carried on a grocery business, and sold in his store fruit, tobacco and liquor by retail under a government license, applied to quash the by-law.

Held, that the statute (Que. 1894, c. 50) not having authorized municipal councils to impose a penalty, with imprisonment in default of payment, for infractions of the by-laws ordering the closing of stores, the provisions of the by-law in question which ordered such penalty and imprisonment are ultra vires the defendant corporation; that the provisions of articles 140 and 141 of the city's charter (Que. 1889, c. 79) by virtue of which the defendant assumed this power, do not apply.

That in the absence of express statutory provision, municipal corporations cannot impose pecuniary penalties, and imprisonment in default of payment, under the authority of by-laws.

That the by-law in question is arbitrary and oppressive, and moreover makes an unjust discrimination between different classes of tradesmen selling the same articles, and orders, without just cause, the closing of stores at hours when trade can be carried on without contravening any police regulations respecting order, health, morals or public well-being; that it restrains freedom of trade; and that the by-law ought therefore to be held null and void.

Dupuis and *Sussier*, for plaintiff.

Roy and *Ethier*, for defendant.

QUEBEC ADMIRALTY DISTRICT.

ROUTHIER, Loc.J.] [August 3.

BELL TELEPHONE COMPANY *v.* THE "RAPID."

Trespass—Interference with submarine cable—Notice—Damages.

By a regulation passed by the Quebec Harbour Commissioners in 1895, and subsequently approved by the Governor in Council and duly published, the Commissioners prohibited vessels from casting anchor within a certain defined space of the waters of the harbour. Some time after this regulation had been made and published the Commissioners entered into a contract with the plaintiffs whereby the latter were empowered to lay their telephone cable along the bed of that part of the harbour which vessels had been so prohibited from casting anchor in. No marks or signs had been placed in the harbour to indicate the space in question. The defendant vessel, in ignorance of the fact that the cable was there, entered upon the space in question and cast anchor. Her anchor caught in the cable and in the efforts to disengage it the cable was broken.

Held, that she was liable in damages therefor.

C. A. Pentland Q.C. for plaintiffs.

A. H. Cook and *Chas. Dorion*, for the ship.

Province of New Brunswick.

SUPREME COURT.

McLEOD, J. In Chambers. [Sept. 13.

EX PARTE HAYDEN, IN RE AMLAND.

Practice—Absconding Debtors' Act, Con. Stat., c. 44—Affidavits of witnesses.

It is not sufficient that the affidavits of the witnesses in verification of the departure of a debtor under the above Act, swear that he has departed. Facts must be stated showing that his departure was with intent to defraud his creditors. Supersedeas granted.

C. J. Coster and *D. Mullin*, for the debtor.

H. A. McKeown, contra.

BARKER, J., In Equity. [Sept. 21.

FISHER *v.* FISHER.

Practice—Order for appearance—Publication—53 Vict. c. 4, s. 18.

On a motion in a partition suit to take the bill pro confesso, it appeared that an order for the appearance of some of the defendants by publication under 53 Vict., c. 4, s. 18, was published in each number of the Royal Gazette from the 12th of May to the 7th of July, inclusive of the issues of both dates.

Held, that the Act had been complied with in respect to the times of publication.

Cockburn, for the plaintiff.

SAINT JOHN COUNTY COURT.

FORBES, J. In Chambers. [Sept. 9.

MYERS *v.* NORTO

Practice—Title of Court—The County Courts Act, 60 Vict., c. 28.

Held, that under above statute the Court must be described as "The Saint John County Court," and that a writ of capias describing the Court by the former title, "The County Court of the City and County of Saint John" was irregular, but might be amended.

W. H. Trueman, for the plaintiff.

D. Mullin, for the defendant.

Province of Manitoba.

QUEEN'S BENCH.

TAYLOR, C. J.] [Oct. 5.

GRAY *v.* MANITOBA AND NORTHWESTERN RAILWAY.

Examination of judgment debtor—Queen's Bench Act, 1895, Rule 733—No examination of non-resident—Practice.

An application was made in this case for a special order for the examination of certain officers of the defendant company who reside out of the jurisdiction of the Court under Rule 733 of the Queen's Bench Act, 1895, with the view of ascertaining the names of the stockholders, and other information to enable the plaintiff to realize the amount of the judgment recovered by him against the defendant.

Held, that the Rules do not provide for the case of the examination of any person for such purposes outside of the jurisdiction of the Court.

His Lordship, however, whilst refusing the application, did so without costs, admitting that a good deal might be said in favor of making the order, and suggested that the question was of sufficient importance to obtain the opinion of the full Court upon it.

Wilson, for plaintiff.

Tupper, Q C., for defendant.

TAYLOR, C.J.] [Oct. 5.

BELL *v.* MCCALLUM.

Breach of promise of marriage—Jury—Assessment of damages.

This was an action for breach of promise of marriage, and, interlocutory judgment having been signed in default of defence, the record was entered for the assessment of damages by a judge sitting on Tuesday under Queen's Bench Act, 1895, Rule 162.

Section 49 of the Act requires that an action for a breach of promise of marriage should be tried by a jury unless the parties in person or by their solicitors or counsel expressly waive such trial.

Held, that the damages could not be assessed without a jury, although there was no defence.

A. Howden, for the plaintiff.

TAYLOR, C J.] [Oct. 8.

ADAMS *v.* HOCKIN.

Real Property Act—Caveat—Description of land — Statement of interest claimed.

This was an appeal from an order of the referee directing the trial of an issue under the Real Property Act.

In the caveator's petition his name was given without any address or description, and a statement of facts on which he relied was given, from which it might be inferred what interest or title he claimed in the lands, but the petition did not state specifically what estate, interest, or charge he claimed as required by Rule 1 of Schedule R.

The land was described in the caveat and petition as "Lot 32 in block 15 as shown upon a plan of Oak Lake, being a sub-division of the north half of section 23, in Township 9, range 24 west of the principal meridian of Manitoba."

Held, that this description was vague and indefinite, that the caveat did not comply with the statute as it did not contain an accurate description of the land, and that the petition was defective in not stating specifically what estate, interest, or charge the caveator claimed.

Jones v. *Simpson*, 8 M.R. 124; *McArthur* v. *Glass*, 6 M.R. 224, and *Martin* v. *Morden*, 9 M.R. 565, followed.

Appeal allowed, order of Referee reversed with costs, and petition dismissed with costs.

Clark, for caveator.

Patterson, for caveatee.

Book Reviews.

Illustrative Cases in Criminal Law, with analysis and citations, by JAMES PAIGE, M.A., LL.M., Professor of Law in the University of Minnesota: 1897, Philadelphia, Rees, Welsh & Co.: Toronto, Canada Law Journal Co.

This is the first volume of a series to be known as the Pattee series of illustrative cases, designed to present the fundamental principles of the branches of law considered by reference to, and discussion of, the facts as shown in an actual decided case. The book is intended mainly for students, and with the exception of four English cases, is devoted wholly to decisions within the United States.

Game and Fishing Laws of Ontario, a Digest, by A. H. O'BRIEN, M.A., barrister-at-law, Assistant Law Clerk of the House of Commons, author of "The New Conveyancer," etc. Third edition, 1897, Canada Law Journal Company, Toronto.

Every branch of the law has its own text book, and Mr. O'Brien has the field to himself in the difficult task of digesting the law respecting fish and game, and reconciling the conflicting and apparently conflicting fishery laws of this Province and of the Dominion. The work is a digest of the whole

law, Provincial and Dominion, with references to the various statutes and Orders in Council. The Digest is issued under the authority of the Ontario Fish and Game Commissioners, and also has the approval of both the Ontario and Dominion Governments. The price (25 cents) is not great, in view of the prevailing prices of law books.

Probate Reports Annotated, Vol. I, comprising recent cases decided in the United States on points of Probate Law, reported in full with extended notes and references; by FRANK S. RICE, ESQ., author of "American Probate Law," etc. 800 pp.; Toronto, Canada Law Journal Co., sole Canadian agents. Price $6.

The plan of this new series of reports is to give an annual volume containing the cream of probate law, and by excluding cases that suggest only the simpler forms of testamentary law, to devote more space to the complexities of the more difficult questions of probate litigation. A most valuable feature is that the various decisions are annotated by the editor and references given and discussed, so that the series will form not only a set of reports but a complete symposium on each point of law in question as the cases appear.

General Digest, American and English (annotated), vol. iii., N. S., 1897. Rochester, N Y : Lawyers' Co-operative Pub. Co. Toronto: Canada Law Journal Co., agents for Canada

This very excellent digest covers the reported decisions of each State and of the Federal Courts of the United States and the English cases from January to July of 1897. A new feature characterizes the present volume by the addition to the more important abstracts, references to the cases overruled, followed or distinguished, which makes it possible at once to estimate the value of the citation in other jurisdictions A further editorial annotation gives a reference to other uncited decisions on the same line. By thus incorporating the older decisions as they are questioned or followed from time to time, the editors thus aim to make the "General Digest" a complete encyclopædia of American law from the earliest decisions to the present, as an incident to the semi-annual digest of the current cases.

In addition to the permanent volumes, quarterly advance sheets are supplied to subscribers without extra charge.

Flotsam and Jetsam.

THE NEW WOMAN AGAIN.

The New Woman, who has not been very much *en evidence* for the past few months, has reappeared. This time she is a literary Cassandra, enslaved by poverty in the menial service of pot washing, and consumed with yearning to rend her bonds.

At Shoreditch County Court, before Judge French, Q.C., a domestic ser-

vant named Ada Wilton claimed £2 6s. 8d. for a month's wages, and another month's money in lieu of notice from Mrs. Stallbrass, of Graham Road, N. The defendant denied liability, saying that the girl only stopped a week, and was always reading and writing.

Judge—Why should she not read?

Defendant—And neglect her work? Oh, my, I wish you had had her for a week. I was to pay her £14 a year. Just listen how she treated me. I told her to cook some steak for the children when they came home from school. At one o'clock I went into the kitchen. The frying-pan was on the fire red hot, and the steak was in the pantry. (Laughter.)

Plaintiff—That is not true.

Defendant—Oh, you wicked girl. Were you not busy writing a novelette?

Plaintiff—What if I were? I did not neglect your work.

Defendant—I saw the beginning of it. The title was, "The Vengeance of the Viscount." (Laughter.)

Plaintiff—And a good title too. (Loud laughter.)

Defendant—And what did you say when I spoke to you?

Plaintiff—Spoke! Do you call it speaking? You uttered shameful imprecations.

Defendant—Eh, what?

Plaintiff—Oh, of course, you don't understand. (Laughter.) You swore. Did I not tell you I had been used to ladies? At the end of my month I was to go. I would not stand a woman who did not sound her "h's."

Defendant—Your Honor, she was most insulting. She used to sniggle when I spoke. She used to say, "Please speak English. I don't understand Whitechapel." (Laughter.) She spilt a bottle of ink over the breakfast table-cloth. When I asked her about it she said she had an idea in her head and was bound to write it.

Plaintiff—And I am not going to miss ideas!

Defendant—When I told her to go she said she did not care; she would leave there and then. She said she had found a publisher, and she would beat Marie Corelli.

Plaintiff—I never used such slang. I said I would outvie Marie Correlli. I have found a publisher. When I have saved enough money they will print my book. No more caps and aprons for me then.

Judge—Will you give her the month's money without notice?

Defendant—Yes, with pleasure. Let her be as writer-fied as she likes.

Plaintiff—I'll take it. When my novel is publshed she can have it back.

A good story is told of a Glasgow baillie on the occasion of a witness being sworn before him. "Hold up your right arm," commanded the lineal descendant of Baillie Nicol Jarvie. "I canna dae't," said the witness. "Why not?" "Got shot in that airm." "Then hold up your left." "Canna dae that either—got shot in the ither airm, too." "Then hold up your leg," responded the irate magistrate; "no man can be sworn in this Court without holding up something."

LAW SOCIETY OF UPPER CANADA.

THE LAW SCHOOL.

Principal, N. W. Hoyles, Q.C. *Lecturers*, E. D. Armour, Q.C.; A. H. Marsh, B.A., LL.B., Q.C.; John King, M.A., Q.C.; McGregor Young, B.A. *Examiners*, R. E. Kingsford, E. Bayly, P. H. Drayton, Herbert L. Dunn.

NEW CURRICULUM.

FIRST YEAR.—*General Jurisprudence.*—Holland's Elements of Jurisprudence. *Contracts.*—Anson on Contracts. *Real Property.*—Williams on Real Property, Leith's edition. Dean's Principles of Conveyancing. *Common Law.*—Broom's Common Law. Kingsford's Ontario Blackstone, Vol. 1 (omitting the parts from pages 123 to 166 inclusive, 180 to 224 inclusive, and 391 to 445 inclusive). *Equity.*—Snell's Principles of Equity. Marsh's History of the Court of Chancery. *Statute Law.*—Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.—*Criminal Law.*—Harris's Principles of Criminal Law. *Real Property.*—Kerr's Student's Blackstone, Book 2. Leith & Smith's Blackstone. *Personal Property.*—Williams on Personal Property. *Contracts.*—Leake on Contracts. Kelleher on Specific Performance. *Torts.*—Bigelow on Torts, English edition. *Equity.*—H. A. Smith's Principles of Equity. *Evidence.*—Powell on Evidence. *Constitutional History and Law.*—Bourinot's Manual of the Constitutional History of Canada. Todd's Parliamentary Government in the British Colonies (2nd edition, 1894). The following portions, viz: chap. 2, pages 25 to 63 inclusive; chap. 3, pages 73 to 83 inclusive; chap. 4, pages 107 to 128 inclusive; chap. 5, pages 155 to 184 inclusive; chap. 6, pages 200 to 208 inclusive; chap. 7, pages 209 to 246 inclusive; chap. 8, pages 247 to 300 inclusive; chap. 9, pages 301 to 312 inclusive; chap. 18, pages 804 to 826 inclusive. *Practice and Procedure.*—Statutes, Rules and Orders relating to the jurisdiction, pleading, practice and procedure of the Courts. *Statute Law.*—Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.—*Contracts.*—Leake on Contracts. *Real Property.*—Clerke & Humphrey on Sales of Land. Hawkins on Wills. Armour on Titles. *Criminal Law.*—Harris's Principles of Criminal Law. Criminal Statutes of Canada. *Equity*—Underhill on Trusts. De Colyar on Guarantees. *Torts.*—Pollock on Torts. Smith on Negligence, 2nd ed. *Evidence.*—Best on Evidence. *Commercial Law.*—Benjamin on Sales. Maclaren on Bills, Notes and Cheques. *Private International Law.*—Westlake's Private International Law. *Construction and Operation of Statutes.*—Hardcastle's Construction and Effect of Statutory Law. *Canadian Constitutional Law.*—Clement's Law of the Canadian Constitution. *Practice and Procedure.*—Statutes, Rules and Orders relating to the jurisdiction, pleading, practice and procedure of the Courts. *Statute Law.*—Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

NOTE.—In the examinations of the Second and Third Years, students are subject to be examined upon *the matter of the lectures* delivered on each of the subjects of those years respectively, as well as upon the text-books and other work prescribed.