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The vacancy on the British Columbia Bench, caused by the death of Chief Justice McColl, has been filled by the appointment of Mr. Gordon Hunter, K.C., of the city of Victoria. Mr. Justice Martin becomes Local Judge in Admiralty of the Exchequer Court for the district of British Columbia.

No more important subject has, since Confederation, been brought before the Dominion legislature than the motion of Dr. Russell, of Halifax, embodied in the following proposed resolution: "That in the opinion of this House the time has arrived when steps should be taken to carry out the provisions of sec. 94 of the B. N. A. Act for securing the uniformity of the laws relating to property and civil rights in Ontario, Nova Scotia and New Brunswick, and in such other Provinces as have been brought within the scope of the section since the passing of the above Act." The matter is not new to our readers. It was discussed in these pages in our volume for 1898, and on other occasions. A valuable paper on the subject by Dr. Russell will be found there (p. 513), to which reference may be made. The report of the debate on Dr. Russell's motion in the Hansard will also be read with interest. The difficulty of course lies in the Province of Quebec, with its system of civil law; and the opposing views came principally from members there. There are undoubtedly difficulties in the way, but they must in some way be surmounted.

The question of company law discussed in this issue (page 179) is important in these days when the business of the country is so largely done through the agency of companies. The conclusion arrived at by the Judicial Committee in *Earle* v. *Burland* must surely be correct. There must however be a limit somewhere to the dealings of directors with profits. It might become important in an extreme case, and under certain circumstances, to consider the true nature of a reserve fund. What is its object and purpose? Should it not be kept in the shape of money or money's worth, and

so invested that, in case of an emergency, it might be immediately used in aid of the company's business. Again, it is possible that accumulations of profits might make the reserve larger than the capital; and if this reserve were used in carrying on a different business from that for which the company were formed, would not such a use of the funds be an abuse of the charter? There is one matter in the judgment of the Court of Appeal in *Earle* v. *Burland*, which has only been slightly touched upon, namely, that there are other legitimate ways of disposing of reserve funds than by distributing it in dividends. Might not a manufacturing company, for example, instead of such distribution, increase its business by the use of the accumulation, etc., etc. A number of other questions might arise, quænunc prescribere longum est. An underlying difficulty is, that if the directors are also the majority shareholders, their discretion or recklessness cannot be effectively controlled at a shareholders' meeting.

We have heard from a subscriber in reference to a recent article in these pages on the Supreme Court. He expresses "painful surprise to learn that a Court which was instituted with such high hopes of bringing the law in the scattered Provinces into something like harmony should be a disappointment." He continues: "You say that the Provincial Courts of Appeal enjoy greater confidence than the Supreme Court Do you say that the judgments of the Provincial Courts that have been recently reversed by the Supreme Court are better law than the latter? I am not inclined to agree with you if that is your opinion;" and he cites some cases where the Ontario Court of Appeal has been reversed by the Supreme Court. We have not said and do not mean that the Supreme Court has not occasionally laid down the law more correctly than the Courts referred to, but we repeat what we have already said, that, speaking generally, the appellate courts in the various Provinces stand higher in the estimation of their Bars than does the Supreme Court of Canada. For example, what professional man can be found in Ontario who would prefer the opinion of the men composing the Supreme Court Bench to those now sitting in the Court of Appeal at Osgoode Hall. A final court of appeal occasionally feels called upon (and it is well it should be so) to mould the law in view of changed conditions in national life, or in trade

requirements, etc. That however does not touch the question referred to by our correspondent; nor have we heard any expression of opinion adverse to our strictures as to the conduct of business in the Supreme Court in other respects. On the contrary we are told that the statements made are more than justified by the facts; and that as to one of the matters referred to, it should be made quite clear that as to the complaints so frequently made by the Bar the Chief of the Court is chiefly to blame. But however this may be, he certainly is responsible for conducting business so as to obtain the highest possible efficiency of the Court and the best results with the material at his command. This can only be done by an example of patient courtesy and untiring attention and industry; and also by having a system of full and frank consultation and interchange of views between the Judges of the Court. This of course requires entire harmony between them, as well as a readiness to consider and give due weight to opposing views.

MINORITY SHAREHOLDERS IN JOINT STOCK COMPANIES.

The case of *Earle* v. *Burland* (1902) Appeal Cases 83, marks another step in advance in the formation of definite company law. The principles involved in it are, however, simple and in that respect resemble those of *Beatty* v. *North-West Transportation Company*, a case for which Canada must get the credit (12 Appeal Cases 589), and also of an English case, *Salomon* v. *Salomon & Co.* (1897) Appeal Cases 22.

The Beatty case was said to have involved a question novel in its circumstances and important in its consequences, but the general effect of the opinion expressed by the Privy Council in that case absolutely recognizes the right of shareholders as such, to exercise their voting power in any manner they please. This principle was applied to a shareholder who held a majority of the shares of the company and whose votes carried a resolution sustaining his action as director, in selling to the company a vessel of which he was the owner. The power of the holders of shares to vote as they choose, and the right of the majority so voting to control absolutely the affairs of the company was carried in this case to the length of enabling them to confirm an action of a director, who by law is precluded from dealing on behalf of the company with

himself and from entering into engagements in which he has a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect.

The Salomon case is an interesting illustration of the result looking at a subject from two different standpoints. The House of Lords vindicated the right of an incorporated company to be considered a distinct entity apart altogether from those who had joined in its incorporation. The Lord Chancellor was willing to assume that the formation of the company was a mere scheme enabling a man's business to be carried on in the name of a company, but he points out that the legal existence of the company, with rights and liabilities of its own, was quite apart from the ideas or schemes of those who brought it into existence. In reading all the judgments in the case, it seems as if the Court of Appeal and Mr. Justice Vaughan Williams had entirely put on one side the fundamental idea in joint stock companies, viz.: that of allowing a man legitimately to carry on business while limiting his liability to creditors, preferring to think that if a man formed a limited liability company with the object and intent of preventing himself from being made liable to its future creditors, he was doing a discreditable action, and was in fact putting into operation a scheme to defraud. In endeavouring to reconcile this aspect with the separate existence of an incorporated company the Court of Appeal held that company to be the mere nominee or agent of the person controlling its formation and practically treated it and him as merged into one fraudulent actor.

The House of Lords in taking the opposite view emphasized the fact that the Act for incorporating these companies apparently recognized only that artificial existence quite apart from the motive or conduct of individual corporators.

In the recent case of *Earle* v. *Burland* the principle underlying the Beatty case has been carried a step further, and in it is found the recognition of the absolute right of the directors while in office to carry on the business of the company in any way they choose provided they do nothing illegal or ultra vires. In that case the elected directors were chosen really by their own votes as shareholders. They had made for many years very large profits, and had carried them forward from year to year without either forming a rest or reserve account, or distributing them to the shareholders. The balance of undistributed or undrawn profits was invested by

them in various securities, and on bank and other stocks, and were loaned out practically at the pleasure of the president. Shortly before the suit was instituted the company lost a valuable contract with the Dominion Government, and then some of the minority shareholders instituted the action to secure a distribution of the undrawn profits, or to prevent them being invested through the president, which had been the course pursued by the directors up to that date.

To enable such an action to succeed the minority shareholders endeavoured to establish wrongdoing and illegality on the part of the directors. Their attack was directed to the investment of the undrawn profits, and they insisted that the directors were engaging in a loan and brokerage business with the surplus funds of the company, which they said, in law, ought to be distributed among the shareholders, as there was no provision in the statutes or by-laws for the creation or maintenance of a reserve fund. The Court of Appeal in Ontario, speaking through Mr. Justice Moss in 27 A.R. p. 557, put aside an objection that the retention and continued investment of the accumulations was a matter of internal regulation and management to be determined by the vote of the majority of the shareholders by saying "that there may arrive a time in the management of the company's affairs when the jurisdiction of the Court attaches, in which case it is the duty of the Court to interfere."

It seemed obvious to him, however, that in order that such time should arrive there should be some act done by the company which was in excess of the corporate powers, or which, if not ultra vires, was tainted with fraud or operated oppressively on individual shareholders.

In this view of the law the Privy Council agreed, stating (at page 93) that the cases in which the minority shareholders could maintain an action asking for the interference of the Court in the internal management of the company are confined to those where the acts complained of were of a fraudulent character or were beyond the powers of the company.

It was in ascertaining whether the case complained of did, or did not, fall within these definitions that the Judicial Committee and Court of Appeal differ widely. The view held by the Canadian Court was, that while there was power in the directors to set aside a fair and reasonable sum as a reserve fund, yet in the case

of a manufacturing company, like the one under discussion, there was no principle of law or morality justifying the retention of such an accumulation of undrawn or undistributed profits. The only authority, however, cited for that proposition is a quotation from Brice on Ultra Vires (3rd Edition, page 348), where it is stated that mercantile corporations not endowed with express authority to keep a reserve fund, cannot do so, but must periodically divide accrued profits. All other writers on the subject put it in a different light, as they say there is nothing which *requires* a surplus to be accumulated, or *forbids* its division as profits among the shareholders.

The Court then considered that the fraudulent or oppressive character of the directors' action lay in the fact that while Mr. Burland's friends might be willing to entrust him with the management of their share of the accumulations, they had no right to insist that the minority should be placed in the same boat as regards their part, nor were the latter bound to permit their shares to remain tied up at the will of the majority, and to submit to their continued employment in precarious and illegal investments.

It is therefore evident that the point that the formation of a reserve fund was ultra vires was not the determining factor, particularly as the accumulated profits had never been called a reserve fund by the directors. The important ground upon which the Court of Appeal based its judgment was the imposition by the majority, through the directors, of their will upon the minority.

The Judicial Committee have laid down a very clear and distinct rule upon this. Having stated that they are not aware of any principle for compelling a joint stock company, while a going concern, to divide the whole of its profits amongst its shareholders, they say that whether the whole or any part should be divided, or what portion should be divided, and what portion should be retained, are entirely questions of internal management which the shareholders must decide for themselves, and for that reason they declined to continue an injunction restraining the directors and president from maintaining the reserve fund as before, from employing it as they had done in the past, and from personally controlling or dealing with the same.

They disposed of the proposition that the loaning of this reserve fund upon bank and other shares was in reality a new and unauthorized branch in which there was engaged a separate

capital by pointing out that the company was not confined to such investments as trustees were authorized to make, and might lawfully invest in such securities as the directors might direct subject to the control of the general meeting.

The importance of the case lies in the fact that it is a very pronounced recognition of the right of directors who hold office by a majority vote (even though that majority vote is represented among the shareholders by the directors themselves) to retain or distribute the net profits of the company as they think expedient and to invest such profits as they retain either in absolutely safe securities or in securities of a more or less speculative nature.

This affords a point of view regarding joint stock companies which is no less important than those afforded by the two other cases referred to in this article. As a general rule the advantage of limited liability is recognized by all those who take or hold shares in joint stock companies—they look to the company for protection against liabilities on the outside, but they are not as much alive to the dangers which may arise from within.

A case illustrating those dangers arose recently not far from the City of Toronto. A joint stock company carrying on a commercial business was composed of five people, three of them held all but two shares, which two were held by employees. It was evident, therefore, that any two of the larger shareholders held a controlling interest in the company. The three largest shareholders were the directors of the company, and held the office of president, vice-president and manager, respectively, all drawing large salaries in addition to the income derived from the earnings of their stock. A quarrel arose, and at the next meeting of the shareholders two of the directors displaced their associate, electing in his place one of the small shareholders, and then passed a resolution depriving the former of his office and consequently of his salary. While he remained therefore a shareholder he became a complete outsider to the management of the business, although he had a right to attend a meeting once a year and criticise the action of the directors. The business (in which his money was invested to an equal extent with the two directors) could be managed by them in any way they choose, and large or small dividends paid upon it as they willed. It is obvious, of course, that they must pay him the same dividend as they paid themselves, and that if they did not pay a dividend but increased the reserve

fund, his stock benefited; but there was no market for it. He could not sell because his purchaser would be in the same position as himself, nor could he exercise the slightest control over the way in which his money was being used.

In noting the results on Company law of these three cases it may be said that the Salomon case recognizes the absolute detachment of the corporation from the character, aims and ideas of the corporators. The Beatty case shows the controlling influence of the shareholders' vote. The Burland case emphasizes the complete power of the directors, between the shareholders' meetings, to deal with the company's affairs, and the helpless position of minority shareholders in a company where the capital is closely held, and where the directors and majority shareholders are the same people.

FRANK HODGINS.

PAYMENT BY CHEQUE.

A correspondent obligingly points out that the Court of Appeal in *Mason* v. *Johnston*, 20 Ont. App. 412, has decided that where a cheque for less than the amount claimed by a creditor is sent to him by his debtor and made payable to order, and it is expressly stated in the cheque itself to be "in full of amount due," the creditor may, nevertheless, retain and cash the cheque without being estopped from showing that he accepted it only as part payment.

We may observe, however, that although the Court of Appeal was of the opinion that the case was governed by *Day* v. *McLea*, 22 Q.B.D. 610, yet there was a distinction between the two cases. In *Day* v. *McLea* the cheque was not on its face expressed to be in full of all demands. The statement that it was sent in settlement was contained in a collateral document to which the creditors had not made themselves parties. Maclennan, J. A., it is true, says "the indorsement on the draft had no more effect than what was stated in the letter, that it was to be taken in full." But with great respect to the learned judge, it appears to us that a creditor who indorses a document stating that a sum of money therein mentioned is to be paid in full of all demands, commits himself to that statement in a way which he would not do if he merely received a letter from his debtor saying the draft or cheque was sent in full of all demands. In the latter case he may be well

heard to say, I did not agree to that, but in the former case by signing his name to the indorsement he in effect adopts the statement in the cheque that it is in full and so accepted by him. It is a case of approbating and reprobating the same transaction.

It may be said, however, that an indorsement of such a cheque amounts to no more than a receipt, and that as a receipt would not be conclusive evidence against the giver of it, so neither can the indorsement of a cheque be. But the giving of a receipt in full although part only of the amount claimed was paid was held binding on the creditor: (*Lees* v. *Carlton*, 33 U.C.Q.B. 409), even before the change in the law made by the Judicature Act, R.S.O. c. 51, s. 58 (8), and in *Henderson* v. *The Underwriting & Agency Association*, 65 L.T. 616, subsequently affirmed by the Court of Appeal, ib. 732, it was held that where money is paid by a debtor to his creditor in pursuance by a supposed compromise the creditor was not at liberty to repudiate the terms of payment and yet retain the money, but must bring the money into court as a condition of being permitted to prosecute an action for the original demand; and the same principle, it is submitted, ought to apply where a creditor seeks to repudiate the terms of a document under which he has received money, and to which he has made himself a party.

The Hon. John W. Foster, ex-Secretary of State for the United States, contributes a notable article to a late number of the New York *Independent* on the question of Reciprocity. Its tone is distinctly friendly to this country throughout. He says: "I feel assured that the great mass of the people of the United States desire to live upon the most cordial relations with our Northern neighbours, and to maintain with them the freest commercial intercourse consistent with our prosperity." Commenting upon the late Mr. Blaine's frank avowal to the Canadian Commissioners in 1874, namely, "Gentlemen, there is only one satisfactory solution of this question—it is to let down the bars!" Mr. Foster says that the proper basis of agreement is "A complete commercial union, with a common tariff upon an agreed basis of division of revenue, and free and unrestricted commerce between the two countries, as is now enjoyed by the States of our Union." And he concludes: "Such is ideal reciprocity, and I do not regard it as visionary to labour and hope for its consummation." Canadians can appreciate the kindliness of Mr. Foster's attitude, even if they cannot agree with his views.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—EQUITABLE SET-OFF.

Phillips v. *Howell* (1901) 2 Ch. 773, was an action for specific performance. The defendant, the vendor, was administratrix of an intestate, and was ordered to pay the plaintiff's costs. The defendant had a beneficial one-fourth interest in the intestate's estate, and it was alleged there were no unpaid debts except a mortgage, and that the purchase money payable by the plaintiff represented the whole of the intestate's estate. The plaintiff asked to have inserted in the judgment a direction that he should be at liberty to deduct his costs due from the defendant from so much of the purchase money in his hands as represented the defendant's beneficial interest therein; but Byrne, J., refused to make the direction on the ground that it would be impossible to ascertain the amount of the defendant's beneficial share in the purchase money, in the present suit, so as to bind other parties interested in the intestate's estate, and that the debt due to the defendant was due to her in her representative capacity, and therefore in another right, as against which the plaintiff could not be allowed to bring into account all or any part of an unascertained sum to which the defendant might be beneficially entitled on the administration of her intestate's estate.

POWER—EXECUTION—INTENTION—"AFTER DEATH OF A," READ "SUBJECT TO A'S INTEREST."

In re Shuckburgh, Robertson v. *Shuckburgh* (1901) 2 Ch. 794, a husband by his marriage settlement had a power of appointment over the settled estate among his children. The estate was settled in favour of himself and wife, and the survivor of them, for life, but if the wife remarried her interest was cut down to one-half. The husband died, having by his will appointed the estate "after his wife's death." She subsequently remarried, and it was held by Farwell, J., that the moiety of the estate then set free passed under the power, the Court finding on the face of the will an intention to appoint the whole fund subject to the wife's interest.

CONTRACT— INJUNCTION — IMPLIED CONTRACT NOT TO TAKE SUBJECT MATTER OF CONTRACT FROM ANYBODY ELSE

Metropolitan Electric Co. v. *Ginder* (1901) 2 Ch. 799, was an action to enforce a contract by injunction. The defendant had signed a request to the plaintiff company to supply him with electricity subject to the terms: (1) The consumer agrees to take the whole of the electricity required for the premises mentioned from the company for a period of not less than five years; (2) to pay a specified sum therefor. There was no covenant by the plaintiff to supply, or by the defendant to take, any electricity Buckley, J., held that this constituted an implied contract on the part of the defendant not to take electricity from any one else which could be enforced by injunction, and that the contract was not an undue preference under the Electric Lighting Act.

MARRIAGE SETTLEMENT — AGREEMENT FOR A SETTLEMENT — "USUAL COVENANT."

In re Maddy, Maddy v. *Maddy* (1901) 2 Ch. 820, the question involved was whether a covenant to settle after acquired property is a "usual covenant" in a marriage settlement. The facts were that a Mrs. Castell having a contingent share in property, in default of its being otherwise appointed, by an ante-nuptial agreement agreed to settle all her share in that property; the settlement to contain certain specified provisions, and also such other agreements clauses and provisions as are "usually inserted in settlements of a like kind." Subsequent to the agreement, a specified sum was appointed to Mrs. Castell out of the above-mentioned property. No settlement had been made by her. The question therefore arose whether the sum so appointed was bound by the agreement; this depended on whether a covenant to settle after-acquired property is a "usual covenant" in a marriage settlement. Joyce, J., held that it was not.

VENDOR AND PURCHASER—COVENANT FOR TITLE—BREACH OF COVENANT—MEASURE OF DAMAGES.

In *Turner* v. *Moon* (1901) 2 Ch. 825, Joyce, J., decided that where a covenant for title is broken by reason of the existence of a right of way in third persons, the breach is single, entire and complete upon the execution of the conveyance; and that the proper measure of damages is the difference between the value of the land as it was purported to be conveyed, and its value as the vendor had power to convey it.

INTERPLEADER—TRUSTEE ENTITLED TO LIEN ON TRUST PROPERTY—EXECUTION CREDITOR OF TRUSTEE — EXECUTION—TRUST PROPERTY, SEIZURE OF, UNDER EXECUTION AGAINST TRUSTEE—BANKRUPTCY OF TRUSTEE.

Jennings v. *Mather* (1902) 1 K.B. 1, was an interpleader issue which arose under the following circumstances: Mather, a trustee for creditors, was empowered to carry on a business of the trust estate. He did so, and incurred debts for which he became personally liable, one of the creditors in respect of a debt so incurred recovered judgment against Mather, and issued execution and seized the trust property. Mather, having absconded and been adjudicated bankrupt, his trustee in bankruptcy claimed the property so seized in execution. It was conceded by counsel for the execution creditor that the goods of the trust estate were not exigible under an execution against Mather personally, but it was argued the trustee could only succeed by shewing that he was entitled, and it was claimed that the trust property did not pass upon the bankruptcy to the claimant. The Divisional Court (Lawrance and Kennedy, JJ.,) gave judgment in favour of the claimant, and this judgment was affirmed by the Court of Appeal (Collins, M.R., and Stirling and Mathew, L.JJ.,) on the ground that Mather was entitled to indemnity out of the trust estate against liabilities incurred in carrying on the business of the trust estate, and had a lien on the property of the trust estate for the amount in respect of which he was so entitled to indemnity, and that this right of lien passed to Mather's trustee on his bankruptcy, and therefore the latter was entitled to succeed on the issue.

ASSIGNMENT OF DEBT—FUTURE DEBT, ASSIGNMENT OF—AMOUNT ASSIGNED INDEFINITE—ASSIGNEE OF DEBT, RIGHT OF, TO SUE IN HIS OWN NAME—JUD. ACT 1873 (36 & 37 VICT., C. 66) S. 25, SUB-S. 6—(ONT. JUD. ACT, R.S.O. C. 51, S. 58, SUB-S. 5.)

In *Jones* v. *Humphreys* (1902) 1 K.B. 10, the plaintiff had obtained from one James Kerr, who was in the defendant's employment, an assignment in writing of so much of his salary and other emoluments due from the defendant "as shall be necessary to satisfy £22 10s. or any further sum or sums" in which he (Kerr) might thereafter become indebted to the plaintiff. The Judge of the County Court (Lumley Smith, K.C.,) held that the defendant could not, without taking the accounts between Kerr and the plaintiff, know for certain how much he ought to pay to the plaintiff, and how much to Kerr; and that the assignment not

being of a definite and ascertained amount, was not an "absolute assignment (not purporting to be by way of charge only)" within s. 25, sub-s. 5,) and consequently the plaintiff could not sue in his own name, and the Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ.,) affirmed the judgment. It is to be noted, however, that there was a difference of opinion as to whether an assignment of part of a debt can in any case be within the statute. Lord Alverstone, C.J., thought that an assignment of a definite part of a debt might be within the statute; but Darling and Channell, JJ., evidently thought that it was by no means clear that an assignment of part of a debt can in any case be within the statute, having regard to *Durham* v. *Robertson* (1898) 1 Q.B. 765.

ANCIENT LIGHTS—DIMINUTION OF LIGHT BY OBSTRUCTION, BUT LIGHT THUS OBSTRUCTED STILL SUFFICIENT FOR ORDINARY PURPOSES — PURPOSES REQUIRING EXTRA LIGHT.

Warren v. *Brown* (1902) 1 K.B. 15, deserves a brief notice because it declares that the principle laid down by Wright, J., in this case and by Malins, V.C., in *Laufranchi* v. *Mackenzie* (1867) L.R. 4 Eq. 421; and *Dickinson* v. *Harbottle* (1873) 28 L.T.N.S. 186, is erroneous and contrary to the decision of the Court of Appeal in *Kelk* v. *Pearson* (1871) L.R. 6 Ch. 809. The case was tried by Wright, J., who found as a fact that the plaintiffs' ancient lights had been diminished by the acts of the defendant complained of, but, following the cases decided by Malins, V.C., he held that notwithstanding the diminution, there was still enough light accessible to the premises for ordinary purposes of habitation or business, and dismissed the action. This the Court of Appeal (Lord Alverstone, C.J., and Williams and Romer, L.JJ.,) held to be based on a wrong principle, and judgment for substantial damages was awarded to the plaintiffs.

CRIMINAL LAW—PERVERTING COURSE OF JUSTICE—CONSPIRACY—NEWSPAPER ARTICLES AFFECTING CHARACTER AND CONDUCT OF PERSONS COMMITTED FOR TRIAL.

The King v. *Tibbits* (1902) 1 K.B. 77, is the case to which we have already referred (see ante p. 1). The defendants were indicted for misdemeanour, the offence consisting in having printed and published in a newspaper grave imputations against two persons who were awaiting trial on a charge of felony. The defendants were found guilty. Kennedy, J., who tried the case,

stated a case for the opinion of the Court for Crown cases reserved (Lord Alverstone, C.J., and Wills, Grantham, Kennedy, and Ridley, JJ.) One of the defendants was the editor and the other a reporter of the newspaper in which the articles appeared, and the Court affirmed the conviction of both defendants for unlawfully attempting to pervert the course of justice by publishing the articles in question, and conspiring to do so.

PRACTICE—COSTS — PAYMENT INTO COURT WITH DENIAL OF LIABILITY — RECOVERY OF LESS THAN PAID IN—COSTS OF ISSUES FOUND FOR PLAINTIFF—RULES 255-260—(ONT RULES 419, 425, 424).

Wagstaffe v. *Bentley* (1902) 1 K.B. 124, was an action to recover damages for negligence. The defendants paid into Court £80, and by their defence denied that they had been guilty of negligence. The action was tried, and the defendants were proved to have been guilty of negligence, and the damages were assessed at £35. Lawrance, J., who tried the action, ordered the defendants to pay the plaintiffs' costs of the action up to the time the money was paid into court, and that the plaintiffs should pay the defendants' general costs of the action from that time, and that the defendants should pay the costs of the issue found for the plaintiffs. Upon the taxation the taxing officer allowed the plaintiffs their costs relating to the question of negligence. Lawrance, J., upheld the Master, and the Court of Appeal (Collins, M.R., and Stirling and Mathew, L.JJ.,) also held that on the judgment pronounced the taxation was correct.

PROBATE—WILL TORN IN PIECES AND PASTED TOGETHER—PERSONS NOT SUI JURIS INTERESTED IN INTESTACY.

In the goods of Brassington (1902) P. 1 The sole executrix named in a will which had been torn up by the testator in a fit of drunkenness, and subsequently pasted together again by him, applied for probate. The estate was of the value of £1,300. Two infant children of the testator were interested under an intestacy, no guardian ad litem had been appointed for them. Barnes, J., granted the application without requiring a guardian ad litem to be appointed for the infants.

WILL — EXECUTION OF WILL — PRESENCE OF WITNESSES — WILLS ACT 1837 (1 VICT. C. 26) S. 9— (R.S.O. C. 128. S. 12).

In *Brown* v. *Skirrow* (1902) P. 3, a will was propounded for probate, and the question was whether it had been duly executed. The facts were as follows: The testatrix herself drew up the will, and took it to the shop of a Mr. Read to execute it. The shop had two counters, at one of which a Miss Jeffrey was serving. The testatrix took it to this counter and executed it in the presence of Miss Jeffrey. Mr. Read was at this time at the other counter and in such a position that he could not see what was taking place. After Miss Jeffrey had signed the will she went over to Read and asked him to go to the counter she had been at, and she took his place at his counter. Read then went over. The testatrix told him it was her will, and he signed it as a witness. Barnes, J., held that this was not a compliance with the statutory requirement that a will must be executed by the testator in the presence of two witnesses, who are to attest the execution in the presence of the testator and of each other. (See R.S.O. c. 128, s. 12.). Probate was therefore refused.

INFANCY — CONTRACT OF PURCHASE OF LAND BY INFANT — ADVANCE OF PURCHASE MONEY BY THIRD PARTY — MORTGAGE BY INFANT TO SECURE ADVANCE — LIEN OF PERSON ADVANCING PURCHASE MONEY FOR ADVANCE.

Thurston v. *Nottingham Permanent Building Society* (1902) 1 Ch. 1, is an appeal from the decision of Joyce, J., (1901) 1 Ch. 88 (noted ante vol. 37, p. 189), where the result reached by Joyce, J., was arrived at on other grounds. An agreement had been made by an infant member whereby the defendant building society, in ignorance of the infancy, agreed to advance money for the purchase by the infant of certain real estate which was to be, and was, duly conveyed to the infant, and she contemporaneously executed a mortgage to the building society to secure repayment of the society's advance. The present action was brought for a reconveyance of the property to the infant (now of age and adopting the conveyance to herself) on the ground that she was not bound by the mortgage. Joyce, J., held that the transaction was all one, and that the only terms on which the plaintiff could get equitable relief was by "doing equity"; in other words, paying the mortgage. The Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.,) gave the plaintiff the melancholy satisfaction

of stating that this was a wrong principle, but her cup of happiness must have been dashed when they proceeded to say that though the mortgage was invalid owing to the plaintiff's infancy, yet on the ordinary principles of equity applicable between vendor and purchaser, the person who actually advances the money for the purchase of land for another, even though that other be an infant, is entitled to a lien on the land for the amount so advanced, and though the judgment was varied by declaring the defendants entitled to a lien for the purchase money and interest, the plaintiff's victory appears to have been a hollow one.

WILL — REPAIRS OF HOUSE — EXPENSE OF REPAIRS AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN, HOW BORNE—TENANT FOR LIFE—REMAINDERMAN.

In re Willis, Willis v. *Willis* (1902) 1 Ch. 15. The Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.,) affirm the judgment of Kekewich, J., to the effect that where an application is made to authorize trustees to expend money for repairs of the trust property out of the corpus of the trust estate, the application must be refused, unless the contemplated repairs are in the nature "of salvage," the non-execution of which would result in a loss to the remainderman (there being no trust declared for the purpose).

WILL — BEQUEST OF LEASEHOLDS BY WILL OF FOREIGNER DOMICILED OUT OF JURISDICTION—CONFLICT OF LAWS—LEX REI SITÆ—LEX DOMICILI.

In *Pepin* v. *Bruyere* (1902) 1 Ch. 24, the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.,) affirmed the judgment of Kekewich, J., (1900) 2 Ch. 504 (noted ante vol. 37, p. 65). The point decided is that a bequest of leaseholds in England, made by a foreigner domiciled abroad, must be executed according to the provisions of the English Wills Act, and such bequest, though validly executed according to the law of the testator's place of domicile, unless that law agrees with the English law, will not be valid to pass such leaseholds, even though the will be admitted to probate in England.

APPEAL—ORDER, FINAL, OR INTERLOCUTORY—ORDER DISMISSING APPLICATION FOR DELIVERY AND TAXATION OF SOLICITOR'S BILL OF COSTS.

In re Reeves (1902) 2 Ch. 29. The Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.,) held that an order dismissing an application for the delivery and taxation of a solicitor's bill of costs was a final order, and not interlocutory, following *Salaman* v. *Warner* (1891) 1 Q.B. 734.

WILL—CONSTRUCTION—ESTATE IN SPECIAL TAIL—RULE IN SHELLEY'S CASE.

In *Clinton* v. *Newcastle* (1902) 1 Ch. 34, the question at issue was as to the proper construction of a will whereby a testator devised lands "to Charles, and if he marries a fit and worthy gentlewoman and has issue male to such issue male and their male descendents, in failure of which," then over. This was held to be equivalent to a devise to Charles and such issue male as he may have by marriage with a fit and worthy gentlewoman and their male descendents, in failure of which, then over, and thus to create an estate in special tail in Charles; the Court of Appeal (Lord Alverstone, C.J., and Williams and Romer, L.JJ.) affirming the judgment of Buckley, J.

MORTGAGEE AND MORTGAGOR—CLOG ON REDEMPTION—AGREEMENT SUBSEQUENT TO MORTGAGE — OPTION TO MORTGAGEE TO PURCHASE MORTGAGED PROPERTY—FINDING OF FACT REVIEWED BY APPELLATE COURT.

Lisle v. *Reeve* (1902) 1 Ch. 53, was an appeal from Buckley, J., on the question whether an agreement made twelve days after the execution of a mortgage whereby the mortgagor gave the mortgagee an option to purchase a moiety of the mortgaged property, was open to objection on the ground that it formed a clog on redemption. Buckley, J., found as a fact that the agreement and the mortgage were one transaction, but nevertheless that the option was valid. The Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.), however, came to a different conclusion on the facts, and held that the mortgage and option were separate transactions, and on well-settled principles the option was valid and not to be regarded as a clog on redemption.

WILL—GIFT OF INCOME — POWER TO LIFE TENANT TO USE CAPITAL IF INCOME NOT SUFFICIENT.

In re Richards, Uglow v. *Richards* (1902) 1 Ch. 76. A testator had made a bequest of the income of an estate to his wife for life, with a direction that "in case such income shall not be sufficient she is to use such portion of the capital as she may deem expedient." On the wife's decease "what is left" of the capital to be divided among residuary legatees. Farwell, J., held that this amounted to a general power of appointment in favour of the wife over the capital during her life.

HUSBAND AND WIFE—MARRIAGE SETTLEMENT—COVENANT TO SETTLE AFTER ACQUIRED PROPERTY.

Davenport v. *Marshall* (1902) 1 Ch. 82. A marriage settlement contained a covenant to settle all property to which the wife should, during the marriage, become beneficially entitled in reversion or remainder. She was then entitled to a reversionary interest, which fell into possession during the marriage. It was held that this property was bound by the covenant.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT OF CANADA.

N.W.T.] TAYLOR *v.* ROBINSON. [NOV. 16, 1901.

Negligence—Solicitor advising on established jurisprudence—Territories Real Property Act—Charging lands—Sale under execution—Indemnity to sheriff—Unregistered conveyances prior to execution—Interpleader—Pleading—Tort—Counterclaim for costs and overcharges—Signed bill of costs.

T. was the sheriff's advocate and also advocate for a judgment creditor. On behalf of the judgment creditor he delivered to the sheriff an execution and a requisition to charge lands then registered in the name of the execution debtor as the said execution debtor's interest therein might appear. The lands were accordingly charged by the sheriff, under the provisions of the Territories Real Property Act as amended by 51 Vict., c. 20, s. 94, and advertised for sale under the execution. Subsequently, transferees of the lands registered deeds of conveyance dated prior to the execution, and served notices upon the sheriff forbidding the sale. T, following the decision *In re Rivers*, 1 N.W.T. Rep. pt. iv. 66, which had not then been reversed, advised the sheriff to proceed with the sale notwithstanding the notices. Actions were then successfully prosecuted by the transferees against the sheriff and execution creditor and an order obtained restraining the sale proceedings and cancelling the execution as a cloud upon the titles. In these suits T appeared as advocate for both the sheriff and the execution creditor and filed a joint defence, without interpleading for the sheriff, on the ground that the unregistered transfers were inoperative as against the execution. He also applied, without success to the trial court and again to the court in banc, to have the sheriff's name

struck out as a defendant in these suits. The sheriff did not appeal against the judgment in favour of the transferees and brought the present action against T to recover damages for the amount of his costs on the ground that T had been guilty of negligence in advising as he did and in pleading the joint defence without interpleading.

Held, reversing the judgment appealed from, that T had followed the approved practice in pleading the joint defence, that he was justified in assuming that the decision *In re Rivers* was correct, and, therefore, that he was not liable in an action for negligence.

Held, also, reversing the judgment appealed from, that neither T nor the sheriff as liable for tort in charging or advertising the lands for sale, as they were both acting in discharge of their respective duties, that as the proceeding by T had been taken to secure to his client the fruits of his judgment, no implied indemnity arose on his part toward the sheriff in consequence of the proceedings taken and, further, that neither the requisition nor the advice given by the advocate could be construed as an express indemnity by him to the sheriff against costs or damages in respect of the execution. In the action for damages, T counterclaimed, first, for alleged overcharges made by the sheriff in bills previously paid to him for fees and charges in respect of matters in the sheriff's office wherein T had acted as advocate for parties interested, and, secondly, for costs in defending the sheriff in the suits brought by the transferees. In respect to the latter part of the counterclaim it did not appear that T had rendered a signed bill of his costs to the sheriff before filing the counterclaim.

Held, that T could not recover with respect to the first part of his counterclaim, as the moneys, if recoverable, did not belong to him but to the clients for whom he had acted, but that he was entitled to recover the reasonable charges in the second part of his counterclaim, notwithstanding the omission to render a signed bill of costs pursuant to the statute. Appeal allowed with costs.

J. Travers Lewis and Smellie, for appellants. *Chrysler*, K.C., for respondents.

EXCHEQUER COURT OF CANADA.

Burbidge, J.] [Dec. 17, 1901.

WEDDELL DREDGING COMPANY *v.* THE KING.

Contract for improvement of Government canal—Change in works—Breach of contract—Spoiled grounds—Cost of—Allowance for.

The suppliants were contractors for certain works of improvement on the Rapide Plat Division of the Williamsburg Canal. For their own use and benefit and without notice to or request of the Crown in such behalf, they obtained certain grounds upon which to waste the material excavated by them.

Held, that the Crown was not bound to indemnify them for money expended in obtaining the said spoiled grounds.

2. In order to carry on the works in the way contemplated by the contract and specification the contractors changed certain dump scows into deck scows. Thereafter a change was made by the Crown in the manner of carrying out the work, which required the contractors to convert the deck scows into dump scows.

Held, that the contractors were not entitled to recover the expense they were put to in respect to the scows from the Crown, because the change in the works being provided for in the contract, there was no breach; but that such expense might be taken into account in considering the increased cost of doing the work under the circumstances in which it was done as compared with the cost of doing it in the way contemplated by the contract.

Aylesworth, K.C., and *German*, K.C. for suppliants. *Chrysler*, K.C. for respondent.

Burbidge, J.] ROSS *v.* THE KING. [Jan. 15.

Customs duties—Importation of steel rails—Return of duties paid under protest—Interest—Law of Province of Quebec.

The suppliants had imported at different times during the years 1892-1893 large quantities of steel rails into the Port of Montreal, to be used by them as contractors for the construction of the Montreal Street Railway. The Customs authorities claimed that the rails were subject to duty, and refused to allow them to be taken out of bond until duties amounting in the aggregate to the sum of $53,213.54 were paid. The suppliants paid the same under protest. After the decision of the Judicial Committee of the Privy Council of the case of *The Toronto Railway Company* v. *The Queen* (1896 A.C. 551), and sometime in the year 1897 the Customs authorities returned the amount of the said duties to the suppliants. The suppliants claimed that they were entitled to interest on the same during the time it was in the hands of the Crown, and they filed their petition of right therefor.

Held, that as the duties were paid at the Port of Montreal, the case had to be determined by the law of the Province of Quebec.

2. That on the question at issue in this case the law of the Province of Quebec is the same as the laws of the other provinces of the Dominion.

3. That as the moneys wrongfully collected for duties were repaid to the suppliants before the action was brought, there was no debt on which to allow interest from the commencement of the suit. If at the time of the commencement of the action the Crown was not liable for the interest claimed, it could not be made liable by the institution or commencement of an action. *Laine* v. *The Queen* (5 Ex. C.R. 128), and *Henderson* v. *The Queen* (6 Ex. C.R. 47) distinguished.

Helmuth and *Saunders*, for suppliants. *E. L. Newcombe*, K.C., for respondent.

Burbidge, J.] McGEE *v.* THE KING. [Jan. 21.

Right of way over Crown property—Easement—Prescription—C.S.U.C. c. 88, ss. 37, 40, 44—Possession—Predecessors in title.

The provisions of c. 88 of C.S.U.C., ss. 37, 40, 44, were in force at the time of the Confederation, and have not been repealed by the Parliament of Canada. Such provisions affect the right of the Crown as represented by the Government of Canada.

2. Under such provisions, where one enjoys an easement as against the Crown and over Crown property within the limits of some town or township, or other parcel or tract of land duly surveyed and laid out by proper authority in Ontario for a period of twenty years, he thereby establishes a right by prescription in such easement; and if the Crown interferes with the enjoyment of it by expropriation proceedings, the owner is entitled to compensation.

3. To establish the easement by prescription, it is not necessary to show that the present owner was in undisturbed possession for the full twenty years; but the undisturbed possession of his predecessors in title may be invoked in order to complete the term of prescription.

Maclennan, K.C., for suppliant. *Johnston*, for respondent.

Burbidge, J.] McQUADE *v.* THE KING. [Jan. 21.

Public work—Injurious affection of property—Deprivation of access—Street—Damages.

By the construction of a public work a public highway was closed up at a point two hundred and fifty feet distant from the suppliant's property, which fronted on the highway. In the first expropriation for the public work of land in the neighbourhood, no part of the suppliant's property was taken. Afterwards, and during the construction of the public work, a portion of his property was taken for the public work, and on the trial of a petition of right for compensation, the question arose as to whether or not the depreciation of the property by reason of the closing up of the street or highway, should be taken into account as one of the elements of damage.

Held, that it should be so taken into account, first, because it appeared that the depreciation from this cause in fact occurred subsequent to the taking of the land, and secondly, it was a case in which the suppliant was entitled to compensation for the injurious affection of his property by reason of the obstruction of the highway, which was proximate and not remote. *Metropolitan Board of Works* v. *McCarthy*, L.R. 7 H.L. 243; *Caledonian Railway Co.* v. *Walker's Trustees*, 7 App. Cas. 259; *Barry* v. *The Queen*, 2 Ex. C.R. 333, referred to.

Maclennan, K.C., for suppliant. *Halpin*, for respondent.

Burbidge, J.] HOGABOOM *v.* THE KING. [Jan. 27.

Insolvent bank—Winding-up Act—Sale of unrealized assets—Set-off—Funds in hands of Receiver-General—Estoppel.

Where moneys belonging to the suppliants had gone to form part of a fund paid into the hands of the Minister of Finance and Receiver-General, as unadministered assets in the case of the insolvency of a bank in proceedings under the Winding-Up Act (R.S.C. c. 129), and it was objected that the suppliants were not entitled to such moneys because of judicial decision to the contrary in other litigation in respect to the fund.

Held, that if it was clear that the matter had been really determined effect should be given to the estoppel, but that where to give effect to it would work injustice, he Court, before applying the rule, ought to be sure that an estoppel arises by reason of such decision. In this case there was no estoppel, a reference to the Registrar was directed to ascertain what proportion of the fund in the hands of the Minister properly belonged to the suppliants. The rule as to estoppel stated by KING, J., in *Farwell* v. *The Queen*, 22 S.C.R. 558, referred to. One of the equities or conditions attaching to the sale to H. was that a debtor had a right to set off against his debt the amount which he had at his credit in the bank at the date of its insolvency. It appeared that at the time of the bank's insolvency certain of its debtors had at their credit in the bank's books, sums which they would, on payment or settlement of their debts, have a right to apply in reduction thereof, and the suppliants claimed that they were entitled to be indemnified in respect of such reductions out of the fund in the hands of the Receiver-General.

Held, that the suppliants were not entitled to such indemnity.

Arnoldi, K.C., for Hogaboom estate. *F. E. Hodgins*, for the Crown. *Marsh*, K.C., for added parties.

Burbidge, J.] KEMP *v.* CROWN. [Jan. 31.

Patent of invention—Infringement—Lantern globe—Want of element of Inventiveness.

In an action for infringement of letters patent for improvements in anterns, one feature only of the lantern, the globe of which could be lifted vertically for the purpose of lighting the lamps, came in question; and as to that one issue was whether or not in the idea or conception, that if the bail of the lantern was made of the right length to drop under the guard or plate of the globe, the bail would hold up the globe while the lantern is being lit, or in the working out of that idea or conception there was invention to sustain a patent.

Held, that there was no invention to constitute a valid patent.

Masten and *Duclos*, for plaintiffs. *Raymond* and *Osler*, for defendants.

Province of Ontario.

COURT OF APPEAL.

Osler, J. A.] RE WATTS. [Feb. 17.

Bail for fugitive committed for extradition—Pending appeal—Power of a single judge—Close custody.

A fugitive having been committed for extradition applied to a judge under a habeas corpus for his discharge which was refused and he was remanded for extradition. Pending the habeas corpus proceedings he was admitted to bail by another judge upon the condition that if he was remanded for extradition he should surrender himself. He appealed against the order remanding him for extradition and applied for bail pending the appeal.

The judge of the Court of Appeal to whom the application was made, declined to make any order on the grounds (1) that it did not appear that the applicant was in actual custody, and (2) that it was doubtful if a single judge of the Court of Appeal had power to make the order as he did not regard a matter of bail as one incidental to the appeal, and so capable of being dealt with by a single judge under section 54 of the Judicature Act.

F. A. Anglin, for application. *Shepley*, K.C., contra.

Osler, J. A.] KIDD *v.* HARRIS. [Feb. 21.

Practice—Leave to appeal to Court of Appeal—Judgments on different branches of a case—Special circumstances.

In an action which at the trial resolved itself into two branches: (1) The status of some of the parties and (2) the testamentary capacity of the testator and the validity of the will propounded; the trial judge dealt with the validity of the will only and on an appeal, a Divisional Court dealt with the question of status only.

Held, upon an application for leave to appeal to the Court of Appeal that although the applicants had the judgment of two tribunals against them they had the opinion of one court only in respect of either branch of the case, and in view of the value of the estate and the important consequences to them sufficient special circumstances were shewn to entitle them to leave to appeal.

Mowat, K.C., *G. E. Kidd*, *A. Mills*, and *J. H. Spence*, for various parties.

HIGH COURT OF JUSTICE.

ARMSTRONG *v.* PROVIDENT SAVINGS CO.

Boyd, C., Ferguson, J.] [Nov. 16.

Insurance—Application for—Completed contract—Date of policy—Due date of premiums.

Armstrong applied in Toronto for a policy in the defendant company. His application was received in the defendant's head office in New York, Aug. 23, 1897, and initialled by certain officers of the company, indicating acceptance of the risk; but this was not communicated to Armstrong.

Held, that no contract with Armstrong was completed by such initialling.

The defendants prepared a policy in accordance with the application, dating it Aug. 23, 1897, the premiums being expressed to be payable Feb. 23, and Aug. 23, in each year, which policy reached the defendants' agent Aug. 28, 1897, who notified the plaintiff, the beneficiary named in the application and the policy, all being according to the ordinary course of defendants in like cases.

Held, that this sending of the policy was the first and only acceptance of the application constituting a contract between the parties, and could not be considered as a counter proposal.

Semble, also, the policy was properly dated Aug. 23, 1897.

Both the policy and the application contained a clause that the insurance should not be binding on the defendants, or the policy go into effect, until the first premium had been paid to the defendants. This was not done until Oct. 4, 1897, and the policy was not in fact delivered till then. The plaintiff acting for Armstrong paid this premium, and received a receipt dated Aug. 23, 1897, to which she made no objection, and which stated that the payment was up to Feb. 23, 1898. On Feb. 26, 1898, she paid the second premium, for which she received a similar receipt stating it was the premium due Feb. 23, 1898, which she also retained and kept without objection. On Oct. 17, 1898, the third premium was tendered and refused by the defendants, on the ground that it was too late, as it should have been paid on Aug. 23, 1898, or within the 30 days of grace. Armstrong died Oct. 20, 1898. The policy provided that failure to pay any premium as specified when due would terminate the policy.

Held, that the defendants were not liable under the policy, and the plaintiff's contention that the third premium did not fall due until Oct. 4, 1898, could not be sustained.

J. K. Kerr, K.C., for plaintiff. *Marsh*, K.C., for defendants.

Falconbridge, C.J., Street, J.] [Dec. 30, 1901.

HUNTER *v.* BOYD.

Tort—Survival of action—Power to appoint administrator ad litem.

Held that R.S.O. 1897, c. 129, s. 11, providing that in case any deceased person has committed a wrong to another in respect to his person or his real or personal property, the person so wronged may maintain an action against the administrators or executors of the person who committed the wrong, does not give authority to maintain an action against one who is an administrator ad litem merely, but only against an administrator in the ordinary sense of the term, that is, a general administrator clothed with full power to collect the assets, pay the debts and divide the estate.

Therefore, for this, apart from other reasons, the appointment of an administrator ad litem should be refused in this action which was brought against five persons for malicious prosecution, one of whom had died pending the action, and whose widow and children refused to administrate the estate, for which an administrator ad litem was now sought to be appointed.

McKay, for defendants. *Lindsey*, K.C., for plaintiff.

Meredith, J.] [Feb. 13.

TORONTO GENERAL TRUSTS CORPORATION *v.* NEWBORN.

Will—Construction — Dower — Election — Annuities—Pre-decease of first annuitant—Rights of subsequent annuitant—Intestacy—"Balance" of estate.

Summary application by the corporation, administrators with the will annexed of the estate of Richard Robinson Newborn, late of the township of Etobicoke, farmer, for an order declaring the true construction of the will, which was executed in 1892, and was in the testator's own handwriting, except some formal parts, which were printed in a common form, filled up by the testator, who died in 1900. In the will he gave annuities to his wife and only child, but the latter predeceased him. The testator was illiterate; the will was not separated into sentences nor punctuated. The material parts of the will were as follows:—"I give, devise and bequeath all my real and personal estate . . . in the manner following . . . I give to my wife $200 per year as long as she remains my widow and to my daughter the sum of $200 per year as long as she remains unmarried but in case she marries then she is only to receive $150 per year the fifty taken off to go to my wife per year. . . . And at her death the said $150 is to go to the Toronto Home for Incurables until the farm is sold my wife and daughter to have and to hold the house and lot with furniture and chattels while they remain unmarried at the death or marriage of either of them it is to go to the other. But after the death or marriage of both the house and lot is to be sold and the money is to go to the Sick

Children's Hospital in Toronto the above annuities are to be taken out of the farm rent . . . Any balance of money received from rent . . . is to go with the interest of what money is in the Permanent Building Society and interest annually divided equally between the Presbyterian Church at Mimico and the Toronto Home for Incurables until the farm is sold I here give the executors power to sell the farm in case of increased expenses or rise in property the amount to be invested in first mortgages the amount of interest required to be used in place of rent the balance of interest to go to the aforesaid two institutions until the death or marriage of my wife or daughter after the death of both $1,000 goes to Presbyterian Church at Mimico and $500 to the Protestant Orphans' Home the balance to be divided equally between the Home for Incurables of Toronto and the Sick Children's Hospital." The estate of the testator was substantially the same at the date of the will and at his death, and consisted of his farm, which was rented, a small house and lot where he lived, and $2,600, which was deposited with the Canada Permanent Loan and Savings Company at the time the will was made, and at the death with the Dominion Bank.

Held, that the widow was put to her election between the provisions of the will in her favour and her dower: see *Hill* v. *Hill*, 1 Dr. & War. 94; *Thompson* v. *Burris*, L.R. 16 Eq. 592: *Amsden* v. *Kyle*, 9 O.R. 439; *Leys* v. *Toronto General Trusts Co.*, 22 O.R. 603.

2. There was no authority for the contention that, because the first annuitant died in the testator's lifetime, those who were to take at her death took nothing. The annuity was payable to them from the testator's death, but only $150 a year: see *Hardwick* v. *Thurston*, 4 Russ. 383: *Edwards* v. *Salaway*, 4 DeG. & Sim. 248.

3. There was no intestacy as to the additional $50.

4. Upon the facts, as found by the judge, with regard to the money on deposit, there were no reasons impelling the conclusion that there was an intestacy as to the interest therein, in the face of the testator's declaration that he disposed of all his property.

5. There was no intestacy as to the corpus or any part of it. By the word "balance" the testator meant the rest or residue of the whole of his preperty.

6. There was no intestacy as to the furniture and chattels, after the expiration of the interest therein given to the widow; this property was included also in the "balance."

W. N. Ferguson, for the administrators. *W. M. Clarke*, K.C., for the Home for Incurables. *E. F. B. Johnston*, K.C., for the Hospital for Sick Children. *Huson Murray*, *J. D. Montgomery*, *S. H. Bradford*, and *E. W. J. Owens*, for various parties.

Street, J.] RE BRADBURN & TURNER. [Feb. 22.

Vendor and purchaser—Will—Debts charged on lands—Devise after payment—Executor's power to sell—Devise to widow in lieu of dower—Evidence of election.

A testator by his will directed his executors to pay his debts, and subject to the payment of debts devised a particular portion of his estate, and directed that the balance of that portion of his estate, after payment of the debts, should be divided amongst his four children in equal shares. Then follows a paragraph that the property willed should go to the parties direct.

Held, that a power of sale was given to the executors under the provisions of R.S.O. 1897, c. 129, s. 18, and that purchasers were by s. 19 released from the necessity of inquiring as to the due execution of the power.

The will also contained gifts to the widow, including an annuity to be accepted in lieu of dower, which was regularly paid to her, and which she apparently had elected to accept in lieu of dower.

Held, that the purchaser was entitled either to a release from her or to a declaration from her in form sufficient to estop her as against him from claiming dower.

Poussette, K.C., for vendors. *Peck*, for purchaser.

Trial—Ferguson, J.] HULL *v.* ALLEN. [Feb. 24.

Evidence—Parol evidence to establish trust.

Among other claims in this action, the plaintiff asked to have it declared that the purchase made by the defendant of a lot of land was made by him as trustee and agent for the plaintiff, and that the plaintiff was entitled to the profits and an account. There was no writing evidencing the alleged trust.

Held, that the plaintiff was at liberty to prove by parol evidence (if he could do so) the existence of the alleged trust. The authorities are conflicting. *Bartlett* v. *Pickersgill*, 1 Cox 15, 1 Eden 515, 4 East 577; *Heard* v. *Pilley*, L.R. 4 Ch. 548; *James* v. *Smith* (1891) 1 Ch. at p. 387, and *Rochefoucauld* v. *Boustead* (1897) 1 Ch. 196, discussed.

Held, however, that the evidence in this case failed to prove the trust.

W. Nesbitt, K.C., and *A. S. Ball*, for plaintiff. *Mabee*, K.C., for defendant.

Street, J.] IN RE GARDNER. [Feb. 25.

Will—Construction—Distribution of estate—"Heirs"—Next in heirship—Period of ascertainment.

Following a gift to the testator's widow of his real and personal estate for her life, there was this clause in a will: "My whole estate (after the

death of my wife) be equally divided between my brothers Luke Gardner, Joseph Gardner, Mrs. Catherine Walkins, and my deceased sister Mrs. Sarah A. Hutchinson's children, or their heirs. Should no heirs of any of the above be alive, that it go to the next in heirship."

Held, that the persons entitled in the first place were all the children of Luke, Joseph, Catherine and Sarah, living at the testator's death or born afterwards during the life of the widow, per capita, not per stripes. The words "children or their heirs" meant "children or their issue," and gave the share of a child dying in the lifetime of the widow to the issue of the child so dying, in substitution for, and not by descent from, the child so dying. The shares of the children entitled to share became vested at once: but if any child died in the lifetime of the widow leaving issue, the share of that child was divested and went to such issue, and vested at once and finally in the issue, who then became the stock of descent. The words "next in heirship" meant the heirs at law to the realty and the statutory next of kin to the personalty: *Keay* v. *Boulton*, 25 Ch. D. 213. The heirs or next of kin are to be ascertained at the death of the person whose vested share they take.

McKechnie, for executor. *Harcourt*, for infants. *Wright*, *J. H. Moss* and *Heggie*, for adults.

Street, J.] HUME *v.* HUME. [Feb. 25.

Pleading—Counterclaim—Claim on behalf of defendant and others—Release—Rules 203, 248.

The plaintiff, having under her deceased husband's will a charge on land devised by him to the defendant, brought this action to enforce a payment of arrears by a sale of the land, and for construction of the will. The defendant delivered a counterclaim alleging that he was one of the next of kin of the testator; that the testator by his will directed the plaintiff, who was executrix, and his executors, to manage a farm for the maintenance of the children until the youngest should reach the age of twenty-four; that the plaintiff received all the profits of the farm for many years, and kept them; that the defendant, as one of the next of kin, was entitled to a share; that the executors of the testator had never had control of the land; and that any remedy against them was barred by statute; and he asked for an account and payment into Court of the amount found due by the plaintiff, to be divided amongst the parties entitled. He further alleged that the plaintiff had executed a release of a part of the charge for which she claimed.

Held, that the counterclaim was in effect for a declaration that the plaintiff was a trustee for the defendant and the other next of kin, of certain profits of working the testator's farm alleged to have been received by her so many years ago that, if she were not a trustee, their rights would be barred. The counterclaim was an action brought on behalf of the

defendant and the other cestuis que trust, who would be necessary parties at the outset but for Rule 203, and who must be made parties in the Master's office; and not being for himself alone, but for himself and others, did not come within Rule 248. *Pender* v. *Taddei* (1898) 1 Q.B. 798, followed.

The effect of the release was not a matter to be raised by counterclaim but as a defence. Counterclaim struck out.

J. Bicknell, for defendant. *Patterson*, K.C., for plaintiff.

Trial—MacMahon, J.] [Feb. 25.

OTTAWA ELECTRIC CO. *v.* CONSUMERS ELECTRIC CO.

Municipal corporations—Agreements with electric light companies—Use of streets—Poles and wires—Rights of rival companies—Proximity of wires—Injunction.

The plaintiffs and defendants were respectively companies incorporated to produce and supply electricity for heat, light, and power, and each had authority from the corporation of the city of Ottawa to erect and maintain poles and wires along the sides of, across, and under the streets of the city for certain periods. The plaintiffs had obtained their rights before the defendants, and had erected their poles and wires before the defendants were incorporated. The agreement between the city corporation and the defendants provided that the latter should not, without the express permission of the corporation, erect additional poles on certain streets.

Held, that, as the plaintiffs and defendants were both electric light companies, and therefore on an equal footing in regard to the business they were respectively chartered to carry on, the fact that the plaintiffs were in prior occupation of the streets gave them no exclusive right or privilege to use such streets, or the particular sides of such streets, occupied by their poles and wires. But, being first in occupation, and using the streets under an authority conferred by the municipality, they were entitled to protection against a company subsequently using the streets under a like authority in such a manner as would be likely to injure the property of the plaintiffs or endanger their workmen or servants. *Bell Telephone Co.* v. *Belleville Electric Light Co.*, 12 O.R. 571; *Consolidated Electric Light Co.* v. *People's Electric Light and Gas Co.*, 94 Ala. 372; and *Rutland Electric Light Co.* v. *Marble City Electric Light Co.*, 65 Vt. 377, referred to.

The defendants were enjoined from maintaining or placing their wires within three feet of the plaintiffs' wires.

Semble, that the plaintiffs could not by extending cross-arms on their poles occupy space not required for the present or immediate future service.

Held, that danger apprehended by the plaintiffs from the use by the defendants of their wires in the condition in which they were strung, or

threatened to be strung, was ground for moving for an interim injunction. *Siddons* v. *Short*, 2 C.P.D. 572, and *Western Union Telegraph Co.* v. *Guernsey, etc., Electric Light Co.*, 46 Mo. App. 120, referred to.

G. F. Henderson, and *D. J. McDougal*, for plaintiffs. *W. Nesbitt*, K.C., and *Glyn Osler*, for defendants.

Falconbridge, C.J., Street, J., Britton, J.] [Feb. 26.

EVANS *v.* JAFFRAY.

Discovery—Affidavit of documents—Materiality—Examination of parties—Scope of—Con ts of documents—Costs of lengthy examination.

The plaintiff alleged a contract of partnership between him and the defendant J. for the promotion of a company to purchase certain bicycle plants, and to carry on a bicycle manufacturing business, etc., and that the defendants R. and C. had maliciously caused a breach of the partnership contract; and the plaintiff claimed a partnership account, and damages for such breach and for conspiracy. It appeared from examination for discovery of the defendant R. that he obtained written agreements from various companies, either in his own name, or in the names of himself and the defendant C., or in the names of other persons; that these agreements, or some of them, were afterwards assigned to a company which was then incorporated (not a party to the action). The plaintiff alleged that these agreements were, in fraud of his rights, substituted, with variations, for certain agreements previously entered into between the same companies and the defendant J., who was alleged to be the plaintiff's partner in the transactions. The plaintiff also alleged that the defendants R. and C. paid $20,000 to the defendant J. to induce him to act with them, instead of with the plaintiff, in completing the purchase of the agreements; and it appeared from R.'s examination that he and C. drew a cheque upon their bank account in favour of the defendant J., which was paid.

Held, the agreements and the cheque and also a certain memorandum prepared by the defendant, were material to the plaintiff's case, and should be produced or accounted for in the defendants' affidavits on production of documents.

2. The defendants R. and C. ought not, as a matter of discretion, to be ordered to disclose, upon their examination for discovery, facts which would become material only when the plaintiff should have established his right to recover damages.

3. The plaintiff was entitled to discovery from the defendants R. and C. as to whether they paid money to J., whether it was their own money or that of other persons, and if the latter, of what persons, and for what it was paid.

4. The plaintiff was entitled also to discovery as to the amount paid by R. and C. to the M. Co. for the bicycle branch of their business; it being

alleged by the plaintiff that he and J. had obtained an option to purchase it, and that the defendants had substituted a new option therefor.

5. The plaintiff was entitled to know from C. the nature of the agreements made for the purchase of the properties; if they were in writing, and he had access to them in his capacity of director of the company which was formed, he should inform himself of their contents so as to be able to answer as to them, or should produce copies; but, if he had no right of access, he was not bound to state his mere recollection of them. *Stuart* v. *Bute*, 11 Sim. 452, 12 Sim. 461; *Taylor* v. *Bundell*, 11 Sim. 391, 1 Cr. and Ph. 104, and *Dalrymple* v. *Leslie*, 8 Q.B.D. 5, followed.

Semble, that where an examination is unnecessarily long, the costs of it should be entirely disallowed.

Decision of MEREDITH, C.J., ante p. 161, varied.

F. A. Anglin, for plaintiff. *Johnston*, K.C., and *C. W. Kerr*, for defendants Cox and Ryckman.

Street, J., Britton, J.] REX *v.* MEEHAN. [Feb. 17.

Practice—Appealable—Orders—Judge in single court.

Orders absolute under s. 6 of c. 88 R.S.O. 1897, are not final, but are appealable, and as a result should be heard before a single judge sitting as the High Court, and not before a Divisional Court.

Hellmuth, for the motion. *Du Vernet*, contra. *Cartwright*, K.C., Deputy Attorney-General, for Crown.

Falconbridge, C.J.] PADGET *v.* PADGET. [Feb. 27.

Practice—Appearance—Limitation of—Submission to judgment—Irregularity.

Motion by the plaintiff to set aside, as irregular, an appearance entered by the defendant, or for leave to sign judgment for the declaration asked for in the endorsement on the writ of summons, with costs, and to proceed with the plaintiff's claim for damages, as endorsed on the writ, or to discontinue the action as to the claim for damages, without costs. The endorsement on the writ was for a declaration that certain lands (described), being the lands intended to be devised to the plaintiff by the will of John Padgett, but erroneously described therein, were absolutely free and discharged from the conditions and obligations to which they are subjected by the will in favour of the defendant, and absolutely freed and discharged from all bequests, legacies, and other payments charged thereon by the will in favour of the defendant; and for damages against the defendant for wrongful refusal to execute a quit-claim deed of the lands when tendered to him for execution. The appearance entered by the defendant was limited to that part of the plaintiff's claim which asked for damages against

the defendant and for costs. The appearance also stated as follows: "Without admitting that the plaintiff is entitled to the declarations asked for in the writ of summons herein, the defendant will make no objection to the making of the declarations asked for, and the defendant it also willing to execute a quit claim deed in favour of the plaintiff of the lands devised to the plaintiff by the last will.

W. A. D. Lees, for plaintiff. *MacCracken*, for defendant.

FALCONBRIDGE, C.J.:—There is no authority whatever in the rules or in the practice for an appearance limited as is this one, in an action of the character disclosed in the endorsement of the writ of summons. The appearance will, therefore, be set aside and judgment entered for the plaintiff (except as to the claim for damages) with costs. The defendant may have leave to file a proper appearance on payment of costs of this motion. But the motion was really argued before me as a motion for judgment, and the merits were gone into, and if the defendant so elect within one week, my order will be that, on execution of the quit-claim and on payment of costs (which I fix at $10), this action shall be discontinued.

ROSE *v.* CRODEN.

Falconbridge, C.J., Street, J., Britton, J.] [March 4.

Pleading—Statement of claim—Amendment—Writ of summons—Two causes of action—Election to pursue one—Penalty—Discovery—Dominion Elections Act, 1900.

The writ of summons (issued Jan. 30, 1901) was endorsed with a claim to recover penalties under the Dominion Elections Act, 1900, and for damages for wrongfully depriving the plaintiff of his vote at an election held on the 7th November, 1900. The statement of claim (delivered on 14th March, 1901) did not assert any claim to penalties, but was confined to the common law cause of action. The statement of defence (delivered March 27, 1901) denied the allegations of the statement of claim and alleged want of notice of action. The plaintiff obtained the usual discovery from the defendant, without objection. On the 31st December, 1901, after such discovery, and when the action was ready for trial, the plaintiff applied for leave to amend the statement of claim by adding a claim for the penalties mentioned in the endorsement of the writ.

Held, that the defendant in an action for penalties might have successfully resisted an attempt to compel him to submit to an examination for discovery. *Regina* v. *Fox*, 18 P.R. 343, distinguished.

The plaintiff having by proceeding at common law obtained from the defendant the discovery which he could not have had in an action for penalties, and having allowed more than a year to elapse before applying for leave to amend, must, notwithstanding the endorsement of the writ, be

taken to have conclusively elected to pursue his common law remedy; and leave to amend was properly refused. Secs. 19, 131, 133, 142, of Dominion Elections Act, 1900, discussed.

Rowell, for plaintiff. *Gibbons*, K.C., for defendant.

Street, J.] CLERGUE *v.* MCKAY. [March 7.

Discovery—Production of documents—Affidavit—Privilege—Confidential communications—Solicitor and client.

There has been a progressive development of the particularity required in the description of correspondence between a solicitor and his client in order that it may be protected from discovery by reason of privilege. As the affidavit on production cannot be contradicted, the grounds upon which the privilege is claimed must be set forth explicitly and fully, so that the Court may judge as to whether the documents so described are properly withheld from production.

The affidavit must not only state that the correspondence is confidential and of a professional character, but the nature of it must be set forth, without any ambiguity whatever, in order that there may be no doubt as to its being privileged.

Where the solicitors were acting as agents for the sale of the defendant's land in question in this action, shortly before the first of the letters for which the defendant claimed privilege was written:—

Held, that the defendant, in order to protect the correspondence, should give some more definite description of it than it was written, "In reference to the matters which are now in question in this action."

Gardner v. *Irvin*, 4 Ex. D. 49; *O'Shea* v. *Wood* (1891) P. 286; and *Ainsworth* v. *Wilding* (1900) 2 Ch. 315, followed. *Hoffman* v. *Crerar*, 17 P.R. 405, commented on.

Aylesworth, K.C., and *R. U. McPherson*, for plaintiff. *W. M. Douglas*, K.C., for defendant Preston.

Street, J.] MORRISON *v.* GRAND TRUNK R.W. Co. [March 8.

Discovery—Examination of officer of railway company—Engine-driver—Rules 439, 461 (2).

The driver of the engine attached to a train of which the plaintiff's husband was the conductor in charge at the time of an accident which caused his death, is not an officer of the railway company examinable for discovery under Rule 439, in an action against the company for negligence.

As, by Rule 461 (2), the depositions on discovery of an officer of a corporation may be used in evidence against the corporation, the meaning of Rule 439 should not be extended so as to include any class of employers without the Court being satisfied that they properly come within it.

Knight v. *Grand Trunk R.W. Co.*, 13 P.R. 386, followed. *Leitch* v. *Grand Trunk R.W. Co.*, 12 P.R. 541, 671, 13 P.R. 369; *Dawson* v. *London Street R.W. Co.*, 18 P.R. 223; and *Casselman* v. *Ottawa, Arnprior, and Parry Sound R.W. Co.*, ib. 261, distinguished.

J. G. O'Donoghue, for plaintiff. *D. L. McCarthy*, for defendants.

Street, J.] [March 10.

CITY OF TORONTO *v.* BELL TELEPHONE COMPANY OF CANADA.

Constitutional law—Incorporation of companies—Dominion objects—Interference with property and civic rights in Province—Telephone company—Right to carry poles and wires along and across streets—Consent of municipalities—Dominion and Provincial Acts—Construction—Inconsistent provisions.

Under the British North America Act, the power of the Canadian Parliament extends to the granting of charters of incorporation to companies, with Canadian, as distinguished from Provincial, objects, and to declaring the objects of their incorporation; but, except in the case of companies incorporated for carrying into effect some of the heads mentioned in s. 91, the mere fact of a Canadian incorporation does not carry with it the right of interfering with property and civil rights in the different Provinces, in any way, no matter how strongly the objects of incorporation may seem to require such interference; and in order that such companies may entitle themselves to do so, it is necessary that they obtain the authority of Provincial Legislation.

While the defendants were duly and properly incorporated under their special Act, 43 Vict., c. 67 (D.), they did not by that Act obtain the power of interfering in any Province with the property or rights of persons or corporations, and could not do so until authorized by an Act of the Provincial Legislature.

The defendants, being desirous of exercising their powers within the Province of Ontario, petitioned the Legislature of that Province to confirm the powers which their Dominion Act of incorporation purported to confer upon them, and especially the power of carrying their poles and wires along, across, and under the streets and highways in the Province, and thereupon the Act 45 Vict., c. 71 (O.), was passed, authorizing them to exercise within the Province the powers in the Act mentioned. Two months later, upon the defendants' petition, the Act 45 Vict., c. 95 (D.), was passed, amending their Act of incorporation in certain particulars, and declaring that the Act of incorporation as amended and the works there under authorized were for the general advantage of Canada.

Held, that from this time forward the defendants were subject to the exclusive jurisdiction of the Dominion Parliament, but the Provincial Act was not thereby repealed, as the Dominion Act had not expressly declared that the provisions of the Ontario Act were no longer binding; and the

defendants were still entitled to all the rights and subject to all the restrictions contained in the Ontario Act not abrogated by absolutely inconsistent provisions in the Act of incorporation.

By the defendants' Dominion Act they were given a general power to erect and maintain their lines upon, under, and across all streets and highways, qualified by the condition that the location of the lines and the opening up of the streets was to be done under the direction of an officer appointed by the municipal council, and in such manner as the council might direct, and that in certain specified cases the consent of the council must first be obtained. By the Provincial Act similar powers were given, but one important qualification was, "that in cities, towns, and incorporated villages, the company shall not erect any pole higher than 40 feet above the surface of the street, nor affix any wire less than 22 feet above the surface of the street, nor carry any such poles or wires along any street, without the consent of the municipal council."

Held, that the effect of this latter provision was to forbid the defendants carrying any poles or wires at all along any street without the consent of the council, not merely poles or wires of the height described in the previous part of the same sentence.

The Ontario Act, in so far as it was not consistent with the Dominion Act, must not be taken to be repealed by the latter; the Ontario Act should be treated as conferring special rights upon the defendants in regard to their works in that Province, and at the same time subjecting them to the necessity of obtaining the consent of the local municipalities to the use of the streets, while leaving to their Act of incorporation its full operation in other Provinces.

Therefore, the defendants had no right to carry any poles or wires (either above or under ground) along any street in the city of Toronto, without first obtaining the consent of the municipal council; but, inasmuch as the Ontario Act does not make their power to carry wires across streets dependent upon the consent of the council, they may carry them across the streets, either above or under ground, subject in the latter case to the direction of the council and its engineer or other officer as to the location of the line and the manner in which the work is to be done, unless such direction shall not be given within one week after notice in writing, and subject to the other provisions of the Act of incorporation.

C. Robinson, K.C., and *Fullerton*, K.C., for plaintiffs. *W. Cassels*, K.C., *G. Lynch-Staunton*, K.C., and *S. G. Wood*, for defendants.

Divisional Court.] [March 12.

DOOLITTLE *v.* ELECTRICAL MAINTENANCE CO.

Division Court — Territorial jurisdiction — Cause of action — Flooding land — Erection of dam — Prohibition.

In a Division Court action the plaintiff's claim was for damages for njuries caused to his lands, which were situate within the limits of the

division in the court of which his action was entered, by reason of their having been overflowed and his crops damaged by waters alleged to have been unlawfully brought by the defendants to and cast upon his lands. The backing of the water was alleged to have been caused by a dam which the defendants had erected on their own lands, situate beyond the limits of such court.

Held, that the erection of the dam was part of the cause of action, and therefore the whole cause of action did not arise within the jurisdiction of the Division Court in which the action was brought, and prohibition was ordered.

F. A. Anglin, and *R. D. Gunn*, for the defendants. *F. G. Evans*, for the plaintiff.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] RE ESTATE OF R. W. HILL. [Dec. 28, 1901.

Will—Proof in solemn form—Parties—Setting aside will after lapse of twenty-four years—Evidence.

On the 9th October, 1877, the last will and testament of H. was proved in common form before the Registrar of Probate on the oath of K., one of the subscribing witnesses, who swore that he and M.H., the other witness, signed in the presence of testator and in the presence of each other. The will was acted upon and remained unquestioned for a period of twenty-four years when, after the death of the witness on whose oath it was proved, it was set aside by the judge of probate on the testimony of the remaining witness, M.H., and his brother, that M.H. did not sign his name to the will as witness until after the testator's death.

Held, 1, reversing the decision of judge of probate with costs of the appeal and costs below, to be paid by the petitioner, that, after the long lapse of time, it was impossible to accept the evidence of M.H. and his brother — both being interested parties—as establishing the invalidity of the will as against the oath of the deceased witness upon whose testimony it was proved.

2. While some weight should be attached to the finding of the judge of probate, it was impossible for the Court of Appeal to feel bound by such finding when it appeared that he came to the conclusion he did simply on the evidence of the two interested parties and without considering other facts bearing on the case.

The devisee of a portion of the property under the will conveyed his title to a third party, and by several intermediate conveyances it came to M. et al, who opposed the decision of the judge of probate setting it aside.

Held, that M. et al, as "parties interested," were competent parties and clearly entitled to be heard even though "parties interested" were not specifically mentioned among those to be cited.

Held, that the naming specifically of heirs, devisees, legatees, and next of kin, was merely a matter of direction leaving it open to those having an interest to intervene for the purpose of protecting their rights.

McInnes, for appellant. *Fullerton*, for respondent.

Full Court.] HART *v.* CITY OF HALIFAX. [Jan. 14.

Municipal corporation—Issue of debentures by—Condition precedent—Duty of purchaser to make enquiry—Word "provided."

Under the provisions of the N.S. Acts of 1898, c. 65, s. 13, the city of Halifax was authorized to borrow certain sums of money, including the sum of $6,500 "for the extension north of the esplanade, provided the owners of the property north of the contemplated extension give and convey to the city the necessary land required for such extension." The work in question was required for the abatement of a nuisance of which the property owners in the vicinity had been complaining for some time, and it being understood that the property owners would convey to the city the land required for the purpose, the city treasurer recommended to the council that all sums required during the year 1898-99, including that required for the carrying on of the work at the esplanade, be borrowed at the same time, as by doing so the expense would be lessened and a better price obtained for the debentures. This recommendation being approved of by the Committee on Public Accounts, was adopted by the city council and the amount in question was included with other amounts to be borrowed and debentures issued for the whole. Plaintiff, a ratepayer whose rates were increased by the amount of eighty-four cents annually for interest on the loan, applied to a judge at Chambers for a writ of certiorari to remove into the Supreme Court the record of proceedings of the Committee on Public Accounts, the Tenders Committee and of the City council relative to the borrowing of the amount represented by the loan as part of the consolidated fund of the city, and the estimates of income and expenditure of the city for the year 1902, the principal ground of application being that the rate which was made upon the basis of said estimates included interest on the said sum of $6,500.

The judge at Chambers dismissed the application on the ground that, although the obtaining of the land under the Act was a condition precedent to the borrowing of the money, the holders could enforce against the city payment of the debentures and of the annual interest.

Held, 1, allowing plaintiff's appeal with costs, that with respect to the issue of bonds for the amount in question there was not merely a defective execution of a power, but a total want of it.

2. The word "provided" in the Act was intended to create a condition precedent to the exercise of the borrowing power.

3. The purchaser of the debentures was bound to examine the statute under the authority of which they were issued, and had he done so would have been made aware of the fact that the terms of the statute had not been satisfied, there being nothing on the face of the debentures, or in any of the proceedings of the council so far as disclosed, to convey any intimation that the condition subject to which the power was to be exercised had been performed.

4. The word "provided" as used in the Act was an apt word to create a condition, being synonymous with "if," "when," and "as soon as."

A. McKay and *Allison*, for appellant. *MacCoy*, K.C., for respondent.

Full Court.] ARCHIBALD *v.* LAWLOR. [Jan. 14.

Statute of Limitations—Twenty years' possession held insufficient as against mortgagee—Foreclosure—Effect of as against third party in possession.

In an action claiming possession of land plaintiff's title was derived under a sheriff's deed made under direction of the Court in foreclosure proceedings, and dated July 23rd, 1896. Defendant relied upon the Statute of Limitations, and gave evidence of more than twenty years' possession of the land in dispute without payment of rent or acknowledgment of title. It appeared that defendant went into possession at a date subsequent to the date of the mortgage under which plaintiff claimed.

Held, dismissing defendant's appeal with costs, and affirming the judgment of the trial judge, that defendant could not acquire title by possession against the mortgagee so long as the mortgage was kept alive.

It is enacted by the Statute of Limitation, R.S.N.S. (1900), c. 167, s. 23, that "any person entitled to or claiming under a mortgage of land may make an entry or bring an action to recover such land at any time within twenty years next after the last payment of the principal money, or interest secured by such mortgage, although more than twenty years have elapsed since the time at which the right to make such entry or bring such action first accrued."

Held, that the granting of a decree of foreclosure was an adjudication that, at that date, the mortgage was in force, and that, therefore, plaintiff's title came under the provisions of the section quoted.

Held, also, that a third party could not by a possession of twenty years acquire title, notwithstanding the provisions of the statute, and that plaintiff's title could not be defeated by defendant's possession, even though it were shewn to be of a more definite kind than was disclosed by the evidence. Weatherbe, J., dissented.

D. McNeil, for appellant. *H. McInnes*, for respondent.

Townshend, J.] GETCHELL *v.* STUYVESANT. [Feb. 24.

Absent or absconding debtor—Attachment set aside with costs—Appearance not required as preliminary to motion—Evidence—Distinction between foreigner and resident.

On application to set aside an attachment against defendant as an absent or absconding debtor, preliminary objection was taken that defendant could not be heard until after appearance entered.

Held, that effect could not be given to this contention; that if the proceedings against defendant were not properly taken and there had been no proper service of the writ of summons, there was no necessity for appearing.

From the affidavits it appeared that defendant came to Musquodboait, in the county of Halifax, in May, 1901, for the purpose of operating a cyanide plant, of which he was owner at a gold mine in the vicinity. He carried on work until November or December, 1901, when he determined to remove his plant to another mine, and made a contract with the company owning the mine for that purpose. Prior to removing he announced his intention of proceeding to New York for a short visit. During his absence the plant and materials, which were of considerable value, together with horses, carriages, and other personal property, were left in the care of defendant's servants and workmen. Defendant made no secret of his intention to go to New York, gave his address while there, and made no attempt to dispose of his property. Almost immediately after defendant's departure plaintiff caused the attachment to be issued.

Held, that there was no evidence to justify defendant being treated as an absent or absconding debtor, and that the attachment must be set aside with costs.

It was contended that as defendant was a foreigner having his domicile in the United States his conduct was to be regarded in a different light from what it would be if he were a resident of the province.

Held, there was no distinction in this respect. The circumstance was one which demanded attention in considering the facts, and mere conclusive evidence might be looked for in the case of a non-resident, but that defendant here had satisfied all the requirements.

W. B. A. Ritchie, K.C., for plaintiff. *H. A. Lovett*, for defendant.

Townshend, J.] RE MORAN ESTATE. [Feb. 27.

Trustee—Right to commissions and interest.

J. C. was appointed a trustee of the estate of P. Moran by order of Court, date May 9, 1887, and by the terms of the order appointing him was to receive "a commission of five per cent. upon all the interest and income which shall be received and paid over, etc." The income, which consisted

of rents, etc., was not collected personally by the trustee, but by agents employed for that purpose who paid over the collections directly to the parties interested and received a commission of five per cent. therefor.

Held, 1. The trustee had the right to employ agents for the purpose of making such collections and would have been liable to the cestuis que trustent for the acts of the agents and obliged to make good any loss, but could not be required to pay the agents out of his own pocket.

2. The trustee was entitled to claim commission on the gross amount of income collected and not merely upon such moneys as technically came into his own hands.

3. The trustee was not entitled to interest on commissions which he should have deducted from time to time as collected.

R. E. Harris, K.C., for cestuis que trustent. *H. Mellish*, for trustee.

Province of New Brunswick.

EXCHEQUER COURT.

ADMIRALTY DIVISION, DISTRICT OF NEW BRUNSWICK.

McLeod, L.J.] THE PAWNEE. [Jan. 6.

Collision—Fog—Sailing rules—Art. 16.

The defendant steamer, bound for St. John, while steering in a dense fog a N.W. by N. course, heard three blasts of a fog horn from the plaintiff's vessel a little before the beam on the port side. The steamer was then going at a speed of from 4 to 6 knots an hour, and kept on her course. Plaintiff's vessel continued sounding her horn at regular intervals, and was proceeding on a northerly course before a light wind, barely sufficient to enable her to keep steerage way. About ten minutes after the horn was heard by the steamer she struck the vessel on the starboard side and sunk her.

Held, that the steamer was solely to blame as she had infringed art. 16 of the regulations by not stopping after the horn was heard.

McLean, K.C., for plaintiffs. *C. J. Coster*, for steamer.

Province of Manitoba.

KING'S BENCH.

Full Court.] McCOWAN *v.* MACKEY. [Dec. 21, 1901.

Contract—Refusal to perform—Rescission—Remedies.

Action for recovery of damages for breach by defendant of his contract to purchase 100 tons of hay from the plaintiff. After delivery of two car-loads of the hay, defendant claimed that the hay in one of the car-loads was not of the quality required by the contract, and wrote to plaintiff that he would take no more hay from him unless he make the first car right, by which he meant that plaintiff should accept less than the price agreed on for it. The trial judge found as a fact that the hay objected to was part of the hay defendant had examined and agreed to purchase, and that he was bound to take it and pay the price agreed on for it.

Held, that defendant's refusal to complete the contract was of such a nature that plaintiff could elect to sue at once for damages for such refusal, and was not bound to wait for any further repudiation by defendant, or to hold himself in readiness to deliver any more hay: *Freeth* v. *Burr*, L.R. 9 C.P. 208; *Withers* v. *Reynolds*, 5 B. & Ad. 882; *Mersey Steel and Iron Co.* v. *Naylor*, 9 A.C. 434, followed.

When the plaintiff received the defendant's letter above referred to he had a third car-load of the hay ready for shipment to defendant at Keewatin, and at once sent it to Winnipeg where he sold it at a price less than the contract price; and, although he had more than enough hay on hand to fill the contract, he did not deliver any more of it to defendant, but placed the matter in the hands of his solicitors and shortly afterwards sold most of the hay that the defendant had in the first instance agreed to take. The solicitors first took proceedings in an Ontario court to recover the price of the hay defendant had received, and, after the settlement of that claim, they wrote defendant that plaintiff had instructed them to write to him to know if he would accept delivery of the balance of the hay ordered, viz., 79½ tons, and saying that their instructions were to issue a statement of claim by the end of the week if the defendant should refuse acceptance. Two weeks afterwards the statement of claim in this action was issued. On the above facts it was contended by counsel for defendant that even if defendant had refused to perform the contract, the plaintiff had not acted upon that refusal in such a way as to entitle him to take advantage of it, but had afterwards urged on the defendant compliance with the contract as if it were still existing, and that the facts brought the case within the principle laid down by Lord Esher, M.R.

in *Johnston* v. *Milling*, 16 Q.B.D. 460, and by Field, J., in *Societe Generale de Paris* v. *Mildirs*, 49 L.T.N.S. 55, and by Cockburn, C.J., in *Frost* v. *Knight*, L.R. 7 Ex. 111, and shewed that the plaintiff was continuing to recognize the contract as still in existence.

Held, that the plaintiff's action before placing the matter in his solicitor's hands shewed decisively that he had adopted the defendant's repudiation, and that the expressions used by the solicitors in their letter were not sufficient to nullify the effect of that decision. When the letter was written it was quite impossible for the plaintiff to have carried out the original contract as he had parted with most of the hay the defendant had agreed to buy, and it could hardly be supposed that he could have instructed his solicitors to write a letter that would commit him to perform his part of the original contract. Written, as the letter evidently was, without a full apprehension of the matter, it was not necessary to hold that it overrode the election the plaintiff had previously made to treat the contract as rescinded.

Verdict for plaintiff affirmed and appeal dismissed with costs.

Phippen and *Hartley*, for plaintiff. *Aikins*, K.C., and *Robson*, for defendant.

Killam, C.J.] WHITLA *v.* ROYAL INSURANCE CO. [Jan. 10.

Fire insurance—Interim receipt—Nature of contract entered into by—Conditions—Authority of sub-agent to bind company by interim receipt—Payment of premiums in cash—Condition as to other insurance being cancelled.

Action by plaintiff as assignee of one Bourque to recover on a contract of insurance alleged to have been created by an interim receipt. Bourque, who then held a policy of insurance in the Manitoba Assurance Co. for $2,000 on his stock-in-trade, wrote to Dumouchel, a sub-agent of the defendants, informing him that he had a stock of over $5,000 which was insured for $2,000 in the Manitoba Co., that people had told him it was a weak company, and that he was going to abandon that insurance, and that he wished to insure for about $3,000. Dumouchel replied that he would be glad to have his insurance, and requesting him to send $75 for the premium. Bourque then wrote that he could not pay the amount at once, but would do so later, in reply to which Dumouchel sent him a promissory note payable to his own order for $51, and asked him to sign the note and return it with a cheque for $25. This was done, and Dumouchel sent Bourque the usual interim receipt, promising the subsequent issue of a policy which was to be subject to the conditions indorsed on the interim receipt. These were the usual statutory conditions, without alteration or addition, one of which provided that the policy should be void if there was any prior insurance on the property unless the consent of

the company was endorsed thereon. Dumouchel discounted the note and accounted to the company in due course for the full amount of the premium. The fire took place before the due date of the note, which was paid by Bourque at its maturity. There was no formal application for the insurance signed by Bourque or by anyone by his authority, although Dumouchel sent the company an application form filled up, but not signed, upon which a policy was made out and sent to Dumouchel before the fire. This policy was never delivered. The question in the application form as to other insurance was answered "No" by Dumouchel.

Held, 1. Dumouchel's authority to bind the company by the issue of the interim receipt was limited to cases in which the premium was paid in cash. *London & Lancashire Life Ass. Co.* v. *Fleming* (1897), A.C. 499, and *Canadian Fire Ins. Co.* v. *Robinson*, in the Supreme Court of Canada (not yet reported), but quære whether defendants should be permitted to avail themselves of this defence in view of the circumstances.

2. The right of action against an insurance company upon an interim receipt still depends, as it did before the fusion of law and equity, upon the right to a specific performance of the agreement which it involves to issue a policy or other contract in binding form, such receipt being only an executory contract and not one which would have been enforceable at law under the former practice.

3. In view of the statements in Bourque's letters to Dumouchel, which constituted the only application there was for the insurance, the case should be treated upon the basis that, either there was not to be a contract concluded until the prior insurance had been abandoned, or it was a condition of the executory contract that it should be abandoned, and that as it had not been abandoned, the company could not be bound to issue a policy except one with their usual conditions, making it void if there was a prior insurance without their consent, and, therefore, that the plaintiff was not entitled to recover upon the interim receipt. If it should be considered that a contract had been entered into between Bourque and the company through their agent, it should also be inferred that a part of the contract was a promise by Bourque to abandon the prior insurance within a reasonable time; and, upon the ordinary rules for the construction of contracts, the performance of such promise was a condition of the executory contract, and, without having abandoned the prior insurance, Bourque would not be entitled in a court of equity to specific performance of that contract.

On the ground that there was no intended contract for additional insurance contemporaneous with the prior existing insurance, which had not been abandoned, the action was dismissed with costs.

Haggart, K.C., and *Macdonald*, K.C., for plaintiffs. *Munson* and *Hudson*, for defendants.

Bain, J.] NATIONAL TRUST CO. *v.* HUGHES. [Jan. 29.

Life insurance—Revocation by assured of trust in favour of beneficiary—Revocation by will—"Instrument in writing" includes a will.

The plaintiffs were the executors and trustees under the will of R. R. Hughes, and brought this action to obtain a decision as to the effect of a clause in his will directing that the money payable under a policy of insurance on his life in the London Life Insurance Company of Canada should become part of his estate, and be paid to his executors, and absolutely revoking the appropriation of same in favour of his wife, which was expressed on the face of the policy. Hughes and his wife were residents of Manitoba, and the policy had been procured through an agent also resident in Manitoba; but the company's head office was in Ontario, where the policy was issued, and where the insurance money was made payable.

By the Life Assurance Act, R.S.M., c. 88, s. 12, as re-enacted by 62 & 63 Vict., c. 17, it is provided that, in the case of a policy of insurance effected by a man or woman, on its face expressed to be for the benefit of his wife or her husband, the insured may, by an instrument in writing attached to, or indorsed on, or identifying the policy by its number or otherwise, absolutely revoke the benefit previously made, and divert the insurance money wholly or in part to himself or his estate.

The corresponding statutory provision in Ontario (R.S.O. c. 203, s. 160), while it permits a person who has effected an insurance on his life for the benefit of his wife, to alter or vary the benefit of the policy as between his wife and children, prohibits him from absolutely revoking his wife's benefit in it and diverting the insurance money to himself or his estate. The decision of the question before the Court, therefore, depended upon whether the right of revocation was governed by the law of Ontario or by that of Manitoba.

Held, that although the contract of insurance itself must be interpreted and carried out according to the Ontario law, yet the law of Manitoba should be applied as regards the collateral right of the assured to make any assignment, revocation, or other appropriation of the insurance moneys payable under it. *Toronto General Trusts Co.* v. *Sewell*, 17 Q.R. 442, and *Lee* v. *Abdy*, 17 Q.B.D. 309, followed.

The question was one not of the construction of the policy or contract, but of the capacity of the insured to make a disposition of the benefit of the policy; and, as he was living in Manitoba when he effected the insurance through an agent of the company there, it was reasonable to presume that it would be in the contemplation of all the parties that he could deal with the benefit that he had given his wife in the policy in such manner as the laws of Manitoba empowered him.

The right to invoke the wife's benefit in the insurance money might also be considered to come under the general description of personal or movable property; and, if it does, then the general principle would apply

that a transfer or disposition of personal property, good by the law, of the owner's domicile, is valid wherever the property may be.

Held, also, that a will is an instrument in writing within the meaning of the Manitoba statute above quoted.

Judgment declaring that the insurance moneys form part of the testator's estate in the hands of the executors, subject to a charge in favour of the widow for insurance premiums paid by her to keep the policy in force. Costs of all parties to be paid out of the estate.

E. E. Sharpe, *Perdue*, *Tupper*, K.C., and *Hudson*, for various parties.

Full Court.] REGINA *v.* JOHNSON. [Feb 15.

Criminal law—Crim. Code, sec. 205—Winning prize dependent partly on skill—Device to evade law against lotteries.

Crown case reserved. The accused was convicted in November, 1900, before RICHARDS, J., and a jury, under Crim. Code, s. 205, for having advertised a proposal or scheme for disposing of a horse, buggy and harness by lot, and also for having unlawfully disposed of a number of tickets, lots or cards as a means of or device for disposing of the same property by lot. The modus operandi advertised and practised was that each purchaser of goods to the value of $5 was given a ticket; and, upon a drawing by lot among the holders of such tickets, the winner was to get the horse, buggy and harness if he could shoot a turkey at a distance of fifty yards in fine shot, it being provided that a lady winner could choose a substitute to shoot for her. The case stated that the evidence shewed that any person could easily shoot a turkey under the circumstances.

Held, that it was a question for the jury whether the interposition of the condition as to the shooting was intended as requiring a real contest of skill, or merely as a device for covering up a scheme for disposing of the property by lot; that the verdict involved a finding that it was merely a device, that the evidence justified that finding, and that the conviction should be affirmed.

Patterson, for the Crown.

Province of British Columbia.

SUPREME COURT.

Full Court.] WARMINGTON *v.* PALMER. [Nov. 16. 1901.

Negligence—Contributory—Defective machinery—Excessive damages—New trial—Full Court—Practice—Argument—Appeal—Particulars.

In an action by a miner against the mine owners for damages for injuries caused him by being precipitated to the bottom of a shaft when at

work in the mine, the jury found inter alia that the system adopted for lowering the men was faulty and that the plaintiff did not comply with the printed rules of the mine. They assessed the damages at $4,000.

It was held by IRVING, J., that the plaintiff was entitled to judgment, although adherence by him to the printed rules would have prevented the accident.

Held, on appeal (MARTIN, J., dissenting), that there should be a new trial on the grounds that the damages were excessive, the plaintiff by his recklessness having contributed to the accident, and there being no evidence to support the finding that the plant was defective.

Points not argued, although included in the notice of appeal, will be considered as abandoned.

Grounds of appeal should be so particularized that the opposite party will know beforehand what he has to meet, and when "misdirection" is alleged particulars should be stated.

Wilson, K.C., and *L. G. McPhillips*, K.C., for appellants. *Davis*, K.C., and *C. B. Macneill*, for respondent.

Irving, J. NICHOL *v.* POOLEY. [Feb. 11.

Costs—Criminal libel—Taxation or action for—Stay—Crim. Code, ss. 833-5.

N., after his acquittal (at the third trial) in a criminal libel action brought against him at the instance of Messrs. Pooley and Turner, proceeded to tax his costs as provided by the Cr. Code, and moved before DRAKE, J., the trial judge, for the costs of some commission evidence used at the first trial. DRAKE, J., dismissed the motion (see *Rex* v. *Nichol*, ante p. 95), and ordered besides that the prosecutors were not liable for the costs of the two abortive trials. As there was no appeal from that order, N. abandoned the taxation and commenced this action for his costs. Defendants applied for a stay of proceedings.

Held, that plaintiff should not be allowed to pursue both remedies at once, but as in the other action there was no appeal, he allowed this action to proceed, provided that plaintiff would undertake to abide by such order as might be made at the trial with regard to the costs of the taxation proceedings in the criminal action thrown away, and in the event of plaintiff giving such undertaking the taxation proceedings shall be stayed.

Cassidy, K.C., for defendants. *Davis*, K.C., for plaintiff.

Irving, J.] TANAKA *v.* RUSSELL. [Feb. 11.

Practice—Capias—Irregularity or nullity—Waiver by giving special bail.

On defendant being arrested his solicitors gave an undertaking to the sheriff to put in special bail in accordance with the terms of the writ of

capias. The order for capias was entitled, "In the matter of an intended action," and defendant took out a summons entitled, "In the matter of an intended action" to set aside the writ of capias on many grounds; this summons was returnable by leave of IRVING, J., before him at Vancouver, and when the application came on to be heard, preliminary objections were taken that this application should be heard in Chambers at New Westminster, and further that the summons was in the matter of an intended action. The summons was dismissed on the ground that it was wrongly entitled.

On a second summons, issued and returnable at Vancouver, coming on to be heard, IRVING, J., held that under r. 52 he had power to give directions that it should be so issued and returnable. The plaintiff then objected that the undertaking to give security was sufficient to waive all irregularities in the proceedings, and that all the grounds as mentioned in the summons were merely irregularities.

Held, that the question whether or not the writ was a nullity was immaterial because by the giving of special bail the defendant waived his right to object to the writ.

Gilmour, for plaintiff. *Davis*, K.C., for defendant.

Walkem, J.] [Feb. 21.

MACAULAY *v.* VICTORIA YUKON TRADING CO

Practice—Special indorsement—Foreign judgment—Interest.

Plaintiffs sued on a judgment recovered in the Territorial Court of the Yukon, and in the indorsement claimed interest at 5 per cent. per annum on the amount of the judgment to the date of the writ, and also from that date until judgment. No defence was filed, and plaintiffs signed judgment. Defendants now moved to set aside the judgment on the ground that the writ was not specially indorsed, inasmuch as the writ claimed was not a debt or liquidated demand.

Held, that the writ was specially indorsed.

It is not necessary in such an indorsement to state that the interest is due by stutute.

Lawson, jr., for the motion. *Cassidy*, K.C., contra.

UNITED STATES DECISIONS.

FALSE REPRESENTATIONS.—Representations made for the purpose of procuring a contract, with the intent that they shall be acted on, without knowledge whether they are true or not, are held, in *Simon* v. *Goodyear Metallic Rubber Shoe Company* (C. C. A. 6th C.), 52 L. R. A. 745, to be within the rule that a contract procured by false representations may be disaffirmed.

CRIMINAL LAW.—The fact that an officer or citizen attempting to make an arrest, and being slain in so doing, has exceeded his authority, is held, in *Roberson* v. *State* (Fla.), 52 L. R. A. 751, not to reduce the killing to manslaughter, if the slayer had no valid reason to believe himself in immediate danger of great bodily harm, and the homicide was in fact perpetrated, not in passion or sudden heat, upon the provocation of the arrest, but with cool, deliberate malice and premeditation.

INSURANCE.—A clause in an insurance policy making it void in case of its assignment is held, in *Whiting* v. *Burkhardt* (Mass.), 52 L. R. A. 788, not to apply to an assignment of his interest by a mortgagee who is entitled to receive the proceeds to the extent of his interest.

Neither the existence of a vendor's lien on insured property, nor the institution of proceedings to foreclose it, is held, in *Southern Insurance Company* v. *Estes* (Tenn.), 52 L. R. A. 915, to avoid the policy under a clause making it void if the interest of the insured be other than unconditional or sole ownership, or if foreclosure proceedings be commenced with notice of sale, by virtue of any mortgage or trust deed.

LIBEL.—In the absence of anything to shew actual malice, members of a school board are held, in *Finley* v. *Steele* (Mo.), 52 L. R. A. 852, not to be guilty of libel in sending a request for a revocation of a teacher's license to the school commissioner, although they do not, in preferring the charges, follow the exact words of the statute, where the charges were made in the discharge of their duty, after complaint by parents, and in response to a communication from the commissioner.

NEGLIGENCE.—The right of a passenger on the running board of a street car to recover for injuries caused by coming in contact with a pillar near the track in attempting to pass around the conductor, who was also on the board, in obedience to the conductor's direction to come forward and get a seat, is denied, in *Third Ave. R. Co.* v. *Barton* (C.C.A. 2nd C.) 52 L.R.A. 471, unless under all the circumstances he acted as a man of ordinary prudence would have done.