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The *Canada Gazette* of October 8th announces a number of judicial appointments. Those in Nova Scotia and British Columbia are noticed elsewhere. The vacancies in the Bench of the Superior Court of the Province of Quebec have been filled as follows: Mr. Justice Routhier takes the position of Chief Justice in the room of the Honourable Sir L. E. Casault, K.C., resigned; and Sir C. A. P. Pelletier, K.C.M.G., K.C., becomes puisne Judge in the place vacated by Mr. Routhier.

The Government has made another good selection by appointing to the bench of British Columbia Mr. Aulay Morrison, K.C., of New Westminister. The new Judge, like so many others who have come to the front in the legal profession, is a Nova Scotian by birth, having been born at Baddeck, June 15th, 1863. He graduated at Dalhousie University, and was called to the Nova Scotia Bar in 1888. Having decided to try his fortune in the west, Mr. Morrison went to British Columbia, and was called to the Bar there in 1890; practicing at New Westminister, for which district he was elected to the House of Commons in 1896, in the Liberal interest. The recipient of the honor is a man of high standing, courteous and considerate of others, industrious and intelligent, and having also the reputation of being a sound lawyer, he will, we venture to prophesy, make an excellent judge.

At the recent meeting of the Trades and Labour Congress of Canada, in Montreal, a resolution endorsing the principle of "Socialism" as an economic factor in working out the future of this Dominion was emphatically voted down, only seventeen delegates pronouncing themselves in favour of the principle embodied in the resolution. The resolution was as follows:—

"Whereas the working class are underpaid as producers, and overcharged as consumers, therefore, be it resolved that this Congress, place itself on record as being of the opinion that the only way for the working class to obtain the full benefit of their labour is the substitution of the co-operative for the competitive system of industry by the common ownership by the people of the means of production and distribution."

The president of the Congress vehemently opposed this resolution, characterizing it as "insidious," and the product of a class who are "seeking to undermine trade unionism." Other speakers deprecated the motion on much the same lines.

We feel justified in referring editorially to this incident as it shows very satisfactorily indeed that the workingmen of Canada, as a whole, may be relied on to uphold the constitutional guarantees of right and justice between man and man as they obtain in this country to-day; and that no revolutionary ideas in economics and government can find welcome lodgment in our midst. We are all socialists in the cause that Socialism means the betterment of the condition of the industrious poor; but Socialism, alas! means a great deal more than that when you sift its literature. According to Dr. Robert Micheis, of Germany, there are over six millions socialists in the world to-day as compared with thirty thousand in the year 1867, an increase in the army of malcontents stupendous enough to make every patriot among us pause and think.

We learn from our English exchanges that the Dublin police seem determined to put down the reckless driving of motors in the Irish metropolis. Last week there was a batch of prosecutions as a result of which the police netted £70 as fines. The police of the metropolis of Ontario would do well to follow this good example. In Dublin according to the evidence for the prosecution the offending juggernauts were travelling at from fifteen to twenty-seven miles an hour, the defence of course making it less than half that pace. Here the speed exceeds even that of Dublin. It is time that the slaughter of the innocents by these dangerous and unsightly monstrosities should be minimized, and their recklessness controlled. In New York we are told that the inhabitants are beginning to arm themselves in defence of the lives of themselves, their wives and children, as they seem to find that the influence of the motor millionaire is too great to permit of any constitutional remedy. The farming community are also discussing some way of abating the nuisance so far as it affects them. The mangled remains of two automobile owners who were recklessly racing lately on Long Island may be a temporary warning; but that circumstances (which had its redeeming feature) will soon be forgotten. It is

intolerable that the many should be terrorized and often mangled to satisfy the whim or pleasure of the few, who thus in defiance at least of the spirit of the law dominate the public highways.

Legal periodicals in the United States are also taking up the discussion of "Reckless Automobilists." *Case & Comment*, in an article under that heading, says that in several cities the authorities have systematically begun to arrest those who violate the law. The same article in discussing the law of the road affecting this subject says: "A supposition that automobiles can run with impunity anywhere up to the limit fixed by statute or ordinance seems to be somewhat common Of course, it is entirely erroneous An enactment that the speed shall not exceed a fixed maximum is by no means a license to run at that speed under all circumstances. The general principles of the law of negligence necessarily require that the speed under particular circumstances should be far less than that maximum, or indeed that the machine must be entirely stopped, if common prudence demands it in order to avoid a threatened injury to another person. There is a surprising lack of adjudication in the courts, up to the present time, in respect to the use of these machines, but the principles applicable to the subject are the same as those which govern all vehicles on highways. Outside of specific enactments, the question is simply one of negligence, and in most instances this will, of course, be a matter for the jury,"—and an ordinary jury would not be likely to err in favour of the defendant.

The writer of the article above referred, deals with the existing evils in the following true and trenchant language: "Many automobiles are operated by gentlemen who run them with due consideration for the rights of other people. Many others are operated by persons who may be fitly described as wealthy hoodlums. These fellows drive their powerful machines with insolent disregard of the rights of other travellers. Women and children who have been accustomed to drive on country roadways have in many instances been practically driven from them because of this new danger. It is the custom of some of these reckless, insolent, and brutal hoodlums, swelled with the sense of their own importance and power, when they have

caused the upsetting of carriages, and seen their occupants, whether men or women, thrown into the ditch, to drive on without slacking pace, not knowing or caring whether their victims may not be seriously maimed or killed. A few experiences of this sort explain, and go far to justify, the desperate measures that in some places have been taken by rural communities for their own protection." The same remarks are applicable to cities.

A well-known and very estimable member of the profession Mr. D. A. McKinnon, K.C., formerly Attorney-General of the Province of Prince Edward Island, has been appointed Lieutenant-Governor thereof. We congratulate him upon his promotion.

MR. JUSTICE RUSSELL.

It is with very great pleasure that we learn that Benjamin Russell, K.C., has been gazetted to a seat on the Bench of the Supreme Court of Nova Scotia.

There is an entry in Lord Chancellor Campbell's diary, of June, 1859, to the effect that he had got himself "into great disgrace by disposing of judicial patronage on the principle of 'detur digniori.'" This was apropos of Colin Blackburn's appointment to the Queen's Bench, and while there is a salient difference between the personal history of Lord Campbell's protégé and the subject of our present observations, in respect of public notice prior to their elevation to the Bench (Blackburn's being greeted with the query, "Who is Mr. Colin Blackburn?"), yet, so far as meriting the honour goes, they are pretty much on the same ground. In the House of Lords the aforesaid query was answered by Lord Lyndhurst in these words: "I take leave to answer that Mr. Blackburn is a very learned person, a very sound lawyer, an admirable arguer of a law case, and eminently fitted for a seat on the Bench." These very words apply with much truth and fitness to the qualifications of the newest member of the Nova Scotia Supreme Court Bench. But there are two things shared in common by the two men which make the parallel we have ventured to institute between them still more complete and noteworthy, viz., the personal quality of modesty, and the fact that both learned their law in that best of all schools—the business of law-reporting. So modest was Blackburn that he always took the humblest seat at the outer

Bar, and was never numbered among the "clamorous crew seeking silk." As to Benjamin Russell's humility, one instance known to the writer will suffice. When the Law School of Dalhousie University was established Mr. Russell was appointed Professor of Contract Law. During the first term his work lay wholly within the curriculum of the junior students; but the excellence of his lectures was such that the seniors (numbering some practising barristers) sought to take the benefit of them, and one spare day mustered in force and without leave or license entered his class-room the while he was engaged in a fine exposition of the doctrine laid down in *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216, as to the completion of a contract by a posted acceptance of an offer previously communicated. The lecturer became embarrassed at this trespass on the case, so to speak, and it was thought that he concluded his observations with more expedition than circumstances would ordinarily warrant. After the class was dismissed he told a mutual friend that he experienced diffidence in lecturing to the "seniors" who, doubtless, so he said, were able to make a better apology for the doctrine than he could, and might enumerate among themselves

"Some Bramwell, guiltless of this judge-made law." (*)

It is instances of this kind that affirm the correctness of La Bruyére's saying—"Modesty is to merit, what shades are to a figure in a picture: giving it strength and elevation."

Mr. Justice Russell was born in Dartmouth, N.S., in January, 1849, and therefore brings to the Bench ripe legal experience and a variously trained mind in its prime. He is one of the most distinguished graduates of Mount Allison University (B.A., 1868; M.A., 1871; D.C.L., honoris causa, 1893). He was called to the Bar of Nova Scotia in December, 1872. Before his call he had become joint reporter of the House of Assembly with the late Sir John S. D. Thompson. For twenty years he held the office of official reporter of the decisions of the Supreme Court of Nova Scotia, and in that connection amply discharged the debt of usefulness which Lord Bacon said every lawyer owes to his profession. In 1882 he became Recorder and Stipendiary Magistrate of his native town, offices which he long discharged with ability and scrupulous care in the interests of the public. In 1883 he

(*) It will be remembered that Baron Bramwell vigorously dissented from the majority of the Court in the case above cited.

was appointed Professor of Contract Law in Dalhousie University, his lectures, as we have before pointed out, attracting wide attention, and contributing largely to the reputation of the law-course in that institution. Notwithstanding all these many drafts upon his time and intellectual energies, he yielded to the persuasion of his friends and successfully stood as a Liberal for the county of Halifax in the Dominion elections of 1896. He was also returned as member for Hants, N.S., in the elections of 1900. During his parliamentary career he made many notable contributions to the debates, and was known as one of the most fluent and forcible speakers in the House. Always a keen student of literature, during the past few years he has most acceptedly addressed audiences in Ottawa, and other important centres of culture, on literary topics. Mr. Russell, while at the Bar, had a persistent and zealous care for the interests of his chosen profession, and both in the capacity of President of the Council of the Nova Scotia Bar, and as an official of the House of Assembly, he had a large share in the promotion of the more important law reforms that have been placed upon the provincial statute-book during the last twenty years. Add to all these employments the fact that he has always been in active practice, and we have indeed the record of a busy life for a man who has not yet grown old. In February last we announced, as professional rumour then had it, that Mr. Russell was to be made the new Chief Justice of the Supreme Court of his native province. We hope that this rumour was not unfounded. "Haud semper erret fama; aliquando et elegit."

RECENT CASES AS TO WINDING UP ORDERS.

We hear now more of the failure than of the formation of companies. This is due, probably, not so much to any wave of depression as to the excessive zeal shown in the past few years in the creation of companies on an unsound basis—too much paper capital and too little cash. A small trading concern carried on successfully as a partnership blossoms into a full blown company with the hope, and often realization, of getting additional credit on the strength of its apparently large capital. There is, however, a day of reckoning, and petitions under the Dominion Winding up Act multiply apace.

The provisions of the Act may seem clear and readily applicable in the case of larger companies, but it has been found that

there may be considerable difficulty in clearly establishing an unanswerable petition against a smaller concern. All the assets of the company may have vanished so that there can be no seizure, and there have probably been no statements exhibited showing the financial position of the company. Swift action may be necessary, and it may be disastrous to wait for sixty days after serving a demand for payment, and yet how else can insolvency be proved under the Act as interpreted by the Courts?

The provisions of the Dominion Act are less elaborate than those of the English Act, and mistakes may occur from relying on the language of English authorities which have reference to the broader provisions of the English Act.

The majority of recent Canadian decisions have limited rather than expanded the scope of the Act, and, while not advocating too sweeping an enactment, an amendment may be advisable if such decisions contain a true exposition of the Act.

The main questions in preparing a petition are :—

1. How can the company be proved to be "insolvent"?

2. What discretion can be exercised by the Court in refusing a Winding up Order?

The Winding up Act, R.S.C. c. 129, provides by s. 3 that it applies to certain companies "which are insolvent." Then s. 5, which it is desirable to quote here in extenso, provides :—

5. A company is deemed insolvent :—

(a) If it is unable to pay its debts as they become due ;

(b) If it calls a meeting of its creditors for the purpose of compounding with them ;

(c) If it exhibits a statement showing its inability to meet its liabilities ;

(d) If it has otherwise acknowledged its insolvency ;

(e) If it assigns, removes or disposes of, or attempts or is about to assign, remove or dispose of, any of its property, with intent to defraud, defeat, or delay its creditors, or any of them ;

(f) If, with such intent, it has procured its money, goods, chattels, lands or property to be seized, levied on or taken, under or by any process or execution ;

(g) If it has made any general conveyance or assignment of its property for the benefit of its creditors, or if, being unable to meet its liabilities in full, it makes any sale or conveyance of the

whole or the main part of its stock-in-trade or assets, without the consent of its creditors, or without satisfying their claims;

(h) If it permits any execution issued against it, under which any of its goods, chattels, land or property are seized, levied upon, or taken in execution, to remain unsatisfied till within four days of the time fixed by the sheriff or proper officer for the sale thereof, or for fifteen days after such seizure."

Then s. 6 enacts that "A company is deemed to be unable to pay its debts as they become due whenever a creditor, to whom the company is indebted in a sum exceeding two hundred dollars then due, has served on the company, in the manner in which process may legally be served on it in the place where service is made, a demand in writing, requiring the company to pay the sum so due, and the company has, for ninety days, in the case of a bank, and for sixty days in all other cases, next succeeding the service of the demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditors."

Is then the language of s. 6 to be considered a final and exclusive definition of the inability of a company to pay its debts as they become due under s. 5 (a)?

The broader interpretation which might be given is that if a notice has been given under s. 6 a company must then be deemed to be unable to pay its debts and no further evidence is necessary while in cases where such a notice has not been given it is nevertheless open to petitioner to shew by other evidence that the company is unable to pay its debts. The latter has certainly been the practice in the English Courts; but the English Act contains other sub-sections clearly authorizing an order wherever inability to pay debts is proved to the satisfaction of the Court or generally when it is just and equitable. (See ss. 79 and 80 of the Act of 1862.)

The stricter construction was favored by Taylor, C. J., in two cases: *Re Qu'Appelle Valley Co.* (1888) 5 M.R. 160, and *Re Rapid City Farmers' Elevator Co.* (1894) 9 M.R. 574. The learned Judge, however, refers to the English case of *Re Catholic Publishing Co.* (1864) 2 D. J., and s. 116, as supporting this view, while a perusal of this case would hardly justify this.

On the other hand, there are two Quebec cases which support the opposite view: *Mackey v. L'Association Coloniale* (1884) 13 R.L. 383, and *Eddy v. Henderson*, 6 M.L.R. 137. The report of

these cases is meagre as no argument or reasons are given. They are cited in White on Company Law and Masten's Company Law of Canada, and both of these learned writers seem to think that the point is unsettled.

In the Ontario Reports we find no full judgment on the point; but in the recent case of *Re Ewart Carriage Works*, 4 O.W.R. 149, Magee, J., referred to the view taken in the two Manitoba cases above cited and concurred in this view, stating also that it had apparently been taken by Proudfoot, J., in *Re Briton Medical and General Life Association*, 11 O.R. 478. The remarks, however, of Proudfoot, J., in that case would seem to be obiter.

Meredith, C. J., seems to be of the same opinion, to judge from his remarks in *Re Grundy Stove Co.*, 7 O.L.R. 252, although the main point of this case is to the effect that it is not sufficient for a company to appear by counsel and admit insolvency and consent to be wound up; the material filed must satisfy the requirements of the Act.

In view, therefore, of the above authorities it seems necessary in order to come within s. 5, (a) to give the notice required by s. 6.

This notice must require the company to pay the sum due at once. A writ of summons is not such a notice: *Re Abbott Mitchell Iron and Steel Co.* (Meredith, C. J.), 2 O.L.R. 143.

The difficulty of coming within s. 5 (b), (c) or (d) is obvious in the case of a small company. It has been held as to (d) that the president or manager of a company has not authority to acknowledge insolvency, and such acknowledgment must apparently be shewn by some Corporate Act.

The difficulty of satisfying 5 (e), (f) or (g) is likewise obvious as evidence must be given not only of the condition of affairs at the time of the petition, but also at the date of the transaction alleged to be covered by any one of these sub-sections; so also in the case of 5 (h) it is not sufficient to issue execution and show that the sheriff has made a report of nulla bona, but the sheriff must actually seize and remain in possession for fifteen days, and if there is nothing for the sheriff to seize this section is not of much value to the petitioner.

The result seems, therefore, that in very many cases the only safe course for the petitioner is to proceed under s. 6.

It must be remembered, however, that it is advisable to state all possible grounds in the petition, even though there may be no apparent evidence in support of the same at the time that the petition is launched. This does not seem very logical when the ground which may subsequently appear on the evidence is one within the knowledge of the company itself: but the authorities seem to make no exception, but to insist stringently on the rule that the issue of an order must depend on what is alleged in the petition; see *Abbott Mitchell Iron and Steel Co.*, supra, and *Re Briton Medical and General Association*, 11 O.R. 478, following the English authority on the point, *Re Wear Engine Works Co.*, L.R. 10 Ch. p. 191.

A point which has caused real or apparent conflict of decision, namely, as to the discretion of the court in granting a winding up order, has been recently dealt with by the Court of Appeal in *Re Strathy Wire Fence Co.*, ante p. 671.

It was held by Boyd, C., in *Re Maple Leaf Dairy Co.*, 2 O.L.R. 590, that the court has a discretion as to granting a winding up order (see ss. 9 and 19) and that this discretion will be exercised against the granting of an order when the assets are small and the creditors have almost unanimously entered upon an assignment for the benefit of creditors.

In this case the petitioner has relied on the decision of Meredith, C.J., in *Re William Lamb Manufacturing Co.*, 32 O.R. 243, as deciding that the petitioner has the right to an order "ex debito justitiæ." The chancellor expressed his dissent from this decision, which was to be expected in view of his judgment in *Wakefield Rattan Co.* v. *The Hamilton Whip Co.*, 24 O.R. 107.

In the *Strathy* case these authorities were considered by Teetzel, J., who did not give effect to the *Lamb* case and gave leave to appeal from his judgment refusing an order both as to discretion and upon the merits.

The judgment of the Court of Appeal confirming Teetzel, J., and refusing an order was delivered by Garrow, J.A., to the following effect: "The decisions in our courts are apparently conflicting, although I think the actual conflict is more apparent than real. I do not understand Meredith, C.J., (in the *Lamb* case) to say that in his opinion it is absolutely a matter of course to grant the order, no matter what the circumstances may be, nor do I understand the Chancellor (in the *Hamilton Whip* and *Maple Leaf*

Dairy cases) to say that where the facts would justify the order it is in the discretion of the court to refuse it. Some discretion must, in my opinion, be exercised in every case."

The Court of Appeal held that on the question of discretion there is no substantial difference between the Canadian and English winding up Acts and considered the English authorities to be applicable, citing the definition of "ex debito justitiæ" given by Cotton, L.J., in *Re Chappel House Colliery Co.*, 24 Ch. D. 259 at p. 268.

No reference was made to the rule laid down in the English case in *Re West Hartlepool Iron Works Co.* (1875) L.R. 10 Ch. 618, approved by Boyd, C, in the *Maple Leaf Dairy* case, to the effect that while a creditor who has made out a proper case is entitled against the company to a winding-up order ex debito justitiæ, this is not so when there is opposition on the part of other creditors.

The approved definition, however, of ex debito justitiæ implies that there is discretion in every case in the sense that proof of insolvency must be accompanied by proof of the existence of assets.

"A creditor generally when the company is insolvent is entitled to the order as a matter of right. But this assumes that a winding up order will help him to obtain payment and in a case where there are no assets which the liquidator can receive the reason fails."—Cotton, L.J., 24 Ch. D. 268.

An interesting point of practice was decided in *Re Arnold Chemical Co.*, 2 O.L.R. 671, where it was held that a petition served on November 4, 1901, and made returnable November 8, 1901, complied with the requirements "after four days' notice" and was properly lodged.

Toronto. C. S. MACINNES.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

CONTRACT—CONSTRUCTION—NECESSARY IMPLICATION.

In *Ogdens* v. *Telford* (1904) 2 K.B. 410, the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) have affirmed the decision of Lord Alverstone, C.J. (1903) 2 K.B. 287 (noted ante vol. 39, p. 700). The action was brought for the price of goods, and the defendant counter-claimed under an agreement whereby the plaintiffs had agreed in consideration of the defendants agreeing to become customers of the plaintiffs and not enter into any agreement with any other firm which would prevent his dealing with the plaintiffs, the plaintiffs for a period of four years would distribute as an annual bonus among their customers, including the defendant, and in proportion to their purchases, a certain fixed annual sum, and also the expected profits on certain goods which should be sold by the plaintiffs during the period. Before the four years had expired the plaintiffs sold their business to a rival concern, and the defendant claimed damages for breach of the agreement. The Court of Appeal agreed with Lord Alverstone, C.J., that there was an implied agreement on the part of the plaintiffs that they would continue to carry on business and not put it out of their power to carry out their contract, and that the defendant was entitled to damages for breach of the agreement. The case throws a curious side light on the extraordinary measures nowadays adopted to secure trade.

SHIP—CHARTER PARTY—DEMURRAGE—COMPUTATION OF TIME—FRACTION OF A DAY.

Yeoman v. *The King* (1904) 2 K.B. 429, was a petition of right claiming demurrage. By the charter party it was provided that the cargo should be "discharged at the average rate of not less than 210 tons per working day" and that demurrage should be paid at the rate of fourpence per ton per day, "and pro rata, employed beyond the time allowed for discharging." It was admitted that the time for discharging began to run at 6 a.m. on Monday, July

15, 1901, and that, on the assumption that a fraction of a day was to be taken into consideration, the time allowed for discharging ended at 9 a.m. on Saturday, July 27. The discharge was not in fact completed till 3 p.m. on July 29. Bigham, J., who tried the case, held that the demurrage began to run at 9 a.m. on July 27, and not from the end of that day as claimed by the Crown, and with this the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) agreed, being clear that the terms of the charter party required the fraction of a day to be taken into account in estimating the time allowed for discharging the cargo.

PRACTICE—SET OFF OF DAMAGES AND COSTS—JUDGMENTS FOR COSTS IN INDEPENDENT LITIGATIONS — JUDGMENT FOR AND AGAINST A PARTY IN DIFFERENT CAPACITIES—RULES 989, 1002 (21)—(ONT. RULES 1164, 1165.)

David v. *Rees* (1904) 2 K.B. 435. An application was made by the plaintiff in this case to set off the damages and costs recovered by him in this action against costs ordered to be paid by him in certain garnishee proceedings subsequently taken on the judgment to a garnishee. This garnishee was one of the defendants in the action and liable for the damages and costs recovered by the plaintiff, but he was made a garnishee as being a joint trustee with others of a fund sought to be attached, and the attaching order was set aside and the plaintiff ordered to pay the costs of the garnishee in question. The plaintiff, under Rules 989 and 1002 (21) (Ont. Rules 1164, 1165), claimed that the costs he was ordered to pay should be set off pro tanto against the damages and costs recovered by him in the action, but the Court of Appeal (Collins, M.R., and Stirling, L.J.) held that the action and subsequent garnishee proceedings were distinct and separate litigations and the Rules did not authorize the set off claimed by the plaintiff, and the application was therefore refused.

PRACTICE—CHARGING ORDER—"STOCK OR SHARES" OF A COMPANY—1 & 2 VICT. C. 110, S. 14—(R.S.O. C. 324, S. 21).

In *Sellar* v. *Bright* (1904) 2 K.B. 446, the plaintiff, having recovered judgment against the defendants which remained unsatisfied, applied for a charging order under 1 & 2 Vict. c. 110, s. 14 (see R.S.O. c. 324, s. 21) for a charging order on certain debentures of a limited company standing in the name of the defendants. Phillimore, J., made the order, but on the appeal of

the defendants it was set aside by the Court of Appeal (Collins, M.R., and Stirling and Mathew, L.JJ.) on the ground that debentures do not come within the words "stock or shares," and therefore are not the subject of a charging order under the Act.

NUISANCE—OVERHANGING TREES—DAMAGES—INJUNCTION.

Smith v. *Giddy* (1904), 2 K.B. 448, strange to say, is a case of first impression. It was an action for damages occasioned by the defendant permitting his trees to overhang the plaintiff's premises, and for an injunction to restrain him from continuing the nuisance. No precedent for such an action could be found, and the plaintiff was nonsuited in the County Court, but the Divisional Court (Wills and Kennedy, JJ.) reversed the decision and directed a new trial, holding that the plaintiff was entitled to the relief claimed and was not shut up to the remedy of himself lopping off the offending branches.

LANDLORD AND TENANT—STATUTE COMPELLING TENANT TO PAY CHARGES IMPOSED BY LOCAL AUTHORITY AND AUTHORIZING HIM TO DEDUCT SAME FROM RENT—COVENANT BY TENANT TO PAY CHARGES IMPOSED BY LOCAL AUTHORITY—DISTRESS.

Skinner v. *Hunt* (1904) 2 K.B. 452, is an instance of the temerity with which some suitors embark in litigation. The plaintiff was tenant of premises and covenanted with his lessor to pay any charges imposed on the premises by the local authority. A statute provided that the local authority might require a tenant to pay charges imposed by it on the demised premises, and provided that what the occupier should so pay he might deduct "out of the rent from time to time becoming due in respect of the said premises as if the same had been paid to such owner as part of the rent." Charges were imposed by the local authority and paid by the tenant. The landlord having subsequently distrained for his rent without making any deduction in respect of the amount so paid the present action was brought claiming that the distress was illegal, and that the payment to the local authority was a payment of rent. Strange to say, Ridley, J., gave judgment for the plaintiff, but the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) had not much difficulty in reaching the conclusion that the payment to the local authority was not a payment of "rent," but a payment of charges and expenses imposed by the local authority, and though under the statute the plaintiff had a

right to deduct the payment from his rent, yet by his covenant to pay the charges he had effectually debarred himself from exercising that statutory privilege, and his action was accordingly dismissed.

BANKER—CROSSED CHEQUE—CUSTOMER CREDITED IN LEDGER WITH AMOUNT OF CHEQUE BEFORE COLLECTION — FORGED INDORSEMENT — BILLS OF EXCHANGE ACT, 1882 (45-46 VICT. C. 61) S. 82—(53 VICT. C. 33, S. 81 (D.)).

In *Akrokerri Mines* v. *Economic Bank* (1904) 2 K.B. 465, an attempt was made to extend the principal of *Capital and Counties' Bank* v. *Gordon* (1903) A.C. 240 (noted ante vol. 39, p. 707). That case, it may be remembered, decided that where a banker cashed a crossed cheque for a customer who had no title thereto he became the holder for value and was not entitled to the protection of s. 82 of the Bills of Exchange Act (s. 81 of Dominion Act). In the present case a crossed cheque was presented to the defendants by a customer for collection. The defendants, before the cheque was collected, credited the customer with the amount of the cheque in their ledger, but it was not credited in the customer's pass book, nor was he allowed to draw against it. The indorsement of the cheque proved to be a forgery and the customer had no title, but it was not discovered until the cheque had been paid to the defendants. The defendants throughout acted in good faith and without negligence. The plaintiffs, who were the rightful owners of the cheque, claimed to recover the amount from the defendants; but Bigham, J., held that they could not succeed, that the crediting the customer in the defendants' ledger with the amount of the cheque was not equivalent to payment, and that s. 82, therefore, afforded defendants complete protection.

PRACTICE—COSTS—PAYMENT INTO COURT WITH DENIAL OF LIABILITY FOR PART, AND ADMISSION AS TO PART, OF CLAIM—ISSUE FOUND FOR PLAINTIFF.

Hubback v. *British North Borneo Co.* (1904) 2 K.B. 473, merely deals with a question of costs. The defendants paid into Court a sum of money, admitting part, and denying liability as to the rest of the plaintiff's claim. The amount paid in proved more than sufficient to satisfy the plaintiff's claim; but an issue raised by the defendants as to part of the plaintiff's claim was found in favour of the plaintiff. Under these circumstances, although the defendants were held entitled to the general costs of the action, the

Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) considered that the defendants should pay the costs of the issue on which the plaintiff succeeded.

LOAN ON FORGED SECURITY—VOLUNTARY PAYMENT BY THIRD PARTY TO INDEMNIFY LENDER AGAINST LOSS—RIGHT OF LENDER TO PROVE FOR WHOLE DEBT WITHOUT DEDUCTION OF VOLUNTARY PAYMENT BY THIRD PARTY.

In re Rowe (1904) 2 K.B. 483, although a bankruptcy case, involves a novel point of general interest. A bankrupt had borrowed £16,500 on a security which proved to be forged. A former partner of the bankrupt, who was in no way liable for the loan, voluntarily paid the lender £6,500 in respect of the loss which he had sustained. The lender claimed to prove for the full £16,500 against the bankrupt's estate without any deduction, and Buckley, J., held that he was entitled to do so, as the payment of £6,500 was not made on account of either the debt or the debtor, and the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) affirmed his decision.

PUBLIC AUTHORITIES' PROTECTION—LIMITATION OF ACTION—PUBLIC AUTHORITIES' PROTECTION ACT, 1893 (56 & 57 VICT. c. 61) s. 1—(R.S.O. c. 88, s. 1),

Parker v. *London* (1904) 2 K.B. 501, was an action brought against the London County Council for damages sustained by the plaintiff as a passenger on one of the defendants' tram cars, and it was pleaded by the defendants that they were entitled to the benefit of the Public Authorities' Protection Act, 1893, s. 1 (see R.S.O. c. 88, s. 1), and that the action was thereunder barred because not commenced within six months from the neglect complained of. The point of law was argued before Channell, J., who held that the Act applied. It may be observed that there is an important difference between the English and Ontario Acts, and that while the former Act applies not only to anything done in the performance of a public duty, as does the Ontario Act, it also expressly applies to any alleged neglect or default in the execution of any statute, duty or authority, which the Ontario Act does not. So far as actions against municipalities in Ontario, in respect of the neglect to repair roads, etc., are concerned, there is the limitation prescribed by the Municipal Act, s. 606 (1).

PROBATE—PRACTICE—UNIVERSAL DEVISEE AND LEGATEE—ADMINISTRATION OR PROBATE—EXECUTOR ACCORDING TO THE TENOR—TITLE OF ADMINISTRATOR TO REAL ESTATE.

Re Pryse (1904) P. 301, is a case that deserves attention. It was an application by the universal devisee and legatee named in a will which named no executor, for a grant of probate as executrix according to the tenor of the will. Jeune, P., upheld the Registrar's refusal to grant probate on the ground that the applicant, though universal devisee and legatee, was not on the construction of the will executrix according to the tenor; the applicant appealed, but the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) affirmed the decision and agreed with Jeune, P., that the applicant was only entitled to a grant of administration with the will annexed; and in doing so they lay it down that the grant when made will relate back to the death of the deceased both as to the real and personal estate.

WILL—LEGACY IN DISCHARGE OF MORAL OBLIGATION—DEATH OF LEGATEE—LAPSE.

In *Stevens* v. *King* (1904) 2 Ch. 30, the personal representatives of the testatrix sought the opinion of the Court as to whether or not a legacy bequeathed by the testatrix had lapsed by reason of the death of the legatee in the lifetime of the testatrix. It appeared that in her lifetime the testatrix had been overpaid her share in a deceased person's estate, and that she had submitted to appoint property in favour of W. King, who had made the overpayment, so as to recoup the amount overpaid; and that this submission had been embodied in an order of the Court; and afterwards, in pursuance of such submission, she made a will appointing the amount of overpayment in favour of W. King, who predeceased her. Falwell, J., under these circumstances determined, that as it was clear that the legacy had been given in discharge of a moral obligation it was immaterial whether there was actually any legal liability, and that the legacy did not lapse, but was payable to King's representative.

COMPANY—WINDING UP—CROSS CLAIMS BETWEEN TWO INSOLVENT COMPANIES—DAMAGES—DIVIDEND.

In re Leeds and Hanley Theatres (1904) 2 Ch. 45, the problem Buckley, J., was asked to solve was the proper mode of adjusting cross claims between two insolvent companies. Com-

pany A. had a claim against company B. for £5,100 on debentures of the B. company, and company B. had a cross claim for damages for misfeasance against the A. company for £4,323; both companies were insolvent and were being wound up. The learned Judge held that the claims not being mutual credits were not subject to set off, but that the proper method of distributing the assets of the B. company was to treat the claim due by the A. company to the B. company as paid, and declare a dividend on that basis; but the dividends payable to the A. company were to be set off pro tanto against the debt due by that company to the B. company until the £4,323 should be satisfied.

MARRIED WOMAN—SEPARATE ESTATE—CONTRACT—ACKNOWLEDGMENT OF LOAN—MARRIED WOMAN'S PROPERTY ACT, 1893 (56 & 57 VICT. C. 63) S. 1 (R.S.O. C. 163, S. 4)—"READY MONEY—EXECUTOR—RETAINER.

In re Wheeler, Hankinson v. *Hayter* (1904) 2 Ch. 66, is a decision under the Married Woman's Property Act, 1893, s. 1 (R.S.O. c. 163, s. 4), whereby the necessity of the possession of separate property at the date of a contract by a married woman was dispensed with. In the present case a married woman, prior to the Act of 1893, having no separate property, had contracted a loan; after the Act, she acknowledged her indebtedness for the amount of the loan, but it was held by Warrington, J., that acknowledgment did not create binding on her. Another question in the action was, whether the executor of the deceased lender could retain the share the married woman was entitled to as one of the next of kin of the lender to satisfy the loan, but Warrington, J., held, that as there was no legally enforceable debt due to the estate, he could not. The case may also be noted for the fact that the learned judge determined that money on deposit at a bank, withdrawable at fourteen days' notice, is not "ready money," following *Mayne* v. *Mayne* (1897) 1 I.R. 324.

PRACTICE—PARTIES—LEGAL ESTATE GOT IN PENDENTE LITE—EQUITABLE ASSIGNEE—LEGAL OWNER NOT A PARTY.

In *Bowden's Patents* v. *Herbert* (1904) 2 Ch. 86, the plaintiffs being equitable assignees of a patent, commenced an action to restrain infringment, without making the legal owner a party. Pending the action they obtained an assignment from him of the patent. Warrington, J., held, that at the date of the writ the

action was defectively constituted, and that, as in the absence of the legal owner of the patent a decision in favour of the defendant would not protect him against an action by the patentee, the action was defectively constituted, and that it was necessary for the plaintiffs to add the legal owner's representatives as parties, he having died; and the defendants were given liberty to amend their defence and the plaintiffs were ordered to pay the costs of the day and any costs thrown away by reason of the amendment.

VENDOR AND PURCHASER—PURCHASER'S INTEREST IN LAND — JUDGMENT CREDITOR OF PURCHASER—RECEIVER OF PURCHASER'S INTEREST—NOTICE—RESCISSION OF CONTRACT ON MONEY PAYMENT TO PURCHASER.

Ridout v. *Fowler* (1904), 2 Ch. 93, was an appeal from the decision of Farwell, J. (1904) 1 Ch. 658 (noted ante p. 459). The Court of Appeal (Williams, Romer, and Cozens-Hardy, L JJ.) agreed with Farwell, J., and dismissed the appeal, holding that the £110 paid to the purchaser on the rescission of the contract to get him to give up possession was not paid in respect of any interest which the purchaser had in the property, and therefore it was not exigible by the plaintiff as execution creditor of the purchaser.

WILL—CONSTRUCTION — CONTINGENT REMAINDER OR EXECUTORY DEVISE—REMOTENESS.

In re Wrightson, Battie-Wrightson v. *Thomas* (1904) 2 Ch. 95 is one of those cases which shew how a testator may succeed in defeating his intentions in his endeavour unduly to tie up his estate. By the will in question the testator devised his estate to certain persons successively in tail; but by a codicil he directed "that no devisee or appointee of my real estate devised and appointed . . shall have a vested interest therein . . or be entitled to possession of the same . . until the attainment of the age of twenty-four years." This provision Farwell, J., decided had the effect of converting the previous dispositions of the will into executory devises which failed for remoteness, and consequently that there was an intestacy.

COMPANY. ISSUE OF SHARES AT A DISCOUNT—ISSUE OF DEBENTURES AT A DISCOUNT—OPTION TO TAKE FULLY PAID SHARES IN EXCHANGE FOR DEBENTURES ISSUED AT A DISCOUNT.

Mosely v. *Koffyfontein Mines* (1904) 2 Ch. 108, was an action by a shareholder of a company on behalf of himself and all other shareholders to restrain the company from issuing debentures at a

discount, with an option to the holders to take fully paid shares for the nominal amount of the debentures. Buckley, J., refused a motion for an interlocutory injunction, but the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.), being of the opinion that the issue of the debentures on the terms proposed might be used as a means for issuing shares at a discount, held that the plaintiff was entitled to relief, and granted the injunction. In coming to this conclusion Williams, L.J., disclaimed any intention of impugning the prior decisions which established that the obligation of a shareholder to pay the full nominal value of his shares need not be satisfied in cash, but might be satisfied in money's worth; but he also took occasion to say that he thought that it was deserving of the grave consideration of the Legislature whether it was not for the advantage of the public that the full nominal value of shares should be paid in cash and nothing else.

SEPARATION DEED — SETTLEMENT BY SEPARATION DEED ON EXISTING CHILDREN—RESUMPTION OF COHABITATION.

In re Spark, Spark v. *Massey* (1904) 2 Ch. 121, was an appeal from the decision of Kekewich, J, (1904) 1 Ch. 451, (noted ante p. 378), but on the appeal being opened the parties agreed to compromise the matter by a declaration that the settlement made by the separation deed in favour of the then existing children of the marriage should be extended in favour of all the children of the marriage whether born before or after the separation, and the Court of Appeal approved and confirmed the compromise.

PRACTICE—PARTIES—ELECTION TO AMEND BY ADDING PARTIES—APPEAL.

Bowden v. *Smith* (1904) 2 Ch. 122. At the trial of this action, which was for the infringement of a patent, Warrington, J., was of the opinion that the action was defective because the legal owner of the patent was not before the Court, and the plaintiffs thereupon asked and obtained leave to amend. From this order the plaintiffs appealed, but the Court (Williams, Romer, and Cozens-Hardy L.JJ.) held that as the plaintiffs had elected to amend instead of having the action dismissed there was no order against which they could appeal. See *Monro* v. *Toronto Ry. Co.* 4 O. L. R. 36; 5 O.L.R. 483.

PRIVATE ACT - STATUTORY AGREEMENT TO REFER TO ARBITRATION—OUSTER OF JURISDICTION—OBJECTION TO JURISDICTION NOT PLEADED.

In *Crosfield* v. *Manchester Ship Canal Co.* (1904) 2 Ch. 123, the defendants at the trial of the action took the objection that under the provisions of certain statutes the matters in dispute between themselves and one of the plaintiffs were required to be referred to arbitration, and that consequently the Court had no jurisdiction as regards the claim of that plaintiff. This objection was not raised by the pleadings, and Byrne, J., at the trial, overruled it, but the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) decided that it was entitled to prevail, and that the pleadings should be treated as amended, and that the action should be dismissed so far as the plaintiffs were concerned to whom the objection applied, and as to the other plaintiffs to whom the provision did not apply, but whose rights were dependent on those of their co-plaintiffs, that it should be stayed till further order.

SOLICITOR AND CLIENT—TAXATION OF COSTS BY THIRD PARTY—MORTGAGEE'S COSTS.

In re Longbotham (1904) 2 Ch. 152. The Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) following *Re Gray* (1901) 1 Ch. 239, and affirming Kekewich, J., decided that where a mortgagee's costs are taxed at the instance of a mortgagor, or other third party liable to pay, items which the mortgagor is not liable to pay ought not to be allowed, notwithstanding that the mortgagee might be liable therefor.

TENANT FOR LIFE AND REMAINDERMAN—LOSS ON INVESTMENT—APPORTIONMENT—DEFICIENT SECURITY.

In re Atkinson, Barber's Co v. *Grose-Smith* (1904) 2 Ch. 160. A security in which a tenant for life and a remainderman were interested having proved deficient, the question arose as to the proportion in which the amount realized from the security should be apportioned between them. Kekewich, J., held that the amount due to them respectively for arrears of income and capital should be ascertained, and the amount realized should be divided in the proportion which the amount due for arrears of interest bore to the amount due in respect of capital, and this the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) agreed was correct.

AUCTIONEER — IMPLIED AUTHORITY OF AUCTIONEER TO SELL WITHOUT RESERVE—LIMITATION OF AUTHORITY OF AUCTIONEER UNKNOWN TO BUYER —NOTE IN WRITING — AUCTION — LIABILITY OF PRINCIPAL — STATUTE OF FRAUDS.

In *Rainbow* v. *Howkins* (1904) 2 K.B. 322, the plaintiff had attended a sale by auction of a pony. The defendant was the auctioneer, and disclosed the name of the vendor, and inadvertently stated that the sale was without reserve, whereas in fact his instructions were to sell subject to a reserve price of £25. The plaintiff bid £15 15s., and the pony was knocked down to him. The defendant immediately after discovered his mistake, and put the pony up for sale again, and bought it in for the vendor. No note in writing was made of the sale to the plaintiff. The plaintiff claimed delivery of the pony or damages for its detention, or alternatively damages for breach of warranty by the defendant of authority to sell the pony. The County Court Judge dismissed the action, holding that the absence of a note in writing was a good defence to the first head of claim, and, as to the second ground, that, the principal having been disclosed, the defendant was not personally liable. The Divisional Court (Lord Alverstone, C.J., and Wills, and Kennedy, JJ.) affirmed the decision, but not altogether on the same grounds. They agreed with the County Court Judge that the absence of a note in writing was a good defence to the plaintiff's claim as purchaser. On the second ground of claim, however, they considered that the fact that the principal had been disclosed was not necessarily a bar to an action against the auctioneer, but they held that there is an implied authority to an auctioneer to sell without reserve, and that the principal cannot repudiate a sale without reserve, on the ground that the auctioneer has exceeded his private instructions which were not communicated to the buyer; therefore they held that (but for the want of a note of writing) the contract of sale to the plaintiff would have been binding on the vendor, consequently there was no breach of warranty of the defendant's authority to sell.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

From Divisional Court] GILLETT *v.* LUMSDEN. [June 29.

Trade Mark—"Cream Yeast"—Validity—Infringement- Trade name—"Passing off."

Held, 1. The plaintiff's trade mark for a certain kind of yeast consisting of a label bearing the representation of the head and bust of a woman with the words "Dry" and "Hop" on either side and the words 'Cream Yeast" below, was properly registerable and valid. *Provident Chemical Works* v. *Canada Chemical Co.*, 4 O.L.R. 545, followed.

2. The defendants, by selling yeast in packages labelled "Jersey Cream Yeast Cake", the words "Jersey Cream" at the top and "Yeast Cake" at the bottom, with the representation of two Jersey cows and a milkmaid between, were not infringing the plaintiff's mark. *Cochrane* v. *McNish*, 13 R.P.C. 100, distinguished.

3. The defendants were not, upon the evidence, guilty of passing off their goods in such manner as to induce the belief that they were goods manufactured by the plaintiff.

Judgment of a Divisional Court, 6 O.L.R. 66, affirmed.

Bicknell, K.C., for appellant. *Shepley*, K.C., and *F. C. Cooke*, for respondents.

From Drainage Referee.] [Sept. 10.

MCGILLIVRAY *v.* TOWNSHIP OF LOCHIEL.

Water and watercourses—Drains—Increasing flow of natural stream—Ditches and Watercourses Act—Outlet—Engineer's award.

The owner of land on the banks of a natural stream has no legal ground of complaint if riparian owners above him use the stream as an outlet for drains made by them in the reasonable agricultural use of their lands although the result is to increase the amount of water in the stream and to flood part of his land. But this principle does not apply to persons not riparian owners, who by proceedings under the Ditches and Watercourses Act obtain an outlet to the stream, and they are liable to a person injured by the increased amount of water.

A proper outlet under the Ditches and Watercourses Act is one which enables the water to be discharged without injuriously affecting the lands of another, and if the outlet chosen by the engineer is not in fact a proper

outlet his award is no protection to the persons acting under it as against a person not a party to it.

Judgment of the Drainage Referee varied.

Matthew Wilson, K.C., *Tiffany*, and *Costello*, for appellant. *Leitch*, K.C., for respondent.

HIGH COURT OF JUSTICE.

Boyd, C., Meredith, J., Idington, J.] [June 7th.

LUCAS *v.* HOLLIDAY.

Sheriff—Interpleader—Seizure of goods—Interest of execution—Debtor as co-owner—County Court Appeal—Proceedings not certified.

A sheriff acting under the plaintiff's execution entered upon the lands of the claimant and seized hay and oats alleged to be the property of the execution debtor. The owner of the land asserted that he was the absolute owner of all the hay and oats seized. The execution creditor alleged that the execution debtor was entitled to a one-half interest therein.

Held, that the sheriff was entitled to an interpleader order; the issue to be framed so as to determine whether the execution debtor had any and if so what interest in the hay and oats seized.

MEREDITH, J., dissented, and was also of opinion that the case (on appeal from an order in a County Court action) was not properly before the court because the proceedings had not been certified.

E. G. Porter, for the sheriff and execution creditor. *R. C. Clute*, K.C., for the claimant.

Teetzel, J.] MIALL *v.* OLIVER. [June 10.

Warehousemen—Damage by rats—Goods lost or stolen—Dampness.

Goods consisting of household furniture, were stored under lock and key in a separate compartment of a brick warehouse, but were afterwards removed by the warehousemen, without the owner's consent, first to another compartment in the same building, and then to a frame building, formerly used as a boathouse and part of which was used as a stable:—

Held, that the warehousemen, in the absence of reasonable precaution to prevent injury therefrom, were liable for injuries caused by rats in the last named building, existence of which the warehousemen were aware, and they were also liable for certain of the goods which were lost, as the removal of the goods had been without the owner's consent and from a place of comparative safety, and that they were not protected by a condition in the warehouse receipt, which relieved them from responsibility for loss or damage caused by irresistible force, or inevitable accident or from want of special care or precaution; but they were not liable for damage

caused by alleged dampness, in that it might have been due to changing temperature, which it did not appear would not have had the same effect in the original place of storage.

May, for plaintiff. *Code*, for defendant.

Street, J.] WEBER *v.* TOWN OF BERLIN. [June 22.

Nuisance—Injury to farm by sewage—Liability of municipal corporation—Fouling natural stream—Damages.

The defendants, a municipal corporation, were held liable to the plaintiffs for damages sustained by reason of sewage matter brought upon the plaintiffs' land by a creek which received the outflow from a sewage farm operated by the defendants, and also for anthrax germs brought upon the plaintiffs' land by reason of the defendants' sewage system. The defendants, though authorized by the Municipal Act to undertake and carry out the works, were not authorized to do so in such a way as to cause a nuisance or to injure other persons. Having given leave to the tanneries from which the anthrax germ came to connect with their system of sewage, the defendants were responsible for the result. Although they had forbidden the throwing of the refuse from which the germs were believed to come into the sewer, they were not relieved from liability, because they had the power, and had not exercised it, of enforcing the prohibition by stopping the connection.

The elements of damage in such a case were considered, and damages were assessed for the loss of an animal which died from anthrax, for the value of lands rendered worthless by anthrax, and interest thereon, for permanent impairment of the value of other lands, for the value of additional fencing to keep cattle from the infected water, for the loss of pasture, and for the pollution of the air in and about a dwelling-house. The acts of the defendants having had the natural effect of giving rise to an apprehension which had destroyed the value of the plaintiff's property, the defendants were held liable to make the loss good.

Aylesworth, K.C., and *C. A. Moss*, for defendants. *Riddell*, K. C., and *C. P. Smith*, for plaintiffs.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [June 28.

IN RE GRANT AND ROBERTSON.

Overholding Tenants Act—Negotiations for new tenancy—Failure to agree—Tenancy at will—Notice to quit—Demand of possession—Jurisdiction of County Court Judge.

Upon a review of proceedings taken under the Overholding Tenant. Act, R. S. O. 1897, c. 171:—

Held, that the evidence sustained the finding of the County Court Judge that no completed agreement for a new lease was ever made, but that the tenant held over expecting that an agreement would be arrived at.

The tenant, overholding after the 1st March, did so with the consent of the landlord pending negotiations. When the negotiations came to an end, the landlord, on the 19th March, served a notice requiring the tenant to give up possession on the 23rd March. Upon the tenant's failure to give up possession on that day, the landlord took proceedings under the Act without any further demand of possession.

Held, that the tenant was, after the 1st March, a tenant at will; the notice had the effect of extending his right of occupation till the 23rd March; and a demand of possession after that date was necessary to give the County Court Judge jurisdiction under s. 3 of the Act.

Aylesworth, K.C., for tenant. *Middleton*, for landlord.

Boyd, C., Meredith, J., Anglin, J.] [June 30.

O'CONNOR v. CITY OF HAMILTON.

Way—Non-repair—Negligence of municipal corporation—Notice of accident—Reasonable excuse for want of—Knowledge of corporation—Prejudice—Appeal from ruling of trial judge.

In an action against a municipal corporation to recover damages for injuries sustained by reason of non-repair of a highway, the ruling of the judge at the trial as to whether there is reasonable excuse for the want or insufficiency of a "notice in writing of the accident and the cause thereof," and whether the defendants have been prejudiced in their defence, under s. 606 of the Municipal Act, 3 Edw. VII. c. 19, (O.), is subject to appeal.

The defendants had actual knowledge of the accident to the plaintiff and its cause on the day it happened. It was caused by the cave-in of a well travelled public street in the centre of a city. The plaintiff's left and only remaining arm was broken and he sustained other injuries. He was in a hospital, suffering great pain, during the seven days allowed by the statute for giving notice, and notice was not given until the eleventh day after the accident.

Held, MEREDITH, J., dissenting, reversing the judgment of MEREDITH, C. J., at the trial, that there was reasonable excuse for the want of a notice in due time; and, affirming the judgment of MEREDITH, C. J., that the defendants had not thereby been prejudiced in their defence.

Armstrong v. *Canada Atlantic R. W. Co.*, 2 O. L. R. 219, 4 O. L. R. 560, applied and followed.

W. Bell, for plaintiff. *MacKelcan*, K.C., for defendants.

Anglin, J.] IN RE COHEN. [July 23.

Criminal law — Extradition—Recovery of stolen property — Evidence — Inference—"Money, valuable security or other property"—Ejusdem generis.

Upon a motion for the discharge of a prisoner committed for extradition no evidence can be considered except that upon which the prisone

stands committed, and into the weight of that evidence or even its sufficiency to sustain the charge no enquiry can be made.

The fact of the silence of a person accused of receiving stolen property upon hearing statements made as to his alleged guilt by the person who stole the property is admissible in evidence as leading to the inference of his guilty knowledge.

Having regard to the interpretation clauses of the Extradition Act, R.S.C. 1886, c. 142, crimes referred to in the "extradition arrangement" of 1890 between Great Britain and the United States come within the Act.

The words "other property" used in that arraignment as to the crime of "receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained" must be construed as relating only to things of the same type as "money" or "valuable security" and a prisoner accused of receiving a stolen pair of shoes was discharged from custody.

Masten, for prisoner. *Washington*, K.C., for private prosecutors.

Anglin, J.] EDWARDS *v.* COLE. [July 25.

Motion for judgment—Admissions—Pleading—Con. rules 259, 261, 616.

Consolidated Rule 616 is not intended to apply to the case of alleged insufficiency in law of the statements of fact pleaded in the defence.

A motion for judgment should not under such circumstances be made under that Rule, but the proceedure indicated in Rule 259 or Rule 261 should be adopted.

C. A. Moss, for plaintiff. *W. H. Blake*, K.C., for defendant.

Teetzel, J.] IN RE KIRKBY AND ALL SAINTS CHURCH. [Sept. 9.

Church of England—Diocese of Toronto—Churchwardens—Agreement to repay rector's expenditure.

An agreement by the churchwardens of a congregation of the Church of England in the Diocese of Toronto raising funds by voluntary contributions to repay the rector thereof, in consideration of his resigning his charge as desired by the congregation, the amount theretofore expended by him in repairs and improvements to the rectory, such amount to be settled by arbitration, is an agreement beneficial to the congregation and binding upon the churchwardens in the corporate capacity conferred upon them in that diocese by 47 Vict. c. 89 (O.)

An order was made for the enforcement of an award made in pursuance of the agreement although the churchwardens had in their corporate capacity no property or funds out of which the award could be satisfied.

Daw v. *Ackerill* (1898) 25 A.R. 37, distinguished,

R. B. Henderson, for applicant *Middleton*, for churchwardens.

Boyd, C., Meredith, J., Idington, J.] [June 30.

McINTOSH *v.* FIRSTBROOK BOX CO.

Master and servant—Injury to servant—Employment of child in factory—Factories Act—Misrepresentation as to age—Dangerous machinery—Warning—Negligence—Jury.

The plaintiff, a boy of ten, represented his age as fourteen, and was employed by the defendants in their factory. He was not put at dangerous work, but, in going to his work through a room in which there was dangerous machines, he was injured by one of them

Held, MEREDITH, J., dissenting, that the provision of the Factories Act, R. S. O. 1897, c. 256, s. 3, that no child (as defined by s. 2, sub-s. 5) shall be employed in a factory, is to protect young children from dangerous employment. It is not enough to take the statement of a child as to his age; the employer must satisfy himself by reasonable means that the applicant for work is of the requisite age, and it is for the jury to say whether reasonable precautions have been taken. The illegal employment may be evidence of negligence.

Upon the facts of this case it was for the jury to say whether sufficient warning had been given by the defendants to protect the plaintiff—having regard to his age and the danger of the place.

Bicknell, K.C., and *Bain*, for plaintiff. *Shepley*, K.C., and *Greer*, for defendants.

Anglin, J.] IN RE DEWAR AND DUMAS. [July 7.

Overholding tenant — Notice of hearing affidavit — Prohibition — Waiver — R.S.O. 1897, c. 171, s. 4.

On an application under the Overholding Tenant Act by a landlord for possession a copy of the affidavit filed on the application was not served on the tenant as directed by s. 4 of the Act. Counsel appeared for the tenant on the return of the application and took this objection and the application was adjourned to enable a copy of the affidavit to be served. After such service the application was proceeded with and counsel for the tenant examined and cross-examined witnesses and argued the case, when an order for possession was made:—

Held, that the failure to serve a copy of the affidavit was an irregularity, which could be and had been waived, and prohibition against the enforcement of the order for possession was refused.

D. C. Cameron, for the tenant. *Roche*, for the landlord.

Divisional Court.] IN RE WOODALL. [August 6.

Limitation Act—Execution—Renewal.

An execution against an existing interest in lands ceases to be a lien thereon in ten years from the time of its delivery to the sheriff even though it has been duly renewed from time to time and kept in force continuously, and sale proceedings cannot be taken under it after that time.

Judgment of STREET, J., affirmed.

G. C. Campbell, for appellant. *Vickers*, for respondent. *H. C. Fowler*, for administrator.

Divisional Court.] MORTON *v.* GRAND TRUNK R. W. CO. [August 6.

Executors and administrators—Negligence—Fatal Accidents Act—Conflicting claims.

A woman claiming to be the widow of a man killed owing as alleged to the negligence of the defendants brought an action against them with her two children as co-plaintiffs to recover damages. Subsequently another action was brought by another woman also claiming to be the deceased's widow to recover damages for the benefit of herself and her child, her marriage having taken place after an alleged divorce of the first plaintiff:—

Held, that only one action would lie under the Act; that that action would be for the benefit of the persons in fact entitled; and that, there being no doubt as to the right of the children in the first action, the first action should be allowed to proceed and the rights of all parties worked out in it, the plaintiff in the second action to be represented by counsel at the trial if desired. Judgment of FALCONBRIDGE, C.J.K.B., reversed.

D. L. McCarthy, for defendants. *Falconbridge*, for plaintiffs in first action. *D'Arcy Tate*, for plaintiffs in second action.

Province of Nova Scotia.

SUPREME COURT.

Weatherbe, Ritchie, Townshend, JJ.] [Nov. 23, 1903.

THE KING *v.* OLAND (No. 1).

Liquor license—Exposing license in warehouse—Brewer's license not included in N. S. law, s. 55—Stated case by magistrate—Summary Convictions Act, R.S.N.S. 1900, c. 161, s. 73—Liquor License Act, R.S. N.S. 1900, c. 100, ss. 115, 127, 149, 182.

1. A wholesale brewer's license under the N.S. Liquor License Act need not be kept exposed in the warehouse, and is not subject to the requirements of s. 55 of the Act.

2. Notwithstanding s. 127 of the N.S. Liquor License Act a case may be stated by a stipendiary magistrate to the Supreme Court in respect of a question of law arising on a prosecution under the Act.

T. Notting, for prosecutor. *W. B. A. Ritchie*, K.C., for defendant.

Weatherbe, Ritchie, Townshend, JJ.] [Nov. 23, 1903.

THE KING *v.* ULAND (No. 2).

Liquor License — Brewers and distillers — "License sign" over doors not required—R.S.N.S. 1900, c. 100, ss. 14, 56.

Brewers licensed as such under the N. S. Liquor License Act are not subject to the regulation (s. 56) requiring a "license sign" to be exhibited over the door of the premises.

T. Notting, for prosecutor. *W. B. A. Ritchie*, K.C., for defendant.

Province of New Brunswick.

COUNTY COURT OF ST. JOHN.

Carleton, Co. J.] THE KING *v.* LITTLEJOHN. [Sept. 13.

Prize fight—Offence of engaging in, as a principal—"Sparring" exhibition —No intent to continue contest until one incapacitated—Cr. Code, ss. 92, 97.

1. A sparring match with gloves, under Queensberry or similar rules, given merely as an exhibition of skill and without any intention to fight until one is incapacitated by injury or exhaustion, is not a "prize fight" under Code section 92.

2. To constitute a "prize fight" there must have been a previous arrangement for a "fight" in the ordinary sense of the term, and that involves an intention to continue the encounter until one or the other of the combatants gives in from exhaustion or from injury received.

E. S. Ritchie, for accused. *Skinner*, K.C., for prosecution.

Province of British Columbia.

SUPREME COURT.

Full Court.] ALASKA PACKERS' ASSOCIATION *v.* SPENCER. [July 29.

New trial—Direction to jury—Obligation of a judge to apply facts to law—Suitor's right to have questions submitted to jury—Exclusion of jury during exceptions to charge—Mode of trial—Scientific investigation.

In an action by a ship owner against a tug owner for damages for negligence on the part of the tug in allowing the ship to drift ashore while attempting to tow her from a dangerous position, the judge in his charge to the jury explained the law applicable to the issues, but he did not point out to the jury the bearing of the facts in evidence upon the questions to be determined:—

Held, that the charge was incomplete and was misunderstood by the jury, and that there must therefore be a new trial. The judge is bound to submit questions to the jury if requested to do so.

Per HUNTER, C.J. 1. A jury is not suited to try a dispute involving questions as to what were the proper nautical manœuvres to be performed under peculiar conditions, and the new trial should be held before a judge without a jury.

2. The court has jurisdiction to order a new trial without a jury, although the appellant in his motion for a new trial does not so ask.

Per MARTIN, J. 1. It is the duty of the judge under section 66 of the Supreme Court Act, 1904, to instruct the jury upon all leading groups of evidence and apply to them the law as affecting the issues arising out of such evidence.

2. The jury should not be excluded from the court room during the discussion on an application by counsel for further direction by the judge.

3. The plaintiffs have an inherent right to a jury, and mere complexity of fact is no ground for depriving them of that right.

Judgment of IRVING, J., set aside and new trial ordered, DRAKE, J., dissenting.

Bodwell, K.C., for appellant. *Davis*, K.C., and *C. E. Wilson*, for respondent.

COUNTY JUDGE'S CRIMINAL COURT.

Irving, J.] THE KING *v.* ROYDS. [March 31.

Assault—Evidence—Confession to person in authority—Alleged assault by choir boys while going to choir meeting—Investigation by church authorities—Answers of accused elicited as for that enquiry only—Onus of proving statement was voluntary.

1. The rector of a cathedral is a person in authority over the choir boys with respect to the investigation of an alleged assault committed by them while on the way to a meeting of the choir, and answers of a choir boy elicited by the rector and the choirmaster upon such investigation and stated to be only for the purpose of that enquiry, are not admissible in evidence against the choir boy afterwards prosecuted for the assault without proof that the statement was voluntarily made.

2. The onus of proving that the alleged confession was a voluntary one is upon the Crown.

Eberts, K.C., and *R. H. Pooley*, for Crown. *J. H. Lawson*, jr., for prisoner.

Bole, Co. J.] THE KING *v.* TELFORD. [Sept. 6.

Manslaughter — Preliminary enquiry for murder — Motion of Crown to commit for manslaughter — Election of speedy trial—Subsequent application of Crown to substitute murder charge—Jurisdiction of County Judge's Criminal Court—Circumstantial evidence—Rules as to sufficiency—Cr. Code, ss. 227, 230, 236, 765, 767.

1. After a committal for trial at the instance of the Crown upon a charge of manslaughter and arraignment thereon under the speedy trials clauses and election of the accused for speedy trial without a jury, the proceedings in the County Court Judge's Criminal Court will not be stayed at the instance of Crown to enable a charge of murder to be substituted.

2. In order to justify a finding of guilt from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and must be incapable of explanation upon any other reasonable hypothesis than that of guilt.

Maclean, for Crown. *Martin*, K.C., and *Bowser*, for prisoner.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

TORONTO RAILWAY COMPANY v. CITY OF TORONTO.

Assessment and taxes—Cars of Electric Railway Company—Real estate—Fixtures—Jurisdiction of Court of Revision—Res judicata.

The cars of an Electric Railway Company are not land, within the meaning of the Ontario Assessment Act, R.S.O. (1897) c. 224, and are therefore exempt from assessment under s. 39 (2) of that Act. *Bank of Montreal* v. *Kirpatrick*, 2 O.L.R. 119, considered.

Where the appellants appealed from the assessment to the Court of Revision and from that Court to a Board of County Judges constituted under the Assessment Act, and from the decision of that Board to the Court of Appeal, which Courts severally confirmed the assessment.

Held, in an action to restrain the collection of taxes, that said Courts had no jurisdiction to confirm an invalid assessment, and that the matter was not res judicata notwithstanding ss. 72 and 84 of the Assessment Act.

Judgment of the Court of Appeal reversed.

[Lord Davey, Lord Robertson, and Sir Arthur Wilson.—August 5.

The Assessment Commissioner of the City of Toronto in 1901 assumed to assess the Toronto Railway Company for the sum of $1,543,281.00 "on the real property, consisting of rails, poles, ties, wires cars and other plant and material, being part of its railway system in and upon the streets, roads and other public places and elsewhere in the City of Toronto." The Toronto Railway Company appealed against the assessment to the Court of Revision in so far as it assumed to assess the cars of the Company as real estate. The Court of Revision confirmed the assessment. The Company then appealed to a Board of County Judges under the Assessment Act, and the Appeal was heard by their Honours, Judge McDougall, Judge McGibbon and Judge McCrimmon on November 2, 1901. The value of the cars was agreed upon for the purpose of the appeal at $450,000.

The Railway Company then appealed to the Court of Appeal for Ontario pursuant to s. 84 of the Assessment Act, R.S.O. (1897) c. 224. The Court of Appeal dismissed the appeal.

By s. 84 (6) of the Assessment Act it is provided that the Appeal shall be heard by three or more judges of the Court of Appeal and the decision of such judges or a majority of them shall be final.

In 1902 the defendant corporation passed a by-law assuming to levy taxes upon the Railway Company in respect of the said assessment. The Railway Company refused to pay to the Corporation the amount of taxes in respect of the cars. On October 31, 1902, the collector of taxes attempted to collect the amount due in the usual way. This action was then brought.

The action was tried on March 2, 1902, before Ferguson, J. The plaintiffs' counsel admitted that he could not distinguish the previous decisions and the action was thereupon dismissed. The plaintiffs then appealed to the Court of Appeal and on the admission of counsel that the previous decisions could not be distinguished, the appeal was dismissed.

The appellants then appealed to His Majesty in Council, and the appeal was heard on July 14, 1904, before Lord Davey, Lord Robertson, Sir Arthur Wilson and Sir Henri Taschereau, but the latter took no part in the judgment.

Haldane, K.C., and *Bicknell*, K.C., (of the Canadian bar) for the appellants. There are two points:—(1) Whether the cars are chattels; (2) Whether the matter is res judicata. The statutes necessary to be referred to are:—R.S.O. (1897) c. 224, s. 2 (9), 6, 7 (20), 13, 39, 68, 71, 84 (6); R.S.O. (1897) c. 223, ss. 402, 403, 405. The jurisdiction of the Court of Revision is confined, under s. 68 of the Assessment Act, to complaints in regard to "persons wrongfully placed upon or omittted from the roll or assessed at too high or too low a sum." If the cars were not assessable as real estate there was no jurisdiction to tax them, and the decisions upon the appeals from the assessment do not conclude the matter: *Great Western Railway Co.* v. *Rouse*, 15 U.C.R. 168; *Nickle* v. *Douglas*, 37 U.C.R. 51; *Toronto Street Railway Co.* v. *Fleming*, 37 U.C.R. 116; *City of London* v. *Watt*, 22 S.C.R. 300; *Milward* v. *Caffin*, 2 W. Bl. 1329. The decision that the cars were fixtures followed the reasoning of the Court of Appeal in *Bank of Montreal* v. *Kirpatrick*, 2 O.L.R. 113, 119. That case is distinguishable. There the mortgage included the rolling stock and assumed to transfer the assets of the Company as a going concern to the trustees for debenture holders. The cars are not fixtures. There was no land to which they were affixed: *Wake* v. *Hall*, 8 A.C. 195; *Leigh* v. *Taylor*, (1902) A.C. 157; *Helliwell* v. *Eastwood*, 6 Ex. 295; *Holland* v. *Hodgson*, L.R. 7 C.P. 388.

C. Robinson, K.C., and *Fullerton*, K.C., (both of the Canadian bar) for the respondents. The appellants are concluded by the judgment of the Court of Appeal on the appeal from the Court of Revision. That decision was final. The appellants might have asked for leave to appeal to the Privy Council, but such leave would have been refused: *Theberge* v. *Laudry*, 2 A.C. 102; *Cushing* v. *Dupuy*, 5 A.C. 409. The question before the Court of Revision was whether the cars were realty or personalty. The Court had jurisdiction to determine this question, and its decision is final: *Niagara Falls Bridge Company* v. *Gardner*, 29 U.C.R. 194; *London Insurance Co.* v. *London*, 15 A.R. 629, 634; *Confederation Life Assurance Co.* v. *Toronto*, 22 A.R. 166. If the assessment deals with a company liable to be assessed and it has property liable to be assessed, the jurisdiction attaches. The appellants having taken the opinion of the Courts and obtained a decision which was final, cannot now bring an action in the same Courts and come here without leave.

Otherwise the declaration of finality is simply waste paper. The cars are fixtures of the power house, and the rails, engines and rolling stock of railways are fixtures: Redfield on Railways, vol. 2, p. 546; *Farmers' L. & T. Co.* v. *Henderson*, 25 Barb. 494. In *Lushington* v. *Seward*, 1 Sim. 480, cattle and slaves on a plantation were declared to be real estate. The appellants have acquiesced in the decisions of the Court of Appeal and therefore cannot succeed by the device of bringing a subsequent action; *Jones* v. *City of St. John*, 31 S.C.R. 320. Sec. 85 of the Assessment Act, giving power to the Lieutenant-Governor to submit a stated case, shows that the jurisdiction of the Court of Revision is not limited, as contended by the appellants. The legislature certainly did not constitute the Board of County Judges with an appeal from them to the Court of Appeal for the purpose merely of valuing property.

Bicknell, K.C., in reply.

The judgment of their Lordships was delivered by

LORD DAVEY:—The principal question on this appeal is whether the cars used by the appellants on their system of electric tramways in the City of Toronto and adjoining municipalities are liable to be taxed as real estate. There is another question, whether the matter is res judicata between the parties.

The cars are the ordinary electric cars used on electric railways and receive their motive power from an electric current passing through an overhead trolley wire. The power is transmitted to the motors below the trucks by means of a wheel at the end of a trolley pole on the top of the car body, which wheel is pressed up against the trolley wire by a spring. No part of the car is of course fixed in any sense either to the tram rails below or the trolley wires above.

The Assessment Act which was in force in the Province of Ontario was c. 224 of the Revised Statutes of Ontario, 1897. By s. 39 (2) of that Act the personal property of the appellant company is exempt from assessment. And by s. 2 (9) of the same Act "land," "real property," and "real estate" respectively include all buildings or other things erected upon or affixed to the land and all machinery or other things so fixed to any building as to form in law part of the realty.

By the assessment made in 1901 for 1902 the real property of the appellants consisting of rails, poles, tires, wires, cars, and other plant and material being part of its railway system in and upon the streets, roads, and other public places and elsewhere in the City of Toronto was assessed at $1,247,281. It is admitted that the cars in question are included in this assessment.

The council of the respondents in June, 1902, taxed the appellants the sum of $8,775 in respect of the agreed value of the cars.

The appellants refused to pay this tax, and commenced the present action in which they claimed a declaration that the cars were personal estate, and that the plaintiffs were not liable for the above sum of $8,775.

and an injunction to restrain the respondents from taking any proceedings for the collection of the said taxes. The respondents pleaded that in 1901 the street cars were legally assessable as real estate and also relied on a decision of the Court of Appeal dated the 28th of June, 1902, as res judicata between the parties.

The action was dismissed by Mr. Justice Ferguson, and an appeal from his judgment was also dismissed by the Court of Appeal on the 15th May, 1903. The present appeal is from the order then made.

No reasons were given either by Mr. Justice Ferguson or the Court of Appeal, as it was admitted that the point of law as to the assessability of the cars as real estate was indistinguishable from the point decided by the Court of Appeal in the previous year. That decision appears to have been given on the authority of a case of *The Bank of Montreal* v. *Kirkpatrick* decided by the same Court of Appeal in 1901, and reported 2 O.L.R. 113.

That was the trial of an interpleader issue between execution creditors of an electric street railway company and trustees for debenture holders of the same company. The property purporting to be charged by the debentures in question included the rolling stock of the company but the debenture deed was not duly registered as a chattel mortgage. The learned trial Judge held that the rolling stock was an essential part of the railway, the latter being useless for any purpose without it, and therefore that it was real property covered as such by the mortgage. The Court of Appeal affirmed this judgment. Osler, J., who delivered the judgment of the Court, held that the rolling stock of the electric railway really constituted part of one great machine confined to a particular locality for which it was specially constructed and fitted. Detached from the rails (he said) it was incapable of use, and upon the principles laid down in certain well known cases on the law of fixtures he was of opinion that, as regards its liability to be taken in execution, it may properly be regarded as part of the corpus of the entire machine, and therefore in the nature of a fixture and passing with the land over which it ran.

In their case on this appeal, the respondents submit that "the cars "are so actually or constructively affixed to land or buildings as to render "them real property and assessable as such," and this was the point argued before their Lordships. *Kirkpatrick's case* is not a direct authority in this case, which depends on the construction to be put on the Assessment Act, but the court below evidently considered that the reasons given for the judgment in *Kirkpatrick's case* were equally applicable to the present one.

Their Lordships are always disposed to treat with great respect an unanimous decision of the Court of Appeal in Ontario on the construction of one of their own statutes, but they cannot accede to the argument addressed to them, or adopt the reasoning of Mr. Justice Osler in *Kirkpatrick's case* without doing violence to the English language and to elementary principles of English law. It does not appear to them to advance

the argument to describe the appellants' system of electric traction as a great machine, or by any other metaphorical expression. The subject of assessment is not the appellants' system or undertaking, but only that part of it which can properly be described as real estate. The cars are no doubt adapted for use in connection with the railway and trolley wires, but they are not part of the railway, and are not fixed in any sense whatever to anything which is real estate. Their Lordships cannot attach any legal meaning to the expressions "in the nature of fixtures," or "constructively affixed," except as an admission that the articles in question are not in fact fixtures or actually affixed. They are, therefore, of opinion that the cars remain and are personal estate only and are unassessable.

The decision of the Court of Appeal, which is said to be res judicata, arose out of a proceeding under the sections in the Assessment Act relating to the Court of Revision. By section 62 a Revision Court of three persons is constituted, the jurisdiction of which is defined by section 68, as follows:—

"At the time or times appointed, the Court shall meet and try all "complaints in regard to persons wrongfully placed upon or omitted from "the roll, or assessed at too high or too low a sum." By sections 75 and 84, there is an appeal from the Court of Revision to the County Court Judge, or where a person has been assessed to an amount aggregating $20,000, to a Board consisting of the Judges of the counties which constitute the County Court district, and from that Board to the Court of Appeal. The Act provides that the appeal shall be heard by three or more Judges of the Court of Appeal, and the decision of such Judges, or a majority of them, shall be final.

The appellants appealed to the Court of Revision against the assessment of 1901 on the ground amongst others that the property enumerated was not liable to assessment as real property. The Court of Revision dismissed the Appeal and their decision was affirmed by the County Court Judges and subsequently by the Court of Appeal.

It appears to their Lordships that the jurisdiction of the Court of Revision and of the courts exercising the statutory jurisdiction of appeal from the Court of Revision is confined to the question whether the assessment was too high or too low, and those courts had no jurisdiction to determine the question whether the Assessment Commissioner had exceeded his powers in assessing property which was not by law assessable. In other words, where the assessment was ab initio a nullity they had no jurisdiction to confirm it or give it validity. The order of the Court of Appeal of the 28th June, 1902, was not, therefore, the decision of a court having competent jurisdiction to decide the question in issue in this action and it cannot be pleaded as an estoppel.

This point was not argued in the Court of Appeal in the present case as that court only followed its own decision in the appeal from the Revision Court in the previous year. It is, therefore, a satisfaction to their

Lordships to know their decision is in accordance with the opinions expressed by learned Judges in the Court of Appeal for Ontario and in the Supreme Court in other cases. In *Nickle* v. *Douglas*, 37 U.C. Q.B. 51, the exact point arose. The appellant had unsuccessfully appealed to the Court of Revision, and it was held, after an elaborate examination of the previous authorities in the English and Canadian courts, that that court had no jurisdiction to decide any question whether particular property was assessable, and also that the party was not estopped by having previously appealed to the Revision Court. In *London Mutual Insurance Co.* v. *City of London*, 15 Ont. Ap. Rep. 629, the decision of the County Court Judge was treated as final, because the question was within the jurisdiction of the assessor, but Hagarty, C. J., held that if the property had not been assessable, that would have shown that ab initio the assessor and the appellate tribunals had been dealing with something beyond their jurisdiction and their confirmation of the Assessors' Act would go for nothing, and Paterson, J., expressed himself to the same effect. In the *City of London* v. *Watt & Sons*, 22 S. C. R. 300, the Chief Justice said: "I agree with the Court of Appeal in holding that the 65th section of the Ontario Assessment Act does not make the roll as finally passed by the Court of Revision conclusive as regards questions of jurisdiction. If there is no power conferred by the statute to make the assessment it must be wholly illegal and void ab initio and confirmation by the Court of Revision cannot validate it."

Their Lordships will, therefore, humbly advise His Majesty that the order of the Court of Appeal for Ontario of the 15th May, 1903, should be reversed, and instead thereof a declaration should be made and an injunction granted as claimed by the statement of claim, and the respondents should pay the costs in both courts. The respondents will also pay the costs of this appeal.

Book Reviews.

Street Railroad Accident Law. By ANDREW J. NELLIS, of the Albany, N.Y. Bar. Albany, N.Y.: Matthew Bender, law publisher, 1904. 850 pages, $6.00.

Mr. Nellis has made this branch of the law his own, being already favourably known to the profession by his recent work on the kindred subject of street surface railroads.

This book claims to be a complete treatise on the principles and rules of law applied by the courts of the United States and Canada in determining the liability of street railroads for injuries to the person and property by accident to passengers, employees and travellers on the public streets and highways.

It must be a comfort to any writer to take up a subject which is new and largely self-contained. That may be said to be the case here. The author commences by a general definition of street railroads, and shews how the litigation connected with them necessarily differs from that which concerns general traffic railroads especially in that the right of the former in streets is subordinate to the right of the public therein, and subject to the regulations of the municipal authorities; the author dealing with matters wherein street railroads differ from railway transportation companies, the former being limited in their use to the carriage of passengers.

The work before us is to be commended more for its intelligent grouping of authorities, under appropriate heads, than for the discussion of difficult points; but the result is a useful summary of the cases bearing on a subject of growing importance. We could have wished that the Canadian cases had been more largely referred to. If legal authors in England and the United States paid more attention to this matter their books would find much larger sale in this country than they do.

The Laws of Insurance. By JAMES BIGGS PORTER, Barrister-at-Law of Inner Temple. Fourth edition. London: Stevens and Haynes, law publishers, 8 Temple Bar, 1904.

In his first edition, published in 1884, the author undertook to treat in one volume of Life, Fire, Accident, and Guarantee Insurance. There apparently was good reason for thus grouping these together as we have now the fourth edition of the work before us. It embodies cases of the English, Scotch, Irish, American and Canadian Courts. The selection of authorities is necessarily limited, but Mr. Porter having made a careful and discriminating selection, the reader can have no cause for quarrel with him. The concise way in which the law is laid down and the intelligent arrangement of the subjects are features of this excellent book which have commended it to the profession.

Mason on Highways. .Containing the New York Highway Law. 3rd edition. By H. B. MASON, of the New York City Bar. Banks & Co., Albany, N.Y., 1904.

This book is peculiarly applicable to the State of New York, giving constitutional and statutory provisions relating to highways with the good roads laws and motor vehicle law with annotations and forms. As we in this country are beginning to pay more attention to good roads, and as that objectionable and unsightly vehicle known as the automobile has come to stay, those concerned will find some useful suggestions in Mr. Mason's book.

UNITED STATES DECISIONS.

DISCOVERY.—The power of courts, at common law, to order an examination of the person of one alleged to have been injured by the negligence of another, for the purpose of ascertaining the extent of the injuries, is denied in *Austin & N. W. R. Co.* v. *Cluck* (Tex.) 64 L.R.A. 494.

MENTAL SUFFERING.—Mental anguish and suffering are held, in *Cowan* v. *Western U. Teleg. Co.* (Iowa) 64 L.R.A. 545, to be sufficient to sustain an action for breach of contract promptly to transmit and deliver a telegram.

HIGHWAYS.—The right of a bicyclist to hold a town liable for injuries caused by a defect making a highway unsuitable for ordinary travel is sustained in *Hendry* v. *North Hampton* (N.H.) 64 L. R. A. 70, under a statute making towns liable for injuries to any person travelling upon a dangerous embankment upon a highway by reason of any defect or want of repair of such embankment, or defective railings, which renders it unsuitable for travel thereon.

One who, in using the street adjoining his property as part of his lumber yard, piles lumber there in an unstable manner, is held, in *Busse* v. *Rogers* (Wis.) 64 L. R. A. 183, to be liable for injuries caused by its fall upon a child who, while travelling along the street follows its inclination to play, and attempts to climb upon the pile, and thereby causes the lumber to fall.

NEGLIGENCE.—A property owner is held, in *Hoff* v. *Shockley* (Iowa) 64 L.R.A. 538, not to be liable for injuries to a traveller caused by obstructions placed in the street in front of the property without danger signals, by an independent contractor whom he has employed to construct a building on the property.

A corporation is held, in *Saylor* v. *Parsons* (Iowa) 64 L. R. A. 542, not to be liable for injuries to its employee in attempting to rescue one of its members who, in superintending and working with the employee, undermines a wall so that it is about to fall upon him, when the employee springs forward from a place of safety to avert the impending accident.

The right of a master to delegate to a servant the duty of inspecting long ladders furnished for the use of employees, and replacing rotten rounds, so as to escape liability for injuries caused by neglect of the duty on the ground that the negligence was that of a fellow servant of one injured by a fall caused by the breaking of a rotten round, is denied, in *Twombly* v. *Consolidated Electric Light Co.* (Me.) 64 L.R.A. 551.